



Maria S.

**IN THE HIGH COURT OF BOMBAY AT GOA  
CRIMINAL APPEAL NO. 9 OF 2022**

Shri Aman Kavitiya  
S/o Gopal Kavitiya  
Aged 21 Years, Bachelor, Driver  
R/o. C/O.Mrs. Maria Ibrahim Fernandes,  
H.No.313/2, 4<sup>th</sup> Ward,  
Colva, Salcete, Goa  
(Presently in Central Jail Colvale)

**...Appellant**

*Versus*

State (through)  
1. Public Prosecutor  
High Court of Bombay at Goa  
Porvorim-Goa  
2. Police Inspector  
Colva Police Station  
Colva Goa

**...Respondents**

**Mr. Rohan Desai, Advocate** *for the Appellant.*

**Mr. S. G. Bhohe, Public Prosecutor** *for the Respondents.*

**CORAM: M. S. SONAK &  
BHARAT P. DESHPANDE, JJ.**

**DATE : 27<sup>th</sup> September 2022**

**ORAL JUDGMENT: (Per Bharat P. Deshpande, J)**

By way of present appeal under Section 374 of Cr.P.C., the appellant/accused is challenging the Judgment and order dated 23/12/2021 arising out of Sessions Case No.10/2018 decided by

the learned Additional Sessions Judge, Margao whereby the appellant was found guilty for the offence punishable under Section 302, 394 and 201 of I.P.C. and accordingly sentenced to undergo imprisonment for life and fine of ₹1,00,000/- for the offence punishable under Section 302 of IPC and in default to undergo simple imprisonment for two years. Similarly, for the offence punishable under Section 394 of IPC, the accused has been sentenced to undergo rigorous imprisonment of 10 years and to pay a fine of ₹25,000/- and in default to undergo simple imprisonment for one year. For the offence punishable under Section 201 of IPC, the accused is directed to undergo rigorous imprisonment for two years and to pay a fine of ₹10,000/- and in default to undergo simple imprisonment for six months. All the above sentences are directed to run concurrently.

2. On 09/03/2022, the appeal was admitted and the Registry was directed to prepare a paper book as early as possible and to place the matter for final hearing. Records and proceedings were also called. Accordingly, after the preparation of the paper book, the matter was taken up for final disposal.

3. We have heard the learned Counsel Shri Rohan Desai, appearing for the accused and learned Public Prosecutor Shri S.G. Bhobe appearing for the State at length. With the assistance of the

learned Counsels, we perused the record and more specifically reasons of the learned Trial Court while convicting the accused on all counts.

4. The learned Counsel Shri Rohan Desai strenuously urged that the case of prosecution is entirely based on circumstances and prosecution has miserably failed to prove the circumstances linking the accused to the commission of the offence and forming a chain so as to consider him guilty. He submitted that on all counts prosecution has failed and evidence brought on record is not admissible and unacceptable in the eyes of law. In spite of this the accused is found guilty on the reasons which cannot be forming any conclusion about the involvement of the accused in such offence. While elaborating such arguments he submitted that the only material which has been relied upon by the learned Additional Sessions Judge is the so-called recovery at the instance of the accused. According to him, recovery under Section 27 of the Evidence Act at the instance of the accused has been totally disproved. The witnesses who deposed before the Trial Court nowhere disclosed the exact words uttered by the accused while making such disclosure statements before the recovery could be effected.

5. The learned Counsel Shri Rohan Desai then submitted that

prosecution tried to implicate the accused on the basis of last seen theory which is also unacceptable. The witnesses examined in this respect are totally shaken during cross-examination and the evidence of these witnesses *inter se* is destroying the case of the prosecution. He submitted that all pancha witnesses examined by the prosecution in this matter are closely related to the deceased. Even the recovery of the knife is highly doubtful. He invited attention of this Court to the evidence of certain witnesses which clearly goes to show that the accused was already in the police station two days before his arrest shown in the matter. Therefore, he submitted that conviction of the accused on these counts cannot be sustained.

6. The learned Public Prosecutor Shri S.G. Bhoje appearing for the State though tried to submit that circumstantial evidence has been brought on record by the prosecution, fairly accepted that investigation in the present matter is shaky and doubtful.

7. He submitted that the statement of Anthony who actually informed the Police on seeing the dead body was not recorded and such witness was not examined for the reasons best known to them. Articles found near the dead body as claimed in the panchanama nowhere shows any fingerprint either of the deceased or that of the accused so as to link him with the said offence. He

then submitted that arrest of the accused is without any disclosure and the investigating agency failed to show what was the material collected against the accused for arresting him.

8. The submissions advanced by the learned counsel for the parties fall for our consideration. The point for determination is as under together with our findings on it.

*Whether the circumstances brought on record by the prosecution are forming unbroken link thereby pointing finger only against the accused?*

9. In all, 28 witnesses were examined by the prosecution. The First Information Report was lodged against unknown persons. In short, it is the case of the prosecution that on 20.01.2018 from 22:30hrs up to 07:15hrs on 21.01.2018 at Lover's Beach Betalbatim, some unknown person committed murder of Shri Baptista @ Batista Roy @ Batu D'Costa, son of Minguel Jose D'Costa, aged 51 years, resident of Colva, by slitting his neck with sharp object/weapon.

10. The wife of the deceased, Santana D'Costa/PW1 lodged a missing report at 07:15hrs on 21.01.2018 at Colva Police Station vide Exhibit-15 wherein she disclosed that on 20.01.2018 at

around 15:30hrs her husband Batu left the house for his work as usual. She contacted Batu on his mobile phone at 21:00hrs and he assured her that he will be coming home shortly at around 22:00hrs. Since he did not return and after calling him on several occasions on his mobile phone, she tried to search for him alongwith her relatives all over Colva but could not find him. The said Batu left home in his Maruti Van bearing No.GA-08-E-2152 of white colour.

