
(2001) 09 BOM CK 0068

In the Bombay High Court

Case No : Criminal Appeal No. 312 and 485 of 1997

Balu Sambhaji Shinde

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 08-09-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 41

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2002) 104 BOMLR 257

Hon'ble Judges : S.S. Parkar, J;Ranjana Desai, J

Bench : Division Bench

Judgement

Ranjana Desai, J.—In both these appeals, judgment and order dated 9.4.97 passed by the Additional Sessions Judge, Baramati, in Sessions Case No. 49 of 1994 is under challenge. Criminal Appeal No. 312 of 1997 is filed by appellant-Balu Sambhaji Shinde, who is original accused No. 2 and Criminal Appeal No. 485 of 1997 is filed by appellant-Dasu Baba Shinde, who is original accused No. 1. Since both these appeals arise out of the same facts, it is convenient to dispose them of by a common judgment. Hence this common judgment. For the sake of convenience, the appellants are referred to, in this judgment, as per their status in the Trial Court.

2. Briefly stated, the prosecution story is that accused Nos. 1 and 2 are residents of Kaprewadi, Taluka Karjat, Dist. Ahmednagar. They are cousins. Accused No. 1 was married to deceased-Asha, daughter of P.W. 1 Vimal Kale of Nimbgaon-Daku, Taluka Karjat. The marriage had taken place just 15 to 20 days prior to the incident in question. Village Kaprewadi is about 16 to 17 miles from Nimbgaon-Daku.

3. On 22.6.94 P.W. 1 Vimal Kale had gone to Kaprewadi in the morning to meet her daughter Asha i.e., the deceased. The mother-in-law of the deceased told her that the deceased was missing from the previous day. Vimal therefore came to

Karjat and from Karjat she went back to Nimbgaon Daku and informed her husband about this. On 23.6.94 she went to Karjat Police Station and lodged a missing report at 11.40 a.m. being missing report No. 7/94. According to Vimal, at that time, both the accused had come to the police station. The police interrogated them in connection with the missing report and accused No. 1 told the police that on 21.6.94 in the morning, he and accused No. 2 had taken the deceased to Pune at about 9.30 a.m.. They had taken her to Saraf's shop. They had sold her ornaments and then left her at Swargate, Pune and returned to Kaprewadi. Thereafter, police took both the accused and P.W. 2 Nanasaheb Bhosale in police jeep to Pune. The accused showed Saraf's shop at Pune to the police. Thereafter, the police searched the deceased at Swargate Bus Stand, but the deceased was not found. The police made efforts to trace the deceased at Ambarnath at her uncle's house, but did not succeed. On 24.6.94 the accused were again called to the police station. Accused No. 1 was asked about the whereabouts of his wife. In the presence of panchas, accused No. 1 told the police that he and accused No. 2 had killed Asha at Kurkhumb and he was prepared to show the place. Accordingly, he led police and panchas to Kurkhumb on Pune Solapur Road. He showed them the dead body of the deceased lying beneath bridge NQ75/1 at the southern side of Kurkhumb village. The spot panchanama came to be recorded and articles found at the said place came to be attached.

4. On 24.6.94, P.S.I. Khilari arrested the accused u/s 41 of the Criminal Procedure Code. After the dead body was recovered at the instance of accused No. 1, a report was made to Daund Police Station being Exh. 43. Further investigation was made by Daund Police Station. Inquest panchnama came to be drawn. On 25.6.94 at 2.50 a.m., P.W. 1 Vimal Kale lodged a complaint in the Daund Police Station. On the basis of her complaint C.R. No. 74/94 u/s 302 and Section 201 read with Section 34 of the Indian Penal Code came to be registered on 27.6.94. On transfer warrant custody of both the accused was taken over by Daund Police Station from the Magistrate at Karjat.

5. While in police custody, accused No. 2 made a statement pursuant to which, the police discovered razor blades from near the scene of offence. At the instance of accused No. 2 blood stained clothes of the accused were discovered from the house of accused No. 1. At the instance of accused No. 1 the police recovered silver payals of the deceased from the shop of B.B. Saraf. Similarly, gold weighing 3.300 grams was recovered from the shop of P.W. 4 Talegaonkar, where accused No. 1 is said to have sold the mangalsutra and 2 golden beads of the deceased. The investigation disclosed that the blood stained clothes discovered at the instance of accused No. 2 were having blood of "B" group which is the blood group of the deceased. The razor blades were blood stained. But the Chemical Analyser's report indicates that the blood group of the said blood stains could not be determined though it was found to be human blood. After completion of the investigation the accused came to be charged as aforesaid.

6. In support of its case, the prosecution examined as many as 11 witnesses which, Inter alia, include P.W. 1 Vimal Kale, who is the complainant and the mother of the deceased, P.W. 2 Nanasaheb Bhosale the Police Patil of Nimbgaon-Daku, P.W. 3 Dr. Dinkar Sapkale, who has conducted the post-mortem on the deceased, P.W. 4 Sandip Talegaonkar in whose shop mangalsutra and 2 golden beads of the deceased were sold, P.W. 5 Ashok Kothawale, who has acted as a pancha, P.W. 6 Hanumant Sonawane, who claimed that he had seen the accused when they got down at Kurkhumb near his hotel and walked along Pune Solapur Road, P.W. 7 Bhimrao Borade to whom the accused had sold silver payals, P.W. 8 Ashok Band, the pancha, P.W. 9 Murlidhar Kothawale, who has also acted as pancha. The details of investigation have been given by P.W. 11 P.I. Balasaheb Khilari and P.W. 12 P.S.I. Shantaram Jadhav. The defence of the accused was one of denial.

