IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

SHRI JUSTICE SUJOY PAUL
&
SHRI JUSTICE PRAKASH CHANDRA GUPTA

CRIMINAL APPEAL No.119 OF 2016

Between :-

GAURAV PANDEY S/O SUDHIR KUMAR PANDEY, AGED AROUND 29 YEARS, R/O 15/1563 GULAB NAGAR, SAMAN CHOKI, REWA (MP)

….**APPELLANT**

(BY SHRI PRAKASH UPADHYAY – ADVOCATE)

AND

THE STATE OF MADHYA PRADESH, THROUGH P.S. SHAHPURA, DISTRICT BHOPAL (MP)

….**RESPONDENT**

(BY SHRI S.K. KASHYAP - GOVERNMENT ADVOCATE)

CRIMINAL APPEAL No.357 OF 2016

Between :-

TRAYAMBAK DWIVEDI ALIAS T.D. S/O SHRI ARUNENDRA DWIVEDI, AGED ABOUT 24 YEARS, R/O 8/684, ANAND NAGAR NEEM CHOURAHA, BODA BAG REWA, DISTRICT REWA (MP)

….**APPELLANT**

(BY SHRI SHREYAS PANDIT - ADVOCATE)

AND

STATE OF MADHYA PRADESH, THROUGH THE STATION HOUSE OFFICER, POLICE STATION SHAHPUR, DISTRICT BETUL (MP)

….**RESPONDENT**

(BY SHRI S.K. KASHYAP - GOVERNMENT ADVOCATE)

Reserved on	:	19/7/2022
Delivered on	:	25/7/2022

J U D G M E N T

Sujoy Paul, J. :-

These appeals filed under Section 374 of the Code of Criminal Procedure, 1973 (In short "Cr.P.C) take exception to the judgment dated 10/12/2015 passed by III Additional Sessions Judge, Bhopal in Sessions Trial No.258/2011 whereby appellants were held guilty for committing offence under Section 302 of Indian Penal Code and directed to undergo life imprisonment with fine of Rs.20,000/- with default stipulation. In addition, appellant Trayambak was held guilty for committing offence under Section 380 of Indian Penal Code for which sentence of two years (R.I.) and Rs.5000/- was imposed as fine. Both the punishments were directed to run concurrently.

Factual Background :-

2. In short, the story of prosecution is that on 17/01/2011 in Police Station Shahpura, complainant Umesh Saxena lodged a report that he received a phone call at about 2:15 A.M. from her sister-in-law Rani @ Shrutikirti that her father-in-law has been murdered. Complainant Umesh Saxena along with his wife Shashikirti rushed to his father-in-law Bishan Narayan Saxena's house B-155 Shahpur, Bhopal at around 3:00 A.M.

3. The complainant found that deceased is lying on a chair/sofa and there is an injury on backside of his head. The blood is coming out from

the wound. The blood stained axe is kept in the adjacent room. The *almirah* in another room is opened and its material is scattered in the entire room. The complainant lodged a report against unknown person alleging that his father-in-law was murdered by said person. Accordingly, Crime No.47/2011 was registered for committing offence under Section 302 of IPC.

4. The forensic team was called by police to examine the scene of crime. Mr. Sunil Gupta, Scientific Officer of Forensic Department examined the said place and found that deceased was sitting on a sofa and there were two injuries on the back of his head. The blood stains were found on the floor, sofa-set, *paijama*, *kurta* and maroon sweater of the deceased. No injury was found on remaining part of body except the head. In store room, the blood stained axe was found.

5. The forensic team prepared a spot map. They collected the blood from floor and from the wound of the deceased. The sample of hairs of deceased, a yellow medicine kept near dining table and blood stained axe were recovered. The *Panchayatnama* of dead body was prepared. A list of ornaments/materials allegedly looted from scene of crime were prepared. The body of deceased was sent for post-mortem.

6. The post-mortem report shows that reason of death is head injuries caused by hard and sharp object. Deceased Bishan Narayan Saxena died because of shock and excessive bleeding.

7. During the course of investigation, the appellant Gaurav Pandey was arrested and on the basis of his memorandum prepared under Section 27 of Indian Evidence Act (in short 'Evidence Act'), a polythene packet containing his blood stained shirt was recovered near Railway Station, Bhopal. Similarly, appellant Trayambak was arrested and pursuant to his

memorandum prepared under Section 27 of Evidence Act, his blood stained clothes were recovered from the house of Avnish. From the shirt, an ATM card of Central Bank was recovered. As per the memorandum of Trayambak, a gold ring was recovered from his friend Chati.

8. During the course of investigation, Sanjeev Ranjan Saxena produced a letter (Article-A) before the Court which shows that appellant Trayambak withdrew rupees from ATM card of deceased on three occasions. Since Rs. 2500/- were deposited in the account of deceased by somebody from Rewa, based on information of SBI Rewa, the information regarding account statement of Shri Arunendra Dwivedi, father of Trayambak was obtained.

9. The samples of finger print of both the appellants were obtained. The finger prints and seized materials were send for examination to Forensic Science Laboratory (FSL), Sagar.

10. In due course, the matter reached to the stage of the trial. The appellants abjured the guilt. The Court framed three questions for determination and after recording evidence and hearing the parties, came to hold that both the appellants are indeed guilty for committing offence under Section 302 of IPC. The appellant-Trayambak was, in addition, held guilty for committing offence under Section 380 of IPC.

Submissions :-

Cr.A. No. 119/2016

11. Shri Prakash Upadhyay, learned counsel for the appellant-Guarav Pandey, urged that the conviction of this appellant is based mainly on the statement of Rambabu Raghuvanshi (P.W.1), recovery of blood stained shirt and chance fingerprint on the *almirah* of the house of the deceased.

It is urged that Rambabu Raghuvanshi (P.W.1) claimed himself to be an eye-witness but by no stretch of imagination he can be treated to be an eye-witness.

12. Shri Prakash Upadhyay, Advocate minutely read out the deposition of Rambabu Raghuvanshi (P.W.1) and urged that as per this statement, the deceased was murdered on the bed and thereafter the appellants kept his body on the floor. As per statement of all the prosecution witnesses, the dead body was found in sitting position on a sofa. There exits no explanation as to how the body travelled from bed to sofa. This makes the story unbelievable.

13. The photographs of the incident were referred to contend that if attack by means of axe was made by appellants while deceased was lying on the bed, there would have been blood stains on the bed whereas there exists no blood stain on the bed. Indeed, there is a pool of blood under the sofa on which the dead body of deceased was found. Thus, it appears that deceased was attacked when he was sitting on the sofa. The description given by P.W.1 does not match with the ground realities and facts mentioned hereinabove.

14. The statement of Rambabu Raghuvanshi (P.W.1) is questioned by contending that he claimed to have seen the incident while standing near one door which is nearly 10 feet away from sofa and positioned right in-front of sofa near the television. Thus, door near the TV was in direct view. Thus, it is difficult to believe that accused who were three in number have not noticed the presence of Rambabu (P.W.1).

15. Reliance is placed on the 'spot map' (Ex.P/18) to establish that the *almirah* is situated in another room behind the room where murder

had taken place. The said room and kitchen is not visible from the door where Rambabu Raghuvanshi (P.W.1) was allegedly standing.