**11.** PW-23 Shri Anand Shirodkar, P.I. at Colva Police Station received a phone call at around 11:00am from Deputy Sarpanch, Village Panchayat Betalbatim Shri Anthony Fernandes who informed that a dead body of a male person is seen lying at Lover's Beach at Betalbatim in a pool of blood. He informed P.I. Colva Shri Filomeno D'Costa/PW26 and thereafter proceeded to the spot alongwith the staff. He then contacted Shri Anthony Fernandes, Deputy Sarpanch who remained present at the spot and pointed out the dead body of a male person lying below a pine tree. Upon inquiry at the Police Station, it was revealed that the said person by name Baptista alias Batu was missing from the previous night. Since the body was found in an injured condition suspected to be homicidal, he deputed staff to guard the scene and returned to the police station and registered UD. No.5 of 2018 under Section 174 of Cr.P.C and after verifying the missing

person report No.1/2018 together with the description of the missing person it was found to tally with the description of the dead body of the deceased. Accordingly, he contacted relatives and proceeded to the spot for the purpose of conducting panchanama.

**12.** Admittedly, Anthony Fernandes who spotted the dead body at Lover's Beach Betalbtain, is not examined before the trial Court by the prosecution and there is no explanation about it, though his name is figuring as CW8.

**13.** PW23, P.I. Shirodkar then conducted scene of offence panchanama in presence of PW2-Joaquim D'Costa and Prince Fernandes and attached various articles which were found around the dead body, which include two empty "Budweiser" beer bottles,(MO-1, Exhibit-I), small "Teachers" plastic water bottle containing some greenish colour liquid (MO-2, Exhibit-2), silver foil container with 2 blue colour polythene bags (MO-3, Exhibit-3), navy blue colour cover having words as 'LORD' 'Stainless rostfreilnox' (MO-4, Exhibit-4), two pieces of old nylon strings of blue colour (Exhibit-5), one white colour small plastic empty bottle having words 'Clinic spirit'(MO-6, Exhibit-6), a control sample of soil (Exhibit-7), blood-stained soil sample collected near the dead body (Exhibit-8), one Micromax mobile phone of

black colour having 2 SIM cards (MO-9, Exhibit-9).

**14.** P.I. Shri Shirodkar then conducted an inquest panchanama (Exhibit 21) during which he observed a sharp, deep and broad injury on the right side of the neck of the deceased. On the basis of above observations, he found that it was homicidal case and therefore he lodged a complaint against unknown persons for committing the murder of Batista alias Batu by slitting his neck with a sharp object/weapon which was registered under Crime No.11 of 2018.

**15.** PW26 Filomeno Costa, P.I. Of Colva Police Station then took over the investigation, recorded the statement of some of the witnesses and on 23.01.2018 arrested the accused under arrest panchanama at Exhibit 32. He then deposed that during an interrogation of the accused, he voluntarily disclosed in Konkani that he is ready to show the place where he concealed the alleged knife, articles of deceased Batu alongwith cash, gold ornaments, his clothes used at the time of the commission of the alleged offence, as well as the vehicle used by him. Accordingly, he secured presence of two panch witnesses and in their presence, the accused made a disclosure which was recorded under the panchanama under Section 27 of Evidence Act and thereafter accused led them to three different places. First of all, the knife

with blood stains was recovered at the instance of accused which was kept in an envelope and sealed. Thereafter, accused took them to a place and after digging, removed one polythene bag containing 3 gold finger rings, one gold chain and one gold bracelet alongwith cash which belonged to the deceased. All these articles were attached. Thereafter, accused led them to another place where he had thrown his clothes. The accused pointed out said place and showed the clothes which were found to have blood stains and thereafter attached under the panchanama. Finally, the accused took them to another place wherein he had shown the bike which he had used allegedly at the time of the commission of the offence. All these articles were attached during the panchanama. The accused was then sent for medical examination and his blood group was found as B Rh (negative) whereas that of the deceased was found as A Rh (positive). It is also claimed that the knife and clothes of the accused were sent for chemical examination and the report from the laboratory shows the presence of human blood on it and on conducting DNA examination, it was matching with the blood group of Batu, i.e. deceased.

**16.** On these counts, charge-sheet was filed before the learned Magistrate who committed it to the Sessions Court.

17. Charges were framed against the accused (Exhibit-11) and upon explaining, the accused pleaded not guilty and claimed to be tried. Prosecution examined in all 28 witnesses in support of the said charges. The accused denied the evidence led against him under Section 313 Cr.P.C and claimed that he had been falsely implicated by two other persons who were close to the deceased. The accused did not step into the witness box. Learned Sessions Judge found that the circumstances brought on record by the prosecution are all proved against the accused and accordingly, he has been found guilty on all counts.

18. The circumstances which are considered by the learned Additional Sessions Judge as found in the discussions are as under:-

- I) Homicidal death.
- II) Missing of deceased Baptista alias Batu
- III) Scene of occurrence panchanama
- IV) Recovery of dead body and its identification.
- V) Arrest of accused.
- VI) Recovery of knife, bag containing gold ornament and mobiles of the deceased and clothes of the accused and Dio scooter at the instance of the accused.
- VII) Presence of blood of deceased on the clothes of

accused as well as on the knife.

*VIII)* Purchase of knife by the accused.

*IX)* Recovery of Sim card, pan card, Aadhar card, voter card of the deceased at the instance of the accused.

*X)* Last seen together.

*XI)* Motive to commit crime.

*XII)* Statement of accused under Section 313 CrPC.

*19.* From the material brought on record and as argued by the learned counsel Shri Rohan Desai for the accused, first of all, we clearly observe and record our anguish about the manner in which investigation in the present matter has been carried out and that too without collecting proper evidence and examining the witnesses. The record itself goes to show and as deposed by PW26 – Filomeno Costa that the accused was placed under arrest on 23.01.2018 around the morning. At page 30 of the cross-examination of PW26, he deposed that the accused was brought to the police station as a suspect on 23.01.2018 at around 08:45am by the staff of the police station. He instructed the said staff to get suspect persons and accordingly the staff brought the accused alongwith other suspected persons. Upon interrogation, accused confessed his crime and as such he was arrested. This statement of the I.O. is found contrary to the prosecution witness who was examined as PW20 by the name Attar Allabaksh. The

said Attar deposed that he is in the construction business and he is owning one Tata Ace rickshaw bearing no.GA-08-U-9043. He identified the accused and claimed that on 10.01.2018 he requested the accused to take his rickshaw to the RTO office at Arlem for the passing of the said vehicle as his driver was not available. On 20.01.2018 the accused contacted him and requested him to engage him as a driver and accordingly he agreed.

