
(2014) 02 BOM CK 0136
In the Bombay High Court
Case No : Criminal Appeal No. 646 of 2010

Ramrao and Vilas

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 18-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313 374(2)
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 201 302 34

Citation : (2014) ALLMR(Cri) 1744 : (2015) 1 BomCR(Cri) 211

Hon'ble Judges : B.R. Gavai, J;A.S. Chandurkar, J

Bench : Division Bench

Advocate : N.B. Kalwaghe, for the Appellant; N.S. Khubalkar, APP, for the Respondent

Final Decision : Allowed

Judgement

A.S. Chandurkar, J.—The appellants herein take exception to their conviction for having committed offence punishable under Sections 302, 201 read with Section 34 of the Indian Penal Code (for short the Penal Code). By judgment dated 20-11-2010, the appellants have been sentenced to life imprisonment and to pay fine of Rs. 1000/- each, in default to suffer rigorous imprisonment for three months. The appellants herein are the original accused Nos. 1 to 3. The accused No. 2 was acquitted by the Sessions Court. The case of the prosecution is that one Sardarsingh Pawar was resident of village Dongargaon, Tah. Barhanpur in Madhya Pradesh. He used to sell cattle in the districts of Buldana and Aurangabad. On 29-4-2009, said Sardarsingh had sold four bulls to appellant No. 1 Ramrao who was from village Mhasala. This sale was effected with the mediation of one Ambadas Taide-original accused No. 2 who resided at village Jamthi. Thereafter, on 16-5-2009, two more bulls were sold by said Sardarsingh-the accused No. 1. The price of the six bulls sold was Rs. 1,62,000/- and it was payable on or about Nag Diwali of 2009. As aforesaid amount was not paid, Sardasingh along with two persons had taken efforts for recovery of the dues.

The said two persons and Sardarsingh had stayed with the accused No. 2 at village Jamthi. However, as there was no recovery, on 20-12-2009, Sardarsingh left for village Mhasala for recovering the dues from appellant No. 1. As Sardarsingh was not heard of after 19/20-12-2009, his son lodged missing report on 25-12-2009 at Dhad Police Station. On 3-1-2010, the police personnel along with son of Sardarsingh inspected the house of appellant No. 1 at Mhasala. They asked him to take son of Sardarsingh to his agricultural field. There towards south boundary, they saw some debris covered by throngs and stones. After some earth was removed, there was a foul smell emanating from the said spot. After digging the same, a dead body was found under said debris. The same was identified as being that of Sardarsingh.

2. The police prepared spot panchanama and also seized shoes and clothes of the deceased. Thereafter, report was lodged and on that basis, offences punishable under Sections 302, 201 read with Section 34 of the Penal Code were registered. According to the prosecution one axe, blood stained Dhoti and other articles were seized. On completion of investigation, charge-sheet was filed against three accused. As the case was triable by the Sessions Court, it was accordingly committed by the learned Magistrate. All the accused pleaded not guilty and claimed to be tried. On completion of the trial, the learned Judge of the Sessions Court convicted the present appellants in the manner as stated above and acquitted the original accused No. 2. Hence, present appeal has been preferred u/s 374(2) of the Criminal Procedure Code (for short the Code).

3. Shri N.B. Kalwaghe, learned Counsel appearing for the appellants submitted that the appellants have been wrongly convicted by the Sessions Court. It is submitted that the entire case of the prosecution is based on circumstantial evidence and each circumstance has not been proved beyond reasonable doubt. Hence, the chain of circumstances has not been completed on the basis of which the appellants could have been convicted. It is further submitted that in the examination of the appellants u/s 313 of the Code, the evidence/circumstances sought to be relied upon by the prosecution were not put to them thereby causing grave prejudice to their defence. It is further submitted that as there was a charge against all the accused based on common intention, acquittal of one of the accused by the Sessions Court would have the effect of vitiating the conviction of the other accused i.e. the present appellants. It was further submitted that the agricultural field from where the dead body of Sardarsingh was found did not belong to the appellants and hence, their conviction was not sustainable. Further the discovery as effected was not in accordance with law. Therefore, it was submitted that the order of conviction deserves to be set aside and the appellants were entitled to be acquitted of aforesaid offences. In support of the above submissions, the learned Counsel for the appellants relied upon the following judgments:-

[1] 2010 ALL MR (Cri.) 1914, Irapa Kumbhar S/o. Anand Kumbhar Vs. State of Goa.

