IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 536 OF 2021

Manjeetkumar Shriramrup Saroj ... Petitioner
Versus
The State of Maharashtra ... Respondent

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Ms. Tahera Abdul Rashid Qureshi for the Appellant.
Ms. Sangita E. Phad, APP for Respondent-State.

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CORAM : MANISH PITALE AND
SHREERAM V. SHIRSAT, JJ.

RESERVED ON : 2nd FEBRUARY 2026
PRONOUNCED ON : 9th MARCH 2026

Judgment (*Per Manish Pitale, J.*) :

. The appellant has filed this appeal being aggrieved by judgment and order dated 31st March 2021, passed by the Court of District Judge-9 and Additional Sessions Judge, Thane (hereinafter referred to as 'the Sessions Court'), in Sessions Case No.148 of 2018, whereby the Sessions Court has convicted the appellant for offences under Sections 302 and 379 of the Indian Penal Code, 1860 (IPC), to suffer rigorous imprisonment for life and also to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/- each on both counts.

2. The prosecution case in brief is that the first informant i.e. prosecution witness No.1 (PW1) – Sandesh Khandagale, was running a small restaurant by the name of Tanduri Corner and

Chinese Centre, near a bus stop at Purna-Bhiwandi, Thane, wherein he had three employees. One chef that is the deceased, and two waiters, one was the appellant and the other was a person named Kamlesh. It is the case of the prosecution that on 5th July 2017, in the evening, there was a quarrel between the deceased and the appellant. In fact, it is claimed that they used to have such quarrels intermittently. It was claimed that with the intervention of PW1, the quarrel was settled down and both of them agreed to work together. PW1 further stated that on 5th July 2017, at about 11:30 p.m. in the night, when he left the restaurant, the three employees were together and that as usual they stayed back in the restaurant during the night. In other words, the prosecution claims that all the three employees used to sleep in the restaurant after the restaurant was closed for the day.

3. On 6th July 2017, at about 6:00 a.m. in the morning, PW3-Shoibuddin, who used to run a pan shop near the restaurant, called PW4 i.e. the brother of PW1, on his mobile, and told him that the chef that is the deceased had been injured and that he along with his brother PW1 should come immediately to the restaurant. Consequently, PW1 and his brother PW4, as also their brother Kalpesh, all three of them went to the restaurant in the morning at about 6:10 a.m. They found that the third employee i.e. Kamlesh was standing outside the shop and that the shutter of the shop was half open. When they entered the shop, they found that the chef was in a badly injured condition, lying in a pool of

blood on the floor. The forehead of the injured person was bleeding profusely and a gas cylinder nearby had bloodstains on it. It is claimed that when PW1-Sandesh his brother PW4-Bhavesh and the said pan shop owner PW3-Shoibuddin reached near where the injured was lying, the injured chef told the three persons that the appellant had assaulted him with the gas cylinder, resulting in the serious injuries. It is further claimed that the Police was informed and the injured was shifted to the hospital. But, he died at about 8:30 a.m. in the morning.

4. In this backdrop, the FIR was registered in the afternoon on 6th July 2017 and investigation was undertaken. The police suspected the appellant as the person responsible for the injuries suffered by the victim and ultimately traced him to Allahabad from where he was arrested and brought to Thane to face trial. The charge was framed for offences under Sections 302 and 379 of the IPC. The prosecution examined 13 witnesses to prove its case.

5. PW1-Sandesh was the first informant. PW2-Shailesh was the *panch* witness for recovery of bloodstained clothes of the appellant. PW3- Shoibuddin was the pan shop owner, who had informed PW4 in the morning on 6th July 2017 about the fact that the victim was lying in an injured condition in the restaurant. PW4 was the brother of the first informant i.e. PW1. PW5 was the *panch* witness for the spot *panchanama*. PW6 was the owner of a neighbouring shop, who also deposed in support of the prosecution case.

6. PW7 was the Doctor who had conducted the postmortem examination. PW8 was the owner of the shop, wherein the restaurant was being run by PW1. PW9, PW10 and PW11 were the Investigating Officers. PW12 and PW13 were the Nodal Officers of the mobile service providing companies, concerned with the mobile phones that were recovered during the course of investigation.

7. The appellant examined a defence witness, who was his brother in law, in order to prove his defence, that after having quarrelled with the deceased, the same evening he had left the job and he had gone to his native place in Uttar Pradesh.