**20.** On 21.01.2018 at around 08:30am accused requested him for some amount for filling diesel in the rickshaw to drop some caterer from Sernabatim to Verna and thereafter accused parked the rickshaw at his construction site. When he tried to call the accused on phone at around 02:30-3:00PM on 21.01.2018 he was informed by the police that the accused was at the police station and to collect the keys from the police station. Accordingly, he went to the police station and collected the keys of his vehicle. This is the prosecution witness who deposed that on 21.01.2018 accused was at Colva Police Station and he collected the keys of his vehicle from the accused after visiting the Colva Police Station. Thus, it is clear from the record that the accused was at the police station detained by the police on 21.01.2018. However, his arrest is shown as only on 23.01.2018.

**21.** In the missing report lodged by PW-1 dated 21.01.2018, she has described the details of her husband alongwith the clothes he was wearing and the gold ornaments. She disclosed that the deceased Batista was wearing a T-shirt, blue Jeans pants and shoes. Similarly, he was wearing two finger rings, one gold chain and one gold bracelet. It is interesting to note that PW-6 Alex Dias who acted as panch witness at the instance of the police deposed that on 23.01.2018 accused was produced before him and voluntarily stated that he has taken gold ornaments of the deceased which he is ready to show. PW-6 Alex Dias then claimed that the accused took them to Majorda and then to Utorda and thereafter accused led them to an inside place. Thereafter, the accused dug a place in the field by the side of the road and removed a plastic bag of white colour. The bag was given to P.I. who opened it and thereafter they saw two mobiles, three gold rings, one bracelet, one chain and one dollar. All these articles were packed and sealed.

**22.** The interesting thing is that instead of two gold finger rings, they found three finger rings. The prosecution has failed to explain how the third finger ring appeared specifically when PW-1 claimed that the deceased was wearing two finger rings.

**23.** Another interesting aspect with regard to the so-called

recovery of weapon, i.e. knife, PW-6 deposed that accused after making a disclosure about commission of the crime, voluntarily agreed to show the place where he threw the knife. Accordingly, accused led them to Betalbatim and from that place they took left and went to the place of the incident. He then deposed that from there, they went ahead by walking a distance of 100mts where the accused showed a place where he threw the knife. The accused searched for the knife at the said place and then found it. The accused removed the knife which was having blood stains and it was handed over to the P.I. After measuring the knife, it was packed in an envelope and sealed.

**24.** In normal circumstances, when a knife is packed by placing it in an envelope and sealed, it is not possible to see such a knife unless the seals of the packet or the envelope are broken and the envelope is opened by cutting. It is not the case of the investigating agency that the said envelope was opened at any point in time till it was forwarded to the laboratory for the purpose of examination.

**25.** However, prosecution witness examined as PW13 Sainath Bandodkar, deposed that he is the owner of a general store known as “Sai General Store” situated near crossroad at Colva. He deposed of knowing the accused as his customer as the accused

used to visit his shop. He then deposed that on 18.01.2018 at around 4:30PM accused came to his shop and asked for a knife. He showed two varieties of knives out of which accused took one having black handle, costing ₹75/-. The said knife was having stainless steel blade and covered with a plastic pouch. He then stated that he will be able to identify the said knife and the pouch if shown to him in the Court. Again, interestingly, when MO No.22 was shown, PW13 Sainath identified said knife as the one purchased by the accused from his shop. Similarly, he identified the pouch as MO No.4. The question that the prosecution failed to answer is about the cover of the said knife as it is not the case of the panch witness/PW6 that the knife was recovered alongwith its pouch.

**26.** The matter does not end here as far as PW13 Sainath is concerned as during cross-examination, he made certain statements which clearly go to show that there was tampering with the so-called knife recovered at the instance of the accused. He admitted on page 3 of his deposition as under:-

*“The police had come to my shop to record my statement. The police did not give any prior intimation that they would visit my shop to record my statement. The police showed me the knife and asked me if I has sold it and I answered in the affirmative. I say that before I answered the police, I verified from my stock if I was selling the same*

*type of knives. I do not have any record of the customers to whom I had sold the knives. I say that I had compared the knife with the knives in my stock and as they were identical, I answered the police in the affirmative. The police then told me that Batu was murdered with the said knife. I was aware prior to that time that Batu was murdered with a knife.”*

27. Such deposition of PW13-Sainath, which has not been disputed by the prosecution by conducting re-examination, clearly goes to show that the modus adopted by the police is to carry the knife to the said shop and by showing it to the so-called owner of the shop and then asking him as to whether he sold it to anyone. This means the knife was taken out of the sealed envelope and shown to the witness by taking it to his shop. He compared the said knife with the stock available in his shop and when found similar, answered in the affirmative. This procedure adopted by the Investigating Officer is clearly unheard of and shocking, as the prosecution is supposed to keep the weapon in sealed container for forwarding it to the laboratory as it was referred by the panch witness-PW6 that such knife was having some blood stains when it was recovered at the instance of accused. When such knife is taken out from the sealed envelope subsequently, tampering with it is more evident. Therefore, the so-called blood report which the prosecution is heavily relying upon as far as said knife is concerned, is of no substance at all, in

view of clear case of tampering with the said knife before it was forwarded to the laboratory for testing.

**28.** Evidence of PW13 Sainath is also unbelievable as it is humanly impossible to remember the faces of the customers when he admitted during the cross-examination that around 400-500 customer per day visit his shop. It is again interesting to note that PW13-Sainath gives a specific date and time when the accused allegedly visited his shop and purchased the so-called knife. The presence of the pouch over the knife and identified by PW-13 in the Court as MO No.4 is again highly suspicious as it is not the case of the investigating agency that such pouch was also recovered alongwith the knife at the instance of the accused.

**29.** However, it is the case of the prosecution that such pouch was found near the dead body alongwith other articles. For this purpose PW2-Joaquim D'Costa disclosed that he acted as panch witness for the scene of offence panchanama on 21.01.2018 and at that time apart from the dead body, they found beer bottles, plastic bottles, empty silver foil container, blue colour cover having words Lord Stainless rustfree inox, one water bottle containing greenish liquid, one small plastic bottle with label clinical spirit, 2 nylon ropes, 3 Kingfisher beer bottles, 2 Budweiser beer bottles and one Micromax mobile with 2 SIM

cards. Thus, it is clear that the so-called pouch at MO no.4 was not recovered at the instance of the accused but it was found near the dead body of the deceased. The prosecution tried to link the testimony of PW13 by trying to identify such pouch and also by showing the knife to him, which clearly goes to show that there was clear-cut tampering of the sealed envelope in which knife was packed and sealed on 23.01.2018 in presence of PW6-Alex Dias, panch witness.