[2] 2011 ALL MR (Cri.) 722, Pushpabai Marotrao Paraskar & Anr. Vs. State of Maharashtra.

[3] Mani Vs. State of Tamil Nadu,

4. Shri N.S. Khubalkar, the learned Additional Public Prosecutor has, on the other hand, justified the conviction of the appellants. He has submitted that the entire chain of circumstances has been duly established by the prosecution and it had been proved beyond reasonable doubt that it was the appellants who were guilty of having committed aforesaid offence. The learned Counsel urged that the deposition of various prosecution witnesses clearly reveals the motive on the part of the appellants in committing the murder of Sardarsingh and hence, there was no need whatsoever to interfere with the judgment of conviction as recorded by the Sessions Court.

5. We have heard the respective Counsel and have also carefully gone through the entire material on record. The case of the prosecution is based on circumstantial evidence. PW-1 Shersingh-Exh. 30 is the son of Sardarsingh. He has stated that his father used to trade in cattle and used to visit villages adjacent to Barhanpur District. He has stated that in April/May 2009, his father had sold six bulls worth Rs. 1,62,000/- on credit to the appellant No. 1. The accused No. 2 had stood as surety for said transaction. He has further stated that the payment was agreed to be made in the month of October/November 2009. As the payment was not received as agreed, his father had left for village Mhasala on 19-12-2009. He had first gone to village Jamthi and had stayed at the place of accused No. 2. His father had contacted him on telephone and informed him that he would go to village Mhasala on 20-12-2009. This witness has further stated that on 20-12-2009, his father had contacted him on telephone and had told him that he had left village Jamthi for Mhasala along with accused no. 2.

As said witness did not receive any information from his father, thereafter he started search of his father on 24-12-2009. Initially he had gone to village Jamthi and after being informed by accused No. 2 that his father had gone to village Mhasala he along with accused No. 2 went to Mhasala. On not receiving proper information from present appellant No. 2, all of them went to Babhulgaon in search of appellant No. 1. On 25-12-2009, he received a call from appellant No. 1 that he was at village Dhad. They all thereafter went to said village and enquired about Sardarsingh. This witness has further stated that appellant No. 1 told him that he had collected the amount of Rs. 1,62,000/- from him and had left for village Goregaon. He was shown the Sauda Pavties that were slightly torn. As there were doubts in the mind of said witness, he lodged report on returning to Barhanpur. Thereafter again on 3-1-2010, he came to Dhad Police Station and expressed doubts that his father might have been kidnapped by the accused as they owed him huge amount of money. Along with the police personnel, they took search in the agricultural field of appellant No. 1 and near the band of the field after removing earth from said spot and after removing 2 to

3 big stones, dead body of Sardarsingh was found. On that basis fresh report was lodged.

6. In his cross examination this witness has stated that his father did not have a cell phone. He has stated that two persons Prakash Pawar and Jivan Pawar had also come for recovering the due amounts. This witness has stated that the agricultural land where the dead body of his father was found was about 1 km from the house of the appellant No. 1. He has further stated that there could be some cattle shed on way to the spot of incident.

It is pertinent to note that this witness in his examination-in-chief has stated that on 20-12-2009 his father had contacted him on telephone and had told him that he had left village Jamthi for Mhasala along with accused No. 2. He has further stated that thereafter he did not receive any information from his father. In his cross examination also this witness has stated that on enquiring with Prakash Pawar and Jivan Pawar, they had told him that his father along with accused No. 2 had left Jamthi for Mhasala. Thus, the fact of Sardarsingh leaving Jamthi for Mhasala is deposed by this witness.