7. After perusing the evidence on record, the learned Sessions Judge convicted the accused. The accused were convicted for offence punishable u/s 302 read with Section 34 of the Indian Penal Code. Each of them was sentenced to suffer imprisonment for life and to pay a fine of Rs. 2000/-. In default of payment of fine, each of them is directed to suffer R.I. for six months. Both the accused are also convicted for the offence punishable u/s 201 read with Section 34 of the Indian Penal Code. Each of them is sentenced to suffer R.I. for two years and to pay a fine of Rs. 500/-. In default of payment of fine, each of them is directed to suffer further R.I. for three months. The substantive sentences are to run concurrently. It is the said judgment and order of conviction and sentence which is challenged by both the accused.

8. We have heard at some length Ms. Revati Mohite-Dere, learned Counsel appearing for accused No. 2 and Ms. Shobha Gopal, learned Counsel appearing for accused No. 1. We have also heard Mrs. Usha v. Kejriwal, the learned A.P.P. With the assistance of the learned Counsel, we have gone through the evidence on record and the relevant material.

9. Ms. Mohite-Dere assailed the impugned judgment on several counts. She contended that the prosecution story rests entirely on circumstantial evidence and, therefore, the chain of circumstances must be complete and must unerringly point out to the guilt of the accused. She submitted that on the basis of the evidence on record no other hypothesis, but that of the guilt of the accused must be possible and it is only when prosecution leads such evidence that the accused could be convicted. Each circumstance, argued Ms. Mohite-Dere, must be cogent and must inspire confidence. In the facts of the present case, according to the learned Counsel, several links have been snapped and, therefore, this Court should not confirm the impugned judgment and order.

10. Ms. Mohite-Dere further contended that several circumstances which the learned Judge has used against accused No. 2 in order to convict him cannot be so used. According to Ms. Mohite-Dere, the first circumstance of non-lodging of missing report cannot be used against accused No. 2 inasmuch as, he was under

no obligation to lodge a report and the responsibility was entirely on accused No. 1 or the family members of the deceased. As regards the second circumstance namely, giving false explanation about the whereabouts of the deceased, Ms. Mohite-Dere contended that this also cannot be used against accused No. 2 inasmuch as, P.W. 1 Vimal Kale and P.W. 2 Nanasaheb have deposed that it is accused No. 1, who gave the alleged false explanation. P.W. 5 Ashok Kothawale takes name of both the accused, but since P.W. 1 Vimal Kale and P.W. 2 Nanasaheb do not depose about this, a doubt is created as to whether accused No. 2 was a party to giving the alleged false explanation. Ms. Mohite-Dere also contended that the evidence on record indicates that accused No. 2 did not accompany accused No. 1 when he allegedly went to sell silver payals, mangalsutra and golden beads at Saraf s shop at Pune. Therefore, the case of the prosecution that accused No. 2 was a party to selling the gold ornaments of the deceased must be held not proved. She submitted that it is only P.W. 7 Bhimrao Borade and P.W. 4 Sandip Talegaonkar, who speak about accused No. 2, but not rest of the witnesses and, therefore, P.W. 7 Bhimrao Borade and P.W. 4 Sandip Talegaonkar are not reliable witnesses and their evidence will have to be scrutinized with caution.

11. As regards discovery of razor blades at the instance of accused No. 2, Ms. Mohite-Dere contended that the said circumstance is not proved beyond reasonable doubt. Memorandum of statement made by accused No. 2 has not been signed by him and, therefore, it is doubtful whether the said statement is voluntary. In this behalf, she relied on Jackaran Singh Vs. State of Punjab, . Drawing our attention to the memoranda under which accused No. 2 is said to have made statements regarding discovery of razor blades and the clothes of the accused, Ms. Mohite-Dere contended that the said statements do not convey that authorship of concealment was with accused No. 2. The said discovery therefore cannot be relied upon. In this behalf, she relied on Smt. Pushpa Vs. Union of India (UOI) and Others, ; R.B. Killedar v. State of Maharashtra 1995 Cri.L.J. 2632, and Slim Babamiya Sutar alias Jamadar Vs. State of Maharashtra, . As regards discovery of razor blades and clothes, Ms. Mohite-Dere contended that there is nothing to indicate that the exclusive possession of room from which the clothes were allegedly discovered was with accused No. 1 and nobody has identified the clothes as belonging to the accused. Therefore, this discovery does not inspire any confidence.