**30.** Further cross-examination of PW13 Sainath show major contradictions which were brought on record wherein he was found to have stated while recording his statement under Section 161 of Cr.P.C. that he came to know through the media and the police that Aman Kavitiya/accused had murdered Batu by slitting his neck with a knife and had fled away. He was also found to have stated to the police that the accused had fled away with the belongings of the deceased. Finally, he admitted that there is no special mark on the knife to indicate that it was the one sold by him. Therefore, it is clear from PW13's deposition that he is a got-up witness only to show the link and identify the so-called pouch of the knife found near the dead body and to implicate the accused.

**31.** As stated earlier, it is difficult for a shop-keeper to identify

the face of a person alongwith his name and other details as well as the date and time when such person is visiting the shop and purchasing a particular article. It is not at all the case of PW13 that accused was a regular visitor at his shop. Thus, linking the accused with the statement of witness no.13 regarding purchase of such knife is highly improbable. Since this witness clearly deposed that knife was shown to him at his shop and thereafter he handled the said knife by comparing the knives available in his shop, clearly shows that the investigating agency tampered with the sealed packed and more particularly with the knife and therefore possibility of finding any blood stains on the said knife and that too with the DNA of the deceased is highly suspicious. There is no explanation coming forward from the Investigating Agency about this aspect.

**32.** Another disturbing aspect is with regard to the identification of accused by a waiter and the items purchased by the accused to be shared with the deceased. First of all PW11-Dr. Andre Fernandes while conducting the post-mortem examination deposed on page 3 as under:-

*'The time of death was assessed by me in context with the contents of the stomach and it was within 6 hours of the last solid meal intake which consist of 100gms of masticated rice with red masala colour and rice is softened vide entry no.21e'*

33. Thus, it is clear that 100gms of masticated rice with red masala colour and softened rice was found in the stomach contents. However, the prosecution tried to project that the deceased did not visit his house after he left his house on 21.01.2018 at around 3:30PM for his business work as usual. This is deposed by PW1 Santana D'Costa, i.e. the wife of deceased. She categorically stated that her husband left the house at around 3:30PM and did not return. Usually Batu used to return at around 10:00PM. She called Batu on his mobile and at that time his mobile phone was not reachable. Thus, it is clear that on that day after leaving the house at around 3:30PM, Batu did not return home. However, the prosecution's own witness Krishna Langde/PW28 deposed that he was working with Batu and looking after Rent-A-Bike business at Colva. On 20.01.2018 at around 6:00PM he received a phone call from unknown person asking for three bikes on rent and the said person told him that he is calling from a place known as Cliff heaven. Therefore, he came at the bike-stand at Colva beach and then went to Cliff heaven which is at Gandaulim, Colva. At that time Batu was already present there. He then handed over three bikes on rent to the customer at Cliff Heaven. Batu then called Aman/accused to pick him up. After some time accused came on a white colour Dio. He, alongwith Batu and Joemiro/PW19 went on accused's Dio

bike together. He was dropped at the bike-stand at Colva by the staff of Cliff Heaven. Thereafter, he went with Jeomiro to take his buffalo which was tied up to a tree at Sucobhat, Colva and then he went home and came back to the bike-stand. After sometime he called Batu on his phone and asked whether he reached home and accordingly Batu replied saying that he reached home.

**34.** During the cross-examination, PW28-Krishna specifically deposed that he was taken to the police station from the place of crime on the same day and the police were questioning him. He was kept at the police station for 2 to 3 days. He then claimed that he did not recollect what type of clothes accused was wearing on that day.

**35.** Jeomiro Fernandes is the other person examined by the prosecution as PW-19. He deposed that on 20.01.2018 during evening hours he went to play at Cossa ground and after finishing at around 6:00PM one Krishna came there and requested him to accompany him to bring his bull from Fatricoddem to his house. Thereafter, he dropped Krishna and came to the banyan tree (voddacode), opposite Hotel Silver Sand Colva. Batu was present at the said spot and Batu told him that three bikes were to be delivered to the customers near Cliff Haven. In the meantime,

Krishna also reached Wadakade. He, alongwith Batu and Krishna took 3 bikes to Cliff Heaven. After delivering the bikes, Batu telephonically called accused to come and collect them. Accordingly, accused came on a Dio scooter near Cliff Heaven. He, alongwith Batu came on a Dio scooter driven by the accused. Accused first dropped Batu at his house and thereafter dropped him near Voddacode from where he took his scooter and went with him. Thus, according to PW19-Jeomiro Fernandes, accused dropped Batu at his residence during the evening time and thereafter the accused dropped him near Voddacode. Thus, according to PW19-Jeomiro and PW28-Krishna, accused visited his house during the night time on 20.01.2018 whereas PW1 who is the wife of accused flatly denied about the presence of accused at his house during that night. This further disproves the theory of last seen together.

**36.** It is interesting to note that PW3-Raju Thapa claiming to be a waiter in House bar and restaurant at Colva near church claimed that he is working at the said bar & restaurant for the last 3 years and residing in the restaurant room. He then claimed that he knows the accused. Further, PW3-Raju claimed that on 20.01.2018 at around 7:15PM accused came to the restaurant wearing 3/4<sup>th</sup> blue jeans half pant and T-shirt with hood. He then claimed that sometimes accused used to come alone and

sometimes with their regular customer Batu. Thus, it is the contention of PW3-Raju that deceased Batu alongwith accused used to visit their bar & restaurant on some occasions. This is necessary to note in connection with further deposition of PW3-Raju.

**37.** PW3-Raju then claimed that on 20.01.2018 accused came to their bar and asked him as to what brand of alcohol Batu used to drink. Accordingly, he told accused that Batu takes Mansion House brandy. Accordingly, accused ordered for one chicken crispy, 2 Budweiser beer bottles and one quarter of Mansion House brandy.