7. Jivan Pawar, PW-3 has been examined below Exh. 35. He has stated that he used to do labour work with Sardarsingh on monthly basis. He has stated that on 19-12-2009, Sardarsingh had visited Jamthi and had stayed with accused No. 2. On the next day along with accused No. 2, Sardarsingh had left for village Mhasala. He has further stated that on 21-12-2009 accused No. 2 alone returned to village Jamthi. This witness has stated that accused No. 2 had told him that Sardarsingh stayed at Mhasala. He has further stated that subsequently on 25-12-2009, he had been to Mhasala and thereafter to Babhulgaon and Dhad with accused No. 2.

In his cross examination this witness has stated that the appellant No. 1 had told him that Sardarsingh had collected his dues on 20-12-2009 and had left for village Golegaon. Though this was stated by him to the police, the same was not recorded by them. It was suggested to said witness that Sardarsingh never went to Mhasala on 20-12-2009 or any other day, but said suggestion was denied. In the cross examination by accused No. 2 he has stated that the portion marked "A" in his statement that he, Prakash Pawar and accused No. 2 had gone to Mhasala on 21-12-2009 and met accused No. 1 was correct.

The version of this witness is hearsay in nature and is based on enquiries made with accused No. 2. His testimony can be relied upon to the extent deceased Sardarsingh left for village Mhasala with accused No. 2.

8. PW-4 Kailash Pawar-Exh. 37 was the scribe of the Saudi Pavties (agreements) dated 29-5-2009. The same are at Exhs. 38 & 39 being written by said witness. PW-2 Mahendra Naik has been examined below Exh. 34. He was the son-in-law of Sardarsingh. He had accompanied PW-1 first to Jamthi village and thereafter to Mhasala. This witness has stated that appellant No. 1 had told them at Dhad Bus Station on 25-12-2009 that Sardarsingh had collected his dues and left

village Mhasala. He has further narrated about the body of the deceased being found on 3-1-2010.

In his cross examination this witness has stated that appellant No. 1 on being asked for proof of payment made to Sardarsingh had produced three Sauda Pavties. The same were, however, torn. Though this was stated to the police, the same had not been recorded. He has further stated that the distance between the village Jamthi and village Mhasala was about 30 kms.

The deposition of this witness corroborates the deposition of PW-1 to the extent that they had learnt from accused No. 2 that Sardarsingh had left Jamthi for Mhasala on 20-12-2009 and that appellant No. 1 told them that payment had been made to Sardarsingh.

9. PW-5 Uttam Taide was examined vide Exh. 43. He was the Police Patil of village Mhasala and he has stated that he along with the police personnel had enquired about appellant No. 1 and had thereafter gone to his agricultural field. He has referred to the seizures effected on 4-1-2010 and 5-1-2010. In his cross examination, it has been suggested that his father and the father of appellant No. 1 had agreed to purchase agriculture land of one Bhagubai, but the father of appellant No. 1 had purchased it exclusively in his name. This suggestion was accepted by said witness to be correct.

10. PW-6 Pandurang Apar was examined below Exh. 44. He acted as panch witness for the inquest panchanama and spot panchanama. In his cross examination, he has admitted that he did not go through the contents of both panchanamas and had signed the same on the request of Police Patil. PW-7 Keshavrao Taide was examined vide Exh. 47. He has stated that on 20-12-2009 while going towards his field, at village Mhasala, on motorcycle, he had given lift to appellant No. 2 Vilas. He has stated that his agricultural land was adjacent to the land of the appellants and hence, he had dropped Vilas on a road leading to his field. He was carrying meals with him. In his cross examination, he has admitted that on many earlier occasions, he had given lift to appellant No. 2.

11. PW-8 Bhimrao Jadhav-Exh. 49 was panch witness with regard to the seizure panchanama dated 4-1-2010. He has stated that the police personnel along with the panch witnesses had gone to the field of appellant No. 1 and in the shed on said field, the quilt, Dhoti both having blood stains, spade and hoe were shown to him and they were accordingly seized. Perusal of spot panchanama-Exh. 50 reveals that the same was conducted in Gat No. 91 of village Mhasala belonging to the appellant No. 1. In his cross examination, this witness has stated that the police had reached to the spot before them. It is further admitted that he was called by the Police Patil while passing by the road and that he had signed the seizure panchanama on the say of the Police Patil.

