

(2017) 06 BOM CK 0056
In the Bombay High Court
Case No : 252 of 1998

STATE OF MAHARASHTRA

APPELLANT

Vs

ANAND

RESPONDENT

Date of Decision : 06-06-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 378\(1\)](#), [Section 378\(3\)](#) - Power to examine the accused - Appeal in case of acquittal - Appeal in case of acquittal<BR

Citation : (2017) 06 BOM CK 0056

Hon'ble Judges : S S Shinde, S M Gavhane

Bench : DIVISON BENCH

Advocate : S J Salgare, Satej S Jadhav

Final Decision : Dismissed

Judgement

1. This appeal is filed by the State, under section 378(1) and (3) of the Code of Criminal Procedure against judgment and order dated 22.05.1998 of acquittal of the respondents (accused Nos.1 and 2) for the offences punishable under sections 384, 302 and 201 read with section 34 of the Indian Penal Code (for short "IPC") passed by the Additional Sessions Judge, Aurangabad, in Sessions Case No.61 of 1996.

2. Since the accused No.1 died on 30.07.2004 during pendency of the appeal as per bailiff report on notice dated 18.08.2016, appeal stands abated against him.

3. The facts of the prosecution case are as under :. The complainant Babu Rajendra Shankarrao Kulkarni (P.W.1) and the deceased accused No.1 were respectively residing at Bibi, Tq. Lonar and Tilak Nagar, Aurangabad and accused No.2 was residing at Daregaon, Tq. and Dist.Jalna at the relevant time of the incident. Deceased Milind was son of P.W.1 and he was residing with P.W.1.

4. On 26.12.1993 P.W.1the complainant lodged First Information Report in

Jawahar Nagar Police Station, Aurangabad, alleging that on 25.12.1993 in the evening at 21.45 hours, he had a phone call at his house, he was told that the deceased ? his son has been going to Khultabad and that he would return to home on the next day in the morning. On his asking the name of the person, who had phoned him, it was told that he is Nitesh Joshi. Thereafter, on 26.12.1993 in the morning at about 11.50 hours, he had a phone call and he was told that in the compound of his house, a bag of his son has been left, that there is one chit in it and that he should act accordingly and in case he acts otherwise, there would be danger to the life of his son. Accordingly, one chit in Hindi language in red letters was found. It was written in the chit that his son is in their custody and in case he failed to give Rs.25,000/at a specified place, his son would be killed and that his pieces would be sent. Again on that day at about 12.35 hours he had phone call in frightened condition. It was probably by his son and he said that he would come till 13.00 hours and immediately the phone call was disconnected. Thereafter, he had third phone call at 13.30 hours and it was asked whether he has made arrangement of money or not? He told that in nobody's house this much amount is available and that as there was Sunday, banks were also closed and therefore some time is required to arrange the amount. Thereupon, immediately the phone was disconnected. He had fourth phone call at about 17=00 hours and again he was asked whether arrangement of money is made and thereupon he told him that the money would be given, but he may be allowed to talk to his son. But, one who had called him was not in a position to listen to him and finally he was told that if he wants his son alive, he should act as per the chit, which was left in the Narayan Hasnabadkar's Tea House, in front of Johar Lodge. The complainant (P.W.1) reached to the said Tea House at about 17=25 hours and as soon as he parked the scooter, the hotel owner asked him whether he is Kulkarni and there upon he said "Yes". He was given the chit and he asked the hotel owner on what basis he identified him. Thereupon, the hotel owner told him that one who had given the chit to him, had told him that he had phoned Shri Kulkarni and he (Kulkarni) would come and that chit should be handed over to him. Thereupon, when the complainant asked him in detail, the hotel owner told that two short persons of black complexion had come to him before some time and they had told him to give the said chit and that immediately they would be going to other place with his (complainant's) son. He suspected accused No.1 who was his tenant for some months and was working in the workshop of his son, who has been residing in Sahakar Nagar in Gajara Building with his maternal brother Akash Wayal. He also suspected hotel owner. Moreover, on the basis of initial two phone calls, he suspected accused No.1.

5. On the basis of above F.I.R., on the same day Crime No.264 of 1993 for the offences punishable under sections 363 and 384 read with section 34 of the I.P.C. was registered in Jawaharnagar Police Station by P.S.I. Mulak (P.W.15), who carried initial investigation. On 27.12.1993 P.S.I. Mulak arrested both the accused, seized dagger from the house of accused No.1 and obtained sample of

blood found in the house of accused No.1, after breaking open the door of said house and made separate panchanamas. Further investigation was carried by P.I. Mayal (P.W.17).