8. After taking into consideration the oral and documentary evidence on record, the Sessions Court found that although this was a case of circumstantial evidence, the prosecution had been able to prove each of the circumstances beyond reasonable doubt and that such circumstances formed a chain which pointed towards the guilt of the appellant. On this basis, by the impugned judgment and order dated 31st March 2021, the appellant stood convicted and sentenced in the aforesaid manner.

9. Ms. Tahera Abdul Rashid Qureshi, learned counsel appearing for the appellant, invited attention of this Court to the evidence of the prosecution witnesses, as well as the sole defence witness. It was submitted that even if the evidence of the prosecution was taken into consideration and in that context, the documents relied upon by the prosecution were perused, the said

material was not enough to bring home the guilt of the appellant. It was submitted that the circumstances upon which the prosecution relied, did not form a chain and that in any case, the circumstances individually were not proved beyond reasonable doubt.

10. It was submitted that the last seen theory propounded by the prosecution was not proved beyond reasonable doubt, as the only witness to depose in support thereof was PW1 i.e. the owner of the restaurant. The said witness had simply stated that on 5th July 2017, all the three employees, including the appellant and the deceased had slept in the restaurant after the restaurant had been closed for the day. Other than this statement, there was no other corroborative material to support the last seen theory. It was submitted that the appellant in his defence had examined the defence witness who was his brother in law. He had clearly stated that the appellant himself had claimed that due to quarrels at the workplace, he had left the job and that he wanted to go back to his native place. The defence witness clearly stated that he had dropped the appellant at the railway station in the wee hours of 6th July 2017 for boarding a train to go to the native place. It was submitted that in such circumstances, the last seen theory propounded by the prosecution was not proved beyond reasonable doubt and therefore, the prosecution case on that count can be said to be rendered seriously doubtful.

11. It was further submitted that one of the major circumstances

on which the prosecution relied was the oral dying declaration allegedly given by the deceased in the presence of PW1, PW3 and PW4. It was submitted that all the three witnesses claimed that when they saw the victim lying in a pool of blood on the floor of the restaurant, with serious injury on his head, he was conscious and that he stated that the appellant had assaulted him with the gas cylinder. It was submitted the said claim was belied by the fact that there was no medical evidence placed on record. No treatment papers were placed on record. The document at Exhibit 69, being a postmortem requisition form, recorded that the victim was brought in an unconscious condition. It was further stated that although there was no endorsement of the hospital on the document at Exhibit 70, it was nonetheless endorsed therein that the patient i.e. the victim was unconscious and not able to give statement at 7:30 a.m. in the morning on 6th July 2017. On this basis, it was submitted that the statement of all the three witnesses i.e. PW1, PW3 and PW4 that the victim had given an oral dying declaration to them was wholly unbelievable. Reliance was also placed on the statement made by PW7-Doctor in cross-examination that if a person suffered the injuries that were inflicted upon the victim, he would either be unconscious or he would die on the spot. On this basis, it was submitted that the circumstance of oral dying declaration was not proved by the prosecution at all.

12. It was further submitted that the prosecution failed to prove

the arrest of the appellant from Allahabad and the recovery of three mobile phones which formed a crucial link in the prosecution case. It is further submitted that *panch* witnesses who were allegedly present when the mobile phones were recovered and when the appellant was arrested at the Allahabad, were not examined by the prosecution, thereby demonstrating that the said fact was not at all proved. Even with regard to recovery of bloodstained clothes of the appellant, it was submitted that such clothes were allegedly recovered from an open place having access to the general public.

13. It was vehemently argued that the role of Kamlesh i.e. the third employee, who was, even according to the prosecution, present at the place of the incident, was not examined as a witness and he was not even arraigned as an accused. This was a crucial missing link for which the prosecution had no explanation. By referring to the evidence of PW12 and PW13 i.e. the Nodal Officers of the mobile service providers, it was submitted that the details of the persons in whose names the mobile phones were registered, demonstrated that no link was established by the prosecution between the said mobile phones allegedly recovered from the appellant and the appellant himself. It was submitted that the Sessions Court completely failed to appreciate these aspects of the matter and proceeded to hold the appellant guilty by accepting the direction in which the investigation was conducted and the manner in which evidence was placed before the Court on behalf

of the prosecution. It was submitted that the appellant himself had honestly stated that there was indeed a quarrel on the previous evening between him and the deceased, but it was emphatically stated that the same was the reason why he had left the job and in fact, taken the train in the wee hours of 6th July 2017 to go to his native place. The defence witness who was examined on behalf of the appellant, corroborated the version of the appellant and therefore, it can be demonstrated that the Sessions Court in the present case came to conclusions without taking into consideration the fact that crucial links in the prosecution story were missing and that a plausible defence was in fact placed on record on behalf of the appellant. On this basis, it was submitted that this Court may consider allowing the appeal and setting aside the impugned judgment and order passed by the Sessions Court.