12. PW-9 Bhagwan Jadhav Exh. 51 was panch witness for the panchanamas dated 5-1-2010 and 6-1-2010. He has, however, denied that any confessional statement was made by appellant No. 1 and appellant No. 2 in his presence. Said

witness was declared hostile and was cross examined by the prosecution. This witness has, however, admitted his signatures on Exh. 52 and 53.

In his cross examination by the appellants, he has stated that it was correct to say that none of the accused gave any confessional statement in his presence and that the memorandums and panchanamas were signed on the dictates of the police.

13. PW-10 Dr. Wankhede was examined vide Exh. 61. He has stated that he had conducted the postmortem examination on Sardarsingh and had noticed seven external injuries on the body. He has stated that in his opinion death occurred due to extensive external haemorrhage. He has further opined that the injuries could have been caused by the axe that was produced before the Court. In his cross examination, this witness has stated that he had opined on 6-2-2010 that the death of Sardarsingh had occurred 10 to 15 days before 3-1-2010. He has further stated that on account of decomposition of the body, the probable date of death was cited by him approximately.

The homicidal death of Sardarsingh stands proved in view of the post-mortem report.

14. PW-11 Akiloddin Qazi has been examined vide Exh. 66. He was the Head Police Constable at Dhad Police Station. He has stated that on 3-1-2010, he along with other police officials had been to Mhasala village. Thereafter, they visited the agricultural land of appellant No. 1. They noticed a pit and dunghill on one site. They also noticed a heap of thorns the dunghill and a stone was put on the thorns. After removing stones and thorns a foul smell emanated from the said spot. On digging said spot with the help of spade, they found a dead body and the same was identified as that of Sardarsingh. In his cross examination this witness has admitted that when they had visited the agricultural field, they also searched the cattle shed, hutment and other structures.

15. PW-12 Dilip Pote was also attached to Dhad Police Station. He has also narrated the removal of dead body of Sardarsingh. The same was thereafter sent for postmortem examination. He has stated that appellant No. 1 was arrested on 3-1-2010 and appellant No. 2 was arrested on 4-1-2010. This witness has also referred to the seizure of axe, blood stained Dhoti, spade and hoe. He has also referred to the seizures made on 6-1-2010.

In his cross examination, he has stated that the agricultural field from where the body was discovered was about 1 km away from village Mhasala. He has stated that the said spot was accessible to others also. He has further admitted that on 3-1-2010, they had inspected the cattle shed, hutment along with the field. They, however, did not come across any objectionable thing in the cattle shed or the hutment. He has further stated that 7/12 extract of the land from where the body was found had not been collected. He was also referred to certain omissions in the deposition of PW-2. From the deposition of this witness also, it is clear that the Investigating Officer had on 3-1-2010 itself inspected the cattle shed,

hutment along with the agricultural field, but they did not come across any objectionable thing there.

16. PW-13 Ravindra Nilakje-Exh. 71 was the officer who had taken over investigation in aforesaid crime from PW-12. He has referred to sending seized articles to the Chemical Analyzer. He has referred to the Chemical Analyzer's report at Exh. 72.

17. In the statement recorded u/s 313 of the Code, appellant No. 1 has stated while answering question No. 26 that as he was on cross terms with the village Police Patil, he had been falsely implicated. Similar answer has been given by appellant No. 2, his son in response to question No. 25 put to him. Thus, besides denial, the appellants have stated that they had been falsely implicated at the instance of the village Police Patil.