6. While the accused were in police custody, P.I. Mayal (P.W.17), the investigating officer on 27.12.1993 recorded the memorandum statements of both the accused that they would show the well along the nala near Khiwansara Park in which the dead body and the motor cycle were thrown and accordingly prepared separate panchanamas in presence of panchas Shaikh Nabab Hyder Patel (P.W.7) and Shaikh Karim Shaikh Hussain (P.W.13). So also, on the same day he visited the spot i.e. the well in which the dead body and the motor cycle were found and prepared panchanamas in presence of same panchas. Thereafter, on that day inquest panchanama of the dead body was prepared. The dead body was sent for postmortem examination. Dr. Anil Jinturkar (P.W.5) conducted postmortem examination and issued postmortem report. So also, P.I. Mayal (P.W.17) seized clothes of deceased except shirt of the deceased in presence of panchas Digambar Khake and Claivaji Gonsalves. On 27.12.1993 offence punishable under sections 302 and 201 of the I.P.C. was added in the crime already registered against the accused. Thereafter, on 28.12.1993 joint memorandum statement of both the accused that the shirt of the deceased is kept in the house of accused No.1, was prepared on 28.12.1993. Thereafter, he prepared panchanama of seizure of shirt of the deceased. P.I. Mayal (P.W.17) prepared panchanama of specimen handwriting of both the accused Nos.1 and 2 on 02.01.1994 in presence of Prashant Mahajan (P.W.14) and Jayant Karpe (P.W.11). He forwarded the specimen of said handwriting to the Handwriting Expert for comparing the same with the chit articles 13 and 14. He collected opinion of the handwriting expert with reasons of the expert. After completion of the investigation, chargesheet was submitted in the Court of Judicial Magistrate, First Class, Aurangabad against both the accused, who committed case to the Sessions Court, Aurangabad, which was then made over to the Additional Sessions Judge, Aurangabad. In the meanwhile, the accused were released on bail.

7. Charge was framed against both the accused for the aforesaid offences, to which they pleaded not guilty and claimed to be tried. Their defence as it appears from the trend of cross-examination of the prosecution witnesses and statement under section 313 of Code of Criminal Procedure, is of total denial. Accused No.1 stated that the deceased was senior to him and was helping him in studies. In vacation he was going to the garage of the deceased and out of misunderstanding false evidence is created against him. He never written any chit. Accused No.2 stated that he had come to Aurangabad in search of service.

8. The prosecution has examined 17 witnesses and relied upon memorandum panchanamas of the accused, other panchanamas referred earlier and Exh.53 opinion of hand writing expert. Considering the post mortem report and the evidence, the learned trial Court held that the prosecution has not proved the

offences against the accused for which they were charged and acquitted them of the said offences by the impugned judgment. Therefore, this appeal by the appellant/State against the said acquittal.

9. We have heard learned A.P.P. Mr. Salgare appearing for the appellant and Mr. Satej S. Jadhav learned counsel appearing for respondents/accused. The learned A.P.P. has submitted that there is no direct evidence and the case is based on the circumstantial evidence. According to him the prosecution has established the circumstances relied upon by it, which we would refer later on to avoid repetition. Therefore, according to him the impugned judgment of acquittal is not correct and hence by allowing the appeal the accused be convicted for the offences charged.

10. On the other hand Mr. Satej Jadhav, learned counsel appearing for the accused submitted that the circumstances relied upon by the prosecution are not established and thus supported the impugned judgment.

11. Since the appeal is against the acquittal, before examining the evidence, it is necessary to bear in mind the principles in this respect laid down by the Apex Court in the case of K.Venkateshwarlu Vs State of A.P. AIR 2012 SC 2955, wherein it has been held in para 5 thus:" xxxxxx If the view taken by the trial Court is a reasonably possible view, the High Court cannot set it aside and substitute it by its own view merely because that view is also possible on the facts of the case. The High Court has to bear in mind that presumption of innocence of an accused is strengthened by his acquittal and unless there are strong and compelling circumstances which rebut that presumption and conclusively establish the guilt of the accused, the order of acquittal cannot be set aside. Unless the order of acquittal is perverse, totally against the weight of evidence and rendered in complete breach of settled principles underlying criminal jurisprudence, no interference is called for with it. Crime may be heinous morally repulsive and extremely shocking, but moral considerations cannot be a substitute for legal evidence and the accused cannot be convicted on moral considerations xxxxx."