14. In support of the aforesaid submission, the learned counsel for the appellant relied upon judgment of this Court in the case of *Mohd. Sattarul Najrul Mulla vs. The State of Maharashtra,* **2017 ALL MR (Cri) 577**, for the proposition that when the victim in the present case was demonstrated to have suffered such serious injuries that he could not have made any statement, much less an oral dying declaration to the witnesses, the appellant ought to have been acquitted. Reliance was also placed on judgment of this Court in the case of *State of Maharashtra vs. Santosh, son of Madukar Kadam,* **2017 ALL MR (Cri) 1642**, in support of the proposition that the recovery in the present case was not

believable, for the reason that the bloodstained clothes of the appellant were recovered from an open place accessible to all. It was further submitted that in any case, the CA reports did not support the prosecution case. On this basis, it was submitted that the appeal may be allowed.

15. On the other hand, Ms. Sangita Phad, learned APP supported the impugned judgment and order of the Sessions Court. It was submitted that the Sessions Court had taken into consideration all the circumstances that were brought on record by the prosecution. It was found that there was a chain formed by these circumstances and that each circumstance had been proved beyond reasonable doubt. The learned APP relied upon the circumstances of last seen together, motive, oral dying declaration, recovery of mobile phones from the appellant, recovery of bloodstained clothes at the behest of the appellant and specifically, the conduct of the appellant in absconding immediately after the incident took place.

16. The learned APP specifically relied upon evidence of the prosecution witnesses i.e. PW1, PW3 and PW4 for proving the oral dying declaration. It was submitted that the last seen theory was clearly proved in the light of the evidence given by PW1 and supported by other prosecution witnesses. Reliance was placed on the evidence of three Investigation Officers i.e. PW9, PW10 and PW11, to prove that the appellant was arrested from Allahabad and that mobile phones were recovered from him, which included

the mobile phone of the deceased, and the said Kamlesh. It was highlighted that the appellant himself in response to questions put to him during recording of the statement under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.), conceded to his having been arrested from Allahabad and the fact that he did have a quarrel with the deceased in the evening prior to the date of the incident. This according to the learned APP also proved the motive.

17. It was submitted that in the face of the clear evidence of PW1, PW3 and PW4 about the oral dying declaration given by the deceased, there was no scope for the defence to raise any doubt about the same, only on the basis that there was lack of proper documentary material to show the treatment given to the deceased. It was submitted that when direct evidence of the aforesaid three witnesses was very much available on record, there was no reason for the Court to look for any other evidence, much less medical evidence. It was submitted that as per settled law, the aforesaid direct evidence would certainly prevail over medical evidence.

18. Reliance was placed on judgment of the Supreme Court in the case of *Trimukh Maroti Kirkan vs. State of Maharashtra,* (2006) 10 SCC 681, for the proposition that when such incidents take place within the privacy of a house or within the four walls of a confined place, wherein only the accused and the victim are present, an unnecessarily heavy burden cannot be placed upon the

prosecution to prove its case. The learned APP relied upon Section 106 of the Evidence Act, to contend that the burden was entirely on the appellant in the present case, to explain as to what happened in the restaurant during the intervening night of 5th July 2017 and 6th July 2017. Since, the appellant had no plausible explanation for the same, the guilt of the appellant was clearly proved.

19. Reliance was placed on judgment of the Supreme Court in the case of *Laxman vs. State of Maharashtra,* **(2002) 6 SCC 710**, with regard to the veracity of an oral dying declaration. On the basis of the aforesaid submissions, it was submitted that in the present case, there was no question of setting aside or interfering with the impugned judgment and order passed by the Sessions Court and that therefore, the appeal deserved to be dismissed.