18. The above material on record indicates that there is no eye witness to the aforesaid crime. The case of the prosecution is based on the premise that the deceased Sardarsingh had to recover an amount of Rs. 1,62,000/- from appellant No. 1 on account of sale of cattle to him. Sardarsingh had, therefore, left for village Mhasala on 19-12-2009 from Dongargaon. He had first gone to village Jamthi and it is the case of the prosecution that he had halted at the place of original accused No. 2 on 19-12-2009. It is further the case that Sardarsingh had informed his son Shersingh on telephone that he would be leaving village Jamthi for village Mhasala along with the original accused No. 2 on 20-12-2009. It is thereafter that Shersingh lost contact with his father.

The prosecution case and the material on record will have to be examined to determine as to whether the prosecution has succeeded in proving that:

- (a) Sardarsingh had reached village Mhasala on 20-12-2009;
- (b) that there he had met appellant No. 1 and appellant No. 3 and he was last seen in their company; and
- (c) on account of Sardarsingh being last seen with the appellants, it was for them to explain about his disappearance and subsequent death.

19. From the deposition of PW-1 Shersingh, PW-2 Mahendra Naik and PW-3 Jeevan Pawar, it is clear that these witnesses have stated that on 19-12-2009 Sardarsingh was at village Jamthi with original accused No. 2 and that he was to leave for village Mhasala on 20-12-2009. These statements are based on phone call said to be received by PW-1 Shersingh on 20-12-2009. As per deposition of PW-1, this phone call was made when Sardarsingh had left village Jamthi for village Mhasala. There is, therefore, no material on record to conclude that Sardarsingh had in fact, reached village Mhasala and had contacted appellant no. 1. No doubt in the cross examination of PW-3 Jeevan he has stated that appellant No. 1 had told him that Sardarsingh had collected his dues on 20-12-2009 and had left for village Golegaon. This is, however, hearsay evidence. He has further stated that though this was stated to the police, he did

not know why the same was not recorded in his statement.

Thus, in absence of any independent evidence on record, it is difficult to come to the conclusion that Sardarsingh had in fact, reached village Mhasala from village Jamthi on 20-12-2009. There is no independent witness from village Mhasala who has been examined by the prosecution who had last seen Sardarsingh with appellant Nos. 1 & 2 at said village on 20-12-2009 or thereafter. Though PW-5-Police Patil of village Mhasala has been examined, he has referred to his role on 3-1-2010 and subsequent investigations. PW-1 has admitted in his cross-examination that his father did not have a cell phone. Thus, there is no material whatsoever on record to hold that Sardarsingh had in fact, reached village Mhasala and was thereafter last seen in the company of the appellants. This is the first circumstance in the chain of events which was required to be proved beyond reasonable doubt especially when the case of the prosecution is based on circumstantial evidence. However, said circumstance has not been so proved beyond reasonable doubt.

20. In so far as the Sauda Pavties (agreements) dated 29-5-2009 are concerned, they have been scribed by Kailash Pawar. Said receipts at Exh. 38 & 39 merely reveal that there was a transaction between the appellants and Sardarsingh with regard to purchase of cattle. It is stated that though said receipts were scribed by PW-4, it did not bear his signatures. These receipts would establish that there was a transaction for sale of cattle between Sardarsingh and the appellants with original accused No. 2 Ambadas standing as surety. This piece of evidence also does not further case of the prosecution as sought to be proved by it.

21. The next circumstance on the basis of which the appellants and the original accused No. 2 have been implicated is recovery of the corpse of Sardarsingh from the field said to belong to appellant No. 1. Similarly, blood stained quilt, Dhoti, axe and other equipments for burying the body have been recovered from the structure standing on the agricultural field of the appellant No. 1.

In so far as locating the body of Sardarsingh is concerned, PW-11 has stated that on 3-1-2010, he had first contacted the Police Patil of village Mhasala and had thereafter gone to the field of the appellant No. 1. He has stated that appellant No. 1 took them to his agricultural land and on inspecting the same minutely noticed a dunghill with a heap of thorns. On suspicion, the stones and thorns were removed after which foul smell was noticed. After digging further, the dead body of Sardarsingh was found. The discovery of the dead body of Sardarsingh is not on memorandum u/s 27 of the Indian Evidence Act. The statement on memorandum u/s 27 of the Indian Evidence Act in so far as appellant no. 1 is concerned, was recorded on 5-1-2010. In said statement, portion marked "A" was marked as Exh. 68 and the same refers to axe, spade, Dhoti and other equipment. It is further to be noted that PW-12-Investigating Officer has admitted that he had not collected the 7/12 extract of the land from where the body was recovered. Exh. 79 "A" is the 7/12 extract of field Survey No. 91 admeasuring 2 Hectares 36 R of Village Mhasala and the same stands recorded