12. To prove homicidal death of the deceased, the prosecution has mainly relied upon the evidence of Dr. Anil Jinturkar (P.W.5), who conducted postmortem examination and issued postmortem report (Exh.24) and Chemical Analyser's report (Exh.59). Dr.Jinturkar deposed that he conducted postmortem on 28.12.1993 from 10.30 a.m. to 12.00 p.m. on the dead body of the deceased and he found following external and internal injuries : EXTERNAL INJURIES

(12) crap252.98

(1) An obliquely placed oval haematoma over left parietal region at vertex. It was 2" x 1" size bluish.

(2) An oval bluish haematoma over left parieto temporal region 1" away and anterior to injury No.1 near sagittal suture line. It was 2"x1" size.

(3) Irregular nibbling of the both the eyelids on either sides, nibbled tissue was whitish in appearance and devoid of vital reactions.

(4) Irregular nibbling of right ear pinna, tissue was pale whitish in appearance. No evidence of vital reaction. (5) Irregular nibbling of left ear lobules, tissue was pale white in appearance. (6) Alae of both nostrils were nibbled out at places leaving whitish tissue beneath.

(7) Both the lips showed nibbling in irregular manner. No evidence of vital reason at nibbled margins. (8) An obliquely placed faint yellowish (imprint abrasion) ligature mark over neck above the level of thyroid cartilage, encircling the neck, with evidence of crossing of posterior portion of neck, it was 12?" in length and ?" in width, margin of the ligature mark did not show echymosis, underlying tissue was pale in appearance, lymphnodes above the ligature mark were normal.

(9) An obliquely placed imprint abrasion i.e. ligature mark seen at left leg calf area, it was yellowish in appearance and 5?" x ?" in dimension, no vital activity noticed at the margins of the mark. (10) An oval whitish yellowish parchment like abrasion at dorsum of little finger of left hand, it was ?" x ?".

(11) Two oval whitish yellowish parchment like abrasion at right knee, located side by side, measuring 1" x ?" and ?" x ?" respectively. No vital reactions noticed. (12) Multiple whitish yellowish dried abrasions at left knee without any evidence of vital reaction.

(13) An oval whitish yellowish parchment like abrasion over left scrotum, 1"x?" size, no vital reactions noticed. Out of these, injury No.1 and 2 were antemortem and the remaining injuries were postmortem in nature.

INTERNAL INJURIES :

(1) Injuries under the scalp : Obliquely placed reddish subgaleal contusion seen at left parietal region at vertex and left temperoparietal region respectively beneath injuries No.1 & 2 of column No.17, these were 3"x2" and 2?"x1?" in dimension.

(2) Brain : Meninges showed reddish contusion at left parietal region at vertex and left tempero parietal region in localised manner. Brain showed reddish subarachnoid and subdural haemorrhage covering left parietal lobe, it was 60 ml in quantity. Bridging cortical blood vessels were ruptured and oval pinkish red contusion seen at left parietal lobe at its medial most area i.e. at vertex, it measured 2"x1" in dimension. The brain tissue at and around it was fragile, hemorrhagic areas seen in brain substance of left cerebral hemisphere scattered hemorrhages were also noticed in cerebellum pons and medulla on left side predominantly.

In the crossexamination the evidence of Dr. Jinturkar that he noticed above said injuries on the person of the deceased has gone unchallenged. He stated that the external injuries were corresponding to the internal injuries and said injury Nos.1

and 2 are sufficient to cause death of a person in the ordinary course of nature. There is no suggestion to the Doctor that the injury Nos.1 and 2, which were sufficient to cause death, were accidental. At the time of postmortem examination, Dr. Jinturkar had taken viscera. The Chemical Analyser's report Exh.59 of analysis of viscera shows that no poison was detected. It is nobody's case that death of the deceased was natural. In the above circumstances and having regard to the nature of injury Nos.1 and 2, which were sufficient to cause death as deposed by the Doctor, we hold that the prosecution has proved that the death of the deceased was homicidal. The Trial Court has rightly held so.

13. Now it is to be seen whether the accused are responsible for death of the deceased and that having knowledge that they have committed offence of murder, caused certain evidence of the said offence to disappear, by throwing dead body and motor cycle of the deceased in well and that they have committed offence of extortion.

