
(2013) 03 BOM CK 0036
In the Bombay High Court
Case No : Criminal Appeal No. 1192 of 2007

Mohd. Jahir Puttan Khan

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 13-03-2013

Acts Referred:

Citation : (2013) 5 ABR 543 : (2013) ALLMR(Cri) 4243

Hon'ble Judges : V.K. Tahilramani, J;P.D. Kode, J

Bench : Division Bench

Advocate : Abhay Kumar Apte, for the Appellant; P.S. Hingorani, APP., for the Respondent

Judgement

P.D. Kode, J.—The appellant-original accused assails the judgment and order dated 17.10.2005 passed by the learned 7th Ad Hoc Addl. Sessions Judge, Sewree, Mumbai in Sessions Case No. 307 of 2004, convicting him for murdering one Mehnaz Istikhar Khan and mother-in-law Smt. Zaheeda Bano and for attempting to commit the murder of PW-4 Arif Istikhar Khan and sentencing him to suffer imprisonment for life for an offence of murder and also to suffer rigorous imprisonment for five years for the offence of attempt to commit murder. According to the prosecution, at the relevant time, one Istikhar Khan was residing in Room No. 27, Mantan Pada, Mohd. Hussain Chawl, Poisar along with his wife Zaheeda (deceased), daughter Mehnaz (deceased), son Arif (PW-4) and son-in-law, i.e., appellant. The appellant and PW-4 Arif were assisting Istikhar Khan in his business of selling of Onions and Potatoes at Poisar.

1.1 On 27.12.2003, PW-3 PSI Ravindra Padwal on Station House Duty at Kandivali Police Station received a telephone call at about 3.00 a.m. from unknown person that many persons has gathered at Mohd. Hussain Chawl, Mantan Pada, Kandivali (W) due to some incident having taken place and for immediately coming to said place. PW-3 rushed to said place along with other staff and found many persons gathered at Room No. 27 in said Chawl. Upon entering the room, PW-3 found that two ladies and one boy with injuries on their

heads and blood smeared on the quilt and the mat, were lying in said room. They also noticed one cement block-brick with bloodstains in the said room ad-measuring into 10" x 10". PSI Yadav, Beat Officer removed injured persons to Bhagwati hospital. However, out of them, Zaheeda Bano had expired and other two injured were in unconscious condition. The police received clue that son-in-law, i.e., the appellant was not at the said place.

1.2 PW-3 lodged Report (Exh. 16) regarding murder of Zaheeda and injuries caused to others by means of cement block. Crime No. 358 of 2003 was registered thereon. PW-10 Ravishankar R. Thakur took up the investigation. The appellant was apprehended and taken in the custody in front of Our Lady Church, Poisar, S.V. Road, Kandivali (W) as per information received about him. The bloodstained lungi and baniyan in the carry bag with the appellant were seized while arresting him under arrest panchanama.

1.3 PW 10 send the corpse of Zaheeda for post-mortem examination to Bhagwati Hospital at Borivali. Mehnaz also having died on 2.1.2004 while taking treatment in Sion Hospital, her body was also sent for post-mortem. PW 10 send all seized articles to Chemical Analyzer and collected C.A. Reports in respect of seized articles as well as blood group of deceased Zaheeda, Mehnaz, injured Arif (PW-4) and of the appellant. After completion of investigation, a charge-sheet was submitted in 43rd Court of Metropolitan Magistrate, at Borivali, Mumbai.

2. The appellant pleaded not guilty to the charge (Exh. 5) for offence under Sections 302 and 307 of I.P.C. framed against him by the Court of Sessions, after the case was committed to the said Court. In addition to the witnesses referred hereinabove, the prosecution examined seven more witnesses, i.e., PW-1 Rakesh Mann, PW-2 Asif Shaikh, PW-5 Dr. Baban Shinde, PW-6 Dr. Sanket Mehta, PW-7 Bhagwan Singh, PW-8 Mohd. Miraz Khan, and PW-9 Dr. Rajesh Dere. The defence of the appellant was of total denial. Though the appellant admitted his presence at the relevant night in the room No. 27, he contended that some unknown persons assaulted Zaheeda, Mehnaz and Arif (PW-4). The trial Court after assessment of prosecution evidence came to the conclusion that the appellant committed murder of Zaheeda and Mehnaz by intentionally causing them injuries by means of cement-block and also attempted to commit murder of PW-4 Arif, inconsonance with such finding arrived, the trial Court convicted and sentenced the appellant.