12. Apart from this, Ms. Mohite-Dere made a serious grievance about there being no evidence of sealing of articles. She contended that there is nothing on record to indicate that from the day on which the articles were seized till the day on which they were sent to the Chemical Analyser they were kept in sealed condition and were not tampered with. According to the learned Counsel, it is the duty of the prosecution to prove beyond doubt that the said articles were protected and that tampering is completely ruled out. In this connection, she relied on State of Maharashtra Vs. Prabhu Barku Gade, , and The State v. Motia and Ors. AIR 1955 Raj. 82.

13. Ms. Mohite-Dere also contended that the manner in which the statements of the accused are recorded u/s 313 of the Code of Criminal Procedure is highly objectionable and has caused grave prejudice to the accused. The learned Counsel submitted that the idea behind putting questions to an accused u/s 313 of the Criminal Procedure Code, is to afford him a reasonable opportunity to explain the circumstances which are being held against him. Therefore, the questions must properly convey the said circumstances to the accused so that he can give his explanation. She drew our attention particularly, to question No. 32 and pointed out that the fact that Chemical Analyser's report indicates that the blood found on the clothes of the accused was of "B" group which is the blood group of the deceased is not conveyed to the accused. This has caused grave prejudice to the accused. In this connection, the learned Counsel relied on *Shahaji Dattu Patil Vs. State of Maharashtra*, , and *Shaikh Mohamed Salim Karimullah and others Vs. State of Maharashtra*, .

14. Ms. Mohite-Dere also contended that P.W. 6 Hanumant Sonawane, who has been examined by the prosecution to prove that the accused were seen together after the incident in question as they were walking along Pune Solapur Road near Kurkhumb does not inspire confidence. This witness has given no date. His testimony is vague and ought to be rejected. In the circumstances, Ms. Mohite-Dere contended that the prosecution has failed to prove its case beyond reasonable doubt. In any case, she submitted that as against accused No. 2 the major circumstances will have to be held as not proved and, therefore at least, benefit of doubt must go to him. She therefore submitted that this Court should acquit the accused.

15. Ms. Shobha Gopal, appearing Amicus Curiae for accused No. 1 adopted the arguments of Ms. Mohite-Dere. In addition to the submissions of Ms. Mohite-Dere, Ms. Gopal contended that the prosecution has led no evidence of motive. In case of circumstantial evidence, motive plays a very significant role and inasmuch as motive has not been established, the prosecution story has become unreliable. Ms. Gopal pointed out that P.W. 1 Vimal Kale has stated that the deceased had made no complaint of any ill-treatment at the hands of her in-laws and, therefore, there was no reason for accused No. 1 to do away with the deceased. Ms. Gopal also contended that accused No. 1 cannot be said to have made any misleading statement. According to the prosecution, he told the police that he had taken the deceased to Pune to Sarafs shop. It is also the case of the prosecution that the deceased was taken to Pune to Sarafs shop. Therefore, there is no question of his making any misleading statement. Ms. Gopal also contended that recovery of dead body at the instance of accused No. 1 is not a conclusive circumstance. At best, it may raise a strong suspicion, but suspicion cannot take the place of proof. In this connection, she relied on *Bakhshish Singh Vs. State of Punjab*, . She therefore submitted that the impugned order of conviction and sentence be set aside.

16. We have given our anxious consideration to the submissions made by the

learned Counsel appearing for both sides. It is true that because the prosecution case rests on circumstantial evidence, this Court will have to find out whether the prosecution has conclusively established several links in the chain of circumstances and whether no other hypothesis but that of the guilt of the accused is possible on the basis of the evidence on record. Before we deal with the submissions advanced by the learned Counsel, we may refer to the evidence of P.W. 3 Dr. Dinkar Sapkale who had conducted the post-mortem on the deceased on 25.6.94 when he was working in Rural Hospital, Daund, Pune as a Medical Officer. He has opined that cause of death was asphyxia due to strangulation. Dr. Sapkale has stated that injuries No. 2 and 13 were caused due to strangulation forces and remaining injuries were due to sharp cutting objects. He further stated that in the ordinary course, injuries No. 2 and 13 were sufficient to cause death of the victim. Injuries No. 2 and 13 can be caused by tying muffler or some cloth. Other injuries could be caused by the blades which are article No. 18.

17. The first circumstances on which the prosecution has placed reliance is non-lodging of missing report at the police station Karjat by the accused. P.W. 1 Vimal Kale has stated in her evidence that when she had gone to Kaprewadi to meet her daughter, her daughter was not there. She met her mother-in-law. The mother-in-law told her that the deceased was missing from the previous day and that both the accused were searching for her. P.W. 1 Vimal then returned home and informed her husband about this. On the following day she went to Karjat. At Karjat Police Station she found that the accused were present. When she asked the accused about the whereabouts of her daughter, they told her that they had taken the deceased to Sarafs shop at Pune where her ornaments were sold by them. They had left the deceased somewhere in Pune and had come back to Karjat. Vimal then returned to her village. On 23.6.94 she lodged a missing report which is at Exh. 23. In our opinion, if the deceased was missing it is surprising as to how her mother-in-law and accused No. 1 could sit pretty and do nothing about it. Their first anxiety should have been to find out as to where the deceased had gone and to rush to the police. They have done nothing of the kind and left it to P.W. 1 Vimal Kale, the mother of the deceased, to lodge the report. In our opinion this circumstance can only be used as against accused No. 1 as being the husband of the deceased he ought to have lodged a missing report. We have no hesitation in drawing adverse inference against accused No. 1 because of this inaction on his part.

