IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CONFIRMATION CASE NO. 01 OF 2022

The State of Maharashtra .. Appellant

Versus

Bhagwat Bajirao Kale, Age 47 years, Occ: Labour, residing at Washi, Tal: Bhum, District Osmanabad .. Respondent

WITH

CRIMINAL APPEAL NO. 1122 OF 2023
WITH
INTERIM APPLICATION NO. 2839 OF 2023
AND
INTERIM APPLICATION NO. 2838 OF 2023
AND
INTERIM APPLICATION NO. 2361 OF 2024
IN
CRIMINAL APPEAL NO. 1122 OF 2023

Bhagwat Bajirao Kale, Age 47 years, Occ: Labour, residing at Washi, Tal: Bhum, District Osmanabad .. Appellant

Versus

The State of Maharashtra .. Respondent

...

Ms.M.M. Deshmukh, APP for the State of Maharashtra.
Ms.Rebecca Gonsalves with Sahana Manjesh for the respondent accused in Confirmation Case No.01/2022 and for the appellant in Criminal Appeal No.1122/2023.

Tilak

CORAM: BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.
RESERVED : 10th JULY, 2024
PRONOUNCED : 9th DECEMBER, 2024

JUDGMENT:- (Per Bharati Dangre, J)

1. Confirmation Appeal No. 1/2022 filed under Section 366 of the Code of Criminal Procedure seek confirmation of the death sentence imposed upon the respondent Bhagwat Bajirao Kale by the Addl. Sessions Judge, Pune in Sessions Case No.80/2004, by the judgment delivered on 14/12/2001, as he was found guilty of committing offences punishable under Section 302, 392, 449, 460, 201 r/w section 34 of the IPC.

Upon the finding of conviction being rendered, based on the evidence placed before it by the prosecution, the accused Bhagwat Bajirao Kale was produced from jail and hearing him on the point of sentence, in terms of the Constitution Bench decision of the Apex Court in case of ***Bachan Singh Vs. State of Punjab***[1], as well as the decision in case of ***Machhi Singh Vs. State of Punjab***,[2] the learned Judge had drawn the list of mitigating and aggravating circumstances, and by recording that the crime committed by the accused was committed in most heinous, barbaric and brutal way and the motive established in it's commission, revealed sheer lust for money and for this purpose, he had done four persons to death, which included two innocent children of tender age. By

1 (1980) 2 SCC 684
2 (1983) 3 SCC 470

considering the gravity and magnitude of the crime and its impact on the Society, he is sentenced to death by hanging by neck, on being found guilty of the offence punishable u/s.302 of the IPC. For his conviction under Section 449 and 392, he is sentenced to undergo Rigorous Imprisonment for 10 years, on each count and to pay fine of Rs.500/-, in default to undergo Rigorous Imprisonment for six months. For the conviction under Section 460 r/w Section 34 of IPC, he is sentenced to suffer Rigorous Imprisonment for 7 years and to pay fine of Rs.500/- in default, to undergo Rigorous Imprisonment for three months.

Similarly, on being found guilty of the offence punishable u/s.201, he is sentenced to suffer Rigorous Imprisonment for 7 years and to pay fine of Rs.500/- in default to undergo Rigorous Imprisonment for two months.

2. We have heard Ms.Deshmukh, learned Assistant Public Prosecutor for the State in support of the Confirmation Appeal filed by the State of Maharashtra and we have heard Ms.Rebecca Gonsalves representing the respondent/accused.

The respondent, Bhagwat Kale has filed Criminal Appeal No.1122/2023, challenging the judgment, recording finding of his guilt and imposition of death sentence as well as other sentences, pursuant thereto.

Since the paper book along with the R & P is received by us in the Confirmation Case, and the connected Appeal filed by the convict, we have directed the presence of the accused to be

secured before us, either physically or through video conferencing facility with proper connectivity, so that the Appeals could be heard finally.

We received an application from the Yerwada Central Prison, permitting to secure presence of the convict for security reasons via video conferencing and we have graciously granted the said permission.

3. Upon the sentence of death being imposed, the Principal District Judge, Pune, by his order dated 14/12/2021 while he pronounced the sentence, suspended the sentence of death awarded to Bhagwat Kale, till its confirmation by the High Court, Bombay, as per provisions of Section 366 of the Cr.P.C. The entire record and proceedings of Sessions Case No.80/2004 was forwarded to the High Court for confirmation of death sentence, and it was directed that the sentence passed against the accused shall not be executed until its confirmation.

The learned Add. Sessions Judge, Pune, also directed that the cash recovered in the crime be credited to the Government, if not already credited, whereas a direction was also given that the gold and silver ornaments be sent to the MINT and rest of the property be destroyed after the Appeal period is over, if it is not already destroyed.

The scene of crime and the prosecution case against the accused.

4. The scene of crime in the present case is flat no.4 in Princeton Town Society, Kalyani Nagar, Pune. The said flat was taken on lease by one Mr.Ramesh Patil, aged about 50 years, who had come from Hubli, State of Karnataka, to Pune on 9/5/1997, accompanied with his wife Vijaya, aged around 40 years, son Manjunath, aged 7 years and daughter Pooja, aged 12 years. The flat being located in C-1 Building, was a part of the Township, constructed by Yogiraj Himmatmal Palaresha (PW 1), a Developer and Builder, who worked in the name and style as "Dhanraj Builder" in partnership with one Subhash Sankla.

In the year 1996, the construction work of six buildings was completed, but in the cluster, construction work of some of the buildings was unfinished. As regards C-1 building, the Part Completion Certificate was obtained and two of the flats in the said building were occupied. Mr.Lunawat had purchased flat no.4 in 'C-1' building which was located on first floor and with the intervention of one Jayshree Chitre, the Estate Agent, the flat was leased out to Mr. Ramesh Patil.

On being introduced to Mr.Palaresha, Mr.Patil informed that he was serving as an Officer in State Bank of India and his wife was serving in Postal Department, and as he was transferred to Pune, he was in need of residential premises. Pursuant to the negotiations, it was agreed to rent out the flat to

Mr.Patil @ Rs.5,000/- per month with a deposit of Rs.50,000/- to be deposited in advance. An agreement to that effect was executed between Mr.Lunawat and Mr.Ramesh Patil on 12/5/1997, which was signed by Jayshree Chitre as a witness.

In furtherance of this agreement, Mr.Ramesh Patil performed the pooja in the said flat on 11/5/1997 and occupied the said flat along with his family members since 12/5/1997.

5. Simultaneous to the flat being occupied by Ramesh Patil and his family, he purchased certain household articles from the shop of Kailash Punjabi (PW 18) on 15/5/1997, and this included a teepoy, sofa and trolley and these articles were delivered in the flat in Kalyani Nagar, Pune.

6. One Subhash Changdeo Adhav (PW 5), a rickshaw driver operating in Kalyani Nagar area, took Ramesh and his wife at various places to purchase the household articles and one of the shop from which the household articles were purchased, was a shop, namely, Swapnil Electronics. Ramesh Patil came in contact with Subhash Adhav on 12/5/1997 and upto 15/5/1997, he plied Mr.Patil and the family, to and fro the market, when he visited the furniture shop, electronics shop, etc. When the tempo with the furniture came in Kalyani Nagar area, Subhash guided it to Nandraj Builder's site and helped it in unloading the furniture which was taken in the flat. For four days, Mr.Ramesh Patil travelled in the auto-rickshaw of Subhash and on the fourth day, he dropped him at his house in the evening.

On 16/5/1997, when Subhash approached his house as per his directions and waited for him, he did not come out, though he rang the bell. He therefore, went back and made inquiry with the neighbor to be informed that the paper boy, milk man had visited the flat, but the owner appeared to be out. The auto rickshaw driver therefore, left for his work.

7. On 16/5/1997, when Mr.Yogiraj Palresha came to his site office at 10.00 am, one Sheshmal Bagmar came to him and informed him that he owned an electrical and hardware shop and he had come to fix the geyser in the flat of Mr.Patil, but the flat was locked from inside. The lights and fans in the flat were on, but despite ringing the door bell, no one answered the door. He was also informed that one rickshaw driver was also waiting for Mr.Patil.

Upon this information being shared, Mr.Palresha visited the flat and rang the door bell and noticed that the lights and fans were on. He therefore, asked one labour to go to the terrace by using the ladder, as he was aware that there is a door to the terrace. One of the labor Gurunath climbed the ladder and went on the terrace, to find blood on the floor. He stepped down the ladder and it was noticed that blood was also coming down from the wall of the terrace upto the chamber of the drainage. Thereafter, Mr.Palresha called his partner on the spot and they approached the police station.

Investigation of the crime.

8. The police staff on its arrival, went up the ladder to find the terrace door of flat no.4 occupied by Ramesh Patil, to be open and the flat was accessed.

The dead body of the wife of Ramesh Patil was found in the passage of the room, whereas his son was found dead in one bedroom. A screw driver and a knife with blood on it was also found in the room. The furniture was smeared with blood and the cupboard was open and blood was found on the wall. When the latch of the flat from inside was opened by Palresha, one strip of blood mark was noticed on the floor which continued from the place where the body of the woman was found. An iron bar with presence of blood mark was also noticed. When the main latch of the door was opened from inside, the newspaper and milk packet was found attached from outside.

On coming down towards the drainage, the cover of the chamber was found to have been pulled away by means of a black cloth and when one of the labour was asked to remove the cover fully, the dead body of a small girl was found placed inside it and even the dead body of Mr.Ramesh Patil was also discovered in the chamber.

9. In this backdrop, the complaint filed by Yogiraj Palresha was registered (Exhibit-15) and the investigating machinery was set into motion. The spot panchnama of flat no.4 was carried out, the clothes of the dead bodies, after carrying out

the Inquest Panchnama were seized by drawing distinct panchnamas and the bodies were sent for post mortem.

Investigation was made with the persons in the neighborhood, as also from the workers who were working on the site.

During the course of interrogation with the workers, who were staying on the site, as the construction activity was ongoing, one Bhagwat Kale, his wife Geetabai and Sahebrao Kale working as watchman, were found to be missing. This prompted the Investigating Agency to search the house of Bhagwat Kale with the help of the panchas, to find the shanty/tin shed allotted to them being locked.

On 20/5/1997, Bhagwat Kale came to be arrested by executing Arrest Panchnama (Exhibit 42) and he was found in possession of one newspaper and two photographs and bunch of keys.

Similarly, the other two accused persons Geeta and Sibu were arrested on 27/5/1997.

10. The police Officer of Yerwada station submitted a charge-sheet against the three accused persons before JMFC, Court No.5, Pune, who committed the case to the Court of Sessions. The charge-sheet alleged that the three accused persons, in furtherance of their common intention had committed murder of four members of Patil family and thereafter committed theft of lakhs of rupees from their residential premises and hence, they were sought to be prosecuted for the offence punishable u/s. 449, 302, 392, 407, 201 r/w Section 34 of the IPC.

After committing the case to the Court of Sessions, it was adjourned for framing of charge. The charge was framed against the three accused persons on 5/2/1998 and thereafter, formal dates were given in the matter and the accused persons were produced from jail from time to time, except on few occasions.

Separation of the trials.

11. On 10/9/1998, while accused nos.1 and 3 were being taken to Central Jail, Yerwada, after they were produced in the Court, they escaped the custody of the police and a report to that effect was filed before the Court on 24/9/1998.

Steps were taken to secure the presence of the absconding accused.

In Sessions Case No. 368/1997, when two of the accused were declared to be absconding, but accused no.2 Geetabai was in jail since the date of her arrest i.e. 27/5/1997 and since two years had lapsed from the date of framing of the charge, and as the prosecution in terms of the directions of the Apex Court was duty bound to complete it's evidence within a period of three years from the date of the framing of charge, the learned Sessions Judge directed fixing of the matter against accused no.2 Geetabai, since the presence of the other two accused persons could not be secured in near future.

12. By order dated 5/2/2000, the Addl. Sessions Judge, Pune, separated case of Geetabai by splitting it against absconding

Accused no.1 Bhagwat Kale and Accused no.3 Saheb @ Navnath Sopan Kale and directed the case against Geetabai to be completed within period of one year.

In Sessions Case No. 368/1997, the prosecution examined three witnesses till 9/1/2001, when absconding accused Sahebrao @ Navnath Sopan Kale was arrested on 17/1/2001 and since the charge against him was already framed, he was included in the trial by recalling the witnesses who were already examined. Once again, the Addl. Sessions Judge, Pune directed the trial to be completed within three months by passing an order on 1/2/2001.

13. The two accused persons i.e. Sahebrao & Geetabai were tried in Sessions Case No. 368/1997 and by a judgment delivered on 20/1/2004, they were found guilty of the offence punishable under Section 449, 460, 392, 201, 302 read with Section 34 of the IPC and accused Geetabai was sentenced to undergo Imprisonment for life, whereas accused Saheb @ Navnath Sopan Kale, on being convicted under Section 302 IPC was sentenced to death and was directed to be hanged by neck till he is dead. The sentence of death awarded to Sahebrao Kale was kept suspended till it's confirmation by the High Court.

Both the accused nos.2 and 3 challenged the judgment of conviction and sentence before the High Court and the Bombay High Court vide judgment delivered in Criminal Appeal No.888/2004 and 889/2004, on 11/10/2004, converted the sentence of death imposed upon Accused no.3 Sahebrao for the

offence punishable u/s.302 of IPC to that of Life Imprisonment, though the Bombay High Court maintained conviction and sentence of accused no.2, Geetabai.

Upon pronouncement of the said decision, the accused persons independently claimed to be juvenile on the day of the commission of the crime and accordingly, necessary inquiry was conducted, and on rendering a finding that they were juvenile, they were directed to be released from jail.

Trial against accused Bhagwat

14. Somewhere in the year 2001, accused Bhagwat came to be arrested and was charged in Sessions Case No.80/2004 by the 6th Additional Sessions Judge, Pune.