16. The eye-witness Rambabu Raghuvanshi (P.W.1) deposed that the appellant-Gaurav left the scene of crime from back door of the house whereas Trayambak left the scene from main door. The prosecution witnesses Seema Usrete (P.W.14) and her husband Sandeep Usrete (P.W.19) deposed that the front door of the room where murder had taken place was closed from inside. Rambabu Raghuvanshi (P.W.1) has not clarified as to how room was closed from inside when he himself was the only person available at the scene of crime after the murder and who did not enter the room where murder had taken place.

17. The conduct of this witness P.W.1 is highly unnatural which makes his statement untrustworthy. It is difficult to believe that Rambabu Raghuvanshi (P.W.1) had witnessed the murder but none of the accused persons could notice his presence at the scene of crime.

18. As per the prosecution story, the murder had taken place between 7-8 P.M. on 16.01.2011. Rambabu Raghuvanshi (P.W.1) after witnessing the said murder did not raise any alarm which is an unnatural behaviour. He did not inform any neighbour and tenant about the incident. He retired to his room situated at the first floor. He did not inform the police. He, as a normal routine, took his dinner and kept sitting in his room. This is an unnatural conduct which is unbelievable.

19. The police reached the scene of crime after 3:30 AM on 17.01.2011. The police called all the tenants of the deceased including Rambabu Raghuvanshi (P.W.1). At this point of time also, Rambabu Raghuvanshi (P.W.1) did not inform the police that deceased was murdered by the appellants.

20. The statement of Rambabu Raghuvanshi (P.W.1) is heavily relied upon wherein he had deposed that he was kept in the Police Station for a period of six days. In view of this statement, it is contended that the Police under threat, pressure/coercion obtained his statement. Such a statement of eye-witness is not creditworthy. The cross-examination of Rambabu Raghuvanshi (P.W.1) further shows that whenever he came to the court for recording of his statement, he was accompanied by Policeman in civil dress. This makes it clear that Police wanted to extract a particular nature of statement from him which suits and fits in with the prosecution story. This witness is not a natural eye witness.

21. The affidavit (Ex.D/1) signed by Rambabu Raghuvanshi (P.W.1) shows that he was threatened and compelled to become an eye-witness and depose his statement in a particular manner. This affidavit was signed by him on 13.8.2011. Jagdish Raghuvanshi (D.W.1), uncle of Rambabu Raghuvanshi (P.W.1), also proved the said affidavit.

22. The colour of blood in the photograph is clearly red. Photographs were taken by FSL team after 2:30 A.M. on 17.1.2011 whereas the murder had taken place between 7-8 P.M. on 16.1.2011. The colour of blood will turn black by efflux of time. This clearly creates doubt about the time of the incident/murder.

23. The appellant as per his pre-decided programme, left for his native place, namely Rewa between 6:00-6:30pm. The incident had taken place thereafter.

24. The Police admittedly brought the appellant from Rewa. Sunita (I.O.) (PW-17) deposed that appellant was formally arrested at Bhopal on 20.1.2011. She gave evasive answer as to how the appellant was brought from Rewa to Bhopal. As per Section 57 and 167 of Cr.P.C. r/w Article

20(2) of the Constitution, a person once taken in Police custody must be produced before the nearest Magistrate within 24 hours of his arrest. The Police team and its members who went to Rewa to arrest the appellant were not made witnesses in the trial. Thus, prosecution could not establish with clarity as to when the Police team proceeded for Rewa, when they reached Rewa, when they arrested the appellant and when he was brought to Bhopal. The time consumed in this entire exercise is relevant and burden was on the prosecution to establish the same. The attempt of the appellant is to show that Gaurav was arrested much before 24 hours on 20.1.2011 when he was formally shown to have been arrested at Bhopal. The illegal confinement of appellant beyond 24 hours not only infringes fundamental and constitutional rights of appellant, it raises a serious question on the fairness of the investigation.

25. The recovery of shirt of appellant is shown to be from an open place near cycle stand of railway station. It is argued that the said recovery was from an open place accessible to all and, therefore for this reason alone, recovery is doubtful. The shirt was not properly sealed and pertinently in the seizure slip (Ex. P/8) and document, the signature of the accused were not taken. No seal was affixed on Ex.P/8.

26. The statement of Chandrashekar (P.W.4) so called independent seizure witness shows that the shirt was kept hidden beneath a stone wrapped in a polythene bag. The recovery of shirt is after about four days, from the date of incident. In these four days when shirt was kept in an open space, it must have gathered some dust etc. However, when it was produced in the court, it was found to be in a clean and fresh polythene bag. The court appended a note in this regard while giving finding that shirt was found to be in a fresh polythene bag.

27. The Police Officer who has recorded the memo under Section 27 of the Evidence Act has not been examined by the prosecution. No local/independent witness of the area from where shirt was allegedly recovered was involved. Two independent witnesses namely Chandrashekhar (PW-4) and Vajendra Rawat allegedly signed the seizure memo. Vajendra Rawat was not examined at all. Chandrashekhar in his cross examination admitted that when he reached the Police Station, I.O. asked him whether he approached her on behalf of family of deceased Bishan Narayan Saxena. He answered in affirmative. The fairness and impartiality of this witness is questioned with further contention that in a fair process, the Police ought to have made some local persons as witness, the persons who were available at the time of recovery at the place of recovery.

28. That there is no iota of material to show that the recovered shirt belongs to the present appellant. Thus, recovery has no legs to stand.

29. Another evidence regarding chance finger print on *almirah* is also unbelievable submits Shri Upadhyay. As per the prosecution story, Gaurav did not commit any theft or loot after the incident. Thus, availability of his finger print on the *almirah* situated in the room adjacent to the room where murder had taken place is of no value at all. The prosecution witnesses candidly deposed that the appellant used to help the deceased in his day to day work. During this activity, on various places impression of his thumb must have been placed. There is no recovery of any ornament, material or valuable thing from the appellant. The singular recovery is of his own shirt. Thus, fingerprint is not a relevant circumstance against appellant. Criticizing the findings of court below regarding *chance finger print*, it is argued that Finger Print Expert,

(P.W.18) relied on some findings based on artificial intelligence/computer analysis. Thus, it is an electronic record, which is not admissible in absence of requisite certificate issued under Section 65-B of Evidence Act.

30. Other discrepancies of investigation pointed out are that in the beginning Sunita, I.O. (P.W.17), deposed that when on the date of incident, she visited the scene of crime, she did not carry the case diary whereas in the later portion of her statement, she took a 'U' turn. The statement of forensic expert, Dr. C.S. Jain, (P.W.2) shows that the forensic team reached and finished their work at the scene of crime before Police reached there whereas statement of A.K. Rai, (P.W.18), FSL Expert shows that he received the information of said crime from Police between 2.30-3:00 am on 17.1.2011. The FSL personnel were required to take all possible evidence, the finger prints and examine material available in the scene of crime. They did not take finger print of Rambabu. During cross examination of FSL Expert (P.W.18) it is admitted that finger prints etc. of Rambabu was not taken because by that time, the accused persons were identified/determined. It is argued that FSL team visited the scene of crime before Police visited there. Thus, before completion of investigation, there was no occasion for the FSL team to know as to who are the prime accused. It was obligatory on the part of FSL team to take all possible evidence of incriminating material from the scene of crime. Leaving evidence related to Rambabu, the only person available at the scene of crime, after the murder is a practice which is unknown to law.