18. The second circumstance on which the prosecution has heavily relied upon is that of giving false explanation about the whereabouts of the deceased by the accused. P.W. 1 Vimal has stated that the accused told her that the deceased was taken to Saraf's shop at Pune where her ornaments were sold and they had left her somewhere in Pune. P.W. 2 Nanasaheb has however stated that it is accused No. 1 who told them this. P.W. 5 Ashok Kothawale has also stated that the accused had told them that the deceased was taken to Saraf s shop where her ornaments were sold and then they left her in Pune. These three witnesses are

consistent about accused No. 1 telling them that the deceased was taken to Pune. But whether accused No. 2 gave this explanation or not cannot be said to be established beyond doubt because P.W. 2 Nanasaheb has categorically stated that accused No. 1 made this statement. He does not talk about accused No. 2 making this statement. It is significant to note that body of the deceased was also discovered pursuant to the statement made by accused No. 1. We shall soon advert to this circumstance. In the circumstances we find no hesitation in coming to the conclusion that the homicidal death of the deceased was within the knowledge of accused No. 1 and yet he gave a false explanation about her whereabouts. This is indeed a very clinching circumstance against accused No. 1.

19. The third circumstance, which in our opinion, conclusively establishes the prosecution case as against accused No. 1 is finding of the dead body pursuant to the statement made by him. After arrest on 24.6.94, accused No. 1 expressed a desire to show the dead body of the deceased. P.W. 2 Nanasaheb Bhosale, the Police Patil of Nimbgaon-Daku acted as a pancha. He has deposed that accused No. 1 made a statement that he was prepared to show the place where the dead body of the deceased was kept. The memorandum in this connection is Exh. 26A. In pursuance to the statement made by accused No. 1, the panchas and the police officers went to Kurkhumb via Rashin, Bhigwan. Before they reached Kurkhumb, accused No. 1 asked the police to stop the jeep near one bridge. They got down from the jeep. Accused No. 1 led them to a cement pipe which was part of the bridge. He showed the dead body of the deceased. A panchnama in this connection was drawn which is at Exh. 26B. P.W. 11 A.P.I. Balasaheb Killari has also confirmed that it is accused No. 1 who made this statement. Though P.W. 1 Vimal has stated that both the accused showed the dead body of the deceased, this deposition of her's is not supported by other evidence. Evidence of P.W. 2 Nanasaheb Bhosale, P.W. 11 Balasaheb Killari, memorandum Exh. 26A and panchnama Exh. 26B establish that the dead body of the deceased was discovered at the instance of accused No. 1. The fact that the dead body of the deceased was recovered at the instance of accused No. 1 goes a long way to prove the prosecution case. Being the husband of the deceased, it was the duty of accused No. 1 to explain the whereabouts of the deceased. He would be the natural and proper person to know where the deceased had gone and the fact that he discovered the body undoubtedly proves his involvement. We are however unable to hold that this circumstance can be held, proved or used against accused No. 2.

20. We may now turn to the next circumstance namely, the recovery of ornaments at the instance of the accused. There is no dispute about the fact that it is the statement made by accused No. 1 which led the police to the shops of goldsmiths at Pune. The relevant memorandum is at Exh. 35A. The memorandum indicates that on 1.7.94 accused No. 1 made a statement that he will take the police to the place where he had sold the ornaments of his wife. The relevant panchnama in this connection is at Exh. 35B. It indicates that accused No. 1 led the police to the shop named "B.B. Saraf" situate at Hadapsar. Accused

No. 2 stated that he had sold silver payals of the deceased for Rs. 200/- in this shop. P.W. 7 Bhimrao Borade, the owner of the shop was present. The panchnama states that he identified accused No. 1 as the person who had sold silver payals to him. The panchnama records that Bhimrao Borade stated that there was one other person with accused No. 1. He produced the said silver payals and a receipt. The receipt is on record at Exh. 25A. The panchnama records that it is only signed by accused No. 1. P.W. 8 Ashok Band, the pancha has stated that accused No. 1 led them to the shop of B.B. Saraf from where silver payals were discovered. P.W. 12 P.S.I. Shantaram Jadhav has confirmed this fact. He has only referred to accused No. 1. This evidence is consistent. Therefore there is no doubt that discovery of silver payals is at the instance of accused No. 1. It is an incriminating circumstance as against accused No. 1.

21. The panchnama states that P.W. 7 Bhimrao Borade identified accused No. 1 as the person who had sold silver payals to him. He stated that accused No. 1 was accompanied by another person. If accused No. 2 was a party to the sale nothing prevented the police from taking him to the said shop along with accused No. 1. P.W. 7 Borade would have identified him as the person who had come to sell ornaments to him. In his deposition in the Court this witness has stated that both the accused had come to his shop to sell the silver payals. But we find it difficult to rely on this witness when he says that accused No. 1 was accompanied by accused No. 2 because he has stated that the accused had come to his shop along with a lady. Probably what was sought to be conveyed was that the deceased had accompanied the accused. But he has admitted that in his police statement he has made no reference to a lady. This witness is therefore prone to exaggeration and his evidence as regards accused No. 2's involvement cannot be accepted for want of corroboration. On the basis of the relevant memorandum and the panchnama and the evidence of P.W. 8 Ashok Band and P.W. 12 P.S.I. Jadhav, we are of the opinion that the silver payals of the deceased were discovered at the instance of accused No. 1 and prosecution has not proved beyond doubt that accused No. 1 was accompanied by accused No. 2 when he went to sell the silver payals.