in the name of one Sulochana Ugale. This fact is further fortified on perusal of Exh. 56 which is a report of the Circle Officer dated 13-1-2010 which states that the map along with spot panchanama is of Field Gat No. 91 belonging to one Smt. Sulochanabai Ugale. Said sketch map is at Exh. 57.

22. In the examination u/s 313 of the Criminal Procedure Code, the appellant No. 1 in answer to question No. 2 has specifically denied being an agriculturist. He has stated that he was a labourer and was producing the 7/12 extract of Field Gat No. 91, Mhasala. Similar answer is also given by appellant No. 2 against question No. 2 in his examination u/s 313 of the Criminal Procedure Code. Said 7/12 extract has been produced below Exh. 79-A showing that said field was owned by one Sulochanabai Ugale. It is thus clear that the body of Sardarsingh was discovered from agricultural field not belonging to the appellants. The body itself not having been discovered on memorandum u/s 27 of the Indian Evidence Act, it has not been proved beyond reasonable doubt that said dead body was recovered at the instance of appellant No. 1 and from his agricultural field.

23. In so far as the recovery of the axe, spade, quilt and Dhoti with blood stains is concerned, the same are said to be recovered on memorandum u/s 27 of the Indian Evidence Act dated 5-1-2010 and 6-1-2010. The aforesaid recoveries are said to have been made from the field in question amid bushes and trees. The clothes that were worn by the accused No. 2 were seized from his hut while the clothes worn by appellant No. 2 were seized from his house. According to PW-11 Akhiloddin, they had visited the residence of appellant Nos. 1 & 2 on 3-1-2010. Such directions were also given by PW-12 the Investigating Officer to PW-11. It is to be noted that PW-2 Mahendra has stated that on 3-1-2010 he along with PW-1 and the Police Constables had searched the field and cattle shed of appellant No. 1. The same is further corroborated by PW-11 who has stated that he along with the Police Patil had inspected the agricultural land minutely on 3-1-2010. He has further stated that the cattle shed, hutment and other structures were also seen when they visited the land. Similar stand is taken by PW-12 the Investigating Officer. It is to be noted that on 3-1-2010 when such search was taken, except the body of Sardarsingh, nothing else was noticed by the police and other persons accompanying them. The seizure of the axe, spade, quilt and blood stained Dhoti from a place which even according to the PW-12 was accessible to others, therefore, raises a grave doubt about the same. This is coupled with the admission of PW-8-Bhimrao in his cross examination that the police had reached the spot from where aforesaid articles were seized before he had reached there. He has further admitted that he was called by the Police Patil when he was passing by the road and that he had signed the seizure panchanama on the say of the Police Patil. These circumstances, therefore, render aforesaid seizure highly doubtful. The prosecution, therefore, has failed to prove beyond reasonable doubt the seizure of aforesaid articles on 5-1-2010 and 6-1-2010 especially when on 3-1-2010, as per the version of the Investigating Officer, search of the land and structures thereon including the cattle shed had been taken. The circumstance of seizure of the incriminating articles is,

therefore, not proved beyond reasonable doubt.

24. As stated above, the case of the prosecution being based on circumstantial evidence, each circumstance is required to be proved independently and only when all the circumstances proved independently are taken together that such chain would be complete and the same should be consistent only with the hypothesis of the guilt of the accused. We find, however, that the prosecution has failed to prove each circumstance leading to the guilt of the appellants independently beyond reasonable doubt. The material on record is not sufficient to prove beyond reasonable doubt the guilt of the appellants of having committed offence punishable u/s 302 of the Penal Code.