3. Mr. Abhay Kumar Apte, the learned appointed counsel for the appellant, submitted that no evidence has been surfaced at the trial leading to inference of the guilt of the appellant for the offences in-question as erroneously concluded by the trial Court. He urged that PW-4 Arif having not supported the prosecution and there being no other eye-witnesses, the trial Court rested conviction upon the circumstances said to have been established by the prosecution. The learned counsel by meticulously taking us through the evidence of each of the witnesses taken into consideration by the trial Court for coming to the conclusion of having established particular circumstance, urged that the said evidence is not sufficient

to reach to the conclusion as arrived. It was urged that the trial Court erroneously put the reliance upon the evidence of hostile witness, i.e., PW-4 Arif. It was urged that further error was committed by the trial Court in taking into consideration the explanation given by the appellant during his examination u/s 313 of Code of Criminal Procedure. It was urged that apart from the same, even the trial Court misconstrued the explanation given by him and drew unwarranted inferences upon the matter, which were not duly established.

4. The learned counsel further contended that the trial Court misconstrued the evidence of PW-4 Arif. It was urged that while drawing unwarranted inferences on the basis of the evidence of PW-4 Arif read along with explanation given by the appellant during his examination u/s 313 of Cr.P.C., the trial Court completely ignored the positive evidence given by PW-8 Mohd. Miraz Khan and explanation given by the appellant to PW-8 Mohd. Miraz Khan just after the incident. It was contended that the trial Court discarded the evidence of PW-8 Mohd. Miraz Khan and the explanation given by the appellant without any basis merely upon surmises. It was urged that the trial Court completely ignored the aspect of PW-8 Mohd. Miraz being the prosecution witness and the prosecution having not declared him hostile and/or discredited of his claim, the evidence was binding upon the prosecution. The learned counsel contended that the trial Court in light of the evidence of PW-8 Mohd. Miraz could not have accepted the evidence of seizure of bloodstained lungi and baniyan found in a carry bag, which was with the appellant. It was contended that the evidence of PW-8 Mohd. Miraz casts a serious doubt upon the prosecution story that of the appellant was arrested in a manner as claimed by PW 3 and investigating officer PW-10 Ravishankar Thakur and the recovery of such material from him. It was contended that there being absolutely no evidence linking the appellant with the offence in-question, the order of conviction and sentence recorded by the trial Court is per se illegal and deserves to be quashed and set aside.

5. Per contra, Mr. Hingorani, the learned APP supported the judgment and order of conviction passed by the learned trial Court by contending that the trial Court has given cogent and convincing reasons for arriving at such conclusion. It was urged that no error was committed by the trial Court in discarding the evidence of PW-8 Mohd. Miraz and particularly the explanation canvassed by the appellant. It was urged that no error was committed by the trial Court in relying upon the part evidence of PW-4 Arif and explanation given by the appellant. It was thus contended that there are no merits in the appeal and same be dismissed.

6. Thoughtful considerations were given by us to the submissions advanced and record of the case was carefully examined to ascertain the merits of the submissions. At the first blush, it can be said that the perusal of the judgment in terms reveal that the trial Court has rested the order of conviction on the circumstantial evidence, i.e., the prosecution having established that:

(1) Both the deceased were seen lastly alive in the company of the appellant when appellant along with them and injured witness had been for sleep after

having the dinner;

(2) After the incident the appellant was the only person who was not injured;

(3) The appellant was standing nearby PW 4 and thus present in the room when PW 4 had sustained injuries;

(4) The appellant had given false explanation to PW 8 regarding involvement of five to six persons in the incident in the room;

(5) The conduct of the appellant in remaining at the house of PW 8 after reporting the matters to him was unusual;

(6) Human blood of "B" group was found upon lungi and baniyan seized from the carry bag which was with the appellant;

(7) Both the deceased having met homicidal death and/or injuries caused to them and PW 4 being probable by means of bloodstained cement-block seized from the spot;

7. In said state of affairs and having due regard to the legal position settled by numerous decisions of the Apex Court that in the cases involving circumstantial evidence, it is necessary to firstly ascertain whether the circumstances relied were duly established by the prosecution cogent and convincing evidence and thereafter whether such circumstances established within themselves form a formidable chain leading to the sole inference about guilt of the appellant, we find it necessary to assess the prosecution evidence for such purpose and thereafter to take up the process whether the circumstances found to have been established were capable of reaching the sole conclusion of the guilt of the appellant as arrived by the trial Court.