The charge against him read as below:-

> *"(1) That during the intervening night of 15/5/1997 to 16/5/1997 between 21 to 6.30 hours at Priston Town, Nandra Builders, Plot no.73, C/4, Kalyaninagar, Pune, you accused No.1 along with accused no.2 & 3 who were already tried in furtherance of your common intention, have committed house trespass by entering into building in possession of Ramesh Patil, used as human dwelling or place custody of property, in order to commit an offence of murder punishable with death and you thereby committed an offence punishable under Section 449 of the Indian Penal Code and within my cognizance.*
>
> *(2) That during the intervening night of 15.5.1997 to 16.5.1997 between 21 to 6.30 hours at Priston Town, Nandraj Builders, Plot No.73, C/4, Kalyaninagar Pune, you accused no.1 along with accused no.2 & 3 who were already tried, in furtherance of your common intention committed murder of Ramesh Jaikumar Patil, Vijaya Patil, Pooja Patil and Manjunath Patil, intentionally or knowingly, causing their deaths by means of iron pipes, knives, screw driver etc. and thereby committed an offence punishable under Section 302 r/w Section 34 of the Indian Penal Code and within my cognizance.*
>
> *(3) That during the intervening night of 15.5.1997 to 16.5.1997 at Plot No.73, C/4, Priston Town, Nandraj Builders,*

Kalyaninagar Pune, you accused no.1 along with accused no.2 & 3 who were already tried, were jointly concerned in committing house trespass or house breaking by night by entering into a building in possession of Ramesh Jaikumar Patil and his family members used as human dwelling and for custody of property viz. Cash, ornaments and other articles. That you accused nos.1 to 3 or any of you was concerned in the house, breaking by night voluntarily caused deaths of Ramesh Patil, Vijaya Patil and Manjunathan Patil and committed an offence punishable under section 460 of the Indian Penal Code and within my cognizance.

(4) That on the above-mentioned time and place, you accused no.1 along with accused nos.2 & 3 who were already tried, in furtherance of your common intention knowing and having reason to believe that an offence has been committed, caused the evidence of that offence to disappear by putting the dead bodies of Ramesh Patil, Pooja Patil in drainage chamber and by removing dead body of Vijaya Patil kept it in the passage, with intention of screening the offenders from legal punishment knowing or having reason to believe that the offence punishable with death or imprisonment for life is committed and thereby committed an offence punishable under section 201 of the Indian Penal Code and within my cognizance.

(5) That on the above-mentioned time and place, you accused no.1 along with accused nos.2 & 3 who were already tried, having reason to believe that an offence has been committed, caused any evidence or commission of that offence to disappear, viz. Buried the ornaments and cash at Indapur, Shivar, Waghi with the intention of screening the offender and thereby committed an offence punishable under Section 201 r/w Section 34 of the Indian Penal Code and within my cognizance.

(6) That you accused no.1 along with accused nos.2 & 3 who were already tried, on the above-mentioned time and place in furtherance of your common intention committed robbery of cash worth Rs.45,73,490/-, golden and silver ornaments, camera, purse etc. worth Rs.1,35,900/- which was the property in possession of Ramesh Patil and thereby committed an offence punishable under Section 392 r/w 34 of the Indian Penal Code and within my cognizance."

Bhagwat pleaded not guilty and was subjected to trial.

15. In order to substantiate the charges levelled as above, the prosecution examined 37 witnesses and by filing joint pursis (Exhibit 64), the learned Prosecutor and the counsel for the

accused jointly agreed to adopt evidence of the medical experts/Doctors, i.e. Dr.Shrikant Chandekar and Dr. Rajendra Bangal recorded in earlier Sessions Case No.368/1997 and the prosecution closed it's evidence by filing pursis on 4/11/2019.

Many of the witnesses who were already examined in the prosecution during trial in Sessions Case No. 368/1997 against Geetabai and Sahebrao could not be examined by the prosecution in the present trial, either because they were not available, being dead, or not traceable, since he was dead.

Shri Shamrao Dhulubulu, the Investigating Officer who was examined in Sessions Case No. 368/1997 could not be examined in the present case.

The accused Bhagwat was confronted with the evidence of the prosecution brought on record through its witness and in his statement recorded under Section 313 of the Cr.P.C and except raising defence of false implication, he did not take any specific stand nor did he examine any defence witness.

16. On determination of the points which were formulated, the learned Sessions Judge vide his judgment dated 14/12/2021 recorded a finding of guilt and while doing so, he relied upon the circumstance that Bhagwat worked as watchman/ waterman with PW 1 at the construction site, and the fact that he was found in possession of huge amount of Rs.42 lakhs in the year 1996, was highly unbelievable without he disclosing any source of the same.

The recovery panchnama, in regards the recovery of cash amount and bundles of currency notes having labels of Karnataka Bank, Hubli, Sangli Bank, SBI Bank Hubli, Punjab National Bank, Hubli, Vijaya Bank,Hubli, etc. was also considered to be a relevant circumstance in connecting him to the death of Patils. Relying upon the evidence of PW 26 to PW 30, it was concluded by the Sessions Judge that Ramesh Patil had collected heavy amount at Hubli and had travelled to Pune, and on the basis of the labels on the bundles of currency notes, it could be safely inferred that the cash belonged to deceased Ramesh Patil.

In addition, the clothes and shoes of the accused which were seized during his Arrest Panchnama (Exhibit 42) which had human blood stains, was also considered to be an incriminating circumstance against him, in addition to the seizure of his trouser, shirt and pair of black shoes having reddish stains. Relying upon the C.A. Report (Exhibit 211) which disclosed that human blood was found on the clothes and shoes of the accused Bhagwat, in absence of he offering any explanation about this circumstance, an adverse inference was drawn against him. Recording that the following circumstances were relied upon by the prosecution to establish his guilt, the trial Judge rendered a finding of conviction against Bhagwat Kale :-

(i) Deceased Ramesh Patil had huge cash with him when he shifted to Pune on 12/05/1997.

(ii) Deceased Ramesh Patil started residence in Flat No.4 Princeton Town Society, Kalyaninagar since 12/05/1997 and he

had purchased luxurious and costly articles from 12/05/1997 to 15/05/1997.

(iii) For around one year upto 15/05/1997 accused Bhagwat was working in Princeton Town, Kalyaninagar either as watchman or waterman.

(iv) On 15/05/1997 the accused- Bhagwat was present in the said society.

(v) In the night between 15/05/1997 to 16/05/1997 Ramesh Patil, Vijaya R. Patil, Pooja R. Patil and Manjunath R. Patil died homicidal death.

(vi) Since morning 16/05/1997 accused Bhagwat was not seen at the regular place.

(vii) Accused Bhagwat came to be arrested on 20/05/1997.

(viii) On 20/05/1997 on the disclosure statement of accused, Rs. 2,50,000/- were recovered.

(ix) On 23/05/1997 on the disclosure statement of accused Rs. 39,48,000/- were recovered along with gold and silver ornaments and on 03/06/1997, Rs. 29,000/- were recovered at the instance of accused Bhagwat.

(x) It is also established that the cash amount belonged to deceased Ramesh Patil. As such, the ornaments can also be held to be of Ramesh Patil.

(xi) There was human blood on the clothes and shoes of accused, who did not offer any explanation for the same and also for his knowledge about such huge cash and ornaments.

17. Considering the aggravating and mitigating circumstances, death sentence was imposed upon Bhagwat for his brutal and heinous act, what was coupled with his lust for money and finding that aggravating circumstances overpowered the mitigating one, the sentence of death was imposed.

Counter Arguments advanced in support of the Confirmation Appeal and the Cross-Appeal filed by Bhagwat seeking his acquittal

18. At the outset, Ms.Gonsalves has invited our attention to the decision of the Apex Court in case of **Manoj & ors Vs. State of Madhya Pradesh**,[3] where it is held that the mitigating factors in general, rather than excuse or validate the crime committed, seek to explain the surrounding circumstance of the criminal to enable the Judge to decide between death penalty or life Imprisonment. She has emphasized upon the pre-sentence hearing - opportunity and the obligation to provide the material to the accused. According to her, due consideration has to be given to the circumstances of the criminal, as well, and upon adjudicating the case if it falls within '*rarest of rare*' and if the option of Life Imprisonment as an alternative, is unquestionably foreclosed, the following observations from the Apex Court is relied upon:-

> *"239. The sentencing hearing contemplated under Section 235(2), is not confined merely to oral hearing but intended to afford a real opportunity to the prosecution as well as the accused, to place on record facts and material relating to various factors on the question of sentence and if interested by either side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty.*
>
> *240. In the absence of an individual's capacity to effectively bring forth mitigating factors, this Court in Bachan Singh placed the burden of eliciting mitigating circumstances on the court, which has to consider them liberally and expansively, whereas the responsibility of providing material to show that the accused is beyond the scop of reform or rehabilitation, thereby unquestionably foreclosing the option of life imprisonment and*

3 **(2023) 2 SCC 353**

making it a fit case for imposition of death penalty, is one which falls squarely on the State. This has been reiterated and further spelt out by this Court in Santosh Bariyar, Rajest Kumar, Chhannu Lal Verma, and other decisions."

19. In addition to the above observations, she has also relied upon the practical guidelines issued to collect mitigating circumstances through the following observations:-

"248. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation in a majority of cases reaching the appellate stage.

249. To do this, the trial court must elicit information from the accused and the State, both. The State, must - for an offence carrying capital punishment - at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in Bachan Singh. Even for the other factors of (3) and (4) - an onus placed squarely on the State – conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison, i.e., to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

250. Next, the State, must in a time-bound manner, collect additional information pertaining to the accused. An illustrative, but not exhaustive list is as follows:

a) Age

b) Early family background (siblings, protection of parents, any history of violence or neglect)

c) Present family background (surviving family members, whether married, has children, etc.)

d) Type and level of education

e) Socio-economic background (including conditions of poverty or deprivation, if any)

f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)

> *g) Income and the kind of employment (whether none, or temporary or permanent etc);*
>
> *h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any) etc.*
>
> *This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.*
>
> *251. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e., Probation and Welfare Officer, Superintendent of Jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be – a fresh report (rather than the one used by the previous court) from the jail authorities is recommended, for an more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will further evidence the reformative progress, and reveal post-conviction mental illness, if any."*

20. Ms.Gonsalves has relied upon the order passed by the Apex Court in **Irfan @ Bhayu Mevati vs. State of Madhya Pradesh,**[4] **and in case of Baljinder Kumar @ Kala vs. State of Punjab**[5] when it permitted visit of Mitigation Investigator to visit and conduct in-person interview with the convict, with permission to record the interview and provide her access to all records pertaining to the applicant convict, not limited to medical, jail conduct, work done or education.

It is by this order the Apex Court directed an independent Writ Petition (Cri) to be registered to facilitate discussion on the said point.

4 2022 SCC Online SC 1053
5 Special Leave to Appeal (Crl.) No(s).6341-6342 of 2024

She has placed before us several such orders passed by the Apex Court where the Court has permitted visit of a suitable team to the prison to carry out a psychological evaluation of the accused/appellant and it was directed to be submitted to the Court.

This covered conduct of multiple interviews in person for the purpose of collecting information relevant to sentencing and to submit a mitigation investigation report within the prescribed timeline.

21. Atleast 10 such orders have been placed before us along with the application filed by Ms.Gonsalves (IA No.2361/2024) seeking permission for the Mitigating Investigator to visit Bhagwat Kale in the Yerwada Central Prison and interview him in person, for the purpose of collecting information relevant to sentencing and to record it by means of audio recorded. In addition, she has prayed for access to various documents from the jail authority, reflecting upon his conduct in the prison, his medical condition, so as to access the chances of his reformation.

22. Since the aforesaid observations and the exercise to be carried out would contemplate a decision to be taken when the death sentence is to be imposed or confirmed, according to us, the said exercise shall be preceded by a finding about whether a case has been made out by the State to confirm the sentence of death, and therefore, we have examined the case placed before us by the prosecution for confirmation of the sentence of death.

23. Ms.Deshmukh, the learned APP who has argued the case in favour of confirmation of the death sentence has painstakingly taken us through the evidence of the prosecution witnesses and she has relied upon the following link to establish the circumstance, connecting the death of the members of Patil family to the accused, Bhagwat Kale and she would rely upon the following circumstances being established through the prosecution witnesses.

1. Deceased Ramesh Patil along with family on 12/5/97 shifted to C-1, flat no. 04 of Princeton Town, Kalyaninagar, and had taken this flat on rent from Mr. Lunavat, who was the friend of PW.1 who is the complainant.

2. The Accused Bhagwat Kale was present at the place of the incident (Princeton Town).

3. The deceased Ramesh Patil Possessed a huge amount of cash which shows he is a wealthy person.

4. Homicidal death of Patil family in C-1 flat no. 04 Princeton Town, Kalyaninagar.

5. Running away by Respondent/ Accused Bhagwat Kale with 2 others Co-Accused in the night of 15/5/97 and 16/5/97 (Conduct of Accused)

6. Accused Bhagwat was working as a waterman, supplying water to the building and his wife worked as a maid/servant in buildings.

7. Arrest of Accused Bhagwat and other Co-Accused.

8. Disclosure statement by the Respondent/Accused Bhagwat on 21/5/97 u/s. 27 of the Indian Evidence Act:

9. Disclosure statement of Accused Bhagwat on 23/5/97 u/s. 27 of the Indian Evidence Act.

10. Disclosure statement of Accused u/s. 27 of Indian Evidence Act on 25/5/97:

11. Disclosure statement of Accused Bhagwat u/s. 27 of the Indian Evidence Act on 2/6/97:

12. Disclosure statement of Accused Bhagwat u/s27. of Indian Evidence Act on 3/6/97

13. Abscondance of Accused during trial: On 10/09/1998 Accused Bhagwat along with the Co-Accused fled away from the custody of the police while they were being taken to Yerawada Central Prison.

14. Re-arrest of Accused Bhagwat: Re-arrested on 24/03/2010 by Khadaki Police Station in CR.120/98 u/s. 224, 420, 427 r/w. 34 of the Indian Penal Code.

15. C.A Report:

16. Section 313 Cr.P.C of the Accused Bhagwat - No explanation given by the Accused about incriminating circumstances against.