25. Another aspect of the matter that is required to be considered is that common charge-Exh. 11 was framed against three accused by the Sessions Court. The charge was that in furtherance of common intention, the accused had caused the death of Sardarsingh. According to the learned Counsel for the appellants, in such situation, where the charge pertains to common intention of the accused and one of the accused is acquitted for want of sufficient evidence against him, then the other accused cannot be convicted on the basis of said charge having element of common intention. In this regard, the learned Counsel has placed reliance upon a Division Bench judgment of this Court in the case of Irapa Kumbhar (*supra*).

In aforesaid case cited (*supra*), two accused were tried for having committed offence punishable u/s 302 read with Section 34 of the Penal Code. Charge was accordingly framed against both of them. The accused No. 2 therein was held entitled to be acquitted on the ground that the circumstantial evidence against him was not of such a nature so as to establish his guilt. It was in that context held that as both the accused were charged u/s 302 read with Section 34 of the Penal Code, the element of sharing common intention by both the accused was core of the charge. The Court, therefore, held that as accused no. 2 therein was held entitled for acquittal, the accused no. 1 could not be independently convicted for said offence in absence of there being no evidence to show that accused No. 1 independently committed the offence.

In the present case, the learned Judge of the Sessions Court has acquitted original accused No. 2 on the ground that there was no inculpatory evidence against him. The charge as framed is based on common intention of having caused death of Sardarsingh. Provisions of Section 34 of the Penal Code have been applied against accused. It was the case of the prosecution that from village Jamthi, Sardarsingh had accompanied original accused No. 2 and had gone to village Mhasala. The evidence against original accused No. 2 having been found insufficient, it is clear that it has failed to prove the common intention in so far as said accused is concerned. In view of aforesaid position, we find that the common intention between the accused having not been duly proved and there being no independent charge, the conviction of the appellants even otherwise cannot be sustained.

26. In so far as reliance placed on the judgment of Mani (supra) is concerned, it was held by the Supreme Court in said case that discovery is a weak kind of evidence and cannot be wholly relied upon, nor can conviction be based upon such discovery.

In the present case, as we have noted above, the prosecution has failed to prove that the body of Sardarsing was last seen in the company of the appellants. Merely because it is the case of the prosecution that the body of Sardarsing was found in the field of appellant no. 1 and weapons with which the said offence was committed were found in said field and hutment, that by itself would not strengthen the case of the prosecution. There is a doubt created as regards ownership of the agricultural field in view of Exh. 79-A which is 7/12 extract of the field in question. Hence, only on the basis of discovery, the conviction of the appellants cannot be sustained.

27. Similarly, the Chemical Analyzer's report Exh. 72-75 and its contents have not been referred to the appellants in their examination u/s 313 of the Code. Hence, in view of the settled legal position as referred to in the decision of Pushpabai (supra), said C.A. report also cannot be used as evidence against the appellants.

28. The appellants in their examination u/s 313 of the Code have stated that they had been falsely implicated at the instance of the police Patil-PW-5 as they were on inimical terms with him. Similarly, they have denied that Sardarsingh had come to Mhasala on 20-12-2009.

The above defence appears probable in view of the material on record. In absence of any direct evidence linking the appellants with the disappearance and subsequent murder of Sardarsingh, they are entitled for the benefit of doubt.

We, therefore, find that the prosecution has failed to prove its case beyond reasonable doubt. The chain of circumstances leading to the guilt of the appellants has not been duly proved beyond reasonable doubt. The learned Judge of the Sessions Court erred in convicting present appellants for the offence punishable u/s 302 r/w Section 34 of the Penal Code. The conclusion arrived at by the trial Court of the entire chain of circumstances being established by the prosecution is found by us to be erroneous. The judgment under appeal, therefore, cannot be sustained. In the result, we pass the following order.

ORDER

[1] Appeal is allowed. The order of conviction and sentence is quashed and set aside.

[2] The appellant no. 1 is in Jail. He is directed to be released forthwith if not required in any other case.

[3] The appellant No. 2 is on bail. His bail bonds shall stand cancelled.