8. Before taking the process of an assessment of the prosecution evidence and since it is beyond dispute that PW-4 Arif was occupant of the room in which crime was committed with regard to his mother and sister and it being further undisputed position that the learned APP after seeking leave u/s 154 of the Evidence Act has cross-examined PW-4 Arif, it will be necessary to take into consideration the legal position prevailing regarding evidence of such witness. In this context, a reference can be made with an advantage to the decision of an Apex Court in the case of Sat Paul Vs. Delhi Administration, . Wherein after considering the previous decisions regarding the witnesses permitted to be cross-examined u/s 154 of the Evidence Act, the Apex Court observed in para No. 51, which is to the following effect:

51. From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part

of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be credit-worthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto.

9. In addition to the aforesaid observation, it can be observed that perusal of deposition of PW-4 Arif does not reveal that while seeking leave u/s 154 of the Evidence Act any reservation was made by the prosecution. On the contrary, the perusal of deposition of PW-4 Arif reveals that during cross-examination of witness upon various aspects by the learned APP, the prosecution has brought on record in all five portions respectively marked as "A", "B", "C", "D", & "E" and ultimately proved the said marked portions through the evidence of Investigating Officer PW-10 Ravishankar Thakur for discrediting him. After carefully considering the matters stated in said five portions leaves no room for any doubt for coming to the conclusion that the credit of PW-4 Arif was altogether shattered during the cross-examination. Hence, in the light of the observation made in case of Sat Paul, (supra), it was incumbent upon the trial Court to discard the testimony of PW-4 Arif altogether. Hence, we find the substance in the submission canvassed that the error was committed by the trial Court in relying upon truncated portions from the deposition of PW-4 Arif for coming to the conclusion that the appellant was in the room No. 27 at the time of assault.

10. Similarly in the context of other aspects connected with the same, it will not be out of place to make a reference to the decision of the Apex Court in the case of Vadivelu Thevar Vs. The State of Madras, , wherein Hon"ble Apex Court while considering the question of Court insisting upon plurality of a witness in a murder case, in paragraph Nos. 11 and 12 amongst other observed:--

11. In view of Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

- (1) Wholly reliable.
- (2) Wholly unreliable.
- (3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way-it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise when only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have, therefore, no reasons to refuse to act upon the testimony of the first witnesses, which is the only reliable evidence in support of the prosecution.

11. Even applying the aforesaid test to the evidence of PW-4 Arif, it can be safely said that he will fall within the category of wholly unreliable witness. Even giving all concession and considering him as falling in third category, i.e., witness neither wholly reliable nor wholly unreliable, then also the trial Court could have used his evidence subject to availability of corroboration from the evidence of any independent witness for accepting such matters. Since it is a trite law that while appreciating the evidence of any witness, his evidence is required to be taken into consideration as a whole, we feel it proper to reproduce the material part of the evidence in PW-4 Arif for appreciating whether the truncated portions from the same can be used in a manner as used by the trial Court. The said relevant part of the evidence of PW-4 Arif after narrating his relationship and after all of them had taken meal on relevant day, runs as under:

Thereafter we all slept. Myself, mother Zaheeda (deceased) and sister Mehnaz (deceased) slept on the floor in room No. 27. The brother-in-law accused Zaheed Khan slept on a bed. My sister Mehnaz (deceased) was sleeping behind my mother Zaheeda (deceased) and myself behind my sister Mehnaaz (deceased)

I do not know what happened thereafter. I sustained injury on my head. But I can't tell how I sustained the same. However, when I saw I found that the accd. Zaheer Khan was standing near us. I can't say whether something was in his

hand or not. I can't tell at what time I opened my eyes and saw that the accd. Zaheer Khan is standing near us. I also can't tell what happened in respect of my mother Zaheeda (deceased) and sister Mehnaaz (deceased) when I opened the eyes. I became unconscious after seeing that the accd. Zaheer Khan is standing near us when I sustained injury on my head. I had no talk with accd. Zaheer Khan after sustaining injury on head and seeing him standing near us when I opened my eyes. The blood was oozing from my injury on head near ear. The bulb of zero watt was on in our room when I saw accd. Zaheer Khan standing near us after sustaining injury.