14. There is no direct evidence to connect the accused with the crime and the case is based on circumstantial evidence. Therefore, before considering the circumstantial evidence it is necessary to refer the settled legal position as regards appreciation of circumstantial evidence laid down by the Apex Court in the case of Sharad Badrichand Sarda Vs State of Maharashtra AIR 1984 Supreme Court 1622, wherein it has been held that following conditions must be fulfilled before a case against accused based on circumstantial evidence can be said to be fully established:"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

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

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

(4) they should exclude every possible hypothesis except that one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

15. The circumstances relied upon by the prosecution to connect the accused with the crime are as under:(1) On 25.12.1993 and 26.12.1993 the complainant (PW1) had phone calls allegedly by accused No.1 demanding money.

(2) Chits articles 13 and 14 demanding money were allegedly sent by accused and Exh.53opinion of the hand writing expert.

(3) Accused Nos.1 and 2 made memorandum statements respectively Exh.29 & 31 that they would show well and recovery of dead body and motor cycle at their instance.

(4) Seizure of dagger from the house of accused No.1 as per panchanama Exh.37 and seizure of shirt of the deceased from the house of the accused No.1 as per panchanama Exh.22.

(5) Finding of blood stains on the shirt of deceased as per C.A. Report Exh.60.

16. Now, let us consider whether the prosecution has proved the aforesaid circumstances. To prove circumstance No.1, it has relied upon evidence of P.W.'s. 1,2 & 12. The evidence of P.W.1 Babu Kulkarni, father of the deceased is that on 25.12.1993 he had a telephone call at 09.45 p.m. and he was informed that the deceased has gone to Khultabad. He would come on the next day morning and the person who telephoned him told him that his name is Nitesh Joshi. His evidence further shows that on the next day i.e. 26.12.1993 at 11.50 a.m. again he had a telephone call and he was told that in the Court yard of his house, bag of his son is kept, there is a chit in the bag and he should act as per the said chit, else there is danger to the life of his son/deceased. P.W.1 found bag in the compound of his house. He further stated that thereafter on the same day he had telephone call at about 12.50 p.m. and as per said call he was asked whether arrangement has been made as per the said chit and he had told that he would arrange the amount. Moreover, P.W.1 has stated that at 02.30 p.m. again he had a telephone call and as per the said call he was told that one chit has been kept in the Hasnabadkar's Tea House and he should take the said chit and act as per the said chit. He stated that he went to the hotel owner and he was given the said chit (Exh.14). Further he stated that he was acquainted with accused No.1 as said accused was residing on rent in his house. He claims that as per telephonic talk it was voice of accused No.1. In the course of his crossexamination he has stated that the voice in the telephonic talk at 12.35 p.m. and 05.00 p.m. might be of accused No.1 and that he had suspicion about the voice of accused No.1. He stated that before lodging the F.I.R. Mr. Dahat had told him to put the currency notes given by him in the waste box, but he could not assign reason of the absence of the same in F.I.R. Exh. 14.

17. Neither in the F.I.R. Exh.14 nor in his deposition P.W.1 has specifically stated that there was demand of Rs.25,000/by accused No.1 by making him telephone call as per chit Article13. As noted above, P.W.1 has only stated that when there was telephone call to him at 2.30 p.m. on 26.12.1993, it was voice of accused No.1 and further he has stated that the person who had telephoned him at 12.35 p.m. and 05.00 p.m. on 26.12.1993 might be accused No.1. He stated that he had suspicion about voice of accused No.1. Thus, it cannot be inferred that the person who had telephoned P.W.1 on 25.12.1993 and 26.12.1993 was the accused No.1. Therefore, the evidence of P.W.1 is not sufficient to infer that accused No.1 phoned P.W.1 and demanded Rs.25,000/from him.

18. P.W.2 Nitin Mulik, who is son in law of P.W.1, has stated in his evidence that on 26.12.1993 at 12.00 noon to 12.30 p.m. his wife Manjusha (P.W.12) informed him on phone that somebody has taken away deceased Milind and the chit was found in the compound of the house and about the telephone call of threatening.