24. According to Ms.Deshmukh, the following aggravating circumstances have been established by the prosecution against Bhagwat Kale, which resulted in his conviction followed by imposition of death sentence

<u>Aggravating circumstances against accused Bhagwat kale</u>

- *Brutal, diabolically, mercilessly killed all family members.*
- *Midnight time when the whole family was asleep the accused along with the co-accused attacked them.*
- *Not spared, budding growing children of 12 and 7 yrs respectively, who were in the dream of their beautiful prospect and accused had not allowed them to do so.*
- *Mercilessly attacked on every part of the body forcefully to rob money and ornaments.*
- *After the assault done mercilessly, he has thrown the bodies from first floor in the chamber of the building. (Doctor's evidence)*
- *The conscious of the society was shocked due to this attack and murder of entire family of 4 members.*
- *The entire family was finished without any fault of the members.*
- *Respondent/accused was the mastermind and maximum cash more than 42 lakhs and ornaments recovered from accused.*
- *No humanity, no sympathy, heartless behaviour was seen towards the helpless, innocent family members and thus is a menace to the society.*
- *The murder of all family members by the accused involves exceptional depravity.*
- *Conscience of society is shocked due to brutal attack.*

- *Killing become necessary as the accused were known.*
- *Phase Pardhi community.*

25. Ms.Deshmukh has relied upon the decision of this Court in case of **State of Maharashtra Vs. Sahebrao @ Navnath Sopan Kale,**[6] when the Division Bench of this Court, modified the sentence of death imposed upon him i.e. accused no.3 and converted it to a sentence of Life Imprisonment. It is her specific contention that the prosecution had proved its case through its witnesses, and the Court had concluded that though no case was made out for imposition of death penalty, as the case did not fall into '*rarest of rare case*', but the recovery of articles and blood stained clothes as corroborated by the witnesses, was sufficient to draw a presumption u/s.114, illustration (g) of the Evidence Act, that the accused must have committed the murder while robbing the deceased.

Relying upon the recovery of articles and cash from the accused and finding a connect with the heinous crime, the attempt on part of the accused to destroy the evidence by throwing dead bodies of Patil and his daughter in drainage, was considered to be an incriminating circumstance. However, since there was no direct eye witness by the prosecution, the Court clearly recorded that the possibility of commission of crime by the accused no.1 Bhagwat, who is absconding, cannot be ruled out.

6 2005 CriL.J 2788

In addition, it is the specific contention of Ms.Deshmukh that when there is no challenge to the examination in chief, the evidence must be unquestionably accepted, and as far as the recovery panchas are concerned, there is no cross-examination and therefore, the Court should accept the panchnama to be proved. In addition, it is her submission that by drawing presumption under Section 114 of the Evidence Act, it can be safely held that the accused persons were atleast guilty of offence of robbery and the unexplained possession of stolen properties from the accused, could be taken to be presumptive evidence of charge of murder as well.

By relying upon the decision of the Apex Court in case of **Dhananjoy Chaterjee Vs. State of West Bengal**[7], the abscondence of the accused after the occurrence is certainly a circumstance which warrants consideration and careful scrutiny. In addition, she would place reliance upon the decision of the Apex Court in **Sukhpal Singh Vs. State of NCT, Delhi**,[8] dealing with the evidence u/s.299 of the Cr.P.C, when accused was absconding for a long time. She would also place reliance upon the decisions in **Nirmal Singh vs. State of Haryana,**[9] and **H. Aarun Basha Vs. State represented by Inspector of Police**.[10]

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7 1994 SCC (2) 220

8 AIR 2024 SC 2724

9 AIR 2000 SC 1416

10 2018 LAW SUIT (MAD) 8270

By relying upon the decision in **Prakash Chand vs. State (Delhi Administration)**,[11] Ms.Deshmukh would submit that the evidence of the circumstance simplicitor that an accused person who led the police and pointed out the place where stolen articles/weapons which might have been used in commission of offence, were found hidden, would be admissible as conduct u/s.8 of the Indian Evidence Act, irrespective of whether any statement by the accused contemporaneously falls within the purview of Section 27 of the Evidence Act. According to her, the conduct of the accused is relevant if such influences or is influenced by any fact in issue or a relevant fact.

According to her, non-production of muddemal in trial is not relevant when no relevant questions are put in cross-examination to cover those aspects and for this purpose, she would place reliance upon the decision in case of **Durgo Bai & Anr Vs. State of Punjab**,[12].

In short, it is the submission advanced on behalf of the prosecution that it is proved beyond doubt that it is the accused who has committed four murders, with an intention to rob the family of their valuables, the offence being committed in most brutal and heinous manner, deserve confirmation of death penalty which is rightly imposed by the District Judge in Sessions Case

11 1979 (3) SCC 90
12 2004(7) SCC 144

No.80/2004.

26. Responding to the above submission, Ms.Gonsalves has urged the following points in support of her contention that the prosecution case is doubtful:

(i) The identity of the deceased is not established

According to Ms.Gonsalves, Ramesh Patil was on the run and the prosecution itself has brought on record that he had collected money from various people in Karnataka and had fleed and no one has established his identity and, the four bodies are not identified by any close relation or friend of the Patils, which is a grave lacunae.

(ii) Recovery of the articles from the accused

The prosecution has failed to prove that the articles that are recovered from Bhagwat, belong to the deceased, as the prosecution has filed to establish the connect.

(iii) Stereotyping of Pardhi community as it is easy for police to target this community.

(iv) Recovery of the weapons as well as the articles seized vide Memorandum Panchnama executed at the instance of the accused is not shown to the panch witness who has executed the panchnama.

(v) No finger prints on knifes, weapons.

(vi) No DNA sampling.

(vii) The presence of the accused on the spot is not conclusively proved as the payment slip produced by PW 1 has failed to establish that he was working with PW 1, nor any evidence to

produce that he was absent from the spot from 16/5/1997.

PW 22 though deposed that he used to maintain register but he did not produce it. There is inconsistency in the version of prosecution about number of workers working on the site.

(viii) Natural conduct of the accused

According to Ms. Gonsalves, the accused ran away because he feared arrest and this conduct is natural as, if four persons were found to be murdered on the site, the accused feared that he may face the accusation or he may be subjected to investigation/interrogation and therefore, it was but natural for him to flee away from the spot.

(ix) Recovery of clothes and shoes

The incriminating circumstance was not put to the accused in his Section 313 statement, and moreover, his so-called blood stained clothes and shoes were recovered after five days.

(x) Prosecution made an application under Section 299 but did not press it

(xi) Recovery not proved.

According to Ms. Gonsalves, if the motive of the commission of the crime was robbery, she pose a question about the proof of recovery.

She is extremely critical about the recoveries effected, and as far as the second recovery is concerned, according to her, the panch is not examined and no one is confronted with the

notes/jewellery and even the owner of the land from where the recovery was effected, Shri Chavan is also not examined. About the third recovery, according to her, only writer has been examined and if the purse along with the papers were lying there, Navlakha who has spotted it, is not examined. Recovery Panch on the piece of bag in the house of the deceased, which matched with the bag from which the gold ornaments were recovered, is not confronted with the piece which was recovered.

Evidence laid by the prosecution before the trial Court

27. In order to prove the charge in Sessions Case No.80/2004, prosecution has examined 37 witnesses to establish the chain of circumstances, since the accused pleaded not guilty and the prosecution case rest on circumstantial evidence.

The prosecution has examined 21 witnesses who were earlier examined in the old Sessions Case No. 368/1997, this include the complainant Yogiraj Palresha (PW 1) as well as auto-rickshaw driver Subhash Adhav (PW 5), Uttam Phere (PW 8), the co-worker of the accused, one Sheshmal Bagmar, the resident of the building and also the shop owner from whom deceased Patil had purchased certain household articles (PW 16), in addition to Mr.Kailash Punjabi (PW 18), from whom some articles were purchased. A few panch witnesses on spot/seizure were also common in the present case. Apart from this, witnesses from Hubli (PW 26 to PW 29) who had given the background of Mr.Patil were

also examined in the present case along with the photographer Sharad Kshatriya (PW 34) as well as one of the Investigating Officer Gajanan Huddedar (PW 35).

28. The deceased Patils were occupying flat no.4 in building C-1, pursuant to a lease agreement being entered with Mr.Lunawat with the intervention of Jayshree Chitre. In the talks initiated for effecting the said transaction, Mr.Ramesh Patil had informed that he had been transferred to Pune, while he was working as an Officer in the State Bank of India, and he would be occupying the said flat with his wife, who was serving in the Postal Department with the two children. Pursuant to the agreement entered on 12/5/1997, the Patils performed the pooja in the said flat and started cohabiting there since 12/5/1997. In C-1 building, flat no.1 was sold to Mr.Gadekar which was rented out to Smt. Mitra.

29. PW 1 Yogiraj Palaresha, the builder who had constructed the Princeton Tower at Kalyani Nagar started his office in 'B' building which is adjacent to 'C' building, and he was visiting his site office everyday at 9.30 a.m.

According to him, accused Bhagwat was serving as a watchman, being appointed for C-2 building, and he was residing with Sibu Kale (accused no.3), another watchman and his wife Geetabai (accused no.2) in the parking place situated in front of the building in a hutment/juggi, along with other workers including Uttam Phere (PW 8), who was residing in a hutment

adjacent to that of the accused, as he was also engaged in the duty of a watchman, being appointed on the site.

According to Yogiraj, all the accused persons including Bhagwat, were present on the site till the date of the incident.

It is PW 1 who first took cognizance of the incident as he was informed by Sheshmal Bagmar (PW 16), who had come to fix the geyser in flat no.4, about the door not being opened, despite he repeatedly ringing the bell, to notice that the lights and fans to be on. The rickshaw driver i.e. PW 5, Subhash was also waiting down, as instructed by Mr.Ramesh Patil.

PW 1 directed one of the labour to climb the stairs to gain an entry into the flat through terrace, and who reported to him of presence of blood on the terrace and he also noticed blood slipping from the walls of the terrace. It is he who provided information to the police and on the police arriving at the spot, and on gaining entry into flat no.4, the body of wife of Mr. Patil and his son was noticed along with the presence of screw driver and knife with blood stains.

The crime scene is described by him in great detail, while he deposed that the furniture was having blood marks and the cupboard was opened and even blood was noticed on wall and floor. An iron bar with blood mark was also lying in the flat. The newspaper and milk packets were found lying outside the flat when the latch was opened from inside. Following the blood stains when

the team on the spot came down near the drainage, it was revealed that the cover of the drainage was removed by means of a black cloth and dead body of Mr.Patil and his daughter was found in the chamber inside.

30. PW 1 identified Bhagwat in the Court as one of the labour working on the spot, who was entrusted the work of providing water to all tanks in the building and being engaged in other work which was allotted to him. As per PW 1, he was knowing the situation of the flat at the site.

PW 1 produced the xerox copy of the muster roll indicating the name of the person, payment made to them and their signature/thumb impression and this Register included the name of the accused Bhagwat at Serial No.3. He categorically deposed that he could identify the black cloth and screw driver if shown, but admittedly, he was not confronted with any of the articles including the knife, screw driver, iron rod, in regards to which he deposed in his examination in chief.

In the cross-examination, Yogiraj, PW 1, has admitted that he had met Patil on two to three occasions and he also deposed that the distance between C-1 and C-2 building was about 60 to 80 ft. Though he admit that 25 to 30 labours were working on the site, 5 to 6 were appointed by him, whereas the others were the labours of the contractor and Mr.Uttam Phere and his wife as well Geetabai, Bhagwat and Sahebrao were working for him and residing in the parking of 'B-3' building.

31. In order to corroborate the testimony of PW 1 who has described the spot of incident, since he was the first person to become aware of the ghastly incident as he was present on the site, the prosecution has relied upon several other witnesses.

Mr.Subhash Sankla, Partner of Palrecha (PW 3), was called by Yerwada police to act as panch for conduct of spot panchnama in flat no.4 in C-1 building in Princeton Town Project, along with one Shantilal Bhatewara (PW 4) on 16/5/1997.

PW 3 gave the location of the flat situated on the stilt floor. On climbing the staircase, he had noticed one iron pipe with elbow soaked in blood and on entering the bedroom, he noticed one single bed and a double bed with white bed-sheet spread over it being soaked in blood. Two uprooted tooth soaked with blood along with one earring of yellow colour, probably of gold, also soaked in blood was found lying on the bed-sheet. As per PW 3, one big knife soaked in blood was also lying there, and he noticed blood stains on the wall of the bedroom. Dead body of a child was lying on the single bed and one knife lying bedside was noticed by him.

According to the panch witness, the bedroom was connected to another bedroom, through a passage and blood marks were noticed in the passage, indicating that the body was dragged along and the articles in the bedroom and hall were scattered and dead body of one lady was lying in the second bedroom.

32. According to PW 3, who is a signatory to spot-cum-

seizure panchnama (Exhibit 32), police seized all articles lying there and prepared a detailed seizure panchnama and he categorically deposed that he can identify the articles, if shown to him.

At this stage, the trial Judge specifically recorded that none of the muddemal articles could be shown to him as they were already destroyed.

33. A careful perusal of Exhibit-32, the panchnama which bear the signature of PW 3 along with PW 4 Shantilal, would reveal the exact description of the spot i.e. flat no.4, including the drainage below it, where the four bodies were discovered; two in the flat and two in the drainage chamber. The panchnama record recovery of the following articles:-

** *Iron pipe, 2 ½ inches in length with two inches bent smeared with blood*

** *screw driver 11 ½ inches in length with 3 ½ inches width with blood.*

** *two pieces of tooth lying on the bed in the bedroom.*

** *One knife in the bedroom with the blade of 4 inches and black colour handle of 4 inches.*

** *One knife found lying at the door of the bedroom with blade of 6 ½ inches with a black handle.*

** *One iron pipe, 3 inches in length and 1 inch in diameter.*

** *Pillow covers and bedsheets from the single bed and double bed from the bedroom*

** *The plastic cover of the bed smeared with blood.*

** *The mosquito net with blood smears recovered from the passage of the bedroom.*

** *A yellow colour metal ring soaked in blood.*

** *Blood stained pillow covers and cushion covers.*

** *Blood samples drawn from floor, passage, door frame, terrace along with the blood stains from the chamber of the drainage mixed with soil.*

** *Soil mixed blood on the staircase.*

** *A black colour cloth tied to the cover of the chamber, on the one end of which a sum of Rs.4,700/- was tied in a knot form.*

**** *One rod of 8 feet 5 inches.*

In addition, the samples of the blood stains on the wall lying on the floor were also drawn by scrapping, in presence of the panchas along with the sample of blood found on bed-sheet, terrace, edges of chamber of the drainage, etc.