31. No 'motive' is established by the prosecution against the present appellant. The singular eye witness, Rambabu, (PW-1) is untrustworthy. In absence of motive being established, the appellant cannot be held

guilty based on circumstantial evidence, like recovery of shirt and chance fingerprint. The recovery of shirt is doubtful, the arrest and remand is made by a method which runs contrary to law. Seizure of shirt is totally defective. The FSL report regarding blood is inconclusive. The chance finger print story is like house of cards.

32. The relevant paragraphs of the impugned judgment shows that although court below has mentioned the specific defence of present appellant taken before it, it has not taken pains to consider, deal and analyse the same. No reasons are assigned by the court below in the impugned judgment as to why defence taken by the appellant was not found to be trustworthy. The court below mechanically accepted the prosecution story, which was totally demolished by the appellant. In support of these contentions, he placed reliance on **(2010) 2 SCC 748, (Musheer Khan @ Badshah Khan and another Vs. State of M.P.) 2019 (7) SCC 781, (Balwan Singh Vs. State of Chhattisgarh and another), 2020 (10) SCC 733 (Chunthuram Vs. State of Chhattisgarh).** The findings of the court below is based on surmises and conjectures and are liable to be jettisoned by this court is the last contention of learned counsel for this appellant.

33. In support of these submissions Shri Upadhyay, Advocate filed written submissions.

<u>Cr.A. No.357/2016</u>

34. Shri Shreyas Pandit, learned counsel for appellant/Trayambak Dwivedi urged that this appellant is convicted on the basis of statement of Rambabu Raghuvanshi (P.W.1) and recovery of a gold ring and a shirt containing an A.T.M card (card of the deceased). In addition, 'Article-A' a letter, also became a reason for his conviction.

35. To elaborate, it is contended that this appellant was arrested on 07/03/2011. At that point of time, he was a student of a Graduation Course of Engineering. Two memorandums under section 27 of Evidence Act were prepared on 09/03/2011 and 11/03/2011 respectively. By first memorandum, a shirt containing A.T.M card was allegedly recovered, whereas by second memorandum, gold ring of deceased was recovered.

36. The statement of Rambabu Raghuvanshi (P.W.1) was relied upon to show that relation of present appellant with deceased were cordial. Shri Pandit urged that this eye-witness Rambabu is common for both the appellants. Thus, he borrowed the argument of Shri Prakash Upadhyay to the extent statement of Rambabu was attacked by contending that the statement is not worthy of credence.

37. The axe allegedly used in murder was recovered from the scene of crime. However, no finger print of appellant on the said weapon could be found. Rambabu Raghuvanshi (P.W.1) deposed that appellant after murdering the deceased went to the next room and opened the *almirah* and opened the gas-knob of the kitchen. By placing heavy reliance on the spot map Ex.P/18, it is urged that the door where Rambabu (P.W.1) was standing shows that from this place, neither *almirah* nor kitchen is visible. Thus, statement of Rambabu Raghuvanshi (P.W.1) cannot be a reason to hold that after committing murder, the appellant opened the almirah and took out the valuables and opened gas-knob of kitchen. There was no other eye-witness to the incident.

38. The statement of Rambabu Raghuvanshi (P.W.1) is assailed for yet another reason. Both the neighbours of deceased *viz.* Sandeep Usrete (P.W.19) and Seema Usrete (P.W.14) categorically deposed that the door of room wherein dead body was found was closed from inside. Rambabu

Raghuvanshi (P.W.1) deposed that this appellant left the scene of crime from the front door, which was found to be closed as per statement of aforesaid neighbours. The unnatural conduct of this eye-witness was highlighted at the cost of repetition in the same line on which Shri Prakash Upadhyay highlighted it.

39. As per statement of Rambabu Raghuvanshi (P.W.1) there was another tenant/Sumit residing adjacent to the room of the deceased. Sumit was not examined.

40. Shri Shreyas Pandit criticized the recovery by contending that first memorandum (Ex.P/4) is related to recovery of a blood stained half shirt and A.T.M card and these materials were recovered from appellant's friend Avnish. Avnish was not made witness in the trial. The appellant was arrested on 07/03/2011. The seizure of shirt was made on 09/03/2011. Similarly, through another memorandum (Ex.P/8) prepared on 16/03/2011. The gold ring was allegedly recovered from appellant's friend Chati. The prosecution did not establish that the alleged gold ring was of the deceased.

41. Shri Rama Rao (P.W.5) entered the witness box on behalf of Bank and stated that C.C.TV footage of A.T.M from where appellant allegedly used the A.T.M card, is not available. There were three transactions from A.T.M card on 22/11/2010 and 16/01/2011. The amount of Rs.10,000/-, Rs.10,000/- and Rs.1100/- were withdrawn by using the A.T.M card. The eyebrow were raised on the fairness of the recovery by contending that Prem Kumar (P.W.3) deposed that the house from where shirt and A.T.M card were recovered, there was nobody inside the house. The description and address of the house is not shown. In his cross-examination Prem Kumar deposed that he is working in Shahpura Police Station. He

already became witness in 2-4 cases. He used to visit Shahpura Police Station at 9 A.M. and remained there upto 12:00 PM. Thereafter, he is available in a shop in front of police station for the whole day. Apart from this, he has no other work to perform. It is further submitted that recovery of shirt was prepared at Bogada Bridge. It is contended that this statement is unbelievable because it is deposed that when they entered the house from where shirt was recovered, there was nobody in the house and house was not locked. Interestingly, at last, he stated that police used to make him witness but he used to turn hostile. Such statement does not inspire confidence and based on this appellant cannot be held guilty for committing offence under section 302 of IPC. The statement of Dinesh Chandra Agrawal (P.W.6), Branch Manager was relied upon to show that Rs.2,500/- were allegedly deposited from Rewa on 13/01/2011 (Ex.P/10). However, who deposited it was not established with necessary clarity.

42. The statement of another recovery witness Philip Penairo (P.W.7) is relied upon to show that as per prosecution case, the appellant took valuable material from the *almirah* of deceased. He kept the gold near a dam in Sagar. The golden ring was recovered from the house near Kamla Park. Shri Pandit submits that apart from ATM Card, shirt and golden ring, nothing else could be recovered from the appellant. The statement of K.S. Baurana, Sub Inspector (P.W.10) shows that there exist no documentary evidence to show that any police team ever visited Allahabad and recovered anything from Allahabad.

43. The statement of Philip Penairo (P.W.7) shows that he did not disclose about the address and details of the house from where recovery was made. He could not give satisfactory explanation about the

description of the house. The house owner was Lal Bhai but he was not produced as witness. Thus, recovery is totally unbelievable.

44. The letter dated 23.11.2010 (Article A) is referred to show that it was not produced alongwith the challan. The family members of the deceased filed it during trial before the Court below. Amit Dwivedi (P.W.16) is the relevant witness to support the letter ('Article A'). The statement of Seema Usrete (P.W.14) is relied upon to submit that deceased has already pardoned the present appellant. Thereafter, no bad blood developed between the appellant and the deceased. The statement of Amit Dwivedi that the room where murder has taken place was closed from inside. Thus, the statement of Rambabu (P.W.1) is incorrect that this appellant left the scene of crime from the front gate. Apart from this, 'Article A' does not show that appellant had committed any offence. Even assuming that 'Article A' is proved, it cannot be a reason to hold the appellant as guilty.