He stated that he immediately came to the house of P.W.1 and at about 01.30 p.m. there was telephone call and he had attended the same. According to him by the said telephone call he was told that deceased Milind is in his (the person who called) custody and whether the amount of Rs.25,000/has been arranged or not. He informed to the person who called that there is Sunday and so much amount is not in the house and that he is arranging for the amount and that he may be allowed to talk to Milind. He asked the said person as to where the amount has to be kept and said person told him not to play more tricks. According to him he met Dy.S.P. Dahat and given him information and showed him the chit Article13. He stated that the voice on telephone was of his acquaintance and it was of accused No.1. In the crossexamination he stated that he was confirmed that voice on telephone was of accused No.1. Further, he stated that before Police that he has suspicion that the said voice was of accused No.1. He stated before police that he was confirmed that the voice on telephone was of accused No.1 and he had stated so before police, but he does not know whether the police recorded so or not.

19. P.W.12Manjusha Kulkarni wife of P.W.2 and sister of the deceased has stated about telephone call to P.W.1 on 25.12.1993 as deposed by P.W.1. Moreover, she has stated that on the next day, there was telephone call in the morning. She attended the same and she was told that one bag is kept in the compound of house and there is one chit in it and to act as per the said chit. She told the same to her father (P.W.1). According to her the voice of the said telephone call was of accused No.1. She further stated about finding of chit in the compound of house and two telephone calls at 12.30 p.m. 01.30 p.m., which were attended by her father and her husband and about telephone call at 5.30 p.m., which was attended by her father. In the crossexamination she stated that she had no suspicion that voice on the telephone was of accused No.1. She stated that she has not stated before police that she had suspicion that said voice was of accused No.1 and that she had told the said suspicion to her father. She has denied the portion marked "A" in her statement before police in this respect, so also she stated that she had not stated before police as per portion marked "B" in her statement before police that she told said suspicion to her father and they all had agreed to said suspicion. Both the portions marked "A" & "B" were proved by the Investigating Officer P.I. MayalP. W.17 and marked at Exh.68A. From the said portion marked Exh.68A, it can be said that P.W.12 had only suspicion about the voice of accused No.1 on telephone and her father had also agreed with her said suspicion. Therefore, it cannot be said that the voice on telephone call which she had attended on 26.12.1993 at the house of her father was of accused No.1.

20. Both P.W.2 and P.W.12 have not stated that the person who made telephone calls at the house of P.W.1, demanded Rs.25,000/. Moreover, the Investigating Officer did not collect call details from telephone office to show that really telephone calls were made by accused No.1 at the house of P.W.1 demanding money or amount of Rs.25,000/as alleged in the F.I.R. (Exh.14) or as mentioned in the chit Article13, which was left in the compound of house of P.W.1.

Therefore, the evidence of P.W.'s.1,2 and 12 referred to above is not sufficient to infer that the complainant P.W.1 had phone calls by accused No.1 for demanding money. As such, the prosecution has failed to prove circumstance No.1 in respect of phone calls to P.W.1 by accused No.1 as alleged.

21. As regards the circumstance No.2 allegedly accused wrote chits articles13 and 14, the chit article13 was found in the bag of the deceased in the compound of the house of the complainant while the chit article14 was given by the accused to P.W.3 ? owner of Tea House, who handed over the same to the complainant. P.W.1complainant has stated about finding of chit article13 in the compound of his house. P.W.3 has not supported the prosecution case that he handed over chit article14 to P.W.1. As per chit article13, an amount of Rs.25,000/was demanded from P.W.1 and that allegedly the deceased was in the custody of accused. As per chit article No.14, the accused gave message to P.W.1 to keep parcel in the dustbean in front of the house of Dy. Director, Animal Husbandry Office, else there would be pieces of his son ? the deceased. The prosecution has not properly proved the seizure of both the chits.