20. Having considered the rival submissions, it is evident that this is a case of circumstantial evidence. There is no direct evidence and therefore, the prosecution is required to prove each circumstance beyond reasonable doubt and the circumstances should form a chain that point towards only the hypothesis of guilt of the accused. The Supreme Court in the case of *Sharad Birdhichand Sarda vs. State of Maharashtra,* **(1984) 4 SCC 116,** in paragraph 153 held as follows :

> *"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
>
> *(1) the circumstances from which the conclusion of guilt is to*

be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793, where the observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(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 the 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."

21. The evidence in the present case will have to be analyzed by applying the aforesaid principles to ascertain whether the prosecution has indeed made out its case. The Sessions Court found the appellant guilty on the basis of the oral and documentary evidence available on record.

22. The circumstances upon which the prosecution has relied are last seen theory, oral dying declaration of the deceased, recovery of bloodstained clothes of the appellant, recovery of mobile

phones from the appellant, when he was arrested in Allahabad, motive and the conduct of the appellant in absconding after the incident took place.

23. For each of the aforesaid circumstances, the prosecution has relied upon prosecution witnesses. As regards the last seen theory, the prosecution has heavily relied upon the evidence of PW1-Sandesh i.e. the first informant in the present case. He was the owner of the aforesaid restaurant where the incident took place. As per the deposition of the said witness there were three employees in the restaurant, the deceased Ajeet Roy @ ustad and two waiters i.e. the appellant and one Kamlesh. In his deposition, PW1 stated that all the three employees used to sleep in the restaurant after the restaurant was closed for the day. It was stated that even on 5th July 2017, when the said witness left the restaurant at about 11:30 p.m, all the three aforesaid employees, including the appellant and the deceased slept in the restaurant. This is the basis for the prosecution to claim that the deceased was last seen with the appellant at about 11:30 p.m. on 5th July 2017 and that early next morning, at about 6:00 a.m. on 6th July 2017, a phone call was received from PW3-Shoibuddin that the deceased was found lying on the floor of the restaurant in a pool of blood with serious injuries to his head. On this basis, it was claimed that the appellant was responsible for the said incident, as he was last seen together with the deceased. The Sessions Court believed the aforesaid evidence to hold against the appellant.

24. It is crucial to note that even according to the said witness PW1, all three employees used to sleep in the restaurant after the restaurant was closed for the day and that this also happened in the night on 5th July 2017. It was not as if only the appellant and the deceased were last seen together and they had slept in the restaurant on the intervening night between 5th July 2017 and 6th July 2017. The evidence clearly shows that the third employee i.e. Kamlesh was also last seen together with the deceased as well as the appellant. The theory of last seen together equally applies to Kamlesh also. But, the said Kamlesh was neither made an accused nor examined as a witness by the prosecution. In fact, it is claimed that when PW1 along with his brother PW4 reached the restaurant in the morning on 6th July 2017, after receiving intimation from PW3, they saw Kamlesh in the restaurant. There is no explanation as to what steps the investigating officer undertook to determine role of the said Kamlesh. It is merely stated that according to Kamlesh, he could not intimate about the incident because the appellant had taken mobile phones of the deceased as well as Kamlesh after the incident. There is no evidence on record to show that Kamlesh, who was also sleeping in the very same restaurant, got up and found the appellant having assaulted the deceased. There is no statement of Kamlesh on record and he was not examined as a witness by the prosecution.

25. In such circumstances, the last seen theory of the prosecution is not supported by the evidence on record to the

extent that only the appellant and the deceased were last seen together in the night on 5th July 2017. This is crucial, for the reason that role of Kamlesh has not come out with clarity and the only argument made on behalf of the prosecution was that adverse inference ought not to be drawn because summons were issued to Kamlesh, but he could not be found and therefore, the prosecution could not examine him. But, there is nothing on record to show as to why the investigating authority did not explore the angle of the role of Kamlesh, during the intervening night between 5th July 2017 and 6th July 2017, when according to the prosecution and witness PW1, he was also last seen together with the deceased. Therefore, we find that the nature of evidence of PW1 being the sole witness for the last seen theory, does not clinchingly prove that it was only the appellant, who was last seen with the deceased before he was found in a seriously injured condition in the morning on 6th July 2017. In any case, last seen theory as a circumstance on its own cannot be the basis of conviction, as it is one of the circumstances forming a chain in the case of circumstantial evidence. We find that the prosecution in the present case has not been able to prove beyond reasonable doubt that it was only the appellant, who was last seen together with the deceased in the night on 5th July 2017.