There is only one room to our house, room No. 27. We had closed it from inside on the date of incident before sleeping.

I can't tell when the incident had taken place, (the witness is saying only "kuch malum nahee" when repeatedly the questions are put by the APP to him. Therefore, his demeanor is noted).

5. I also can't tell when I regained consciousness. I came to know after regaining consciousness that my mother Zaheeda Bano is dead. However, nobody told me about my sister Mehnaz (deceased). I also did not come to know how my mother Zaheeda Bano died. My sister Mehnaaz is also died prior to two years. I did not come to know how she died.

I was in Sion Hospital when I regained consciousness. I can't tell after how many days I was discharged from Sion Hospital. I do not remember whether police have recorded my statement in Sion Hospital or after my discharge from Sion Hospital or not.

12. After having reproduced the relevant part of the evidence of most material witness PW 4 relied by the trial court, now taking up the 1st circumstance relied by the prosecution the trial Court on the basis of the evidence of neighbour PW 7 Bhagwan Singh and cousin of Iftikhar Khan, i.e., PW 8 Mohd. Miraz Khan also residing in same area and the answers given by the appellant during 313 of Cr.P.C. regarding their evidence of having seen the appellant along with both the deceased and injured in said room at about 10.30 to 11.00 p.m. in the relevant night, had concluded the prosecution having established the said circumstance. Since no dispute regarding the said circumstance being established is made on behalf of the appellant and such a position is emerging from the evidence of both the said witnesses and so also about the answers given by the appellant to the questions put to him regarding the evidence of both the witnesses, it can be safely said that the trial Court has committed no error in coming to the conclusion of prosecution having established the said 1st circumstance.

13. Since the trial Court had concluded prosecution having established circumstance Nos. 2 to 4, mainly on the basis of evidence of PW 4, part of the evidence of PW 8 and the answers given by the appellant during 313 of Cr.P.C. to the relevant part of the evidence, makes it necessary to consider the said circumstances together. The reasoning given by the trial Court in paragraph Nos.

10 to 13 reveals that therein the trial Court had observed that though all the said persons were sleeping in the said room the appellant had not sustained any injuries. We find the said sweeping observation was made by the trial Court on the basis of truncated portion from the evidence of PW 4 who was declared to be unworthy of credit by the prosecution by seeking leave u/s 154 of Evidence Act. As a matter of fact, even the appellant has not disputed of having not sustained any injury in the incident as he has claimed of himself being not present in the said room at the time of incident. The reasoning given by the trial Court reveals that on the basis of evidence of PW 4, the trial Court concluded the appellant was present just after PW 4 has sustained injuries. Now even considering the excerpts from the evidence of PW 4 during the examination-in-chief before he was declared hostile does not lead to the conclusion of such fact being established by the said evidence. As a matter fact, reading the said evidence in entirety the same makes it clear that PW 4 was not able to tell as to how he has sustained the injuries. The further recitals in his evidence that when he saw, he found that the appellant was standing near them. It further reveals that he was unable to tell the time at which he had opened the eyes and seen the appellant standing near them. Since the relevant part of entire examination-in-chief is reproduced hereinabove, we do not propose to reiterate the same, but only say that considering the said part of evidence as a whole, it is difficult to accept a conclusion impliedly sounded by the trial Court during said reasoning that immediately after receipt of injury PW 4 had seen appellant standing nearby them in the room. Significantly enough, the prosecution having cross-examined PW 4 without any reservation regarding the purpose for which the leave was obtained and even considering the said cross-examination, the same being restricted for discrediting him by bringing on record the portions from his statement recorded by the police and proving the same through the investigating officer and no admission being elicited even during the said cross-examination leading to the inference as drawn by the trial Court of a nature of establishing such facet as concluded by the trial Court makes it difficult to accept such a conclusion arrived by the trial Court. Needless to add that considering the evidence of PW 4 in light of the test given by the Apex Court in a decision in the case of Sat Pal (supra), we find that PW 4 was totally discredited and as such his evidence was liable to be discarded in toto.