22. That takes us to the discovery of melted gold in the form of tablet at the instance of accused No. 1 from the shop of P.W. 4 Sandip Talegaonkar. The same panchnama records that accused No. 1 led the police and the panchas to the shop of on Talegaonkar. It states that P.W. 4 Sandip Talegaonkar was present in the shop. He identified accused No. 1 as the person who had come to him to sell mangalsutra and golden beads. He stated that he purchased the golden beads and the mangalsutra and paid him Rs. 14,000/-. He produced a golden tablet weighing 3.300 grams made out of melted gold recovered from the mangalsutra and the beads sold by accused No. 1 and one xerox receipt allegedly signed by both the accused. P.W. 8 Ashok Band, the pancha has stated that accused No. 1 took them to the shop of Talegaonkar. P.W. 12 A.P.I. Shantaram Jadhav has confirmed that accused No. 1 led them to the shop of Talegaonkar. The panchnama records that P.W. 4 Sandip Talegaonkar identified accused No. 1 as

the person who had come to sell mangalsutra and golden beads to him. It further records that P.W. 4 Talegaonkar stated that accused No. 1 was accompanied by one other person.

23. Significantly in his deposition in the Court P.W. 4 Talegaonkar has stated that both the accused had come to his shop to sell the ornaments. After about 10 to 12 days in the evening, both the accused and the police came to his shop and he told the police that they had come to his shop to sell ornaments. This evidence is not borne out by the panchnama which reads that he identified accused No. 1 as the person who had come to his shop and stated that accused No. 1 was accompanied by some other person. If accused No. 2 was there with accused No. 1, P.W. 4 Talegaonkar would have identified him as the person who had come to sell ornaments to him and panchnama would have recorded it. Assuming that both the accused along with police went to the shop of P.W. 4 Talegaonkar, the fact that the panchnama does not record that P.W. 4 Talegaonkar identified accused No. 2 as the person who had come to sell ornaments along with accused No. 1 and further records that Talegaonkar stated that accused No. 1 was accompanied by one other person indicates that accused No. 2 was not a party to the said sale. The alleged signature of accused No. 2 on the xerox copy of the receipt produced by the prosecution does not inspire confidence and does not link him with the sale. In our opinion, therefore, this circumstance can only be used against accused No. 1.

24. We therefore hold that the prosecution has proved that accused No. 1 had sold ornaments of the deceased to the goldsmiths in Pune. It has however failed to establish beyond reasonable doubt that accused No. 2 had, along with accused No. 1, sold the ornaments of the deceased. It cannot be said that accused Nos. 1 and 2 were last seen together at the Saraf's shop.

25. Ms. Mohite-Dere also argued that inquest panchnama Exh. 18 shows that on the body of the deceased there was a chain which had beads of yellow metal. Therefore, argued Ms. Mohite-Dere, the story that the accused killed the deceased and removed the mangalsutra is a got up story. We are not impressed by this submission. First of all, whether the beads of yellow metal mentioned in the inquest panchnama were golden beads or not is not on record. It is possible for the accused to remove the gold mangalsutra and keep the worthless artificial chain with artificial beads on the body of the deceased. From this circumstance, we cannot come to a conclusion that the prosecution has come out with a false case.

26. Ms. Mohite-Dere has also argued that certain discoveries are made pursuant to the statements made by the accused, but the accused have not signed the said statements which casts doubt on their voluntary nature.

27. In this connection, we may usefully refer to the judgment of the Supreme Court cited by Mrs. Kejriwal, the learned A.P.P., in *State of Delhi v. Sunil and Ors.* AIR 2000 S.C.W. 4398. In that case, the Supreme Court was considering what is

the effect of absence of an independent witness when the recovery is made of an article pursuant to a statement made by the accused u/s 27 of the Evidence Act. In the facts of that case, independent pancha had not signed on the memorandum in which statement of the accused leading to discovery was recorded. After considering the relevant cases on the point, the Supreme Court observed that it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the Investigating Officer contemporaneous with such recovery must necessarily be attested by independent witnesses. The Supreme Court further observed that:

...if any such statement leads to recovery of any article it is open to the Investigating Officer to take the signature of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the Police Officer must be treated as tainted and the recovery evidence unreliable.

The Supreme Court also observed that:

...the Court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the Legislature. Hence when a Police Officer gives evidence in Court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the Court to believe the version to be correct if it is not otherwise shown to be unreliable.