26. The learned counsel for the appellant correctly relied upon judgment of this Court in the case of *Mohd. Sattarul Najrul Mulla vs. The State of Maharashtra* (supra), wherein this Court found

that in the said case, the evidence of the person who was sleeping with the deceased was necessary on the point as to whether the accused therein were present till he and the deceased slept. In the present case, since the prosecution proceeded on the basis that all the three persons i.e. the appellant, deceased and the said Kamlesh were sleeping together, the evidence of Kamlesh was most crucial to know as to whether the appellant and the deceased were together till all of them had slept. It is all the more crucial that the appellant claims that he had left the place in the backdrop of the quarrels he was having at the work place and the very same night he had left for his native place. This is another factor which the Sessions Court failed to appreciate.

27. The other circumstance on which the prosecution has placed much reliance is alleged oral dying declaration of the deceased. Even according to the prosecution, this is not a case where the dying declaration was recorded as per procedure before a Magistrate after a Doctor gave fitness certificate to the victim for giving such a statement. This was a case where the witnesses claimed that the deceased told them certain facts.

28. The witnesses relied upon by the prosecution for the oral dying declaration are PW1, PW3 and PW4. According to these three witnesses, when they saw the deceased lying in a pool of blood on the floor of the restaurant, they approached him and he stated that the appellant had assaulted him with the gas cylinder. All three witnesses did state about the serious injuries suffered by

the victim on his head and that there was blood all over the floor when they saw the victim in the restaurant. In this context, the evidence of PW3 is crucial. He is the first person who claims to have seen the deceased lying on the floor of the restaurant in a pool of blood and the said Kamlesh standing next to him. This was at about 6:00 in the morning. PW3 claims that he asked Kamlesh as to why he had not called PW1 i.e. the owner of the restaurant, when Kamlesh told him that the appellant had assaulted the victim with the gas cylinder and he had run away with Kamlesh's phone and therefore, he could not inform PW1. PW3 claims that thereafter he called PW4 i.e. brother of PW1 and told him that the victim was seriously injured. It is therefore claimed that when PW1-Sandesh and PW4-Bhavesh came to the restaurant and they along with PW3 went near the victim and asked him, the victim allegedly told them that the appellant had assaulted him. PW3 was the first person on the scene and he did not state in his examination-in-chief that upon seeing the injured victim on the floor lying in a pool of blood, he was conscious or that PW3 made any attempt to interact with victim. It is also stated that only Kamlesh was with the victim at the point in time PW3 first came to the scene. No attempt was made by PW3 to ask the victim about what had happened. Kamlesh told him that the appellant had assaulted the victim with the gas cylinder. It is not even the case of the prosecution that Kamlesh was an eye-witness. As a matter of fact, Kamlesh was not even examined as a witness. He was also not arraigned as an accused, although, he was the only

person found with the victim lying in a pool of blood on the floor of the restaurant.

29. A perusal of the evidence of PW1 shows that according to him, when he along with PW3 and PW4 went inside the restaurant and asked the victim, he stated that the appellant had assaulted him with the gas cylinder. The evidence of PW4 shows that according to him, when he along with PW1 and PW3 went inside the restaurant and asked the victim, who was lying in a pool of blood, as to what had happened, the victim stated that when he was sleeping, the appellant had assaulted him with a gas cylinder. If the assault had occurred when the deceased was sleeping, how is it that he could state that it was only the appellant and not Kamlesh, who had assaulted him. Even according to the prosecution, Kamlesh was in the restaurant along with the appellant and the deceased throughout the night. This gives rise to doubt and it also demonstrates that another view is possible and as per settled law, if there are two views possible, the one that benefits the accused has to be accepted.

30. The prosecution has relied upon the position of law that when there is an ocular evidence, the same must prevail over medical evidence. There can be no quarrel with the said proposition. But, the said principle would operate with full force when there is direct evidence in the form of eye-witness having seen an incident or an assault as opposed to the claim of prosecution witnesses in the present case that the deceased told