34. Exhibit-32 give a truthful depiction of the flat belonging to Patils and the panchnama run into 11 pages. It refers to a photo stand with the photographs of the deceased Patil and his children and the children's photographs were also found displayed on the wall along with the photographs placed on the fiber chair.

The panchnama also give the exact view of the bedroom, by describing that one iron almirah found in an open condition and some clothes, cheque book, pants were found to be lying outside. In another bedroom, a new geyser was noticed along with photographs of deities and a copy of bible. The empty boxes of television and tape recorder are also found on the spot. Blood was also found on the walls and the grills of the door.

It is pertinent to note that PW 3 in his deposition, did not narrate all that which was contained in the panchnama, but was shown the spot-cum-seizure panchnama and he recognized the same along with his signature and deposed that its contents are correct.

35. Subhash Sankla, being examined as PW 4 had proved the panchnama which was also exhibited in Sessions Case No.

368/1997 (Exhibit 76). It is worth to note that in the first round, he was confronted with the following articles and he had identified it to have been seized during conduct of spot panchnama.

Article 42	:	Ring of blood cloth.
Articles 9 & 4		Two iron pipes.
Articles 12 & 14	:	Two knives.
Article 12		: Screw driver
Article 132		: Earring
Article 22		: Bed-sheet on double bed-sheet
Article 23		: Piece of mattress on the single bed with blood on it.
Article 24		: Pillow covers (8 in nos.)
Article 25 & 26		: Plastic cover of the mattress on the bed.
Article 29		: Bed-sheets/mosquitto net lying in the passage.
Article 35		: Towel lying on terrace soaked in blood.
Article 44		: Ladder with blood stains.

36. Shantilal Bhatewar, who acted as panch to the spot cum seizure panchnama (Exhibit-32) is examined as PW 4 in the present trial, whereas he was examined as PW 5 in the old Sessions Case, and he deposed that when he reached flat no.4, in the hall, he noticed one iron rod, screw driver and several other articles.

According to him, some amount was kept in the clothes in the shelf of the bedroom and police seized the articles lying in the room and affixed labels and signature of the panchas (Exhibit 37). Even he was not confronted with any of the articles that were seized during the present trial.

PW 4, though signatory to Exhibit-32, did not depose

about the contents of Exhibit-32, but he was examined to establish the contents of Exhibit-37.

Exhibit-37 is the panchnama prepared on the same day, with one Bharat Vithalrao Shedge, as another panch. As per his deposition, some amount was kept in the clothes in the shelf of the bedroom and what was seized from the spot, was mentioned in the panchnama. Two photo albums which had the photo of Patil family was seized along with a diary with certain entries being scribed by Shri Patil, along with some computations made as regards Canara Bank of the year 1997. One letter Pad on which M/s. S.J. Patil & Sons, Financer with the address 5/A, Laxmi Niwas, near Mahavir Nagar Junior College, Gurudev Nagar, Hubli scribed, was also seized. One another diary of 1997 of State Bank of India, which had also accounts scribed, was also seized from the spot. In addition, some receipts from Ajagram Finance Limited (87 in number) with different names and different amounts were also seized. The balance sheet of M.J. Patil & Sons, reflecting the promissory notes, along with the blank stamp papers, agreement, scribed in Kannada language also came to be seized. Four passbooks of Karnataka Bank Ltd, Hubli, in the name of S.R. Jaidev Patil, Smt. Vijaya Jaidev, with the balance amount lying therein, was also seized. Two other passbooks in the name of Master Manjunath and Kumari Puja Patil also reflected the balance amount lying to their credit. The identity card of Vijaya Kumari

from Department of Technology, Bangalore Telecom Distribution with the date of birth is also seized. Some Dividend Certificates of Ajagram Finance Limited, cheque book, 10 blank cheques from Karnataka Bank, Union Bank, Bharatiya State Bank, Hubli, on some of whom the amount was specifically scribed, were also seized. In addition, a sum of Rs.13,400/- in cash was seized from the jeans pant of deceased Patil and some of the valuables like two watches; out of which one of Rado Company and one watch of Titan Company, was also seized which was kept on the refrigerator. Two finger rings with precious stones were also seized from the spot. In addition, from the bedroom from one box which was concealed under the clothes, a bag was seized which also contained some documents, which included the school documents of the children, their progress cards, a diary, which had recorded some accounts, a passbook from Karnataka Bank in the name of Sindheshwar Patil, Hubli, a driving licence in the name of S. Jaikumar Patil along with 21 visiting cards was also found in the said bag. In addition, a ration card in Kannada language and a registration book of Maruti Car registered at Dharwa RTO, in the name of S.J. Patil, is also seized. In addition, some keys and a cash amount of Rs.16,500/- is also recovered from the said bag.

Exhibit-37 also run into 12 pages, but PW 4 in his examination in chief, in one sentence, deposed that the police seized the articles lying in the room, without he being confronted with any of the articles and he only identified his signature on

Exhibit-37 and deposed that his contents are correct.

It is worth to note that this very witness was examined in the earlier Sessions Case, as PW 5 and he categorically deposed that he was called for the panchnama for seeing the papers and other articles in flat no.4 and he along with PI Dhulubulu was taken by Palresha into the flat. In his deposition in Sessions Case No.368/1997, he gave the narration of what he saw and what articles were found with specific reference to the photo album, passbooks of different banks and other documents contained in the files found in the bedroom.

He told the Court that in all, 48 articles were seized under the panchnama (Exhibit 85) and the panchnama was read to him and his contents are found by him to be true and correct. He was confronted with the articles seized under the panchnama and identified them to be the same, which were seized.

37. In addition, prosecution has examined PW 10 Suresh Gaike, who signed seizure panchnama (Exhibit 119) under which the white colour pyjamas and blue colour underpants belonging to the deceased Mr. Patil, was recovered. Though he identified his signature on the panchnama, he was not confronted with the articles seized.

38. PW 12 Chandrashekhar Shedge is a panch on recovery of piece of bag lying at the crime scene i.e. flat no.4 of 'C' building

and when the accused Bhagwat made a disclosure statement on 2/6/1997, and expressed his willingness to lead the Investigating Team to the same. As per his deposition, the police handed over the key of the flat to the accused and police unlocked the flat and they found a piece of bag inside the flat, which was kept in a brown envelope and his signature was obtained. He signed on the disclosure/recovery panchnama (Exhibit 94), and on the other hand, in the cross-examination, he categorically admit that he has not been shown original bag by the police, nor was it told to him that the original bag was with the police, and it is necessary to search its pieces. He categorically admit that in the earlier trial, he was never called by the police, despite the fact that since 1997, till 2004, he was residing on the same place which address he had given. In cross, he also admit that police had told him that gold and money was already seized and now only the piece of bag has to be seized.

39. Dilip Redasani (PW 14), yet another panch was called at the Yerwada police station for signing the panchnama (Exhibit 101).

He deposed that police prepared panchnama of white colour pyjama, pink colour shirt, neck chain and waist chain and was informed in the police station that they belong to deceased boy residing in flat no.4, but his name was not disclosed.

In the cross-examination, he admit that nothing else was seized beyond what he had described in the examination-in-

chief. He also admit that when the panchnama was prepared, no accused persons were present and he was called at Ramwadi police chowky and the police had shown him the articles and informed that the clothes and articles belong to the deceased.

40. Ambarnath Ghosekar PW 15, is a panch on seizure of Salwar and Kurta with blood stains, and according to him, he was shown the said articles along with locket and one yellow metal and one knicker and police kept those articles in envelope and sealed it and prepared panchnama (Exhibit 136) on which he affixed his signature. He was also not confronted with the articles but deposed that the police had read over the contents of panchnama to him.

Another panch witness (PW 17) Aishabee Shaikh was called on the spot and she had been to Sassoon Hospital. The deceased lady, according to this witness, was wearing a pink colour maxi as well as black colour petticoat, whereas her son was wearing pink shirt and pant. The clothes were stained with blood. She was confronted with Inquest Panchnama (Exhibit 138) and she identified her signature on the same.

41. The aforesaid witnesses are examined by the prosecution to establish that the members of the Patil family were done to death in their residential flat and it was homicidal death, since from the spot, several weapons, including knives, screw driver stained with blood, were recovered. The other articles, including the bed-sheets, pillow covers, as well as the clothes of the deceased were seized, to demonstrate that they had been brutally murdered

and hence, their clothes were smeared with blood.

42. Sharad Kshatriya, a photographer from Wakad Pune, was examined by the prosecution as PW 34, who on receipt of phone call from Dhulubulu, of police station Yerwada, accompanied him on the spot of incident where he snapped photographs of the spot and deceased from different angles. He also took photographs of the dead body in Sassoon hospital and on accomplishing his task, he handed over the photographs to Police Inspector Dhulubulu. The said witness was also examined in the earlier Sessions Case as PW 42, who had produced 7 photographs along with its negatives which were exhibited as 'Exhibit 177' and the negatives were exhibited as 'Exhibit-178' collectively.

Appreciation of Evidence of the Prosecution Witnesses

43. It is the case of the prosecution that with an intention of burgling the Patils of their money and gold ornaments, the accused persons, including Bhagwat, had gained entry into their house and by doing the members of the family to death, they robbed him of cash/jewellery and other valuables and they fled away from the spot on the intervening night, after commission of the offence.

For presence of the accused persons on the spot, prosecution has relied upon the evidence of Yogiraj Palresha (PW

1), the builder, who found the entire family dead in the morning hours of 16/5/1997, with a corresponding circumstance that from that day, all the three accused persons were not found in the house and the house was locked.

PW 1 however, did not produce the original muster to establish the absence of accused Bhagwat from the spot on the particular day when Patils were found to be murdered.

44. PW 8, Uttam Phere, a labour working with Palresha on the construction site and residing in the labour camp along with the accused persons is examined as PW 8. He identified accused Bhagwat in the dock and deposed that in the 'C' building, Patil family was residing on first floor which included the husband, wife and two children, all of whom were murdered. According to Phere, wife of accused was serving as maid servant with deceased Patil.

He gave narration of the incident on the fateful night, as he deposed that after having dinner, he and his wife were sleeping on the sand in front of the building, when in the midnight, they found some persons from labour camp gathered near the building. Bhagwat was present there and he apologized to the others present and requested the persons not to disclose anything to anybody and accept money and he threw money (currency notes) on the heap of sand and left the labour camp. Though he left, after a while, he returned and requested for a crow bar or some other instrument to open the chamber for putting dead bodies and the amount, but the members of the labour force

refused to help him and therefore, he proceeded towards the chamber, after putting something in his room.

Uttam also deposed that a piece of cloth meant for chumbal belonging to the wife of the accused, was lying near the chamber. According to PW 8, the currency notes which he had collected from the heap of sand on the earlier night was put by him in a hole and then he closed it by putting stone. It is not his version that he led the police to this money nor did he produce the currency notes to police or Palresha.

In his deposition, he stated as below:-

> *"12 The police called me, my wife and son Sandeep. I was told that I would be arrayed as accused by the police. It is not true that police asked me to state the facts as per their wish otherwise I would be made accused. It is not true that I have given statement before the police that as per their direction, and therefore, I was released. It is not true that as my wife and son gave statements as per the say of the police, they were also released. It is not true that I, my wife and son stated before the police that we do not know anything about that incident.*
> *13 The persons from adjoining locality gathered there in the morning hours. It is not true that for the first time in the morning hours I came to know that the incident took place in the flat of deceased Patil. The accused had not come to me at 7.00 a.m. On the next day morning, I and policemen and Palrecha went inside the flat of the deceased Patil."*

45. Further, in the cross-examination, he has admitted to the following:-

> *"I do not remember whether the police showed knife, screw driver and iron bar to me. The police personnel were preparing some papers but what type of papers they were preparing, I do not know."*
>
> *"The police recorded my statement after the accused was arrested and before the arrest of the accused, police had come to me, but my statement was not recorded"*

In the cross-examination, though he denied a suggestion that he had not seen the accused going towards the chamber from his room, and when the piece of cloth (chumbal) was taken in custody by the police and he admitted that he had shown the spot where currency notes were concealed in a hole, but the amount was not found there. He also deposed that police had not inquired about missing of those currency notes.

46. In the earlier Sessions Case No.368/1997, Ratan, wife of Uttam was examined and she identified Geetabai and Sahebrao as the persons who were residing at the construction site. Corroborating her husband Uttam, she had deposed before the Court that while they were sleeping on the heap of sand, she saw electricity in the flat of deceased Patil and Bhagwat was inside the flat, and he had opened the Almirah. This was seen by her as the window of the flat of the deceased Patil was half opened with the ladder being affixed. According to her, she had deposed that she saw accused Bhagwat coming from the flat with the help of staircase and he offered money to Tulsiram, but he refused and she also asked her husband to take money and not to disclose anything. He threw money on the sand and her husband accepted the currency notes.

Ratan is not examined by the prosecution in the trial of Bhagwat.

47. It is to be noted that none of the relatives of the deceased family ever arrived on the spot, or even to receive their

bodies and no complaint was ever filed by them even as regards the missing articles/jewellery/ornaments or about the currency notes that are alleged to be removed from flat no.4 belonging to the Patils or as to what was the family robbed of.

Evidence of recovery against accused Bhagwat

48. We shall now come to the evidence of recovery of the articles including the cash and the ornaments, which according to the prosecution, provides a link between offence and the present accused Bhagwat.

It is the case of the prosecution that the deceased persons were done to death, since the accused attempted to rob them of the valuables, the prosecution has failed to lead any evidence about what articles/valuables were removed from the flat of Patils and to establish the link between the articles robbed from the flat and which was allegedly traced in the hands of Bhagwat.

In order to establish that the accused persons had ran-sacked the house, the spot panchnama has been drawn and the articles lying on the spot were seized, as reflected in Exhibit-37 which is proved by PW 4 Shantilal Bhataware.

From the spot panchnama, it is evident that valuables like watches, finger rings and cash amount, was seized during the spot panchnama, but there is nothing brought on record by the prosecution to establish what valuables and how much cash was removed.

49. The different recoveries are attributed to accused

Bhagwat pursuant to his statement recorded u/s.27 of the Evidence Act, 1872.