28. Though the facts of the case before the Supreme Court are not identical with the facts of the present case, we feel that the prosecution can certainly draw support from the observations of the Supreme Court quoted above. In this case the panchas have supported the prosecution as regards discoveries made at the instance of accused No. 1. In addition to this the Investigating Officer has also spoken about them. We have no reason to disbelieve him. We do not find that the Investigation Officer's evidence is tainted or he had any animus against accused No. 1. In the facts of the present case we feel that assuming that the statements are not signed that does not reflect on the credibility of the prosecution case. We therefore reject this argument of Ms. Mohite-Dere.

29. The prosecution has examined P.W. 6 Hanumant Sonawane to establish that the accused and the deceased were seen walking together along Pune-Solapur Road with a lady and thereafter they were seen sitting in a police jeep. This witness runs a hotel styled as Shiv Sankar at Kurkhumb on Pune-Solapur National Highway. His evidence is recorded on 27.8.96. He has stated that the incident in question took place about 2 years back. He was in his hotel. At about 9.00 to 9.30 p.m. two persons and a lady came from Pune in a truck and got down at Kurkhumb near his hotel. They walked along Pune-Solapur Road. He identified the accused present in the Court as the same persons. He did not talk

to them. Two to three days thereafter at about 7.30 a.m. he was going to fetch water from his hotel. A police jeep was standing in front of police chowky. He saw both the accused sitting in it. He told the police about it. Police recorded his statement.

30. This witness is speaking about an incident which had taken place about two years back. He is unable to give the date of the incident. He says that he did not know the accused. He did not talk to them. He has stated that many people walk along the National Highway. He has no reason to remember those who pass by the said road. He cannot tell how many persons pass from there at a particular time. He has stated that there is no reason for him to remember the accused going with a lady.

31. His evidence clearly indicates that he had not seen the accused. First of all he has given no date. He did not know the accused. He has confirmed that he is unable to state how many persons pass by this road. If he did not know the accused, it is inconceivable that he would remember the accused and identify them in the Court. We find it very difficult to place reliance on such vague testimony.

32. That takes us to the two circumstances which the prosecution has alleged against accused No. 2. On 29.6.94 accused No. 2 is said to have made a statement that he will recover the razor blades. The memorandum in respect of this is Exh. 34A and the relevant panchnama is Exh. 34B. Pursuant to the statement, the police and the panchas went to village Kurkhumb and from near mori No. 75(1) accused No. 2 recovered two razor blades after digging the soil. P.W. 8 Ashok Band is the pancha to the said discovery of razor blades, Article 18. P.W. 12 Shantaram Jadhav has also deposed about it. The Chemical Analyser's report, Exh. 21 indicates that the razor blades were stained with human blood. However, the blood group could not be determined.

33. Ms. Mohite-Dere assailed this recovery on the ground that the statement as recorded in Exh. 34A does not indicate that the authorship of concealment was with accused No. 2. The Marathi translation of statement of accused No. 2 indicates that he stated that he and his cousin Dasu Bala Shinde had killed the deceased about 8 days back near Kurkhumb village by strangulating her and by assaulting her with razor blades and he shall show the place where she was murdered and the place where the weapons of assault were kept. In this connection, reference will have to be made to the judgment of the Supreme Court in Pohalya Motya Valvi Vs. State of Maharashtra, , relied upon by Ms. Mohite-Dere, where the Supreme Court was considering somewhat similar statement made by an accused. While dealing with this question, the Supreme Court observed that if the authorship of concealment is not clearly borne out by cogent and uncontrovertible statements and has to be inferred by implication, then implicit reliance cannot be placed upon it. In that case, at the instance of the accused the blood stained spear was discovered. The recorded translation of the statement made by the accused was:

That spear is kept hidden under the heap of grass which is just taken out and near the small plant of Hengal in the crop of the Jawar and towards southern side of my dwelling house. I am willingly ready to produce that spear.

Though the accused had not stated that he had himself hidden the spear, it appears that the High Court, while translating the said statement in English, had used pronoun "I" at two places to indicate that accused had stated that he had hidden the spear. The Supreme Court found fault with the translation made by the High Court and observed that:

The recovery of a blood stained spear becomes incriminating not because of its recovery at the instance of the accused but the element of criminality tending to connect the accused with the crime lies in the authorship of concealment, namely, that the appellant who gave information leading to its discovery was the person who concealed it.

The Supreme Court therefore did not place any reliance on the said discovery. Similar view has been taken by the Supreme Court in *R.B. Killedar v. State of Maharashtra* 1995 Cri.L.J. 2632. Ms. Mohite-Dere has also drawn our attention to the decision of the Division Bench of this Court in *Slim Babamiya Sutar alias Jamadar Vs. State of Maharashtra*, , where relying on *Pohalya Motaya Valvi's* case (supra), this Court has taken a similar view.

34. In order to meet this argument, the learned A.P.P., has placed reliance on *Sanjay Alias Kaka v. State N.C.T. of Delhi* AIR 2001 S.C.W. 767. In that case, the Supreme Court was dealing with the disclosure statement of the accused and recoveries of stolen property and blood stained clothes and weapon of offence made upon such statements. It was argued that the bracketed portion from the accused's statement was inadmissible in evidence. The accused had made a statement that:

Both shirts are lying at my house, one pant at the residence of my friend at Madipur, and I am wearing the pant which I washed (after commission of the offence).