them about the assault carried out by the accused (appellant). It is crucial to note that in the present case, the victim had suffered serious head injury and part of his skull was depressed and crushed by the blow. The prosecution failed to place on record the treatment papers of the deceased. The documents relied upon by the prosecution do not show existence of the treatment papers from the point in time the deceased was admitted to the hospital and his body was sent for postmortem. The only documents on record, brought to the notice of this Court, are Exhibits 69 and 70. Exhibit 69 is the postmortem requisition form, wherein the history of the deceased, when he was brought as a patient, records that he was assaulted by an employee at about 2:00 a.m. The deceased was unconscious with nasal bleeding and two episodes of convulsions when he was brought to the hospital. The general condition was poor and he was unconscious. The said document also recorded depressed injury over forehead. Exhibit 70 is a document which does not bear endorsement of the hospital at all, but it is a request made by the police constable to the medical officer to state as to whether the deceased was fit to give a statement. The handwritten endorsement on the said document records that the patient was unconscious and not able to give statement at 7:30 a.m. on 6th July 2017.

31. These documents are required to be considered with the evidence of PW7 i.e. the Doctor. The evidence of the Doctor PW7 shows that as per the details given in the postmortem report, the

following injuries were found on the body of the deceased :

> "1) CLW over forehead mid part extending from right eyebrow involving right eyebrow, frontal bone upto left eyebrow. Semicircular forehead compressed antero-posteriorly. Size 14cm x 1.5 cm x bone deep with depressed fracture of frontal and nasal bone at nasion.
>
> 2) Evidence of right black eye.
>
> The injury was ante-mortem in nature corresponding internal injuries.
>
> 3) Contusion of scalp underneath over frontal parital region.
>
> 4) Fracture depressed mid frontal bone and nasal bone.
>
> 5) Fracture cibriform plate. Fracture right orbital plate.
>
> 6) Subdural hemorrhage over bilateral frontal region."

32. PW7-Doctor stated that the head injury was due to heavy, hard and blunt impact. It had resulted in fracture of the skull, which led to the death. PW7-Doctor further stated that rigor mortis was well marked in the whole body when it was brought for postmortem and that rigor mortis in the whole body develops within 12 hours. The postmortem was conducted between 13:15 hrs and 14:30 hrs on 6th July 2017. It was specifically stated that considering when the body was brought for postmortem, the death of the deceased may have occurred approximately 12 hours prior to the postmortem. It was also stated by PW7-Doctor that a person having injuries as recorded in column Nos.17, 18 and 19, pertaining to surface wounds and injuries, as also internal injuries and injuries to the head, would show that person would be unconscious or he may have died on the spot.

33. Such evidence cannot be ignored by the Court and a rational analysis of the same leads to the conclusion that considering the nature of injuries, the fact that the assault was carried out by the gas cylinder, which had a heavy, hard and blunt impact, the evidence indicating that the assault had taken place about 10 to 12 hours prior to the postmortem, the victim would have been in no condition to make any statement, as claimed by the witnesses PW1, PW3 and PW4. The treatment papers have not been placed on record and the only two documents at Exhibits 69 and 70 sufficiently demonstrate that the deceased was not fit to give a statement. This creates a serious cloud of doubt about the claim of oral dying declaration. It would be unsafe to accept the said circumstance as having been proved beyond reasonable doubt.

34. In this context, reliance placed on behalf of the appellant on the judgment of this Court in the case of *State of Maharashtra vs. Santosh, son of Madukar Kadam* (**supra**) appears to be justified. In the said case also, the victim had suffered serious head injury and in that context, the trial Court had refused to accept the story of oral dying declaration given by the deceased. This Court did not find fault with the trial Court taking such a view in the matter and upheld the acquittal of the accused therein. In the present case also, we find that the evidence on record creates a serious cloud of doubt on the claims made by PW1, PW3 and PW4 that the deceased had stated to them that the appellant had assaulted him with the gas cylinder.

35. In this context, the timing of recording of the FIR needs to be taken note of. PW1, PW3 and PW4 claim after they saw the deceased in the said condition, they had informed the Police and further steps were taken in that regard. But, the record shows that the FIR was registered much later at 14:23 hrs on 6th July 2017. This may not be a factor to be considered as fatal to the prosecution. Nonetheless, the time gap between the point in time the Police was allegedly informed by the said witnesses and recording of the FIR after about 8 hours, is a factor that cannot be ignored. Having noticed that the appellant was missing, the said witnesses could have developed a suspicion about his involvement. The time gap in the registration of the FIR creates a doubt that in order to support the theory of involvement of the appellant, the claim of the deceased having told the said witnesses about involvement of the appellant, may have been floated. At least, the said sequent of events gives scope for the appellant to contend that the story was concocted that the deceased had told, while lying in a pool of blood on the floor of the restaurant, that the appellant had assaulted him with the gas cylinder. In such circumstances, we find that the crucial circumstance of the oral dying declaration cannot be said to have been proved beyond the reasonable doubt.