**38.** First of all, it is doubtful as to why the accused will ask the waiter/Raju/PW3 about the type of liquor which Batu used to drink. This is for the simple reason that according to PW3-Raju, accused alongwith Batu used to visit their bar on some occasions. Such visit of accused alongwith deceased Batu to the bar was obviously for consuming alcohol and eating food and not for any other purpose. Thus, the question which crops up is as to why accused will ask a waiter about the brand of liquor which Batu used to drink, when the accused himself was accompanying deceased to the same bar for consuming liquor. In such a scenario, it was expected that the accused knew the type of liquor

which the deceased was consuming normally. There was no question of asking the waiter about the brand of liquor which the deceased used to consume. Therefore, such statements of PW3-Raju Thapa including his contention about the clothes which accused was wearing on that day is highly unacceptable. This is stated so for the simple reason that through this witness the prosecution even tried to identify the empty beer bottles, plastic containers and other articles which were found near the dead body as supplied by him to the accused.

**39.** PW3-Raju Thapa then claimed that accused remained near the hotel for around 15 to 20 minutes and after handing over the food packets and beverages, he left the said hotel at around 7:45PM. He claimed that two plastic carry bags were given to the accused containing food packet in silver containers and the accused made payment of ₹460/-. He then claimed that his statement was recorded by the police on 26.01.2018, i.e. after 6 days from the date of alleged incident. However, it is quite interesting to note the deposition of PW3-Raju as under:-

*'I was called by police to the place where Batu was murdered. The place where Batu was murdered is a beach. The police asked me whether the accused had come to our hotel for taking parcel of food and whether the empty container and the empty bottles found on the beach were the same given to the accused. I identify the said empty*

*container and the bottles found on the beach to be that given to accused by me as food parcel. I say that the dead body of Batu was lying on the beach. The said bottles and the empty container was fallen by the side of the dead body.'*

**40.** Thus, it clearly shows that PW3-Raju who was working as waiter at Colva near the church in a hotel known as House bar and restaurant suddenly appeared and remained present at Lover's Beach Betalbatim which is at a distance of 4-5kms. It is not known as to how the police at that time gathered any information that PW3-Raju was working in some hotel at Colva and he handed over food packets and beverages to the accused on the earlier night and the same were found near the dead body. If it is accepted that Raju remained present at Lover's Beach where the dead body was found, on his own, a question further remains as to why police asked him as to whether the accused had come to his hotel for taking food parcel and whether empty container and empty bottles found on the beach were the same which he gave to the accused.

**41.** At that moment, admittedly no offence was registered with regard to murder. It is clear from the case of prosecution that at the same time only a case with regard to unnatural death was registered. After the panchanama of the scene of offence,

attachment of articles found near the body and the inquest panchanama, the concerned officer observed that it is a case of murder. This aspect is deposed by PW23-P.I. Anand Shirodkar which is referred earlier. However, at the cost of repetition, PW23-Anand Shirodkar stated on page no.2 that after the dead body was found on the said Lover's Beach, he went to the police station and registered unnatural death vide Colva Police Station UD No.5/2018 under Section 174 of Cr.P.C.. After verifying Missing Person Report No.1/2018 and the description of missing person, it was found tallying with that of dead body of the deceased. Only thereafter he called relatives of the deceased and proceeded to the spot for conducting the scene of offence panchanama. He secured presence of 2 panch witnesses namely, PW2-Joaquim D'Costa and Prince Fernandes and then conducted the panchanama and attached various items found near the body as discussed earlier. Thereafter, he conducted inquest panchanama and forwarded the dead body for post-mortem examination. Only then he observed in the preliminary inquiry that it is a case of homicidal death and thereafter he registered his complaint against unknown persons.

**42.** PW2-Joaquim D'Costa who is the panch witness for the scene of offence panchanama stated on page no.2 that one person by name Raju Bairali came there and had informed that he was a

waiter in a bar by name House Bar at Colva and he had given two blue colour plastic bags containing two Budweiser beer bottles, chicken crispy in silver container, one Teacher's big bottle and one small Teacher's plastic bottle containing Mansion House brandy of one quarter to their regular customer by name Aman. Said Raju identified polythene bag, two empty beer bottles, one empty silver foil container, one empty Teacher's plastic water bottle and one small Teacher's plastic bottle with greenish colour liquid.

43. Thus, PW2 also stated that PW3-Raju appeared at the spot and disclosed that he has given some food items and beverages to the accused. Said Raju also identified empty bottles and the silver foil container at the scene. However, PW23-P.I. Anand Shirodkar who conducted the scene of offence panchanama, is totally silent about presence of PW3-Raju at the time of scene of offence panchanama and more specifically identifying empty bottles/containers/plastic bags, while deposing before the Court. Being a police officer who conducted the scene of offence panchanama, it was his duty to record this aspect in his deposition. However, on perusal of scene of offence panchanama which is at Exhibit-18 and more particularly typed copy at page 3, it is found recorded thus:

'While recording the panchanama police brought one male person who upon asking disclosed his name as Raju S/o of

Bir Baraili, age 22 yrs, who informed that he is the waiter at House Bar at Colva and yesterday i.e. on 20/01/18 at about 20.00hrs he gave two blue colour polythene carry bag containing two "Budweiser" beer bottles, chicken crispy in a silver foil container, one "Teachers" big water bottle and one small "Teachers" Plastic bottle containing "Mansion House" of one quarter to one Shri Aman who is the regular customer of "House Bar". On showing the scene the said Raju identified two blue colour plastic polythene carry bags, two "Budweiser" beer bottle empty, one empty silver foil container, one empty "Teachers" plastic water bottle and one small "Teachers" plastic water bottle in which there is greenish colour liquid in it.'

**44.** Thus, it is the contention of prosecution that PW3-Raju Thapa handed over the food items, i.e. chicken crispy and 2 beer bottles and one quarter brandy bottle to the accused. It is further their case that such plastic containers, empty beer bottles and 2 bottles which said Raju handed over to the accused were found near the dead body of the deceased.

**45.** First of all, while conducting the post-mortem examination, only rice contents were found in the stomach of the deceased and no chicken contents. It is not known as to when and where the deceased consumed rice during that night. It is not the case of prosecution that cooked rice was ordered by the accused from the said hotel. He only collected chicken crispy, two beer bottles and one quarter Mansion House brandy.

46. Admittedly, lot of garbage was found on the beach where the dead body was located. This fact is admitted by PW2, PW3 and even the Investigating Officer. It is also interesting to note that such food items were allegedly collected by the accused prior to 8:00PM. However, the wife of deceased who was examined as PW1 claimed that she called her husband at 9:00PM and he received her call and told her that he will be returning home at around 10:00PM. Thus, there is no link to connect statement of PW3-Raju with regard to involvement of accused only because he handed over some food packet, beer bottles and other articles to him prior to 8:00Pm on that day. Interestingly, PW3-Raju Thapa nowhere disclosed that accused purchased these articles or specifically Mansion House brandy for the purpose of deceased himself and that he was supposed to consume it alongwith the deceased.