14. Now considering the purpose for which the examination of the accused person is contemplated u/s 313 of Code of Criminal Procedure, i.e., primarily for affording him an opportunity to explain the circumstance appearing against him in the prosecution evidence and the aforesaid discussion leading to the conclusion that prosecution having not established as to when PW 4 has seen the appellant standing nearby him by cogent evidence, putting such a circumstance to the appellant and treating his answer as an admission given by him that he was standing nearby PW 4 just after he had received the injury, is apparently impermissible in law. Such a conclusion is inevitable as the wording used in Section 313 of Cr.P.C., "circumstances appearing in the evidence against him"

only contemplates the circumstance established by the evidence. Needless to add that the circumstance not found to have been established by the evidence could not have been even put to the appellant.

15. It can be further added that it is well settled that the answers given by the accused to the questions put to him during the examination u/s 313 of Cr.P.C., are not in the nature of the evidence. Obviously the examination is not expected to be not in nature of his cross-examination, due to the same would be violative of the constitutional right of silence conferred upon the accused. It is also settled that explanation given during the said examination can be said to be false only in event of there existing the evidence negating the same. We find that the trial court on the contrary has adopted converse procedure of negating the evidence of PW 8 by explanation given by the appellant. The trial Court totally ignored the aspect of the evidence of PW 8 that the appellant had been to him in the night at about 2.30 a.m., and knocked his door and after PW 8 opened the same told him that some incident had taken place-lafda and 5-6 persons are assaulting Zaheed and all; and the appellant was then weeping and frightened. The said unshattered evidence of PW 8 itself reveal that in the said night the appellant had not eloped away and on the contrary had informed accordingly to PW 8. In the same context, the answers given by the appellant to Question No. 109 is to the effect:

I went outside the house in the night for giving responses to the call of nature by opening the door. I returned to home room No. 27 after 15 to 20 minutes. I saw Arif in injured condition. I asked him what happened but he did not tell anything and became unconscious. Thereafter, I informed the neighbours and all others.

is also on the same lines as told by him to PW 8 except omission of telling occurrence of lafda and five to six persons assaulting the inmates of the room. Further more even support to the same is found from the evidence of PW 4 wherein he has deposed of having not seen anything in the hand of the appellant. We further find that the trial court negated the evidence of PW 8 as well as said explanation given by the appellant during his examination u/s 313 of Cr.P.C. on the basis of his answers to the circumstance put on the basis of evidence of PW 4 of having seen the appellant nearby him. As pointed out earlier, such a facet cannot be said to have been established by the evidence of PW 4 putting the relevant questions to the appellant and using the answers thereon to negative the evidence of PW 8 and so also the explanation which could have been negated/repel only by the contrary substantive evidence, in our humble opinion, is wholly impermissible in law.

16. Even considering the relevant facets upon the probability factor, by assuming that the appellant was the author of the said attack, we find it extremely difficult to perceive that after such attack the appellant would have been to the house of PW 8 and would have reported such matters and then PW 8 could have seen him in weeping and frightened condition as deposed. As a matter of fact, such a conduct on part of the appellant militates against himself being the person who

had attacked the victims. Resultantly, we find extremely difficult to accept of the prosecution having established the circumstance Nos. 3 and 4. We also find that the said explanation at the earliest point of time given by the appellant and surfaced through the evidence of PW 8 and reiterated by him at the trial also takes away the sting of the circumstance that the appellant sleeping in the said room after the incident was not having any injuries on his person.

17. Now with regard to the 5th circumstance relied by the trial Court about the conduct of the appellant in remaining at the house of PW 8 after reporting the happening to him, the trial Court on the basis of the evidence of PW 8 that thereafter he alone went to the room in-question, concluded the same being inconsistent or unnatural conduct of the appellant. It is difficult to accept that such an inference can be drawn from the said facet as the same ignores the fact of the appellant having come across such a unexpected happening during the mid-night after he had returned to house after answering the call of nature. Further more we find that hardly anything has surfaced on record to indicate that for how much time the appellant remained at the house of PW 8. The evidence adduced by the prosecution of PW 8 or of anybody else does not lead to the position that in the said night the appellant thereafter had not returned to the said room. The evidence of PW 7 is also silent upon the said aspect.

18. In the context of said circumstance, the trial Court erroneously by laying the finger upon the explanation given by appellant to Question No. 109 and the same omitting to tell anything about the assault, i.e., as told by him to PW 8 concluded the conduct of the appellant after the incident is against him. We are afraid that any such conclusion can be drawn on the basis of not telling the matters, existence of which, at much earlier stage has been established by the evidence of PW 8. It can be added that it is settled legal position that the prosecution has to stand on its own leg and is not entitled to derive any benefit about the weaknesses of the defence. Having regard to the same and such matters being already told by the appellant to PW 8 much earlier than at the time of trial and the same having remained to be negated, we find the trial Court was unjustified in concluding of prosecution having established the 5th circumstance against the appellant.