36. The next circumstance on which the prosecution has relied was recovery of bloodstained clothes. In support of the said circumstance, the prosecution relied upon evidence of PW2 i.e. the *panch* witness for recovery of bloodstained clothes, as also the

evidence of the investigating officer. We find that even if the evidence of the said witnesses is considered, the bloodstained clothes were found in an open space near a tree, which was accessible to the general public. As per settled law, such recovery is not believable and it cannot be a sole circumstance to hold against the appellant. Even otherwise, the Chemical Analysis (CA) reports show that the blood found on the clothes was human blood, but the blood group was inconclusive. The CA reports also show that the analysis of the blood sample of the deceased showed human blood with no details of blood grouping. Therefore, there is no evidence to establish that the blood allegedly found on the clothes of the appellant was the blood of the deceased. Hence, the aforesaid recovery is of no consequence and the said circumstance is also not proved beyond reasonable doubt.

37. The prosecution heavily relied upon recovery of the mobile phones from the appellant, when he was arrested in Allahabad. It was claimed that three mobile phones were recovered from the person of the appellant. One mobile phone was claimed to be that of the appellant, another of the deceased and the third mobile phone allegedly belonged to the said Kamlesh. It was vehemently argued on behalf of the appellant that the whole act of arresting the appellant at Allahabad was not proved as the *panch* witnesses taken by the concerned police officer to Allahabad, were not examined as prosecution witnesses and that the local witnesses in whose presence the recovery was undertaken, were also not

examined, as regards arrest of the appellant. We are unable to accept the said contention raised by the learned counsel for the appellant. This is simply for the reason that in his response to questions put to him during recording of his statement under Section 313 of the Cr.P.C., the appellant categorically stated that he was indeed arrested by the Police team at Allahabad, that he was produced before the Court for transit remand and he was also medically examined at Allahabad. Therefore, on the question of arrest from Allahabad, this Court is unable to accept the contentions raised on behalf of the appellant. But, even in the statement recorded under Section 313 of the Cr.P.C., the appellant stoutly denied recovery of any mobile phones from him when he was arrested at Allahabad.

38. Therefore, it is only the evidence of PW10-Investigating Officer about the alleged recovery of the three mobile phones from the appellant when he was arrested in Allahabad. But, it is crucial to note that the evidence of PW12 and PW13 i.e. Nodal Officers of the mobile service providers, shows that the sim cards of the mobile numbers attributed to the appellant and the deceased, were registered in the names of some third persons. The prosecution did not bring evidence on record to link these third persons with the appellant and the deceased. It was not explained as to how these mobile phones and the sim cards found therein were linked and traceable to the appellant and the deceased. In the absence of any such connecting material and evidence, the whole

theory of the mobile phones of the appellant, deceased and the said Kamlesh being found with the appellant, when he was arrested at Allahabad, collapses completely. There is no evidence on record to show as to on what basis the prosecution claimed that these three mobile phones belonged to the said three persons. In fact, this was the basis for the Sessions Court to have convicted the appellant for offence under Section 379 of the IPC. We find that the entire evidence of the prosecution claiming recovery of the three mobile phones from the appellant, when he was arrested at Allahabad, is deficient and therefore, the said circumstance is also not proved beyond reasonable doubt.

39. In any case, the prosecution failed to make any effort to place the tower locations of these mobile phones on record. If such material was placed on record, the movement of the appellant could have been traced and proved, in order to support the prosecution theory that he immediately absconded after assaulting the deceased.