47. Cross-examination of PW3-Raju Thapa is only creating serious doubt about the so-called last scene theory which the prosecution tried to prove in this matter. He deposed on page 3 that on that night accused came alone on his scooter and placed order for food and beverages. He then claimed that one Maruti van was parked near the hotel on one side. He does not know how many people were sitting in the said Maruti van and who

were they. However, he claimed that he had not seen Batu properly in the car but claimed that the said Maruti van was of Batu.

**48.** He interestingly stated that on 20.01.2018 he had gone to the beach and thereafter he was called by police on 26.01.2018 for recording his statement. Thus, deposition of PW3 Raju Thapa with regard to the presence of accused at Colva at around 7:45PM and purchasing of food and beverages is not convincing. Presence of PW3-Raju Thapa on the beach on 20.10.2018 and more specifically during scene of offence panchanama and then identifying the articles found near the beach is highly suspicious. Neither PW23-P.I. Shirodkar nor PW26-P.I. Filomeno Costa tried to explain about it. Therefore, attempt on the part of prosecution to link such articles with the accused cannot be accepted. PW2 during cross-examination on page 5 admitted that there are coconut trees, bushes and pine trees at the sea-shore at Lover's Beach. Dry coconut stems and leaves were seen fallen near the coconut trees. He voluntarily stated that there was dry coconut stem near the deceased. He then admitted that people visiting the beach for picnic throw waste nearby which is seen fallen. He admitted that he has not seen other bottles fallen in the vicinity. A specific question was put to him that there were many other bottles including Coca Cola, beer and other waste

fallen around. He conveniently stated that he did not notice it. Further, as far as presence of PW3-Raju and he identifying such articles is concerned, PW2 deposed that he did not remember in which language PW3-Raju had given information. He was unable to tell the exact words used by Raju while giving such information.

**49.** At this stage, it was observed that the photographs were clicked while conducting scene of offence panchanama and more specifically the body and the nearby area. On perusing such photographs, it was found that no such bottles, plastic containers, etc. were found near the body so as to accept the statement of PW2 and PW3 and to link it with the accused.

**50.** Another circumstance which the prosecution tried to link with the accused is the disclosure and recovery of knife, packet containing gold ornaments and mobile of the deceased. Similarly, the clothes of the accused allegedly used by him during commission of alleged offence.

**51.** In this regard it is well settled proposition of law that recovery of articles at the instance of accused is not itself proving commission of offence. Such evidence is a corroborative piece which needs to be linked with other circumstances. The

disclosure alone would not automatically lead to the conclusion that offence was also committed by the accused. What is admissible under Section 27 of the Evidence Act is the information leading to the disclosure and not any opinion formed on it by the prosecution. Burden lies on the prosecution to establish a close link between discovery of material object and its use in commission of offence. Such disclosure under Section 27 of Evidence Act is a weak kind of evidence and it cannot be wholly relied upon without supporting other circumstantial material.

**52.** Learned counsel Shri Rohan Desai, for the appellant placed reliance on the following decisions with regard to circumstantial evidence and recovery on the basis of disclosure made under Section 27 of Evidence Act, to elaborate his submissions that the case of prosecution is not at all established on this aspect.

- a) *Mustkeem alias Sirajudeen v/s. State of Maharashtra*<sup>1</sup>
- b) *Vijay Thakur v/s. State of Himachal Pradesh*<sup>2</sup>.
- c) *Mani v/s. State of Tamil Nadu*<sup>3</sup>
- d) *Santosh Pujari v/s. State*<sup>4</sup>.

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1 (2011) 11 SCC 724

2 (2014) 14 SCC 609

3 (2009) 17 SCC 273

4 2018 All MR (Cri) 1139

e) *Dular Munda v/s. State of Goa and Another*<sup>5</sup>

f) *Sudhakar alias Sudharasan v/s. State represented by the Inspector of Police, Srirangam Police Station, Trichy, Tamil Nadu*<sup>6</sup>.

53. Similarly, in the recent decision in the case of *Shahaja alias Shahajan Ismail Mohd. Shaikh v/s. State of Maharashtra*<sup>7</sup>, the Apex Court while discussing the scope of Section 27 of Evidence Act has observed in paragraph 47 as under:-

*'47. Thus, in the absence of exact words, attributed to an accused person, as statement made by him being deposed by the Investigating Officer in his evidence, and also without proving the contents of the panchnamas, the trial Court was not justified in placing reliance upon the circumstance of discovery of weapon. '*

54. In the case of *Sunil Kumar And Another v/s. State of Jharkhand*<sup>8</sup>, the Apex Court while dealing with the defective or illegal investigations and lapses/irregularities in investigations observed that such aspect vitiates prosecution case to such an extent as to warrant acquittal. In paragraph 2 it is observed thus:-

*'2. This case is a glaring example of how cause of justice can be defeated by inefficient, lackadaisical and incompetent investigating agency. As we go ahead, the*

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5 2020 SCC OnLine Bom 53

6 (2018) 5 SCC 435

7 2022 SCC OnLine SC 883

8 (2013) 4 SCC 422

reasons for these observations would be clear.'

55. Then, the Apex Court observed in paragraph 29 as under:-

*'29. We began by commenting on the unhappy conduct of the investigating agency. We conclude by reaffirming our view. We are distressed at the way in which the investigation of this case was carried out. It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored. In this case, the lapses are very serious. PW 5 Jaldhari Yadav is a pancha to the seizure panchnama under which weapons and other articles were seized from the scene of offence and also to the inquest panchnama. Independent panchas have not been examined. The investigating officer has stated in his evidence that the seized articles were not sent to the court along with the charge-sheet. They were kept in the malkhana of the police station. He has admitted that the seized articles were not sent to the forensic science laboratory. No explanation is offered by him about the missing sanha entries. His evidence on that aspect is evasive. Clothes of the deceased were not sent to the forensic science laboratory. The investigating officer admitted that no seizure list of the*