19. Now considering the 6th circumstance of the human blood of "B" group was found upon lungi and baniyan seized from the carry bag which was with the appellant when he was allegedly arrested in front of Our Lady Church, Poisar, the trial court had concluded such a circumstance being established through the evidence of PW 3 and PW 10. The evidence of PW 3 appears to be significant in said respect wherein he had claimed that on 27th December, 2003, one person personally came in the police station and did not tell his name and informed that the Zaheer was standing at Our Lady Church. It reveals that thereafter PW 3 along with the said person, PW 10 and other police staff went to said place. After the said person pointed out Zaheer, they went nearby him and asked his name. He was frightened. PW 3 called two panchas and took search of carry bag in his

hand and the same was found containing lungi and baniyan having bloodstained upon it. PW 3 seized the same by affixing labels of the panchas. He brought Zaheer to the police station and drew the panchanama Exh. 20. In the same context, the evidence of PW 10 is silent in examination-in-chief about the said aspects similar matters has been deposed by him during the cross-examination. However, the prosecution having not examined the informant, who has played the vital role in the alleged episode as police officers by then claimed to have not seen the appellant and so also the panch witnesses for panchanama Exh. 20, we find it extremely difficult to accept the said evidence. The learned APP has also not brought to our notice any explanation given by the prosecution for not examining said three independent witnesses and having chosen to place reliance upon the evidence of the I.O. We are of such a view, in view of evidence of PW 8 also having established of the appellant having not ran away from the spot after the incident.

20. Even after testing the evidence of PW 3 and PW 10 upon the probability factor about the events allegedly occurred at the time of alleged arrest of the appellant, we do not find the same is convincing. However, we do not propose to embark upon detail dilation about the said evidence as the appellant himself having admitted of visiting the room after answering the call of nature and considering the extent of violence taken place in the room, we find finding of few bloodstains on lungi and baniyan cannot be considered as an unnatural phenomenal nailing him with the crime in-question. We further add that considering C.A. Report, we find that even the appellant was having blood of "B" group, which also takes away the sting of the said circumstance.

21. Now considering the 7th circumstance relied by the prosecution of both the deceased having met homicidal death and/or injuries caused to them and PW 4 being probable by means of bloodstained cement-block seized from the spot, no dispute being made on part of the appellant and such a facet being established by the prosecution through the evidence of Doctors PW 5 Dr. Baban Shinde and PW 6 Dr. Sanket Mehta and PW 9 Dr. Rajesh Dere and/or opinion given by them and so also the evidence of concerned witnesses related with the articles seized from the spot, we do not propose to indulge in making threadbare unnecessary dilation about the said evidence.

22. At the cost of reiteration, we say that as only the circumstances duly establishes can be taken into consideration for ascertaining whether the said circumstances within themselves form a formidable chain leading to the sole inference of the guilt of culprit consistent with the hypothesis of his guilt to the exclusion of every other hypothesis of himself being not guilty and by applying the said test, we find that out of seven circumstances relied by the trial court the prosecution having failed to establish the vital circumstance Nos. 3, 4 and 5 and remaining circumstance Nos. 1, 2, 6 and 7 within themselves being incapable of reaching to the sole inference of the guilt of the appellant, we find the finding of a guilt of the appellant arrived by the trial Court is not legally sustainable, the

same will deserve to be quashed and set aside. We are of such a considered opinion as the established circumstances fail to reasonably exclude the hypothesis suggested by the appellant of the victims being assaulted by unknown persons in his absence when he had been for answering the call of nature.

23. Resultantly, we quash and set aside the judgment and order of conviction and sentence passed by the trial Court by allowing the appeal preferred by him and acquit him from the charges framed against him. The appellant be set at liberty, if not required to be detained in connection with any other case. The fine amount, if any, paid be refunded to him.

24. The copy of the judgment be forwarded to the appellant through the Superintendent of Prison at which he is lodged. We appreciate the pain staking efforts made by the learned appointed advocate in arguing the matter and quantify his fees at Rs. 2200/-.