45. Shri Shreyas Pandit, learned counsel for appellant urged that the so called letter Article-A also became a reason to convict the appellant. Son of deceased, Sanjeev Saxena (PW-13) deposed that Article-A was given to the police after half an hour when police reached the place of incident on 17.01.2011. This Article-A was given through Ex-P/22. PW-3 further deposed that a list of articles/ornaments (Ex-P/23) was prepared pregnant with details of the material/ornaments which were not found in the *almirah* of the house after the murder of his father.

46. Criticizing the reliance made on Article-A, it is contended that Amit Dwivedi (P.W.16) clearly mentioned that letter Article-A is not in his handwriting.

47. In Ex.P/23 list, the signature of Sanjeev Saxena (PW-13) was not taken. The Section 311-A of Cr.P.C. is read out to contend that it is an enabling provision which gives power to the Magistrate to obtain specimen signature of a person arrested. No specimen signature of appellant were ever taken to establish that his signature was indeed available on the letter Article-A. For this reason, the appellant in his statement under Section 313 of Cr.P.C. clearly stated that the said Article-A is wrong document.

48. The statement of Seema Usrete and her husband Sandeep Usrete (PW-14 and PW-19) were relied upon to show that both of them in clear terms deposed that the front side of the door of the room where deceased was found dead was locked from inside. As per the statement of these persons, the police came after the staff of 108 Ambulance left. As per statement of I.O. (P.W.17) when she had seen the body of the deceased blood was oozing but no formal declaration was taken either from staff of 108 Ambulance or from any other doctor that deceased is no more. No staff of 108 Ambulance became part of investigation process and court proceedings. Seema Usrete (PW-14) further deposed that appellant was pardoned by the deceased.

49. The recovery of shirt and ATM card by memo dated 09/03/2011 and recovery of gold ring through memo dated 10/03/2011 also became a subject matter of attack. Statements of Investigating Officer (PW-17) is relied upon to contend that admittedly three memorandums under Section 27 of the Evidence Act were prepared. However, for the reasons best known to the I.O., the memo dated 07/03/2011 was never produced before the Court.

50. Recovery is bad-in-law because recovery of shirt and ATM card alleged to have been made from the house of Avnish. The I.O. candidly deposed that at the time of recovery from the residence of Avnish, Avnish was found by her in the house whereas recovery witness Prem (P.W.-3) in reply to question No.7 clearly stated that there was nobody in the house from where shirt and ATM card were recovered. Avnish was not made witness by the prosecution. Hence, recovery of shirt and ATM card is highly doubtful.

51. The gold ring was allegedly recovered from another person namely Chati, friend of this appellant. This witness was not produced before the Court. No test identification of property/gold ring was conducted. The description of gold ring given in the list Ex.P/23 was not tallied with the gold ring allegedly recovered. It was not established that gold ring belongs to the deceased. The witness Prem is an employee of Police Station Shahpura.

52. It is further submitted that during the course of investigation even finger prints of Avnish were taken by the prosecution. However, no explanation is forthcoming as to what happened to said finger prints. Pertinently, in the recovery memo also, the signature of Avnish from whose house the shirt and ATM card were recovered was not taken. Thus, method of recovery is totally unknown to law and cannot be a reason to convict the appellant.

53. After concluding the arguments on appreciation of evidence, Shri Pandit, placed reliance on the impugned judgment to show that defence of appellant was recorded by the Court below. However, without there being any analysis, the Court below simply reproduced the prosecution story once again and treated it to be a gospel truth. The Court has not discussed

about the defence of the appellant and has not assigned any reason why such defence did not suit it. Thus, judgment has become vulnerable.

54. In support of aforesaid submissions, Shri Pandit placed reliance on certain judgment. **2020 (19) SCC 165, Amar Singh vs. State (NCT of Delhi),** was referred for twin purpose. *Firstly,* about the principle laid down regarding quality of the sole eye-witness and *secondly*, to draw the attention to the Court regarding principles relating to unnatural conduct of a witness. **2020 (10) SCC 733, Chunthuram vs. State of Chhattisgarh**, was also relied upon for twin purpose. *Firstly,* to show the unnatural conduct of eye-witness and *secondly*, to establish that if two views are possible, one which favours the accused should be taken. Unreported judgment of the Division Bench of this Court in CRA No.2227/2012 was relied upon to bolster the submissions that in similar factual backdrop, the Court interfered with the judgment of conviction.

55. Shri S.K. Kashyap, learned Government Advocate supported the impugned judgment. By placing reliance on **(2003) 1 SCC 456 (State of U.P. vs. Jagdeo and Others)** it is canvassed that defective investigation is a fault of investigating agency/prosecution. Mere faulty investigation will not vitiate the trial and the judgment.

56. Learned Government counsel by placing reliance on the statement of Rambabu (PW-1) urged that he is a natural eye-witness. His conduct is also natural. Statement of G.V. Ramarao (PW-5) was referred to show that there were three withdrawals by using ATM card of deceased by somebody. However, video footage of any such withdrawal is unavailable. The statement of Dinesh Agarwal (PW-6) and Harishchandra Jain (PW-8) shows that Rs.2500/- were deposited in the account of deceased from Rewa. Since parents of appellant-Trayambak were

residents of Rewa, it can be presumed that the money was deposited by the parents of this appellant.

57. The statement of Amit Dwivedi (PW-16) was relied upon to submit that he was a natural witness who signed the Article-A in the presence of deceased.

58. During the course of arguments Shri Kashyap referred statement of Shri Amit K. Rai, (PW-18) a fingerprint expert to show that chance print of middle finger of appellant-Gaurav could be found on the locker of *almirah*.

59. The statements of recovery witnesses Prem Kumar (PW-3) Chadrashekhar (PW-4), and Joseph Pinro (PW-7) were referred to show that recovery of shirt, ATM card from Gaurav and recovery of golden ring from Trayambak is clearly established in view of statements of these recovery witnesses.

60. The statement of Sunita I.O. (PW-17) was referred to show that it is in tune with the statements of aforesaid recovery witnesses. She clearly deposed that she reached the scene of crime on 17.01.2011 at 6:20 AM.

61. The solitary eye-witness Rambabu (PW-1)'s conduct cannot be said to be unnatural because every person, in a given situation, acts in a different manner. Thus, court below has rightly relied on certain Supreme Court judgments on this point.

62. Shri Kashyap has taken pains to read the finding portion of the impugned judgment and contended that there is no flaw in appreciation and analysis of evidence. Hence, no interference be made.

63. Parties confined their arguments to above extent.

64. We have heard them at length and perused the record.

Investigation :-

65. As per the statement of prosecution witnesses, the staff of 108 Ambulance reached first at the scene of the crime followed by the forensic expert. Then police visited the scene at around 6:20 am on 17.1.2011 as per the statement of the Investigating Officer Sunita (PW-17).