*clothes of the deceased was made. Blood group of the deceased was not ascertained. No link is established between the blood found on the seized articles and the blood of the deceased. It is difficult to make allowance for such gross lapses. Besides, the evidence of eyewitnesses does not inspire confidence. Undoubtedly, a grave suspicion is created about the involvement of the accused in the offence of murder. It is well settled that suspicion, however strong, cannot take the place of proof. In such a case, benefit of doubt must go to the accused. In the circumstances, we quash and set aside the impugned judgment and order [Sunil Kundu v. State of Jharkhand, Criminal Appeal No. 1762 of 2004, decided on 20-8-2007 (Jhar)] . The appellant-accused are in jail. We direct that the appellants A-1 Sunil Kundu, A-2 Bablu Kundu, A-3 Nageshwar Prasad Sah and A-4 Hira Lal Yadav be released forthwith unless otherwise required in any other case.'*

**56.** In the case of *Sharad Birdhichand Sarda v/s. State of Maharashtra*<sup>9</sup> and *Shivaji Sahabrao Bobade And Another v/s. State of Maharashtra*<sup>10</sup> the particulars on which the case based on circumstantial evidence can be established are considered. Firstly, the circumstances from which the conclusion of guilt is to be drawn should be fully established. It is necessary to note that the 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

<sup>9</sup> (1984) 4 SCC 116

<sup>10</sup> (1973) 2 SCC 793

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.

**57.** In *Mustkeem Alias Sirajudeen v/s. State of Maharashtra* (supra), the Apex Court observed in paragraph 25, 26, 27 as under:-

*'25. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.'*

*'26. If the recovery memos were prepared at the police station itself then the same would lose their sanctity as held by this Court in Varun Chaudhary v. State of Rajasthan [(2011) 12 SCC 545 : AIR 2011 SC 72].'*

'27. The scope and ambit of Section 27 were also illuminatingly stated in *Pulukuri Kotayya v. King Emperor* [(1946-47) 74 IA 65 : AIR 1947 PC 67] reproduced hereinbelow: (IA p. 77)

*“... it is fallacious to treat the ‘fact discovered’ within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ‘I will produce a knife concealed in the roof of my house’ does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added ‘with which I stabbed A’, these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.”*

*The same were thereafter restated in another judgment of this Court in *Anter Singh v. State of Rajasthan* [(2004) 10 SCC 657 : 2005 SCC (Cri) 597]'*

58. Similarly, the Apex Court reiterated the principles of circumstantial evidence as laid down in the case of ***Sharad Birdhichand Sarda*** (supra) as observed in paragraphs 23, 24 and 28, which need not be quoted at this juncture as it is discussed

earlier.

59. In the case of **Vijay Thakur v/s. State of Himachal Pradesh**(supra), the Apex Court while discussing its earlier decision in the case of **Mustkeem** (supra), **Sharad Birdhichand Sarad** (supra), observed that it is settled proposition of law that suspicion, however strong, cannot take the character of proof.

60. In the case of **Mani** (supra), the Apex Court observed in paragraph 26 as under:-

*'26. The discovery is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case. We have already held that the prosecution has failed to prove that the house where alleged bloodstains were found belonged exclusively or was possessed exclusively by the appellant, we have further pointed out that the discovery was absolutely farcical. There is one other very relevant factor ignored by both the courts that the prosecution never made any attempts to prove that the clothes belonged to the appellants. There is literally no evidence to suggest anything to that effect. Therefore, even if we accept the discovery, it does not take us anywhere near the crime. Both the courts below have ignored this very important aspect. Once these two important circumstances are disbelieved, there is nothing which would remain to support the prosecution theory.'*

**61.** Keeping in mind above settled proposition, and as discussed earlier with regard to alleged recovery of knife at the instance of the accused, it is clearly found that there was clear-cut tampering of the article attached at the instance of accused and more specifically the knife since it was shown to the shopkeeper by name Sainath Bandodkar,/PW13 who compared such knife with the knives available in his shop and then identifying it as sold by him. Thus, the so-called discovery of knife at the instance of accused is highly doubtful. Similarly, the bloodstains allegedly found on such knife cannot be accepted as that of the deceased since there is clear-cut evidence of tampering with such knife by the investigating agency. Hence, possibility of tampering with the blood sample allegedly found on the said knife cannot be ruled out. This further disbelieve the theory of linking the discovery of knife to the commission of offence.

**62.** The deposition of PW6-Alex Dias shows that he acted as panch witness on 23.01.2018 wherein accused was produced before him and there he made some disclosure. Surprisingly, he deposed that accused stated of going to a bar, purchasing chicken crispy and a bottle of brandy for Batu. First of all, the deposition of PW3 Raju clearly discloses that this fact was known to the police officer who conducted scene of panchanama on

21.01.2018. Therefore, there cannot be such disclosure for the first time at the instance of accused.

**63.** PW6-Alex Dias then claimed that accused disclosed that after commission of the said offence, he removed gold ornaments from the body of Batu and then concealed it at some place and he is ready to show such place. During cross-examination, it has been brought on record that PW6-Alex Dias and deceased Batu were childhood friends and therefore PW6 was clearly an interested witness to see that his deceased friend gets justice. Thus, deposition of PW6 being interested witness cannot be considered as without any dent. He is likely to support prosecution and more specifically so-called disclosure and recovery by putting words in the mouth of accused so that the accused can be convicted.

**64.** Further, PW6 in his cross-examination deposed that on knowledge of death of Batu, he had gone to the police station alongwith the brothers of the deceased and at that time he was requested to act as panch witness by P.I. Filomeno Costa who he knew even prior to that date. He then claimed that the accused made disclosure in Konkani but he does not know whether any recording was done by the Investigating Officer at the time of panchanama. He then claimed that the accused was disclosing

facts very fast and he was unable to verbally tell the words used by the accused while disclosing such facts. This clearly shows that PW6 was unable to disclose the words used by the accused while making alleged disclosure on the basis of which so-called recovery of weapon and so-called ornaments was carried out. Therefore, as observed earlier in the case of *Shahaja @ Shahajan* (supra) that it is necessary for the prosecution and the panch witnesses to disclose words used by the accused while making such disclosure, such evidence of PW6 is clearly putting a dent to the case of the prosecution regarding discovery and recovery at the instance of accused.

**65.** So far as recovery of so-called ornaments at the instance of accused, it is clear from the record that though the wife of deceased claimed that he was wearing only 2 gold finger rings, the investigating agency recovered 3 gold finger rings. It is also clear from the record that these gold ornaments which were recovered at the instance of accused were handed over to the wife of deceased without taking any test identification parade. It is not established that these gold ornaments were belonging to the deceased himself and not to any other person. Therefore, such recovery on the basis of alleged discovery made by the accused is of no substance to link the accused with the main offence of murder.