The prosecution has relied upon several recoveries at the instance of this accused, but unfortunately, the evidence on record has failed to establish the link between the stolen articles including ornaments, cash etc. for the reasons which are indicated in each of the recovery as indicated above.

Recovery No.I (Exhibit 47/160 and Exhibit 48/161)

As per the prosecution, on 21/5/1997, accused Bhagwat while in police custody, in presence of Shri Gorakh Narayan Jadhawar (PW 7), disclosed that he has hidden the bag containing the money in the territorial limits of Indapur, and he will show the place. Police prepared detailed discovery panchnama, (Exhibit 47) and pursuant thereto, seizure was effected (Exhibit-48).

According to PW 7, he accompanied with another panch, (not examined) proceeded from Yermala to Terkheda and from Terkheda to Indapur and they were taken to the eastern side, where the accused stopped at the boundary of one field and he removed the earth and in a pit, one unlocked suitcase was found, which was removed.

Several bundles of currency notes were found in the suitcase and according to PW 7, the amount was around Rs.2 lakhs to 2.5 lakhs.

PW 7 identified Bhagwat in the Court, but was unable

to say whether he could identify the currency notes bundle.

50. Version of the panch witness Jadhawar is corroborated by PW 35, Gajanan Rajaram Huddedar, API attached to Yerwada police station, where Shri Dhulubulu, was the Senior Police Inspector.

After obtaining the police custody remand of the accused, he was taken by PW 35 to Yermala Police Outpost where he made a disclosure statement that he was ready to show the place where the stolen bag had been concealed by him.

PW 35, however, do not state that the disclosure by the accused was about the money in the bag.

He identified his signatures on the panchnama (Exhibit 160) (old Exhibit 47/48) and deposed as under :-

> *"Therafter, as per say of accused, he went to Indapur in a field by Government jeep. There, accused took out a suitcase which was kept on bandh/bank (Field boundary of that field) and on opening of the same, cash of Rs.2,50,114/- was found and the amount was kept in a gunny bag. He seized the suitcase with the cash amount vide exhibit 161 (Old exhibit 48)."*

The Memorandum Panchnama (Exhibit 47) record that the accused had made a statement about a suitcase with money being stolen by him from the flat, was concealed on boundary of one field in Indapur Shivar.

There is no description of the field and we find discrepancy in the evidence of PW 7 and PW 35, in regards the statement made by the accused, as PW 7 has deposed that the

accused told about the bag containing the money being hidden by him in territorial limits of Indapur, whereas, as per PW 35, he made a disclosure statement that he is ready to show the place where the stolen bag is concealed by him.

The Memorandum Panchnama record that the accused had stated that a suitcase with money was stolen by him, which he had concealed in a pit prepared by excavating the sand on the bandh.

None of the witness has thus reproduced the exact statement made by the accused while he made a disclosure statement.

In addition, according to PW 7, accused removed the soil on the boundary, and in the pit, one suitcase was found, whereas according to PW 35, the accused took out a suitcase which was kept on the bandh (boundary of a field).

The discovery of the suitcase along with the money, took place on 21/5/1997, which is after five days of the incident. PW 3 has admitted that the field was at a distance of 1.5 pharlang from the village and the place was not visible from the road, but he admitted that one pathway passes from the said field which is used by the agriculturist to pass.

Admittedly, the owner of the field is not examined and it has come on record in Exhibit 48 that the field of Pandurang Nimbalkar i.e. Survey No. 86(A) is in the possession of the Government. Adjoining the said land is the land of Suresh Manik

Shirsat.

51. Since the recovery no.1 is made from open field, as PW 7 has stated that public had access to the place, the recovery cannot be relied upon.

In **Salim Akhtar @ Mota Vs. State of Uttar Pradesh**[13], it is categorically observed by the Apex Court that the recovery made from an open place which was accessible to all and everyone do not inspire confidence, as there is every possibility of any other person to have planted the article recovered, and the accused acquiring knowledge about its whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles and this recovery from an open place cannot be solely relied upon to sustain his conviction.

Recovery No.II (Exhibit 162-163)

As PW 35, API Gajanan Huddedar, the accused gave disclosure statement that he along with other accused committed a crime, and ornaments and cash removed from the flat had been concealed in the field of one Chavan of Indapur and he is ready to lead to that place.

Pursuant to the said statement, a Memorandum Panchnama was drawn (Exhibit 162), which is exhibited through PW 35 who identified his signature on the same and deposed that

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it's contents are correct.

The said disclosure statement was made on 23/5/1997, and as per Huddedar, they went to the field of Chavan and accused produced gold and silver ornaments, camera and cash of Rs.39,48,000/- from four places in that field and all the muddemal was buried in the field, and there was also a suitcase. All the articles were seized in presence of panchas (Exhibit 163).

As per the panchnama, when the investigating team along with the panchas reached the agricultural field of Shri Chavan, accused told that he had concealed the suitcase containing money and ornaments as well as one nylon bag containing money, one gunny bag containing money, and he has buried the same. He, thereafter is alleged to have gone to the spot and dig out one suitcase containing cash and some ornaments of gold and silver. The panchnama record that the bundles seized contained the label of Karnataka Bank, Hubli. The ornaments as well as the cash was seized and handed over by PW 35 to the Investigating Officer.

PW 35, who was also examined in Sessions Case No. 368/1997 as PW 56 was shown the suitcase of Citizen Company, and he identified the same.

52. The Recovery no.2 also suffer from the same discrepancy as recovery no.1, since the cash amount and ornaments were seized from open place and neither of the panchas to Exhibit 162/163 have been examined.

PW 35 has given the following admission:

> *"10. I cannot state without going through the panchanama whether accused had given information about the gold ornaments. A list of ornaments dated 24/05/1997 is shown to the witness. This document does not bear the signature of policeman. I don't remember whether the ornaments as per the said list were seized and brought to Police Station."*

Further, he has admitted that there is no signature of accused on seizure panchnama (Exhibit 163).

Recovery No.III (Exhibit 164-165)

PW 35 Huddedar also deposed about one more recovery from the accused, pursuant to his disclosure that the stolen ornaments have been concealed in a steel box, buried near the hut of his parents in Washi Shivar and he is ready to produce the same.

PW 35 accordingly prepared the Memorandum Panchnama (Exhibit 164), which is exhibited by him. When the team reached the spot indicated, the accused dug out a steel box buried in the earth in which cash of Rs.29,000/- and something more was found.

Exhibit 164 dated 3/6/1997 record that accused made a disclosure that cash from the booty had been concealed by him in a steel box, which he had buried near his hut. However, Exhibit 165 record that when the investigating team reached the place, to which the accused had led, he excavated the soil and took out one steel box which contained bundles of notes.

PW 35, however, in his substantive evidence, has

deposed that the accused has disclosed that the stolen ornaments have been concealed in steel box and he will lead to the same.

The above statement clearly contradicts the statement of the accused in the disclosure panchnama. As according to PW 35, the disclosure was as regards the ornaments, but what was recovered, was cash. Further, since there is no connection established by the prosecution between the amount that is recovered, pursuant to the disclosure statement made by the accused and the crime committed, even this discovery cannot be relied upon.

Admittedly, the panch to the said panchnamas (Exhibit 164 and 165) Shri Bibishan Undre and Satyapal Shinde are not examined by the prosecution.

Recovery no.IV (Exhibit 173-174)

One more disclosure resulting into execution of disclosure panchnama at the instance of Bhagwat (Exhibit 173) is drawn on 25/5/1997 when while in custody, he is alleged to have made a statement that after committing the crime, when the accused persons fled with the bag containing money and golden ornaments and one purse, while proceeding from Hadapsar to Tulzapur, he had thrown the purse along with the papers contained therein in one sugarcane field and he would show the place.

The two panchas on the Memorandum Panchnama, Suresh Dinkar Sawant and Sanjay Charandas Chand are not examined by the prosecution, but the panchnamas are exhibited

through PW 37, who is a writer of PI Shri Dhulubulu.

PW 37 deposed that on 25/5/1997, he had scribed the Panchnama in respect of disclosure made by Bhagwat in presence of PI Dhulubulu, two panch witnesses and he recorded the statement as given by the accused.

According to him, he along with the entire team accompanied by the accused, proceeded towards Mundhwa bridge, Southern side and thereafter, to the east side and thereafter, ahead of Vadgaon Sheri graveyard, in the field of Sugarcane, near Babul and Neem trees, when the accused led them to a spot where they found one purse and some papers which came to be seized under panchnama (Exhibit 174). Though the panchnama was written by this witness in his handwriting, it do not bear his signature and therefore, he is not competent to depose about it's correctness.

As PI Dhulubulu was not available for present trial in Sessions Case 80/2004, in absence of the panchas, of Exhibit 173 and 174 being examined, the evidence of PW 37 cannot be relied upon. Since the purse and papers are alleged to have been recovered under Exhibit 174, it contained some ladies articles, along with medical papers of Manjunath Patil, the papers were found in the black colour purse, but PW 37 has deposed that the papers were lying on the spot. In any case, the recovery of the purse and the documents cannot be relied upon since the signatories to the said panchnama i.e. the Investigating Officer and

the panchas are not examined in support of the said recovery.

Recovery no. V (Exhibit 94)

Yet one more recovery attributed to the accused is about the piece of bag lying in the flat, the statement being given on 2/6/1997, while he was in Yerwada police station, Pune.

To establish this recovery, PW 12, Chandrashekhar Shedge is examined by the prosecution and the disclosure-cum-Recovery Panchnama (Exhibit 94) was exhibited through him.

In the panchnama, the disclosure statement record that since the lock of one big bag found in the flat could not be opened, and therefore, the accused cut the upper portion of the bag, to find that it contained money and though he fled with the bag, the piece cut out by him was left on the spot.

Exhibit 94 record that when the Investigating Officer with the panchas followed the accused in the flat, he entered the bedroom, where an iron almirah was kept, he kneeled down and by placing his hand below the almirah, took out one piece of bag, blue in colour with the description mentioned in the panchnama.

In cross-examination, PW 12 admit that the contents of panchnama were not read over to him, and he was not aware whether the person who gave disclosure was arrested or not. He also admit that he used to always visit the police station and surprisingly, though he visited the spot on 2/6/1997, after more than 15 days from the incident, he noted clothes and goods

scattered here and there, and even he noted blood marks.

He categorically admit that he was not shown the original bag by the police.

This recovery is also not trustworthy, as it is improbable that in a hurry of leaving the spot along with the gold ornaments and the cash, after bludgeoning four persons, the accused who had stated in his disclosure statement that he had cut the bag with the knife to find out its contents, had the time and mindset to conceal the piece of bag under the almirah from where he recovered it after more than 15 days.

53. All the recoveries pursuant to the disclosure statement, attributed to the accused do not inspire confidence for the reasons which we have recorded against each of the recovery.

In the present trial, prosecution has examined two more witnesses who were not examined in the earlier trial; PW 24 Satish Indapurkar and PW 25 Pawan Shinde.

Satish Indapurkar, resident of Indapur, as per the say of Sarpanch of the village, went to the field, where cash and ornaments were found and one Fase Paradhi woman, named Geetabai, was also brought there. The earlier exhibited panchnama (Exhibit 150) was shown to PW 24 and he identified his signature and contents. He deposed that money was counted in his presence, but he could not say with certainty as to how many notes of denomination of Rs.100/- were recovered. He also was unaware

whether the police weighed the ornaments, but admit to have signed the list prepared.

In any case, it is not understood as to why this panchnama came to be included in case of the accused Bhagwat, as the panchnama was drawn to establish seizure of ornaments and cash at the instance of Geetabai, the co-accused.

54. One Pawan Satyapal Shinde (PW 25), another resident of Indapur, Shivar, is examined, who deposed that Bajirao Kale was working as labour and he had two sons; Dashrath and Bhagwat. He identified Bhagwat present in the Court, who was seen by him after 23 years.

PW 25 categorically stated that police did not make any inquiry with him about the incident, and he was told by his father that there is news in the newspaper that Bhagwat killed someone and except this, he did not know anything and police had never recorded his statement. Even the evidence of this witness is of no assistance to the prosecution.

Absence of connect between the alleged recovery and the deceased family.

55. The circumstance of recovery of the money as well as ornaments stolen from flat no.4, being recovered from accused Bhagwat, is not established by the prosecution and moreover, even if some articles/jewellery could have been recovered, unless it was established that they were stolen from flat no.4 and somebody had identified it to be the articles missing from the house of Patils, the

link between the missing articles and those recovered from the accused could not have been said to have been established. Even though it is the case of the prosecution that when Bhagwat was arrested, huge amount of cash and jewellery was recovered from him through discovery panchnama executed at his instance, the prosecution has failed to establish that the ornaments and cash is the same which was looted from flat no.4, when Patils were done to death.

56. At this juncture, we must refer to the decision of the Apex Court in case of **Sanvat Khan & Anr Vs. State of Rajasthan**,[14] where this very question fell for consideration when Sanvat Khan and Kalu Khan being convicted for committing offence of murder and sentenced to death, appealed to the High Court which confirmed the conviction but commuted the sentence of death.

It was the case of the prosecution that a wealthy person Mahant Ganeshdas used to live in the temple situated on a hillock near Panchota along with one Ganpatia. One fine morning, both of them were found dead in the temple, having sustained injuries by means of an axe and the house had been ransacked and the boxes and almirahs open.

The incident was reported to the police and FIR was registered against unknown persons who were responsible for robbery and murder. One of the appellant Kalu Khan was arrested and produced a gold kanthi from his bara, where it was lying

14 (1952) 2 SCC 641

buried. The other appellant was arrested and he produced a silver plate found buried in the ground.

57. There was no direct evidence whatsoever showing the participation of the appellants in the murders, but the learned Sessions Judge sustained the conviction by relying upon evidence of one of the witness and the recovery of the articles. The fact that they were seen near the place of occurrence on the day previous to the murder and seen thereafter, they left the village, was the circumstance which was found to be relevant for their conviction.

Before the Apex Court, it was contended on behalf of the appellants that the evidence of recovery of articles belonging to the deceased at the instance of accused, at the most, could lead to a presumption that they were thieves or had received the articles knowing them to be stolen, but it was inconclusive on the question of they having committed murders.