66. Investigating Officer Sunita (PW-17) in her cross-examination stated that chance print were taken by the FSL expert between 3:30 to 4:00 A.M. on 17.1.2011. The fingerprints of all the persons were taken and sent for examination to FSL expert. It is important to note here that a specific question was asked by the defence during cross-examination whether fingerprint of Rambabu (PW-1) was taken and sent for examination. The Investigating Officer deposed in her statement that Rambabu's fingerprint were not sent for examination to the FSL expert. It is further stated that Rambabu was the eye-witness to the incident and therefore, it was not thought proper to sent his fingerprint for examination. We are surprised in the manner investigation was conducted. When FSL experts reached the scene of crime on 17.01.2011 between 3:30 to 4:00 A.M., they were obliged to obtain all possible evidence from the scene of crime. An axe was admittedly used to murder the deceased. There is no iota of material to show that the availability of fingerprints on handle of axe was examined or not. As held by the Supreme Court, the investigation must be sincere, honest and dispassionate. The Supreme Court in **Kishore Chand v. State of H.P., (1991) 1 SCC 286, para-12** has held that :

> "Before accusing an innocent person of the commission of a grave crime like the one punishable

> under Section 302, I.P.C. an honest, sincere and dispassionate investigation has to be made and to feel sure that the person suspected of the crime alone was responsible to commit the offence. Indulging in free fabrication of the record is a deplorable conduct on the part of an investigating officer which undermines the public confidence reposed in the investigating agency. Therefore, greater care and circumspection are needed by the investigating agency in this regard. It is time that the investigating agencies, evolve new and scientific investigating methods, taking aid of rapid scientific development in the field of investigation."
>
> **(Emphasis Supplied)**

67. The investigation should be impartial and fair. The Apex Court in **Common Cause v. Union of India, (2015) 6 SCC 332, para-35** opined as under :-

> "What is of importance is that as justice must not only be done but it must also appear to have been done, similarly, investigations must not only be fair but must appear to have been conducted in a fair manner".
>
> **(Emphasis Supplied)**

68. The Apex Court in **CCE v Jainson Hosiery Industries, (1979) 4 SCC 22, para-1** has held as under :-

> "The investigation of a criminal offence is a very sensitive phase where the investigating authority has to collect evidence from all odd corners and anything that is likely to thwart it course may inhibit the interests of justice."
>
> **(Emphasis Supplied)**

69. The Investigating Authority and FSL experts should have collected all possible evidence available in the scene of crime to examine the complicity of any person. In a case of this nature, we do not find any justification as to why Rambabu's fingerprint were not obtained and why the matter was not examined and investigated from all possible corners.

70. In view of the aforesaid principles laid down, we are constrained to hold that the investigation was faulty and no efforts were made to examine as to how the body of deceased was found on a sofa when he was assaulted elsewhere as per version of Rambabu (PW-1) and nobody else thereafter entered in the said room. The investigation is silent as to how room where body of deceased was found was locked from inside. As per prosecution story, three persons were involved including one Rajnish.

71. Learned Government Advocate could not point out as to whether the investigation was concluded against Rajnish and what is the outcome of the same.

72. Apart from the above, the statement of Investigating Officer Sunita (P.W.17) in answer to question number 12 and 13 shows that the fingerprints of Rambabu were not sent to the FSL expert on the pretext that the accused persons' names were disclosed. Before completion of investigation and without examining the role of Rambabu based on his fingerprint, it was not proper to exclude him from the purview of investigation.

73. Shri Prakash Upadhyay, Advocate during the course of argument, strenuously contended that the investigation was faulty and also criticized the arrest and detention of appellant. In catena of judgments the Supreme Court laid down that conviction of an accused cannot be mechanically set aside merely because there was some procedure flaw in the investigation. If flaw in the investigation results into miscarriage of justice, interference can be made [See :- **Muni Lal vs. Delhi Admn. (1971) 2 SCC 48; Khandu Sonu Dhobi vs. State of Maharashtra (1972) 3 SCC 786; Durga Dass vs. State of H.P. (1973) 2 SCC 213;**

Ashok Kumar vs. State of Rajasthan (1991) 1 SCC 166; Gajoo vs. State of Uttarakhand (2012) 9 SCC 532 and **Ganga Singh vs. State of M.P. (2013) 7 SCC 278**). It is profitable to quote the relevant portion of **Khandu Sonu Dhobi vs. State of Maharashtra (1972) 3 SCC 786** :-

> "**11.** …...the result of the trial cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. The underlying reason for the above dictum is that an illegality committed in the course of investigation does not affect the competence and jurisdiction of the court to try the accused. Where, therefore, the trial of the case has proceeded to termination, the invalidity of the preceding investigation would not vitiate the conviction of the accused as a result of the trial unless the illegality in the investigation has caused prejudice to the accused."
>
> **(Emphasis Supplied)**

74. The *ratio decidendi* of this judgment was consistently followed in the subsequent judgments .

75. In **Ganga Singh (supra)**, the Apex Court opined that the court cannot acquit the accused on the ground that there are some defects in the investigation but if the defects in the investigation are such as to cast a reasonable doubt on the prosecution case, then of-course the accused is entitled to acquittal because of such doubt.

76. The manner in which appellant Gaurav was arrested also became subject matter of criticism. We have considered this aspect and deem it proper to observe that if an accused person is arrested by police, the police must show with mathematical precision as to when, where and how he was arrested. Unless this is done with accuracy and precision, the constitutional mandate of Article 20(2) cannot be translated into reality.

The same will be the situation with Section 57 and 167 of Cr.P.C. To elaborate, the aforesaid constitutional and statutory provisions make it clear that an accused person cannot be detained by police beyond 24 hours unless he is produced before the nearest available Magistrate. The starting point of 24 hours will begin from the time he was arrested. Thus, the prosecution must show to the Court as to when the accused person was arrested. In the instant case, there is opaqueness on this aspect. It is not clear as to when police party of Bhopal reached Rewa and took the appellant Gaurav into custody, when they started from Rewa and reached Bhopal. In absence thereof, no definite finding can be given that Gaurav was detained beyond 24 hours without producing him before the Magistrate. Thus, on this score, it cannot be said that any miscarriage of justice has taken place which will vitiate the prosecution case and the result.

Eye-witness (P.W.1) :-

77. Rambabu Raghuvanshi (P.W.1) is indisputably the singular eye-witness. As per the prosecution case, the conviction of both the appellants is based on account of statement of said eye-witness and on the recoveries made from the appellants.

78. As per statement of Rambabu Raghuvanshi (P.W.1), both the appellants assaulted the deceased by means of an axe when he was taken out from his bed. However, all the prosecution witnesses including I.O. categorically deposed that dead body of deceased was found on a sofa. The prosecution completely failed to show as to who brought the dead body from bed to sofa. In the bed or on the floor touching the bed, no blood stains were found. On the contrary, there was a pool of blood

beneath the sofa. Thus, statement of Rambabu Raghuvanshi (P.W.1) on this account does not inspire confidence.

79. The spot map shows that there are two doors in the room which were opening on a corridor. Rambabu Raghuvanshi (P.W.1) was allegedly standing near one such door. He claims that the appellants could not notice his presence when they murdered the deceased and when they left the scene of crime. A minute glance of spot map shows that it is highly improbable that the assailants will not notice the presence of any person if he is witnessing the incident from one such door. It is further difficult to believe that while leaving the place of crime they could not notice the presence of P.W.1.