The question as to whether the words "(after commission of the offence)" were admissible or not was under consideration. In paragraph 27, the Supreme Court observed that:

Even if the objectionable words (bracketed above) are deleted, the appellants cannot be conferred with any benefit which would entitle them to acquittal. It cannot be disputed that consequent upon the disclosure statements made, the articles mentioned therein were actually recovered at their instance from the place where such articles had been hidden by them.

35. Mrs. Kejriwal, relying on this, urged that even in the case before the Supreme Court, the accused had not stated that he had concealed or hidden the clothes. Even then the Supreme Court accepted the discoveries made at his instance. We are not inclined to accept this submission of the learned A.P.P. In

that case, the Supreme Court was not dealing with the question of authorship of the concealment. Neither any arguments were advanced in that behalf nor the earlier judgment of the Supreme Court in Pohalya Motaya Valvi's case (supra) was considered. The observations of the Supreme Court were entirely on the question of admissibility of the words "after commission of the offence". The statement allegedly made by accused No. 2 in the instant case, in our opinion is similar to the statement made in Pohalya Motaya Valvi's case (supra).

36. The prosecution has also relied upon the recovery of blood stained clothes at the instance of accused No. 2. On 30.6.94 accused No. 2 is said to have made a statement that he will lead them to the place where the clothes worn by the accused, at the time of murder were hidden. The relevant memorandum in this connection is Exh. 37A and the relevant panchnama is Exh. 37A-2-3. Pancha, P.W. 9 Murlidhar Kothawale has deposed about this discovery. Accused No. 2 led the police and the panchas to the house of accused No. 1 and from the wooden loft he produced Articles 4, 5, 6 and 7 which were stained with blood. The clothes of the deceased which are Exhs. 1 and 2 were sent to the Chemical Analyser to find out the blood group of the blood stains found on them. The Chemical Analyser opined that the blood group of the blood stains was "B". The Chemical Analyser's report Exh. 21 indicates that Exhs. 4 and 5 which are supposed to be the shirt and pant of accused No. 1 were stained with human blood. The blood stains on Exh. 5 were of "B" group, Exhs. 6 and 7 are supposed to be shirt and pant of accused No. 2. Human blood of "B" group was found on Exh. 6 shirt. On the basis of this, the learned A.P.P., contended that this is a clinching circumstance against the accused. It is true that if this circumstance can be held to be proved undoubtedly it would be a very clinching circumstance against the accused. However, even in this statement made by accused No. 2 leading to the discovery of clothes we find that there is no authorship of concealment. Besides, the clothes of the accused have not been identified by anybody. The learned A.P.P. drew our attention to the evidence of P.W. 12 Shantaram Jadhav, who has, in his evidence, stated that the clothes discovered were that of accused Nos. 1 and 2. But on this lone statement of the officer, in the facts of this case we are unable to conclude that the clothes were identified.

37. Apart from this, the learned Counsel urged that there is no indication in the evidence that the articles seized were kept properly protected and in sealed condition till they were sent to the Chemical Analyser. In this connection, the learned Counsel has relied on a decision of this Court in State of Maharashtra Vs. Prabhu Barku Gade, , where dealing with a similar fact situation, after considering the several decisions on the point, this Court observed that there was no evidence on record that from the time the articles were seized and till the time they were sent to the Chemical Analyser they were kept throughout in a sealed condition. This Court observed that:

It was obligatory on the part of the prosecution to lead link evidence to that effect. This was imperative because the possibility that the prosecution may have

put human blood on the aforesaid articles during that interregnum, had to be eliminated before any reliance on the aforesaid recovery evidence could be placed.

While coming to this conclusion, this Court relied on the decision of the Rajasthan High Court In *The State v. Motia and Ors.* AIR 1955 Raj. 82. The relevant observations of the Rajasthan High Court may be quoted:

Similarly it is necessary that the officer recovering the articles should immediately take steps to seal them and evidence should be produced that the seals were not tampered with till the identification is over, or till the articles are sent to the Chemical Examiner for analysis. In the absence of such precautions it would always be open to the accused to say that the police later put human blood on the articles in order to implicate the accused. If evidence as to such sealing is not produced, Court cannot place the same reliance on the discovery of blood stains on various articles as the Court would have not if necessary precautions had been taken.

38. The learned A.P.P., argued that the Chemical Analyser's report, Exh. 21, states that the seals were intact and the forwarding letter also states that the seals were intact. Panchnama states that seals were put. There is no suggestion put to the witness that seals were not put and, therefore, it cannot be inferred that the seized articles were tampered with. In the present case, the panchas do not speak about sealing. The Investigating Officer has merely denied the suggestion put to him by saying that it is not correct to say that the articles kept in the police station were tampered. Though by itself this circumstance is not sufficient to damage the prosecution case, as the facts in this behalf are not as gross as they were in *Prabhu Barku's* case (*supra*), taken along with other circumstances, namely absence of authorship of concealment in the statements and the fact that the clothes were not identified by anyone and that exclusive possession of the house of accused No. 1 is not proved, it adversely affects the prosecution case. We are also not in a position to conclude that the discovery of clothes at the instance of accused No. 2 is established beyond doubt. Since these are the only two circumstances against accused No. 2 and since in our opinion they are not established beyond reasonable doubt, it may not be possible to sustain his conviction, as benefit of doubt will have to be given to him.