The Apex Court found force in this contention and observed thus:-

> *"6 The unexplained evidence against the accused charged with murder and theft, and they could not be convicted of murder unless their possession of the property could not be explained on any other hypothesis except that of murder. In the absence of any evidence whatsoever of the circumstances in which the murders or the robbery took place, it could easily be envisaged that the accused at some time or other seeing the Mahant and Ganpatia murdered, removed the articles produced by them from the temple or received them from the person or persons who had committed the murder."*

The conclusion drawn was reasoned thus:-

> *"8 In our judgment, Beaumont, C. J., and Sen J. in -- 'Bhikha Gobar v. Emperor', AIR 1943 Bom 458 (B) rightly held that the mere fact that an accused produced shortly after the murder ornaments which were on the murdered person is not enough to justify the inference that*

> *the accused must have committed the murder. There must be some further material to connect the accused with the murder in order to hold him guilty of that offence.*

58. Yet, in another judgment, recently delivered by the Apex Court in case of **Tulesh Kumar Sahu Vs. State of Chhattisgarh**,[15] when the only evidence against the accused person was the recovery of stolen property and although the circumstances were indicative that the theft and murder have been committed at the same time, it was held that it was not safe to draw the inference that the person in possession of the stolen property was the murderer, as suspicion cannot take place of proof. In paragraph no.28, the Court observed thus:-

> *"28 On the other hand, in Sanwant Khan Vs. State of Rajasthan, one Mahant Ganesh Das, who was a wealthy person, used to live in a temple of Shri Gopalji along with another person. Both of them were found dead. The house had been ransacked and boxes and almirah opened. It was not known at the time who committed the offence. Investigation resulted in arrest of the appellant, and on the same day, he produced a gold khanti from his bara, where it was found buried in the ground. Another accused produced a silver plate. The Court found that there was no direct evidence. There were certain circumstances which were rejected by the Sessions Judge and the solitary circumstance was the recovery of the two articles. In these circumstances, the Court held, inter alia, as follows:*
>
> > *"Be that as it may, in the absence of any direct or circumstantial evidence whatsoever, from the solitary circumstance of the unexplained recovery of the two articles from the houses of the two appellants the only inference that can be raised in view of illustration A to S.114 of the Evidence Act is that they are either receivers of stolen property or were the persons who committed the theft, but it does not necessarily indicate that the theft and the murders took place at one and the same time."*
> >
> > *** ** ** Here, there is no evidence, direct or circumstantial, that the robbery and murder formed parts of one transaction. It is not even known at what time of the night these events took place. It was only late next morning that it was discovered that the*

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> *Mahant and Ganpatia had been murdered and looted. In our Judgment, Beaumonth, C.J., and Sen J. in - Bhikha Gobar v. Emperor, AIR 1943 Bom. 458 (B) rightly held that the mere fact that an accused produced shortly after the murder ornaments which were on the murdered person is not enough to justify the inference that the accused must have committed the murder.*
>
> *** ** ** In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murdered. Suspicion cannot take the place of proof. " (Emphasis supplied)*

59. Yet another important aspect in relation to the recovery is assuming that the articles are recovered, they must be identified to be belonging to the deceased and in the present case, no one from the family of Ramesh Patil came forward to even identify the dead bodies, though some evidence was collected against him when the Investigating machinery visited Hubli, but what articles were burgled from the flat, is not established by the prosecution. In absence of the identity of the articles alleged to have been seized at the instance of the accused, through the discovery panchnama, by any person identifying the articles, the prosecution has failed to establish the connect between the two circumstances.

The case of the prosecution is based on circumstantial evidence and it is cast with a heavy burden to establish complete chain of circumstances and the chain should be so established, which should point to only one conclusion i.e. it is the accused alone who had committed the crime and none else. Each evidence

which completes the chain of evidences, must stand on firm grounds. The discovery of articles through a panchnama executed under Section 27, which is alleged to be one circumstance connecting against Bhagwat to the death of Patils has to be conclusively proved. In absence of any identification of the article/money that is allegedly seized from Bhagwat as belonging to Patils, the nature of circumstantial evidence is weak, as it is well settled that the circumstances from which the conclusion of guilt is to be drawn should be fully established and the fact so established should be consistent only with the hypothesis of the guilt of the accused i.e. there should be no explanation on any other hypothesis, except the guilt of the accused and the circumstances should be conclusive in nature and tendency.

The non-reliability of the alleged discovery based on the disclosure statement given by accused Bhagwat under Section 27 of the Evidence Act.

60. As regards the alleged recovery from Bhagwat, Ms. Gonsalves has also focused her attention on a very important aspect that the contents of the disclosure statement are not proved by the Seizing Officer and she has placed reliance upon the decision of the Apex Court in case of **Ramanand @ Nandlal Bharti Vs. State of Uttar Pradesh**[16]**,** wherein the trial Judge convicted the appellant for the offence punishable under Section 302 and sentenced him to death, relying upon distinct incriminating circumstances, one of them being; discovery of weapon of offence and blood stained

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clothes at the instance of the accused appellant.

The Appeal filed by the accused/appellant failed in the High Court and this constrained him to approach the Apex Court. Since the case of the prosecution was based on circumstantial evidence, the Apex Court referred to the well settled principles in law, relating to appreciation of circumstantial evidence and reiterated the test which are to be followed, the foremost being; the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

In this chain of circumstances, discovery of weapon of offence and blood stained clothes and the evidence led by the prosecution in this regard, came to be appreciated. According to the prosecution, after the arrest of the accused/appellant while he was in custody, on his own free will and volition, he had made a statement that he would like to point out the place where he had hidden the weapon of offence (baanka) and his blood stained clothes. Since the accused led the Investigating Officer to the place, from the bush the articles were recovered, by drawing a panchnama and they were forwarded for serological test to the Forensic Science Laboratory.

The Apex Court expressed its reluctance to accept the evidence discovered, since the Investigating Officer, in his oral evidence, had not said about the exact words uttered by the accused at the police station and secondly, since the Investigating Officer failed to prove the contents of discovery panchnama, apart from

the fact that what was lacking, was the authorship of the concealment. It is in this background facts the Apex Court observed thus:-

> *"56. The requirement of law that needs to be fulfilled before accepting the evidence of discovery is that by proving the contents of the panchnama. The investigating officer in his deposition is obliged in law to prove the contents of the panchnama and it is only if the investigating officer has successfully proved the contents of the discovery panchnama in accordance with law, then in that case the prosecution may be justified in relying upon such evidence and the trial court may also accept the evidence. In the present case, what we have noticed from the oral evidence of the investigating officer, PW-7, Yogendra Singh is that he has not proved the contents of the discovery panchnama and all that he has deposed is that as the accused expressed his willingness to point out the weapon of offence the same was discovered under a panchnama. We have minutely gone through this part of the evidence of the investigating officer and are convinced that by no stretch of imagination it could be said that the investigating officer has proved the contents of the discovery panchnama (Exh.5). There is a reason why we are laying emphasis on proving the contents of the panchnama at the end of the investigating officer, more particularly when the independent panch witnesses though examined yet have not said a word about such discovery or turned hostile and have not supported the prosecution. In order to enable the Court to safely rely upon the evidence of the investigating officer, it is necessary that the exact words attributed to an accused, as statement made by him, be brought on record and, for this purpose the investigating officer is obliged to depose in his evidence the exact statement and not by merely saying that a discovery panchnama of weapon of offence was drawn as the accused was willing to take it out from a particular place.*
>
> *61. Further, the examination-in-chief of the PW-6, Sub-Inspector and PW-7, investigating officer does not indicate that they were read over the panchnama (Exh.5) before it was exhibited, since one of the panch witnesses was not examined and the second panch witness though examined yet has not said a word about the proceedings of the discovery panchnama. Everything thereafter fell upon the oral evidence of the investigating officer and the Sub-Inspector (PW-6).*
>
> *62. In the aforesaid context, we may refer to and rely upon the decision of this Court in the case of Murli 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]*
>
> *76 Thus, in view of the aforesaid discussion, we have reached to the conclusion that the evidence of discovery of the weapon and the blood stained clothes at the instance of the accused appellant can hardly be treated as legal evidence, more particularly, considering the various legal infirmities in the same."*

61. The proposition of law as held above was followed in **Rajesh Vs. State of Madhya Pradesh**,[17] where it was reiterated that it is only if the Investigating Officer has successfully proved the contents of the discovery panchnama in accordance with law, the prosecution would be justified in relying upon such evidence and the trial Court may also accept the same.

In order to enable the Courts to safely rely upon the evidence of Investigating Officer, it is necessary that the exact words attributed to the accused, as the statement made by him, be brought on record and the Investigating Officer is obliged to depose the exact statement and not merely say that the discovery panchnama of the weapon was drawn up, as the accused was willing to take it out from a particular place.

In absence of the deposition of either the Investigating Officer or the panch about the exact statement to have been made by the accused, which ultimately led to the discovery of a fact relevant u/s.27 of the Evidence Act, the recovery of the articles cannot be relied upon.

Section 27 of the Evidence Act has to be translated in practicality and since it is a position of law well accepted that the contents of the panchnama are not the substantive evidence, but what has been stated by the panchas or the person concerned in the witness box, is the substantive evidence. In absence of the exact

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words attributed to an accused person, as a statement made by him being deposed by the Investigating Officer in his evidence and also without proving the contents of panchnama, the Court is not justified in placing reliance upon the circumstance of discovery of weapon.

62. In case of **Bodhraj @ Bodha Vs. State of Jammu & Kashmir**,[18] the Apex Court recorded as under:-

> *"18 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 in to 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 come from a person not 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. !t 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 of supporting the interpretat ion 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*

18 (2002) 8 SCC 45

given must relate distinctly to that effect. [see Stale of Maharashtra v. Dam Gopinath Shirde and Ors, (2000) Crl.L.J 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."

63. Another point and a significant one, which has been pressed into service by Ms.Gonsalves is that the contents of panchnama are not the substantive evidence and by referring to Section 3 and Section 145 of the Evidence Act, 1872, according to her, what is substantive evidence, is what has been stated by panchas or the person concerned in the witness box and in absence of the actual articles being not shown to the panch witness, according to her, the recovery could not be proved. She has placed reliance upon the observations of the Apex Court in case of **Murli & Anr Vs. State of Rajasthan.**[19]

"34 The contents of the Panchanama 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 concerned person in the witness box. Again, even if we accept the extreme preposition, anything and everything stated in the Panchanama can be read as the substance evidence, still the fact remains that in this case, the witness who has supposed to have made the statement to the Magistrate, is not given an opportunity to explain the same. The portion marked from X to Y is in Column No. 7 of the Panchanama, where he had made the statement as above. However, there is no cross-examination or no question put to him about the contents of Column No. 9, where he has taken the name of Heera. The statement in Column No. 7 amounts to his previous statement and unless he was confronted with the statements specifically and asked to explain, such statement cannot be used.

35 It is trite law that a previous statement of the witness, even if admissible in evidence, cannot be used against the witness, unless the

19 (2009) 9 SCC 147

witness is confronted with the same and his attention is invited. In his substantive evidence, the witness has never made a statement that he had identified Bheru as Heera. So much so that there is nothing in the evidence, which suggests that Heera and Murli were ever identified by him. His admitted case was that he knew Heera and Murli even before the incident took place.

36 It is an admitted position that Heera and Murli were never put in for identification in the Identification Parade. Under such circumstances, the insignificant circumstance in the Test Identification Panchanama to the effect that the witness had identified Bheru and named him as Heera, cannot amount to the substantive evidence and further it cannot be used, as that statement was never specifically put to the witness. This is apart from the fact that even if the witness was confronted with his previous statement, there is other over-whelming evidence to the effect that witness had in fact known Heera and had identified him and named him in the First Information Report."

64. In **Niranjan Panja Vs. State of West Bengal**[20], when the murder weapon which was alleged to have been recovered from the accused was never produced before the Court, but was relied upon as a circumstance to establish the guilt of the accused and the High Court accepted the evidence on the recovery of the so-called weapon, the Apex Court expressed disagreement with the finding rendered.

One circumstance in the chain of circumstances about the arrest of the accused on the next day of the incident, followed by the statement made by him before PW 13 which led to recovery of blood stained siuli katari under seizure list Exhibit 4 and a green colour chadar with white colour dhoti under the seizure list i.e. Exhibit-5 in presence of PW 5, the Court observed as below:-

"13 …… Unfortunately, for the prosecution, this siuli katari was never brought before the Court. It is said to have been lost and has never seen light of the day before the Court. This is

20 (2010) 6 SCC 525

apart from the fact that proof of discoveries itself is doubtful. Neither the Hansua nor did the siuli katari been presented before the Court.

PW 9 Ravindra Rana, village blacksmith, who is said to have been seen the accused, sharpening a hansua on the earlier day of the incident, is an extremely strained circumstance. This witness also did not even see or identify the same."

In this background, the Court observed thus:-

"14 The High Court has accepted the evidence on the recovery of the so-called weapon. We fail to follow as to how the said discovery could at all be relied upon in the absence of the weapon being produced before the Court."

Conclusively, in paragraph no.20, it was held as under:-

"20 For effecting a discovery, a statement has to be recorded on the part of the accused showing his readiness to produce the material object and it is only the part of the statement which is not incriminating and leads to discovery which becomes admissible. The evidence of this witness does not inspire confidence and it is of no use, more particularly, because the so-called Hansua allegedly produced by the accused never saw the light of the day nor had the witness identified the same and the prosecution had also not given any explanation whatsoever about the disappearance of this weapon."

Alleged recovery unreliable since effected from open place

65. Another circumstance on which the prosecution has relied, which according to Ms.Gonsalves, is not sufficient to establish the recovery of the ornaments and money alleged to have been robbed by the appellant from flat no.4 of Patils, since the recovery was from open space which had access to each and everyone.