80. Apart from this, the spot map shows that *almirah* from where articles were allegedly taken away by Trayambak was situated in the other room. As per sketch map, the place where Rambabu was allegedly standing, neither *almirah* nor kitchen could be visible. Thus, his statement that Trayambak after assaulting deceased went to the next room and took out certain materials is not trustworthy. For the same reason, the statement of this eye-witness that Trayambak opened the knob of cooking gas is also not worthy of credence.

81. In series of judgments, the Apex Court considered the aspect of unnatural conduct of a witness. It is profitable to quote few of such judgments :-

82. In **Shivaji Dayanu Patil Vs. State of Maharashtra** reported in **1989 Supp (1) SCC 758** it was held as under:-

> **"11.** The question for consideration is as to why was Parvatibai mum from 30-1-1972 to 1-2-1972? The High Court felt satisfied by saying that she was in a dazed

> mood. We do not agree with the High Court. Parvatibai's conduct was highly unnatural. A wife, who has seen an assailant giving fatal blows with a stick to her husband, would name the assailant to all present and to the police at an earliest opportunity. There is nothing in the evidence to justify this highly unnatural and improbable conduct of Parvatibai."
>
> **(Emphasis Supplied)**

83. Similarly in **Anil Phukan Vs. State of Assam** reported in **(1993) 3 SCC 282** the Supreme Court opined as under:-

> **"5.** The unnatural conduct of Ajoy PW 3 which has come to our notice from the record is that though he was present along with the deceased at the time of occurrence, on March 21, 1976, at about 8 p.m., he made no attempt to save his uncle from the assault. He did not even continue to stay there, though of course according to him, he ran for his life on being advised so by his uncle. He was not assaulted though both he and his uncle were unarmed. Even if Mahendra was engaged in assaulting the deceased, Anil who was also allegedly armed neither made an attempt to assault Ajoy PW 3 nor even chased him. PW 3 Ajoy did not himself lodge the FIR. Of course, he gave information about the occurrence to PW 4, PW 5, PW 7 and others immediately after the occurrence describing the manner of assault and the names of the assailants but why he did not lodge the FIR has not been explained by him."
>
> **(Emphasis Supplied)**

84. Reference may be made to **Harbans Lal Vs. State of Punjab, (1996) 2 SCC 350** wherein it was held as under :-

> **"6.** With a view to satisfy our judicial conscience, we have perused the evidence of PW 11 Kartar Singh and PW 12 Karnail Singh but their evidence does not inspire confidence. PW 11 Kartar Singh deposed that on the night in question, while passing through the house of Harbans Lal he peeped through a window of the house and saw that the appellant had kept his foot on the neck of Punni Devi deceased while Pawan Kumar had caught hold of her arms and Dial Ram of her legs. Why PW 11 had to peep through the window is not explained by him,

> particularly when it is not his case that the deceased was shouting or raising an alarm? ……..Thus, these two witnesses deposed about two stages of the occurrence they had seen through the window. Their evidence appears to be rather artificial. These two witnesses appear to us to be got-up witnesses. They saw a gruesome murder being committed with their own eyes and yet for reasons best known to them, they did not raise any alarm but went their way and did not disclose about the occurrence to anyone, not only that evening but even till the third day after the occurrence. Their conduct was thus most unnatural. This creates a serious doubt about their creditworthiness.**"**
>
> **(Emphasis Supplied)**

85. In **Mohan Singh Vs. Prem Singh and another, (2002) 10 SCC 236** it was again held as under :-

> **"23.** ……..At some places, in the impugned judgment of acquittal the reasoning of the High Court may not be sound but on weighing the total evidence on record, in our considered opinion, the High Court committed no error in acquitting both the accused. There are several infirmities in the prosecution case. The evidence of the alleged eyewitnesses does not inspire confidence. At about 8 o'clock in the night, their version is that they were following the deceased on the way to the village. Their subsequent conduct in not intervening in the attack or rushing to the village for help is unnatural. Their testimony has rightly been found unreliable."
>
> **(Emphasis Supplied)**

86. In **State of Punjab Vs. Sucha Singh, (2003) 3 SCC 153** the findings are as under:-

> **"7.** A perusal of the statements of PWs 4 and 5, coupled with the testimony of other witnesses and facts and circumstances of the case, shows that the presence of PWs 4 and 5 at the place of occurrence is inherently improbable for the following reasons…….PW 5 did not accompany the injured to the hospital. No explanation by the

> prosecution as to why he could not accompany the injured to the hospital. The conduct of PW 5 is quite unnatural. This would make the presence of PW 5 at the place of occurrence all the more doubtful. In our view, these circumstances would make the alleged presence of PW 4 and PW 5 at the place of occurrence inherently improbable."
>
> **(Emphasis Supplied)**

87. In **State of Rajasthan Vs. Banwar Singh, (2004) 13 SCC 147** it was held as under :-

> **"6.** ……. The presence of PWs 3, 4 and 8 at the alleged spot of incident has been rightly considered doubtful in view of the categorical statement of PW 5, the widow that she sent for these persons to go and find the body of her husband. It is quite unnatural that PWs 3, 4 and 8 remained silent after witnessing the assaults. They have not given any explanation as to what they did after witnessing the assault on the deceased. Additionally, the unexplained delay of more than one day in lodging the FIR casts serious doubt on the truthfulness of the prosecution version.**"**
>
> **(Emphasis Supplied)**

88. In **State of T.N. vs. Zubair, (2008) 16 SCC 319** it as held as under:-

> **"33.** It is seen that PWs 1 and 2 stated that they had left the injured in lurch and had disappeared from the scene making the deceased to cringe to an auto driver to take him to hospital. Would any close friend of a person involved in the movement allow such a thing to happen to him is the question looming large and there is no explanation for it. Further, it is curious to note that both PWs 1 and 2 have stated that they did not inform about the occurrence to anybody till they were asked by the police in the midnight of the date of occurrence. The conduct of PWs 1 and 2 is unnatural and unbelievable and their presence at the time of occurrence is doubtful and the testimonies of PWs 1 and 2 cannot be accepted."
>
> **(Emphasis Supplied)**

89. In **Lahu Kamlakar Patil and another Vs. State of Maharashtra** reported in **(2013) 6 SCC 417** held as under :-

> **"21.** The attack is based on the grounds, namely, that the said witness (PW 2) ran away from the spot; that he did not intimate the police about the incident but, on the contrary, hid himself behind the pipes near a canal till early morning of the next day; that though he claimed to be an eyewitness, yet he did not come to the spot when the police arrived and was there for more than three hours; that contrary to normal human behaviour he went to Pune without informing about the incident to his wife and stayed there for one day; that though the police station was hardly one furlong away yet he did not approach the police; that he chose not even to inform the police on the telephone though he arrived at home; that after he came from Pune and learnt from his wife that the police had come on 21-2-1988, he went to the police station; and that in the backdrop of such conduct, his version does not inspire confidence and deserves to be ignored in toto."
>
> **(Emphasis Supplied)**