22. According to the prosecution, the Investigating Officer ? P.I. Mayal (P.W.17) had taken specimen of hand writing of accused No.2 in respect of chit article13 as per article16 and specimen of handwriting of accused No.1 in respect of chit article14, as per article17 in presence of panchas ? Prashant Mahajan (P.W.14) and Jayant Karpe (P.W.11) and panchanamas Exh.43 and 44 were prepared. Both the panchas have not supported the prosecution case, as they have denied that specimen of hand writings as above of the accused were taken by P.W.17. P.I. Mayal (P.W.17) has stated that he had taken specimen of hand writing of accused No.1 in presence of panchas as per panchanama Exh.43, as per articles17 and that he had taken specimen of hand writing of accused No.2 in presence of panchas as per panchanama Exh.44, as per article No.16. In the crossexamination, he stated that he does not remember whether specimen of handwritings of both the accused were taken. Infact, he should have stated that he had taken specimen of handwritings of both the accused in respect of both the chits article Nos.13 and 14. Therefore, when he has not stated about taking specimen handwritings of both the accused in respect of both the above said chits and when the panchas P.W.11 and P.W.14 have not supported the prosecution case, the panchanamas Exh.43 and 44 in respect of taking specimen of handwriting of accused Nos. 1 and 2 in respect of disputed chits articles13 and 14 are not sufficient to state that really P.I. Mayal had taken the specimen of hand writings of both the accused. In such circumstances, it cannot be said that P.I Mayal had taken specimen of hand writing of accused No.2 as per article16 and specimen of hand writing of accused No.1 as per article17. Therefore, comparison of said handwritings of accused Nos.1 and 2 with disputed handwritings in chits articles13 and 14 and Exh.53opinion of handwriting expert cannot be considered.

23. Assuming for the sake of arguments that P.I. Mayal (P.W.17) had taken

specimen of hand writing of accused No.2 as per article 16 and specimen of hand writing of accused No.1 as per article 17 and said specimen with disputed chits articles 13 and 14 were sent to the handwriting expert for examination, let us consider whether opinion Exh.53 given by the handwriting expert is of any help to the prosecution to connect the accused. P.W.16 Assistant State Examiner of Documents has deposed that on 15.02.1994 he received article Nos.13,14 and 15, six documents in article No.16, six documents in article 17 and six documents in article 18. He examined all the said documents and issued opinion Exh.53. Said opinion Exh.53 shows that the person who wrote red encircled writing marked S1 to S6 also wrote red encircled writings marked Q1. Said opinion further shows that red encircled writings marked Q1, Q3 and S7 to S18 i.e. specimen hand writing of accused No.1 and hand writings S7 to S18 have been written by one and the same person. Thus, on the basis of above opinion of hand writing expert, it can be said that chit article 13 is in the handwriting of accused No.2 and chit article 14 is in the handwriting of accused No.1, but when as observed above, panchas have not supported the prosecution case regarding taking specimen of hand writing of accused Nos.1 and 2 and when the evidence of hand writing expert is extremely weak type of evidence as held by the Apex Court in the case of S.P.S. Rathore Vs. Central Bureau of Investigation and Anr., 2016(9) J.T.316, wherein the Apex Court in para 30 observed thus : " 30. It is thus clear that uncorroborated evidence of a handwriting expert is an extremely weak type of evidence and the same should not be relied upon either for the conviction or for acquittal. The Courts, should, therefore, be wary to give much weight to the evidence of handwriting expert. It can rarely, if ever, take the place of substantive evidence. Before acting on such evidence, it is usual to see if it is corroborated either by clear, direct evidence or by circumstantial evidence."

Thus, Exh.53 ? opinion of handwriting expert, unless corroborated by clear or direct or by circumstantial evidence, cannot be relied upon to connect the accused with the offences alleged against them. Thus, the circumstance No.2 relied upon by the prosecution is of no help to the case of the prosecution. For the above reasons, we hold that circumstance Nos.1 and 2 are not sufficient to connect accused with the offence of extortion.

24. As regards the third circumstance that accused No.1 made memorandum statement Exh.29 and accused No.2 made memorandum statement Exh.31 that they would show the well in which dead body and motorcycle of the deceased were thrown and then panchanamas Exh.30 and 32 and spot panchanama Exh.33 were prepared is concerned, both the panchas Shaikh Patel (P.W.7) and Shaikh Hussain (P.W.13) have not supported the prosecution case. P.I. Mayal (P.W.17), the Investigating Officer has of course stated regarding memorandum statements as above of both the accused and preparing panchanamas referred to above in presence of the above panchas. But when the panchas of said panchanamas have not supported the prosecution case and when memorandum statement Exh.29 and 31 do not bear signatures of accused Nos.1 and 2 respectively, said memorandum statements are not reliable. This conclusion is

based on the decision of the Apex Court in the case of Jaskaran Singh Vs. State of Punjab, 1997 S.C.C. (Cri) 651, wherein while considering the recovery of revolver pursuant to disclosure statement of accused under section 27 of the Evidence Act, the Apex Court has held that when the panch witnesses were not examined at the trial, in absence of signature or thumb impression of the appellant /accused on the disclosure statement, no reliance could be placed upon alleged disclosure statement of the appellant/accused. Thus, the memorandum statements Exh.29 and Exh.31 of accused Nos. 1 and 2 and recovery panchanams of the dead body and the motor cycle Exh.30 and Exh.32 at the instance of accused Nos. 1 and 2 and spot panchanama Exh.33, as per which motor cycle and other two articles were seized are of no help to the prosecution to connect the accused with the crime.