66. There is another angle to the above matter as the investigating agency conducted one more disclosure and recovery panchanama at the instance of the accused on 25.01.2018. Earlier disclosure and recovery panchanama was conducted on 23.01.2018. There is no explanation as to how there are two recovery panchanamas within a gap of two days. Be that as it may, prosecution examined PW18-Luis Fernandes who claimed that on 25.01.2018 he acted as panch witness at the request of P.I. Filomeno Costa and at that time accused was brought before them who made disclosure that he had thrown one plastic bag in which he had kept covers of mobile phones, 2 purses and he is willing to show the place to them. Thereafter, the accused led them to a bund at Seraulim and informed that he had thrown the bag near one board with a message that garbage dumping was prohibited. They went near the said board. Accused went alongwith the police and then brought one plastic bag. On opening the said bag they found 2 mobile phone covers which they put in one envelope. They further found 2 purses in the same bag of which one was of brown colour and the other one was of black colour. In the said purses they found identity card, Aadhaar card and voter card of Batu alongwith some pictures of Jesus. He then claimed that thereafter accused told them that he had thrown SIM cards of the phone and volunteered to show the

place. He then told them that he put it in one empty tin of soft drink and had thrown it in a garbage dump. Thereafter, the accused took them near one hotel at Sernabatim which is near Lions Club. The accused went and brought a tin from the garbage dump in which they found 2 damaged SIM cards out of which one was of Idea company and the other was beyond identification.

67. During cross-examination PW18 clearly admitted as under:-

*'I admit that PI Filomena Costa informed us about the case and that the accused would show us the places. I admit that he had also informed us that the accused would show us the purses and other articles of Baptista.*

*I admit that the accused was then produced in the cabin of PI Filomena Costa by two policemen. After the accused was brought, PI Filomena Costa questioned the accused and the accused then informed us that he had thrown the articles at certain places which he would show to us. PI Filomena Costa has asked the accused whether he was willing to show the places where he had thrown the articles. I cannot say the exact words used by the accused at that time.'*

68. Thus, it is further clear that PW18 was unable to disclose exact words used by the accused while making disclosure statement. Therefore, such disclosure allegedly made by the accused is of no help to the prosecution and further to link the

accused with the alleged offence.

**69.** The observations of the learned trial Court while relying on such circumstances and linking it to the accused are, therefore, considered to be incorrect for the reasons disclosed above. In fact, such observations are against the settled proposition of law as disclosed above. The knife allegedly recovered at the instance of accused was found tampered with. The witnesses examined by the prosecution are all interested witnesses. There is serious doubt with regard to the manner in which investigation was carried out. In fact, there is clear material on record to show that accused alongwith 3 to 4 friends of the deceased Batu were regularly attending police station and they were considered as suspects, from the day when the body of the deceased was recovered at the beach. The material brought on record clearly goes to show that there was lot of pressure from the people of the locality to arrest someone in the matter since FIR was lodged against unknown person. The deposition of PW26 PI Filomena Costa further shows that without any suspicion or material against the accused, he was arrested. On page no.30 of the cross-examination of PW26 he clearly admitted that accused was brought to the police station as suspect on 23.01.2018 by the staff. Such staff member who brought the accused to the police station as a suspect is not examined. PW26 Filomena Costa only instructed his staff

members to bring the suspects. However, he does not depose as to what was the material against the accused which brings him in the category of suspect and that too, on 23.01.2018.

70. The prosecution is not claiming or linking the accused on the basis of last seen theory. There is no witness examined by the prosecution who claimed to have seen lastly the accused and the deceased together. In fact, as discussed earlier, PW28 Krishna clearly deposed that deceased Batu was dropped at his home by him alongwith accused prior to 7:30PM. PW19 Jeomiro Fernandes categorically stated in the chief-examination itself that the accused first dropped Batu at his house and thereafter dropped him at Wadakade. They dropped Batu at his residence at around 6:45PM. Thus, the accused was lastly seen with the deceased, PW19 Jeomiro Fernandes and PW28-Krishna Langde at around 6:45PM. They all dropped deceased at his residence and they left the said place. Thereafter, no one has seen Batu till his dead body was discovered. His wife/PW1 claimed that she called Batu on his mobile phone at 9:00PM and talked to him. Admittedly, no CDR or SDR of mobile phone of Batu, that of accused, PW19-Jeomiro, PW28-Krishna were produced during the trial to show their locations. Thus, a serious doubt is created with regard to entire case of the prosecution. The circumstances which are brought on record and discussed by the learned trial

Court in much detail are not at all established to the hilt and, more particularly, to point finger only against the accused.

71. Having said so, the findings of the learned trial Court cannot be accepted for holding accused guilty on all counts. Apart from the circumstances, the motive for commission of such offence is not at all established. The investigation has been carried out in a most shabby and casual manner. There is apparent tampering with the muddemal articles and more specifically alleged knife and clothes of the accused. The possibility of tampering with the knife is clearly established. Thus, overall material placed on record is not clinching material and it creates serious doubt about the entire evidence produced before the trial Court. In other words, the case of prosecution appears to be extremely doubtful and concocted so as to implicate the accused in the matter. Accordingly, we answer the above framed point in the negative.

72. Thus, judgment and conviction of the accused as recorded by the learned Additional Sessions Judge needs to be quashed and set aside. Hence, we pass the following order:-

### ORDER

i) The appeal is allowed. The impugned judgment

dated 20.12.2021 in Sessions Case (302) No.10/2018 passed by the learned Additional Sessions Judge, Margao is hereby quashed and set aside. Accordingly, conviction of the accused for the offence punishable under Section 302, 394 and 201 of IPC is hereby set aside. The appellant shall be set at liberty forthwith if not required in any other offence.

ii). However, the appellant shall furnish Bail Bonds as provided under Section 437-A of Cr.P.C. for ₹25,000/- with one surety in the like amount, within a period of one week from the date of his release, which shall continue till the period of appeal is over. Such Bail Bonds and surety shall be furnished to the learned Additional Sessions Court at Margao to its satisfaction.

**BHARAT P. DESHPANDE, J**

**M. S. SONAK, J**