40. The prosecution has heavily relied upon the evidence of the prosecution witnesses, including PW1 and PW4, to claim that in the evening on 5th July 2017, the appellant had a quarrel with the deceased. In the evidence of these witnesses, it was stated that the two were having quarrels while working in the restaurant. We find that even if that be so, the prosecution cannot claim that the quarrel between the two was the sole motive for the appellant to have assaulted the deceased in the aforesaid manner. It is to be

noted that the appellant has throughout stated that he was himself forced to leave the job and go to his native place in the light of the frequent quarrels at the work place i.e. the restaurant. Much emphasis was placed by the learned APP on the conduct of the appellant in absconding after the incident. The appellant has throughout claimed that he left the job, went to his brother in law, who helped him buy a ticket and board a train to leave for his native place. Both scenarios are possible, particularly in the light of the fact that the appellant did produce his brother in law as a defence witness. In his statement recorded under Section 313 of the Cr.P.C, the appellant throughout stated and stoutly claimed that he was falsely implicated. In fact, he stated that he had not slept in the restaurant on 5th July 2017 and that he was not aware about how the incident had taken place. As noted hereinabove, the presence of Kamlesh throughout the night in the restaurant is established and his role was not even explored by the investigating officers and the prosecution, thereby creating serious doubt about the sequence of events that took place on the intervening night between 5th July 2017 and 6th July 2017.

41. Although the learned APP submitted that the responses of the appellant in his statement under Section 313 of the Cr.P.C., demonstrated that he had admitted to certain crucial facts, we find that the responses of the appellant appear to be natural and consistent with his theory that he had left the restaurant, went to his brother in law and left for his native place, being fed up with

the quarrels at the work place i.e. the restaurant. Therefore, it cannot be said that in the responses to questions put to the appellant during recording of his statement under Section 313 of the Cr.P.C., the appellant made crucial admissions that would inure to the benefit of the prosecution.

42. We are of the opinion that when the evidence and material on the basis of which the prosecution has built its case, on an objective analysis, gives rise to two possible views, the one in favour of the accused (appellant) has to be accepted and the benefit of doubt must go to the appellant. In the present case, as noted hereinabove, one of the crucial aspects, was the consistent assertion of the prosecution witnesses that the third employee i.e. the said Kamlesh was with the deceased throughout, from the point in time PW1 last saw him in the night on 5th July 2017, till he was found with the deceased lying in a pool of blood, on the floor of the restaurant at about 6:00 a.m. on 6th July 2017. This creates a room for doubt as to who could be said to be the author of the ghastly incident, which resulted in the death of the victim/deceased. The other factors noted hereinabove also demonstrate that crucial circumstances in the form of recoveries and oral dying declaration are covered in a cloud of doubt and hence, the benefit of doubt must go to the appellant. In this case of circumstantial evidence, applying the above quoted principles laid down by the Supreme Court in the case of *Sharad Birdhichand Sarda vs. State of Maharashtra* (**supra**), it would be

unsafe to confirm the finding of guilt recorded by the Sessions Court.

43. As regards, reliance placed by the learned APP on the judgment of the Supreme Court in the case of *Trimukh Maroti Kirkan vs. State of Maharashtra* (**supra**), we find that even if in such a case of circumstantial evidence, the prosecution finds it difficult to lead evidence to establish the guilt of the accused, the burden is still on the prosecution to prove that the circumstances asserted by it are proved beyond reasonable doubt and such circumstances indeed form a chain that points only towards the hypothesis of guilt of the accused. Even in such a case where the incident in question takes place within four walls and in the absence of direct evidence of eye-witnesses, the burden on the prosecution to prove the circumstances beyond reasonable doubt, has to be discharged.

44. As regards judgment of the Supreme Court in the case of *Laxman vs. State of Maharashtra* (**supra**) relied upon by the learned APP, we do not find that it can be of much assistance. We find that in the present case, in response to question put to the appellant with regard to incriminating circumstance of oral dying declaration being allegedly given by the deceased to the said witnesses, the appellant had specifically stated that such claims were false. Hence, the said judgment also cannot take the case of the prosecution any further.

45. In view of the above discussion, the appeal is allowed in the following terms :

ORDER

(i) The appeal is allowed;

(ii) The impugned judgement and order dated 31st March 2021, passed by the Court of District Judge-9 and Additional Sessions Judge, Thane, in Sessions Case No.148 of 2018, convicting and sentencing the appellant, is quashed and set aside;

(iii) Consequently, the appellant is acquitted of all the charges;

(iv) The appellant shall be released forthwith, unless required in any other case;

(v) Before being released, the appellant shall execute P.R.Bond in the sum of Rs.25,000/-, under Section 481 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (corresponding to Section 437A of the Cr.P.C.) for their appearance, in the event an appeal is preferred against his acquittal.

46. Pending applications, if any, also stand disposed of.

(SHREERAM V. SHIRSAT, J.) **(MANISH PITALE, J.)**

BIPIN DHARMENDER PRITHIANI
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