39. Ms. Mohite-Dere also argued that the questions put to the accused u/s 313 of the Code of Criminal Procedure are not properly worded and no reasonable opportunity was afforded to the accused to explain the allegations made against them. Ms. Mohite-Dere has drawn our attention to several questions and in particular, question No. 32. She contended that the fact that the blood stains found on the clothes were of blood group "B" ought to have been conveyed to the accused. In this connection, she relied on *Shahaji Dattu Patil Vs. State of Maharashtra*, and *Shaikh Mohammed Salim Karimullah and Ors. v. State of Maharashtra* 1998 Cri.L.J. There can be no dispute about this proposition of law. But in the facts of the present case, we find that the prosecution case has been

adequately conveyed to the accused. We are unable to come to a conclusion that any prejudice is caused to the accused. In this connection, reference be made to question Nos. 21, 28 and 32. The accused were conveyed that the clothes seized were sent to the Chemical Analyser's office and the Chemical Analyser's report, Exhs. 21 and 21A were received. After reading all the questions, we are of the opinion that the prosecution has conveyed its case to the accused. The fact that the accused have not given any explanation though the case was conveyed to them will also become a link in the chain of circumstances. In this connection, we may usefully refer to the decision of the Supreme Court in *Geetha Vs. State of Karnataka*, . In the facts of that case, the accused had denied that the dead body was recovered from his house, in the statement u/s 313 of the Cr.P.C. The Supreme Court came to a conclusion that it would supply a missing link in the chain of circumstances. In the facts of the present case, the false explanation given by accused No. 1 to several circumstances can likewise be considered to be a missing link in the chain of circumstances, as against accused No. 1 against whom other circumstances are proved.

40. In the ultimate analysis therefore we are of the opinion that the prosecution has established its case beyond reasonable doubt as against accused No. 1 only. In our opinion the evidence adduced by the prosecution against accused No. 2 is not free from doubt. Though the said circumstances raise suspicion, suspicion cannot take the place of proof. We have already observed, that circumstances such as discovery of dead body, discovery of ornaments, giving of false explanation, non-lodging of missing report are not proved and cannot be used against him. Therefore we will have to give him benefit of doubt.

41. So far as accused No. 1 is concerned, we are totally satisfied that he has committed the murder of his wife. All the proved circumstances directly point out to the guilt of accused No. 1. It is true that prosecution has not been able to spell out any motive. But the proved circumstances directly point out to the guilt of accused No. 1. Relying on *Bakshish Singh's* case (supra), Ms. Gopal, the learned Counsel for accused No. 1, urged that recovery of dead body at the instance of accused No. 1 is not a conclusive circumstance. It is true that by itself it may not be a conclusive circumstance. But taken along with the other proved circumstances on record it establishes the guilt of accused No. 1. It cannot be forgotten that accused No. 1 is the husband of the deceased. He will have to explain the disappearance of his wife. Discovery of the dead body at his instance undoubtedly establishes his involvement in the murder. We have no doubt therefore that the prosecution has proved its case beyond reasonable doubt as against accused No. 1.

42. Ms. Gopal has however rightly made a grievance that the Trial Court has wrongly rejected set off to accused No. 1 for his pretrial detention from 24.6.94 till the date of the judgment. Accused No. 1 is entitled to the said set off. We therefore set aside the said order.

43. In the result we pass the following order:

(i) Criminal Appeal No. 312 of 1997 is allowed. The order of conviction and sentence passed by the learned Additional Sessions Judge, Baramati on 9.4.97 in Sessions Case No. 49/1994 convicting and sentencing appellant/original accused No. 2 Balu Sambhaji Shinde for offence u/s 302 and Section 201 read with Section 34 of the I.P.C. is hereby quashed and set aside. Appellant-Balu Sambhaji Shinde be released forthwith unless otherwise required in any other case.

(ii) Criminal Appeal No. 485 of 1997 is dismissed. The impugned judgment and order passed against appellant/original accused No. 1 - Dasu Baba Shinde convicting u/s 302 read with Section 34 of the I.P.C. and sentencing him to suffer imprisonment for life and to pay a fine of Rs. 2000/ and in default of payment of fine, to suffer R.I. for six months is confirmed. Similarly, the impugned judgment and order convicting him for the offence punishable u/s 201 read with Section 34 of the I.P.C. and sentencing him to suffer R.I. for 2 years and to pay a fine of Rs. 500/- and in default of payment of fine, to suffer R.I. for 3 months is confirmed. The substantive sentences shall run concurrently. We however set aside that part of judgment which denies set off to accused No. 1 of his pretrial detention from 24.6.94 till the date of judgment, that is 9.4.97. Accused No. 1 Dasu Baba Shinde is entitled to the said set off and hence it is directed that the period of pretrial detention undergone by him from 24.6.94 till 9.4.97 be set off against the sentence awarded to him.