90. In the same case, it was further held as under:-

> **"24.** In *Gopal Singh* v. *State of M.P.* [(2010) 6 SCC 407 : (2010) 3 SCC (Cri) 150] this Court had overturned the judgment of the High Court as it had accepted the statement of an eyewitness of the evidence ignoring the fact that his behaviour was unnatural as he claimed to have rushed to the village but had still not conveyed the information about the incident to his parents and others present there and had chosen to disappear for a couple of hours on the specious and unacceptable plea that he feared for his own safety."
>
> **(Emphasis Supplied)**

91. Lastly, in **Chunthuram Vs. State of Chhattisgarh, (2020) 10 SCC 733** it was poignantly held as under :-

> **"15.** Next the unnatural conduct of PW 4 will require some scrutiny. The witness Bhagat Ram was known to the deceased and claimed to have seen the assault on Laxman by Chunthuram and another person. But curiously, he did not take any proactive steps in the matter to either report to the police or inform any of the family members. Such conduct of the eyewitness is contrary to human nature."
>
> **(Emphasis Supplied)**

92. In the same case, the Supreme Court held as under :-

> **"16.** The witness here knew the victim, allegedly saw the fatal assault on the victim and yet kept quiet about the incident. If PW 4 had the occasion to actually witness the assault, his reaction and conduct does not match up to ordinary reaction of a person who knew the deceased and his family. His testimony therefore deserves to be discarded."
>
> **(Emphasis Supplied)**

93. The judgments cited by learned counsel for the appellants are also in the same lines. The common string in all the judgments is that the conduct and behaviour of an eye-witness must be examined on the touchstone whether his behaviour is natural and probable.

94. The statement of Rambabu Raghuvanshi (P.W.1) comes under doubt for yet another reason. He stated that appellant Trayambak left the room from the front gate where deceased was murdered. Seema Usrete (P.W.14) and Sandeep Usrete (P.W.19) categorically deposed that front door of the said room was found to be closed/locked from inside. Rambabu deposed that he did not enter the room where murder had taken place. The story of prosecution has serious flaw where the reason of locking the door from inside is not shown. Rambabu was the only person available in the house before Seema Usrete (P.W.14) visited the scene. If

Rambabu did not enter the room, who locked the room from inside was an aspect which should have been answered by the prosecution.

95. This eye-witness, during the course of assault by the appellants could have raised alarm and could have asked for help. There were other tenants residing in the building who could have come there for help. He not only did not raise alarm, advanced help after the incident, he silently retired to his room. He consumed dinner as a normal routine and kept sitting in his room. When another neighbour P.W.14 informed the police and 108 ambulance, police and ambulance staff visited the scene of crime, surprisingly, Rambabu did not inform the neighbours, the 108 staff or the police about the reason of incident and about the assailants. Next morning only, he informed the police. We find substantial force in the argument of learned counsel for the appellants that his conduct was highly unnatural and unexpected from a normal human being.

96. As per the acid test laid down by the Apex Court in above mentioned cases, we are inclined to hold that the conduct of the eye-witness Rambabu (P.W.1) is highly doubtful, unnatural, improbable and unreliable. Hence, his statement cannot be relied upon to affirm the conviction.

97. Pertinently, Rambabu (P.W.1) in his deposition categorically deposed that he remained in police custody for 5-6 days. He was not declared hostile and this part of statement was unrebutted. In **Rajaram vs. State of Rajasthan (2005) 5 SCC 272; Mukhtiar Ahmed Ansari vs. State (NCT of Delhi) (2005) 5 SCC 258; Javed Masood and another vs. State of Rajasthan (2010) 3 SCC 538** and **Akil vs. State (NCT of**

Delhi) (2013) 7 SCC 125, the Courts have held that portion of statement of prosecution witness which goes against the prosecution can be used by the defence. In **Rajaram (supra)** the Apex Court opined that :-

> "**9.** But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (*sic* declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined."
>
> **(Emphasis Supplied)**

98. In the case of **Mukhtiar Ahmed Ansari (supra)** the Supreme Court held as under :-

> "**29.** The learned counsel for the appellant also urged that it was the case of the prosecution that the police had requisitioned a *Maruti* car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness in this case as PW 1. He, however, did not support the prosecution. The prosecution never declared PW 1 "hostile". His evidence did not support the prosecution. Instead, it supported the defence. The accused hence can rely on that evidence.
>
> **30.** A similar question came up for consideration before this Court in *Raja Ram* v. *State of Rajasthan* [(2005) 5 SCC 272 : JT (2000) 7 SC 549] . In that case, the evidence of the doctor who

was examined as a prosecution witness showed that the deceased was being told by one *K* that she should implicate the accused or else she might have to face prosecution. The doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the doctor and it was binding on the prosecution.

31. In the present case, evidence of PW 1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his *Maruti* car to the police in which the police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, the accused can rely on that evidence."

(Emphasis Supplied)

99. In **Javed Masood (supra)**, the Apex Court held thus :-

"**19.** PW 5 is none other than the brother of the deceased and a highly interested witness whose evidence was required to be carefully scrutinised and precisely for that reason we have looked into the evidence of PW 5 with care and caution. The testimony of Mohammad Ayub (PW 6) cannot easily be surmounted by the prosecution. He has testified in clear terms that PWs 5, 13 and 14 were not present at the scene of occurrence. It is not known as to why the public prosecutor in the trial court failed to seek permission of the court to declare him "hostile". His evidence is binding on the prosecution as it is. No reason, much less valid reason has been stated by the Division Bench as to how evidence of PW 6 can be ignored.

20. In the present case the prosecution never declared PWs 6, 18, 29 and 30 "hostile". Their evidence did not support the prosecution. Instead, it supported the defence. There is

nothing in law that precludes the defence to rely on their evidence.

(Emphasis Supplied)

100. The Supreme Court in the case of **Akil (supra)** opined that :-

"**29.** Apart from the above decisions relied upon by the learned counsel for the appellant, we ourselves have noted in the decisions in *Kunju Muhammed* [*Kunju Muhammed* v. *State of Kerala*, (2004) 9 SCC 193 : 2004 SCC (Cri) 1425] , *Nisar Khan* [*Nisar Khan* v. *State of Uttaranchal*, (2006) 9 SCC 386 : (2006) 2 SCC (Cri) 568] , *Mukhtiar Ahmed Ansari* [*Mukhtiar Ahmed Ansari* v. *State (NCT of Delhi)*, (2005) 5 SCC 258 : 2005 SCC (Cri) 1037] and *Raja Ram* [*Raja Ram* v. *State of Rajasthan*, (2005) 5 SCC 272 : 2005 SCC (Cri) 1050] , wherein this Court has specifically dealt with the issue as regards hostile witness who was not treated hostile by the prosecution and now such evidence would support the defence i.e. the benefit of such evidence should go to the accused and not to the prosecution. In para 16 of the decision in *Kunju Muhammed*[*Kunju Muhammed* v. *State of Kerala*, (2004) 9 SCC 193 : 2004 SCC (Cri) 1425] this Court has held as under : (SCC p. 202)

"*16.* We are at pains to appreciate this reasoning of the High Court. This witness has not been treated hostile by the prosecution, and even then his evidence helps the defence. We think the benefit of such evidence should go to the accused and not to the prosecution. Therefore, the High Court ought not to have placed any credence on the evidence of such unreliable witness."