25. As regards fourth circumstance regarding seizure of dagger from the house of accused No.1, as per panchanama Exh.37 and seizure of shirt of deceased from the house of accused No.1, as per panchanama Exh.22 is concerned, the Investigating Officer P.S.I. Mulak (P.W.15) seized the dagger from the house of accused No.1 as per Exh.37 in presence of panchas Radhakisan Shinde (P.W.8) and Vijay Kumar Patil (P.W.9). Both have not supported the prosecution case. Therefore, the uncorroborated evidence of P.S.I. Mulak is not sufficient to state that really dagger was seized from the house of accused No.1. As regards, seizure of shirt of the deceased is concerned, the Investigating Officer P.I. Mayal (P.W.17) and panch Ravindra Pachlohe (P.W.4) have stated about memorandum statement Exh.21 of the accused, which is a joint memorandum statement of the accused. In cross examination P.W.4 has stated that separate memorandum statements of accused No.1 and accused No.2 were prepared. Considering this evidence, evidence of P.W.4 regarding joint memorandum statement Exh.21 of both the accused is not believable. The Investigating Officer P.I. Mayal was required to prepare separate memorandum statement of both the accused. Therefore, his evidence regarding seizure of shirt article 5 of the deceased is not sufficient to state that really the accused made memorandum statement Exh.21 and that he seized the shirt article 5 of the deceased. Assuming for the sake of argument that the prosecution has proved that at the instance of accused No.1 dagger was seized and at the instance of both the accused, shirt article 5 of the deceased was seized, it is necessary to see whether seizure of said articles is of any help to the prosecution to connect the accused. The prosecution has relied upon report of Chemical Analyser in respect of analysis of above said shirt of deceased Exh.60 report of Chemical Analyzer shows that blood of group "A" was found on full manila of the deceased allegedly seized as per panchanama Exh.22. Chemical Analyser's report (Exh.63) shows that blood group of the deceased was "A". However, when as observed above, the prosecution has not properly proved the seizure of shirt article 5 circumstance of finding of stains of blood of group "A" of the deceased on the shirt article 5, is not sufficient to connect either of the accused with the crime.

26. Thus, for the reasons discussed above, circumstances Nos. 1 to 5 relied upon

by the prosecution are not established by the prosecution and they are not sufficient to draw conclusion of the guilt of the accused as said circumstances have not passed the tests laid down by the Apex Court in the case of Sharad Badrichand Sarda (Supra). Another aspect to be noted is that the allegations made by the prosecution are mainly against accused No.1. Moreover, the evidence which the prosecution has tried to adduce is also against accused No.1, who is dead and against whom appeal is abated. There is no evidence to show that accused No.2 shared common intention with accused No.1 in respect of allegedly demanding money from P.W.1 or allegedly committing offence of murder of the deceased, so as to say that accused No.2 has committed the alleged offences in furtherance of common intention with accused No.1.

27. The Trial Court has considered the evidence adduced by the prosecution and on proper appreciation of the evidence held that the circumstantial evidence relied upon by the prosecution is not believable. Further, the Trial Court has rightly held that mere suspicion against the accused cannot take place of proof. The Trial Court on ultimate analysis of the evidence held that the prosecution has failed to prove the offence under section 384, 302 and 201 read with section 34 of the IPC against the accused. The said view taken by the Trial Court is a reasonably possible view. There are no strong and compelling circumstances to rebut the presumption of innocence in favour of the accused, which has been strengthened by their acquittal. Needless to state that the impugned judgment and order of acquittal cannot be said to be perverse or against the weight of evidence. Therefore, there is no ground to interfere with the impugned judgment and order of acquittal of the respondents/ accused. Accordingly, the appeal being devoid of merits, same is liable to be dismissed. Accordingly, we dismiss the same. The bail bond of accused No.2 stands canceled.

28. The fees of Mr. Satej S. Jadhav, Advocate, who was appointed to represent respondents/accused, is quantified at Rs.7000/(Rupees Seven Thousand).