In **Aslam Parwez Vs. Government of NCT, Delhi**,[21] such recovery made after 8 months from an open place which was by side of a building under construction, was held to be not

21 (2003) 9 SCC 141

drawing an inference of his guilt with the following observation :-

> *"11 Aslam Parwez has been convicted under Section 5 of TADA on the ground that he made a disclosure statement on 3.5.1988 to the effect that A-1 had given him a revolver on 8.9.1989 which he had concealed near the building which was being constructed opposite the factory and that the said revolver was recovered by him after digging out the earth. It may be stated at the very outset that the evidence on record does not show that any effort was made by the police party to have any public witness with them when A- 4 took them to the spot on 3.5.1988, where the revolver is alleged to have been recovered. Only two witnesses, namely, PW10 Ram Narain Head Constable and PW14 Surinder Kumar SI, who are both police personnel, have deposed about the aforesaid recovery. The recovery has been made after 8 months and that too from an open place which was by the side of a building under construction. The recovery has not been made from any closed or concealed place but from an open place which is accessible to all and everyone including those who were engaged in the construction of the building.*
>
> *12 The inference to be drawn where an incriminating article is recovered at the pointing out of an accused from an open place accessible to all was considered by us in Crl.A. No.685 of 2001 Salim Akhtar @ Mota v. State of Uttar Pradesh decided on 9.4.2003 and it was observed as under:-*
>
> > *"In Sanjay Dutt v. State through C.B.I., Bombay 1994 (5) SC 540 it has been held by a Constitution Bench that with a view to hold an accused guilty of an offence under Section 5 of TADA, the prosecution is required to prove satisfactorily that the accused was in conscious possession, unauthorisedly in a notified area of any arm or ammunition of the specified description. In Trimbak v. State of MP AIR 1954 SC 39 recovery of certain stolen articles was made at the pointing out of the accused and on that basis he was convicted under Section 411 IPC by the High Court. Reversing the judgment it was held by this Court that when the field from which the ornaments were recovered was an open one and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of these articles. It was further held that the fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles. In Raosaheb Balu Killedar v. State of Maharashtra (1995) 3 Crl. Law Journal 2632 the accused had made a disclosure statement and had led the police party to a place behind a mill, pointed out the place and himself removed the earth and from a pit about 6 inches deep recovered a revolver loaded with a live cartridge wrapped in a polythene bag. It was held by this Court that the statement made by the accused was capable of an interpretation that the appellant had the knowledge about the concealment of the revolver at the particular place from where it was got recovered and not that he had concealed the same and therefore it was not possible to say conclusively and beyond a reasonable doubt that the appellant had conscious possession of the revolver and the cartridge. This principle*

was reiterated in Khudeswar Dutta v. State of Assam (1998) 4 SCC 492 and it was held that mere knowledge of the accused that incriminating articles were kept at certain place does not amount to conscious possession and conviction under Section 5 of TADA was set aside."

66. In **Salim Akhtar @ Mota Vs.State of Uttar Pradesh**[22], when the discovery was from an open place which was accessible to all and everyone, was held to be not safe and was not relied upon, since the recovery of the polythene bag was made from an open 'gher' in a lonely place where anyone could easily come. Similarly, in **Makhan Singh Vs. State of Punjab,**[23] where the dead bodies were recovered after three months from an open field, which was surrounded by other fields, the place of recovery was held to be not within the exclusive knowledge of the accused/appellant alone, and therefore, an inference was drawn that it cannot be said with certainty that the place from where the bodies were recovered, was such a place about which knowledge could only be attributed to the appellant and none else and which this exclusive knowledge could not have been attributed to the appellant, the evidence under Section 27 cannot be said to be a circumstance against him. As a result, the charge against the appellant was held to be not proved beyond doubt and conviction and sentence passed upon the appellant was set aside.

Yet, in another decision in **Nilesh Dinkar Paradkar Vs. State of Maharashtra,**[24] reliance by the High Court on the alleged

22 (2003) 5 SCC 499
23 1988 SCC (Cri) 916
24 (2011) 4 SCC 143

recovery of revolver to be used for crime from house of cousin of the appellant, from the back of the house in an open space was not relied upon. In paragraph no.46, the circumstance relied upon by the High Court in convicting the appellant about recovery of the alleged revolver from the back of the house, which did not even belong to the appellant, was found to be of little assistance to the prosecution and by granting benefit of doubt, the appellant was acquitted of the charge levelled against him under MCOCA.

Missing link in the case of Prosecution

67. The case of the prosecution being based on circumstantial evidence, it is necessary for the Court to examine the entire evidence in its entirety, and derive a conclusion that only inference that can be drawn from the evidence is guilt of the accused. With the recovery of the money/ornaments alleged to have been pillaged from flat no.4 occupied by the Patils and the entire family having been found dead, the motive attributed to the accused is robbery, though there is no direct evidence of the same. However, in order to establish the link between the two circumstances, it is imperative for the prosecution to establish that the two circumstances form a chain.

In the present case, in absence of the prosecution establishing the circumstance of the ornaments and the money being plundered from Patils, since no witness has been examined by the prosecution to bring on record as to what articles/money was found to be missing from the house and in its absence, the recovery

of some articles/money at the instance of the accused under the discovery panchnama recorded under Section 27, in no case, offer credence to the case of the prosecution. In addition to the above, since the prosecution has not examined any witness in the present trial against accused Bhagwat, who has identified the alleged recovery from him, since the articles were already disposed off, the connection between the two circumstances is not at all established. Neither of the two circumstances relied by the prosecution and accepted by the Court below, can be said to sufficiently establish the guilt of the appellant, as in order to find him guilty, the circumstances should be so conclusively pleaded and established that it would not lead to any other inference. If more than one inference can be drawn, then definitely, the accused is entitled for the benefit of doubt.

It being a position well accepted in law that the circumstances from which conclusion of guilt is drawn, should be fully proved and must be conclusive in nature. All circumstances must lead to a chain, with no gap being left and each circumstance on its own, must be proved to be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence.

68. In the earlier Sessions Case No.368/1997, where all the three accused, including the present appellant, Bhagwat, was charged with Geetabai, his wife, and Saheb @ Navnath, since he absconded, his trial was separated and though initially, the trial

proceeded only against Geetabai, and Saheb @ Navnath joined the trial after he was traced.

In the said trial, prosecution has examined 57 witnesses to establish the charge u/s.449, 302, 460, 201, 392 along with Section 34 of IPC against accused nos.2 and 3.

Some witnesses who were examined in the earlier sessions trial, are also examined in this case; the key witnesses being the informant Yogiraj Palresha, Raju Jadhav, Subhash Sankla (panch on the spot), Shantilal Bhataware (panch on spot), Subhash Adhav (auto rickshaw driver), Uttam Phere (labour working on the site), Vishnu Ramgude (seizure panchnama on clothes of Mrs.Patil), Ambarnath Bhosekar (seizure of clothes of Mrs.Patil), Sheshamal Bagmar (produced the bills of electronic items purhcased by Mr.Patil, Kailash Panjabi, the shop owner from whom Mr.Patil has purchased various household articles, Netaji Kavdekar, Deepak Vali and Pradeep Raikar (businessmen from Hubli) and Sharad Kshatriya (photographer).

Some of the witnesses who were examined in the old case are not examined by the prosecution in the present case and this includes the following witnesses:-

(i) Jayshree Chitre

(ii) Vijay Kumar Raje, Supervisor, who went to the spot and deposed about the body of Mrs.Patil and a boy in the flat and about the dead bodies of Mr.Patil and his daughter being taken out in the drainage chamber (man-hole).

He deposed about a cloth of black colour which was tied to the drainage chamber who identified the same in the Court.

69. Arvind Nargund, owner of trax Jeep who received a call from receptionist of Hotel Sangam located in Belgaum, asking his willingness to carry one party in Jeep along with him to Pune. His vehicle was hired by Mr.Patil who was carrying 10 to 15 bags and he carried Patil family, including his wife, son and daughter from Belgaum to Pune and dropped them at Hotel Ashirwad which they boarded and the luggage was unloaded by him. He was confronted with a big bag (Article 156).

70. Now coming to the evidence on background of Mr. Patil, Mr.Huddedar, API was directed by PI Dhulubulu, the Investigating Officer to proceed to Karnataka State for knowing from where the deceased had obtained the amount. He, therefore, proceeded to Karnataka and recorded the statements of Deepak Vali, Chandrakant Patel, Pradeep Raikar, Netaji kavlekar and 9 more persons at Hubli. He obtained the extract of the bank account of deceased and handed over the same to the Investigating Officer.

He is a witness who deposed that he had approached Bangalore in search of the parents of deceased Mr and Mrs.Patil and when he met them and requested them to take the dead bodies of the deceased, they refused to come to Pune and he therefore, recorded their statements.

71. Another witness Shamrao Dhulubulu (PW 57), the Investigating Officer examined in Sessions Case No.368/1997 was not examined in this case, as he was dead and no procedure under Section 299 was followed by the prosecution when the earlier trial was conducted. It is this witness who in cross-examination had admitted that deceased Patil was using various fake names in Karnataka, Bangalore, etc and he was never working as an Officer in State Bank of India, Bangalore, He had also deposed that during the course of investigation, it had transpired that deceased Patil had cheated various persons and the Banks in Bangalore, Belgaum, Hubli in Karnataka State and various complaints were lodged against deceased Ramesh Patil with different police stations in Karnataka, and he had fled to Pune from Karnataka after cheating.

It was possible for the prosecution to have adopted the procedure u/s.299 of the Cr.P.C, but the record clearly reveal that the prosecution preferred an application, but did not press the same.

Failure of the Prosecution to adhere to the procedure under Section 299 of the Code of Criminal Procedure, 1973

72. The right of the accused to be tried only on the basis of evidence recorded in his presence, and the witnesses also being cross-examined in his presence, is well accepted to be integral part (Article 21 of the Constitution). The said right received the recognition from the Apex Court in **A.T. Mydeen & Anr Vs.**

Assistant Commissioner, Customs Department,[25] that in the matter of criminal trial against the accused, the distinctiveness of evidence is paramount in light of his right to fair trial, which encompasses two important facets i.e. recording of evidence in the presence of accused or his pleader, and secondly, the right of an accused to cross-examine the witnesses. The culpability of any accused is held not to be decided on the basis of any evidence, which was not recorded in his presence or his pleader's presence, and for which he do not get an opportunity of cross-examination.

Section 273 of the Code of Criminal Procedure, 1973 expressly provides that all evidence taken in the course of trial or other proceedings shall be in presence of the accused or when his attendance is dispensed with, in presence of his pleader. The exception to this provision is to be found in Section 205 of Cr.P.C, wherein the personal attendance of accused is dispensed with and he is permitted to appear by his pleader. Another exception is in form of Section 299, which provides for recording of evidence in absence of the accused under certain eventualities, like he being absconding or commission of an offence punishable with death or Imprisonment for life by some person or persons unknown. However, this provision also provide a solution if the accused is absconding by preferring an Appeal. Section 299 (1) and (2) reads thus :-

> *"**299 Record of evidence in absence of accused***
>
> *(1) If it is proved that an accused person has absconded, and that there is no*

25 (2022) 14 SCC 392

immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of, may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India."

73. Section 299(1) which is an exception to Section 33 of the Evidence Act and therefore, all, the conditions precedent for utilising such evidence, viz. (i) accused absconding; and (ii) deponent are dead or incapable of giving evidence or cannot be found or his presence cannot be procured….." must be established by the prosecution. The burden lies on the prosecution to satisfy the Court about the existence of circumstances provided in Section 299(1) but in absence of this burden being discharged, the benefit of Section 299, cannot be claimed by the prosecution.

Admittedly, in Sessions Case No. 368/1997, the prosecutor had filed an application for recording the evidence u/s.299 but did not press the application. In any case, the prosecution failed to establish that the witness/witnesses who had deposed in the earlier Sessions Case, is dead or incapable of giving evidence or cannot be found or his presence cannot be procured.

74. The Apex Court was confronted with the issue about

reading of the evidence led during the trial of cross-cases and by referring to the well settled principle that each case has to be decided on its own merits and the evidence recorded in one case cannot be used in its cross-case, in **A.T. Mydeen** (supra), it cautioned that both the trials should be conducted simultaneously or in case of Appeal, they should be heard simultaneously, but in an eventuality of two separate trials for commission of the same offence for two set of accused, on account of one of them absconding, it examined the issue in great length and after referring to the earlier precedents, clearly derived the following inference.

> *"42 The provisions of law and the essence of case-laws, as discussed above, give a clear impression that in the matter of a criminal trial against any accused, the distinctiveness of evidence is paramount in light of accused's right to fair trial, which encompasses two important facets along with others i.e., firstly, the recording of evidence in the presence of accused or his pleader and secondly, the right of accused to cross-examine the witnesses. These facts are, of course, subject to exceptions provided under law. In other words, the culpability of any accused cannot be decided on the basis of any evidence, which was not recorded in his presence or his pleader's presence and for which he did not get an opportunity of cross-examination, unless the case falls under exceptions of law, as noted above.*
>
> *43. The essence of the above synthesis is that evidence recorded in a criminal trial against any accused is confined to the culpability of that accused only and it does not have any bearing upon a co-accused, who has been tried on the basis of evidence recorded in a separate trial, though for the commission of the same offence.*

75. In **Vijay Ranglal Chourasiya Vs. State of Gujarat**,[26] the applicability of Section 299 in a case, where, one of the accused absconding and was tried separately, an application was moved by Public Prosecutor for transfer of depositions at earlier trial of other accused came to be rejected by the trial Court and accused no.6 was

26 (2014) 12 SCC 400,

acquitted. The High Court reversed the acquittal and relied upon certain depositions which had not been recorded or validly transferred u/s.299 of the Cr.P.C.

Recording that in the earlier case, 66 witnesses were examined, but since accused Gautam Kumar Devjibhai Rathod (A6) was absconding and he was tried separately, but was acquitted by the trial Court, and the High Court reversed the acquittal and sentenced him to Imprisonment for life, the Apex Court noted that the transfer of the depositions was not in accordance with the provisions of Section 299 of the Cr.P.C, and it could not be treated as an evidence against the appellant.