(Emphasis Supplied)

101. Apart from this, Rambabu stated that whenever he visited the Court for the purpose of recording evidence, police personnel in civil dress accompanied him. This statement of P.W.1 also went unrebutted. The cumulative effect of this is that this witness was either tutored or was under pressure of the prosecution. It is highly unsafe to rely on such statement.

Chance fingerprint of appellant Gaurav :-

102. The prosecution made efforts to establish that a chance fingerprint of Gaurav was found on the locker of the *almirah.* The learned Government Advocate placed reliance on this chance print during the course of argument. We do not see any merit in this contention for the simple reason that it is not the case of the prosecution at all that after assaulting the deceased, Gaurav entered the second room where almirah and locker were situated. No allegation of taking away any material from *almirah* is levelled against appellant Gaurav. Thus, we are unable to fathom as to how availability of chance print on locker will improve the case of the prosecution against Gaurav. Apart from this, the prosecution witnesses deposed that Gaurav had cordial relation with deceased and deceased used to give him various house hold works including changing gas cylinder etc. During performance of such work, his fingerprints must have been printed on various articles etc. Thus, chance fingerprint is of no use for prosecution against appellant Gaurav.

Recovery :-

103. As per prosecution story, the blood stained shirt of Gaurav was recovered near a vehicle stand of Habibganj Railway Station. Two persons signed the recovery memo. Out of them, one Chandrashekhar

(P.W.4) entered the witness box. It is admitted by I.O. and Chandrashekhar during the cross-examination that signature of accused was not taken on the recovery material. This flaw makes the recovery vulnerable. We find support in our view from the judgment of Apex Court in the case of **Kishore Bhadke vs. State of Maharashtra (2017) 3 SCC 760** wherein it is held as under:-

> **"38.** In *Jaskaran Singh* [*Jaskaran Singh* v. *State of Punjab*, 1997 SCC (Cri) 651 : AIR 1995 SC 2345], the Court opined that the disclosure statement given by the accused regarding conscious possession of the weapon did not inspire confidence. One of the reasons was that disclosure statement did not bear the signature or the thumb impression of the appellant. The Court found that even the recovery memo of the revolver and the cartridges did not bear either the signatures or the thumb impression of the accused. In the present case, the disclosure statement bears the signature of Accused 2 and 3 respectively. The absence of signatures on the recovery memo (Ext. 76 A) would not make it inadmissible and it has been rightly taken into account because of the other evidence regarding its authenticity and genuineness."
>
> **(Emphasis Supplied)**

104. That apart, the sealed shirt was produced before the Court and Court gave a specific finding that it is packed in a fresh packet. As per the allegations, the blood stained shirt was lying near vehicle stand for 3-4 days. It must have gathered some dust etc. but there was no trace of it on the packet of said shirt. For this reason also, the recovery becomes doubtful. No local person of the area from where recovery was made was made witness. In the answer to question No.36 and 37 Chandrashekhar (P.W.4) clearly stated that he is a witness on behalf of the family members of the deceased. The shirt was recovered from an open space. The

cumulative effect of these aspects leads us to the conclusion that it is not safe to accept the recovery of blood stained shirt of Gaurav from an open space. Thus, we are constrained to hold that prosecution could not establish by leading clinching evidence about recovery of shirt of Gaurav.

105. The recovery from Trayambak is of a golden ring and a shirt and a ATM Card of deceased. The golden ring was allegedly recovered from a house which was not locked and nobody was available in the house as per version of Prem (P.W.3) whereas I.O (P.W.17) stated that owner of the house was available when recovery was made. The owner of the house was not examined. The statement of Prem (P.W.3) shows that he was working in the Police Station. He became recovery/seizure witness in several matters on behalf of prosecution. In answer to last question of cross-examination, he said that police makes him seizure witness and he used to turn hostile in the Court. It is not safe to give stamp of approval to such recovery on the strength of statement of such recovery witness.

106. The gold ring allegedly recovered was not put to test identification of property. It was not established that said gold ring belonged to the deceased or his family members. Even this could not be established that the ring so recovered was a ring made of gold. As per Section 27 memorandum obtained from Trayambak, certain material were allegedly kept by him at Allahabad and other places. The police team visited Allahabad. However, no finding or material could be produced before the court below regarding recovery of any other material. The persons namely Avnish and Chati from whose house materials were recovered were not produced as witnesses. Thus, it is unsafe to rely on such doubtful recovery. Thus, we are unable to hold that any valid

recovery has been made from the appellant Trayambak which connects him with the crime.

Spot map :-

107. This is trite that spot map is of great significance for the purpose of proving the commission of offence. The statement of star witnesses must be in consistent with the spot map. If there is glaring discrepancy and contradiction between eye-witness account and spot map, a serious dent is caused to the prosecution story.

108. In the instant case, there is no harmony between the statement of eye-witness and spot map. From the place Rambabu (P.W.1) has allegedly seen the incident, by no stretch of imagination could give him a glance of *almirah* situated in the next room and also the kitchen because there was a wall in-between. In view of glaring contradiction between the spot map and eye-witness account, the statement of eye-witnesses cannot be accepted.

Article-A :-

109. 'Article-A' also does not help the prosecution. It was not proved by producing any handwriting expert that this document contains signature of appellant Trayambak. Even otherwise, this document only shows that prior to the incident, some money was withdrawn using the ATM Card of deceased by Trayambak. Even assuming that this aspect is established, in absence of a proof beyond reasonable doubt about the murder, appellant Trayambak cannot be held guilty. Thus, 'Article-A' is of not much help to the prosecution.

Error in the impugned judgment :-

110. A minute reading of impugned judgment shows that the court below has mentioned the prosecution story which was followed by description of evidence so led by it. The court proceeded to discuss the defence taken by the present appellants. Thereafter, comes the finding portion of impugned judgment. A microscopic reading of the findings given in the impugned judgment shows that only one point/objection raised by defence is taken care of and considered by the court below. The said point is relating to allege unnatural conduct of solitary eye-witness Rambabu (PW-1).

111. It is noteworthy that the appellants raised eyebrows on the entire investigation process, the manner in which fingerprint and evidence are being collected. They raised certain points to demolish the recoveries allegedly made from them. Sadly, in the finding portion, except dealing with one point mentioned hereinabove, the court below did not deal with the specific argument and points in relation to different aspects raised by the defence. The prosecution story is again reproduced and on the basis of said one sided story, the appellants were held guilty.

112. Needless to emphasize that nobody can be held guilty for committing offence under Section 302 of IPC unless the allegations are proved to the hilt. Suspicion, surmises and conjunctures in no case can take the place of proof.

113. This was the minimum expectation from the court below that each point of defence taken by the accused persons will be specifically dealt with. The court below was obliged to give adequate reasons relating to specific points raised by the defence. If the points so raised did not suit the court below or the court below was not impressed with the points so raised, it was incumbent upon the court below to assign adequate reasons

for such rejection. The court below has miserably failed to discharge said obligation and therefore we are unable to give stamp of approval to the impugned judgment.

114. In view of the foregoing analysis, we are unable to hold that prosecution could establish its case beyond reasonable doubt. Resultantly, we deem it proper to give the benefit of doubt to the appellants. The impugned judgment dated 10/12/2015 passed in Sessions Trial No.258/2011 is accordingly set aside. The appeals are **allowed**.

(SUJOY PAUL)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE

PK