76. Taking note of the observations made by the trial Court while rejecting the application for transfer of deposition from the earlier trial, it was held as below :-

> *"Ordinarily, in any criminal case, the accused has a right to cross-examine the witnesses of the prosecution and this right should be given as per principles of natural justice.*
>
> *In the present case before us against the accused in Sessions Case No.99/1998, there is no order that evidence be recorded against the accused in his absence u/s.299 of the Cr.P.C.*
>
> *Thus, in the above circumstances, the evidence which is recorded in Sessions Case No.99/1998 cannot be taken as evidence against the present accused and without analysing the said evidence and without giving an opportunity of cross-examination to the accused. Thus, the argument of learned P.P cannot be accepted.*
>
> *…...And therefore, I believe that the application of the prosecution is to be rejected."*

Confirming the said finding and expressing disagreement with the view taken by the High Court, the Apex Court recorded as under :-

> *"21 The High Court does not appear to have taken note of the*

above rejection order. It has, on the contrary, proceeded on the basis that the evidence adduced in the previous trial was evidence in the case against the appellant validly transferred under Section 299 of the Code of Criminal Procedure. That apart even assuming that the deposition in terms of Section 299 of the Code of Criminal Procedure had been transferred to the case against the appellant, it may have been open to the petitioners to argue that such a transfer was not valid in the eyes of law and could not, therefore, be read against him. Reliance before us was placed upon the decision of this Court in Jayendra Vishnu Thakur v. State of Maharashtra and Anr. (2009) 7 SCC 104 which deals with some of these aspects.

22. The High Court has, it is evident from the impugned order, remained oblivious of the above aspects and proceeded to appreciate the evidence adduced in the previous Sessions Case No.99 of 1998 as though the said evidence had been adduced in the case against the appellant. In doing so, the High Court committed an error. The High Court ought to have addressed two questions falling for determination before it, viz. (i) whether evidence recorded in Sessions Trial No.99 of 1998 was and/or could be transferred to the case against the appellant and read against him and, (ii) if such evidence recorded in Sessions Case No.99 of 1998 was not or could not be transferred, was there any other evidence to support an order of conviction against him. Both these questions having escaped the attention of the High Court, the case would, in our opinion, call for a remand to the High Court to enable it to hear and dispose of the matter afresh."

77. The learned APP has relied upon the decision of the Apex Court in case of **Sukhpal Singh Vs. NCT of Delhi, AIR 2024 SC 2724,** but the observations therein will have to be read with reference to the facts involved.

The accused being absconding and could not be arrested, charge-sheet was filed u/s.299 showing him to be an absconder and permission was granted to the prosecution to proceed with the trial by resorting to Section 299.

The trial Judge recorded the statement of the complainant/neighbor of the accused u/s.299 after administering oath to him. It is in this background the evidence of the complainant recorded u/s.299, which provided complete chain of

circumstantial evidence, was permitted to be read at the time of trial, since the said witness could not be traced out and produced in the witness box during trial after the accused has been arrested.

Non-identification of the bodies of the deceased

78. Though Ms.Gonsalves has argued that the bodies of the deceased persons are not identified by anyone and this be construed as loophole in this prosecution case, while she place reliance upon the observations of the Apex Court, in **Nizam and Anr Vs. State of Rajasthan**,[27] we are not impressed by this submission.

When we refer to the observations made in the said case, the circumstance of last seen and recovery of body, was held to be made applicable by taking into consideration the case of prosecution in its entirety and keeping in mind circumstances that precede and follow the point of being so last seen.

79. In **Rajiv Singh Vs. State of Bihar & Anr**,[28], when the wife mysteriously disappeared from the company of the appellant husband during train journey and husband lodged an FIR on the next day, and the body was found from the bush near railway tracks, after three days, it was held that the prosecution had failed to prove beyond reasonable doubt that the body recovered was that of his missing wife, though the viscera of the dead body contained highly poisonous substance, the prosecution was held to have failed in discharging its onus of establishing how and when the poison

27 2016(1) SCC 550
28 (2015) 6 SCC 369

was administered.

A cousin of the wife of the appellant touched upon the reasons why she was not his wife, but he was not examined and the post mortem was also silent about the cause of death and since there there was time lag between the wife going missing and the time of death of recovery of the body, with DNA report found to be unreliable and made by incompetent persons, being bereft of essential facts, it was held that the prosecution had failed to prove that dead body recovered was that of missing wife of the appellant.

80. In the present case, the identity of Mr.Patil has been established as a lease agreement was executed with the owner of the flat in presence of PW 1 and from the photographs which were seized from the house, it could be easily inferred that it was a family, the body of the lady found was the wife of Mr.Patil and two young children, his own children. The documents which are recovered from the house also establish identity of Mr.Patil and from the identity card seized, even Mrs.Patil's identity was established. We do not find merit in the submission that the prosecution was clueless as to who these four persons were, and in fact, it is the case of the prosecution that Mr.Patil absconded from Hubli and came to Pune, but about his job, his credentials, of course, there is no evidence, but the witnesses examined from Hubli have referred to Mr.Patil as the person who accepted their money and fled one day.

We, therefore, do not agree with the submission of Ms.Gonsalves in that regard.

Evidence of 5 witnesses from Hubli, Karnataka

81. The prosecution has also relied upon the evidence of 5 witnesses from Hubli i.e. PW 26 to PW 30.

Amongst them, the first four witnesses i.e. Harish Revankar, Netaji Kawdekar, Deepak Vali and Pradeep Raikar are the businessmen from Hubli Karnataka, who had borrowed money from one Patil, who had assured low rate of interest.

PW 26 specifically depose that he opened an account with Karnataka Bank, Hubli, as he was told that he will be given the loan of Rs.50 lakhs but for that purpose, a sum of Rs.1,99,500/- will be paid as advance interest. He collected Rs.1,90,000/- from Maratha Bank as loan and gave sum of Rs.1,90,000/ to the peon of Karnataka Bank, but deceased Patil and his accomplices changed the bank depositing slip in their name and deposited that amount in the account of deceased Patil. He came to know that he was murdered after he had left Hubli.

All the four witnesses have exposed Patil as to how he manipulated them to derive benefit for himself. PW 30 is the witness who had taken Patil from Belgaum and brought him in Ashirwad Hotel Pune, along with his wife, son and daughter and he deposed that Patil was having 4 – 5 bags with him.

The said evidence, except to establish that Patil had duped and cheated people from Hubli and then came to Pune to reside with his family members, is of not much consequence, except for this limited purpose.

Medical Evidence and the Chemical Analyzer Report

82. As far as the medical evidence is concerned, PW 24 and PW 25 who were examined in Sessions Case No. 368/1997, as they have conducted the post mortem of the children of Patil on 16/5/1997, (though described as 'unknown') and also conducted the post mortem of body of Mr. and Mrs. Patil. The medical evidence of these two witnesses was read in the present Sessions case as it was agreed by filing a joint pursis.

In addition, the prosecution has also relied upon the Chemical Analyser's report which include the report of Regional Forensic Science Laboratory, Pune dated 21/7/1997 on blood, nail clipping and teeth of Ramesh Jaykumar Patil (Exhibit 205), but the blood group of blood detected on the nail clipping could not be determined as inconclusive, but Exhibit 1 and 3 were found to contain blood of group 'A'. Similarly, Exhibits 206, 207 and 208, have established the blood group which was sent for analysis but definitely, it do not, in any manner, aid the prosecution. There is also a report of blood group of accused Bhagwat which is analysed to be of group 'B'.

Fallacy in the impugned judgment of conviction

83. The judgment in Sessions Case No.80/2004 suffer from perversity, as the Judge has failed to appreciate the evidence on record and was highly impressed by the conviction of Geetabai and Sahebrao in Sessions Case No.368/1997 and also the fact that the said judgment had attained finality.

The trial Judge committed a fallacy by relying upon the recovery panchnamas (Exhibit-161, 163, 165), by merely recording as below:-

> *"In the year 1997, the salary of class-I officers was around Rs.6,000/- to Rs.8,000/- per month. As such age, it is highly improbable and unacceptable that fake recovery of such huge amount will be shown at the instance of accused by planting huge cash and jewellery.*
>
> *The accused did not offer any explanation for his knowledge about the same. He did not state whether he had seen anyone hiding the same and in absence of any such explanation, the accused Bhagwat will be deemed to be the author of said concealing."*

The learned Judge has also relied upon the recovery of weapons from the spot and opined that the logic that failure to recover the weapons from the accused is fatal to the prosecution cannot be applied here.

The learned Judge has fallen in grave error in relying upon the recoveries, including the cash/ornaments, seizure of weapons by ignoring the fact that none of the panch/witness who has proved the panchnama, is actually shown it, thereby creating doubt about the alleged recoveries.

84. What is held in **Suraj Mal Vs. The State (Delhi Administration)**,[29] is aptly applicable here, as it was held as below:-

> *"Where substantial evidence of the prosecution is found to be tainted or unreliable, few incriminating pieces of evidence have to be read with doubt."*

The case of the prosecution was based on circumstantial evidence as there is no direct evidence to prove his complicity. In absence of any eye witness to the incident and the recoveries being highly tainted, we infer that the prosecution has failed to establish its case, based on circumstantial evidence, as the incriminating circumstances that are being used against the accused, must be such as to lead only to a hypothesis to reasonably exclude every possibility of his innocence. The well known principles governing circumstantial evidence, not having been established, the benefit of doubt created upon appreciation of evidence led by the prosecution, must be given to the accused and on the prosecution having miserably failed to establish the charges against the accused Bhagwat Kale, is entitled for acquittal, by extending the benefit of doubt to him.

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85. Ms.Gonsalves has invoked the principle laid down by the Apex Court in case of **Manoj & Ors** (supra), where it was held that approach of rigid categorization of crimes, or aggravating and

29 AIR 79 SC 1408

mitigating circumstances, to determine the imposition of death sentence as adopted to some extent in **Machhi Singh & Ors** (supra) is per incuriam ***Bachan Singh*** (supra) to that extent, as Bachan Singh rejected the contention that the standards and guidelines should be laid down and held that aggravating and mitigating circumstances could not be rigidly enumerated so as to exclude "all free-play of discretion".

With the emphasis being laid on "Individualized, principled sentencing" based on both crime and criminal, with consideration of whether reform or rehabilitation is achievable and consequently, whether the option of life Imprisonment is unquestionably foreclosed, guidelines have been issued for pre-sentence hearing.

The sentencing hearing contemplated u/s.235(2) has been held not confined merely to oral hearing, but intended to afford a real opportunity to the prosecution as well as the accused to place on record facts and material relating to various factors on the question of sentencing, and if desired by other side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty.

The Apex Court has laid down the practical guidelines to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime and therefore expected the trial court to elicit information from the accused and State, both.

The collection of additional information pertaining to the accused being illustrative, made it imperative for the trial court to obtain the information at sentencing stage, which include the details of his family background, socio-economic background, criminal antecedents etc. In addition, the information regarding the accused's jail conduct and behaviour, activities of the accused, is also directed to be called for, in form of a report from the Jail Authority and the Appeal is being heard by the High Court for confirmation after a long hiatus, the fresh report be called, so as to have the more exact and complete understanding of the contemporaneous progress made by the accused in the time lapsed.

However, since this exercise is to be carried out only when a conclusion is derived that the death sentence imposed upon an accused deserve confirmation, since in the present case, on appreciation of the evidence on hearing the learned Assistant Public Prosecutor on the Confirmation Appeal and Ms.Gonsalves for the appellant in Appeal No.1122/2023, we have reached a conclusion that the present case deserve reversal of the impugned judgment, recording the finding of guilt, by converting the sentence of death into that of acquittal, as the prosecution has failed to prove its case beyond reasonable doubt by placing on record reliable and cogent evidence and therefore we refrain ourselves from following guidelines laid down by the Apex Court :-

In following the said sequence that is, initially determining whether the death sentence imposed upon the accused

deserve confirmation and it is only upon scrutinizing the evidence, a conclusion is reached as regards his guilt and since he do not deserve the capital punishment, the process prescribed in Manoj (supra) including calling of report from psychological evaluator/psychiatrist/mitigating investigator is unwarranted.

86. We are fortified in the process adopted by us by an order passed by the Division Bench in case of **Mahesh Balasaheb Thakur Vs. State of Maharashtra**, (IA No.2654/2022 with IA No.2652/2022 in Criminal Appeal No.459/2018) when the Division Bench (A.S. Gadkari and Prakash D. Naik, JJ) had recorded as below:-

> *"6.2 It is to be noted that, in common legal parlance, we are yet to open the brief i.e. to even cursorily peruse the evidence on rnecord tohave the basis assessment of evidence agaisnt the applicant and other accused/appellants.*
> *6.3 In the case in hand, there are three possibilities.*
> *(i) Acquittal of the accused.*
> *(ii) Commutation of sentence from death to life and*
> *(iii) Confirmatin of death sentence.*
>
> *As far as the first probability noted herein above is concerned, there would be no requiremenet for calling for the report of psychological evaluator/psychiatrist or Mitigating Investigator. Same would be the analogy as far as the second probability noted herein above is concerned.*
>
> *6.4 As far as their probability is concerned, if the Court after scrutinizing entire evidence on record reaches to the irresistible conclusion that, the applicant/accused are not only guilty of the offencne alleged against them, but the capital punishment is the only sentence which can be imposed, according to us, then only the report from the Psychological Evaluator/Psychiatrist/Mitigating Investigator is required to be called for by appointing such person/persons. It is also required to be noted that, in the event the information collected by the Mitigating Investigators is negative, it should not have any adverse effect on the proceedings before the Court arrives at conclusion of confirming the death sentence. It is pertinent to note that, the endeavour of defence Advocate would not only to commute sentence but also to strive for acquittal.*

6.5 In the present case, the said stage is yet to be reached and therefore, according to us, passing Orders on the Applications preferred by the accused No.2 at this stage is premature."

87 In the wake of the aforesaid discussion and on appreciation of the case of the prosecution against the accused Bhagwat, we pass the following order:-

ORDER

i. Since we find no case made out in confirming that the death sentence awarded to Bhagwat Kale in Sessions Case No.80/2004, we dismiss the Confirmation Case No.1/2022 filed by the State of Maharashtra.

ii. Since we are of the opinion that the Bhagwat Kale do not deserve death sentence, in light of decision in case of **Manoj and Ors vs. State of Madhya Pradesh,** the exercise contemplated is not warranted.

iii. Appeal No.1122/2023 filed by Bhagwat Kale is allowed, thereby setting aside the finding of conviction and the death sentence imposed upon him, in light of the said finding in the impugned Judgment dated 14/12/2021.

iv. On being acquitted, the Appellant Bhagwat Kale is entitled to be set at liberty forthwith.

87. Pending Interim Applications stand disposed off.

(MANJUSHA DESHPANDE, J) (BHARATI DANGRE, J.)

Tilak