IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 17TH DAY OF MAY, 2022

PRESENT

THE HON'BLE MR. JUSTICE B. VEERAPPA

AND

THE HON'BLE MR. JUSTICE S. RACHAIAH

CRIMINAL APPEAL No.573/2019

BETWEEN:

SHIVAPRASAD @ SHIVA,

... APPELLANT

(BY SRI B.A.BELLIAPPA, ADVOCATE)

AND:

THE STATE BY BANASAWADI POLICE,
BENGALURU CITY, REP. BY SPP.,
HIGH COURT BUILDING,
HIGH COURT,
BENGALURU – 560 0001.

... RESPONDENT

(BY SRI K. NAGESHWARAPPA, HCGP)

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THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE PRAYING TO SET ASIDE THE JUDGMENT OF CONVICTION AND ORDER OF SENTENCE DATED 19.03.2019 PASSED BY THE XXXII ADDITIONAL CITY CIVIL AND

SESSIONS JUDGE FOR CBI CASES, BENGALURU, (CCH.34) IN S.C.NO.365/2009 CONVICTING THE APPELLANT/ACCUSED FOR THE OFFENCE PUNISHABLE UNDER SECTION 302 OF THE INDIAN PENAL CODE.

THIS APPEAL HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, B.VEERAPPA, J DELIVERED THE FOLLOWING:-

J U D G M E N T

The appellant/accused who has been in judicial custody since last 13 years has filed the present Criminal Appeal against the judgment of conviction and order of sentence dated 19.03.2019 made in S.C.No.365/2009 on the file of the XXXII Additional City Civil and Sessions judge and Special Judge for CBI cases, Bengaluru (CCH-34), convicting the accused for the offence punishable under Section 302 of the Indian Penal Code sentencing him to undergo imprisonment for life and to pay fine of ₹10,000/-, in default, to undergo simple imprisonment for a period of six months.

I. FACTS OF THE CASE:

2. It is the case of the prosecution that the deceased Thulasi, aged about 48 years was residing along with her son-P.W.3 and daughter-P.W.4, aged about 14 and 22 years respectively, at House No.8, 9th D Main, I Block, HRBR Layout, Bengaluru, within the jurisdiction of Banaswadi Police Station and her husband Ravishankar-P.W.5 being an

Engineer was staying at Abudhabi. Initially, accused was driver under P.W.6-Ramaswamy, neighbour of the deceased, and as some differences arose between them, P.W.6 removed the accused from driver job. It is further case of the prosecution that at the time when accused was working under P.W.6, he gained confidence of the deceased and her husband, and used to visit their house. As the husband of the deceased was in abroad, the deceased Thulasi used to go to functions with the help of accused in his car. During such times, the accused had seen the jewels being worn by the victim and thereby he thought that the victim might be possessing much more jewels, as her husband was working in abroad and hatched a plan to steal the jewels when her children were not at home, so that he can live a happy life by purchasing a new car. When things stood thus, on 27.06.2008, realizing that the children of the victim had went to school and victim was alone at home, at 9.45 am, the accused entered the house of the victim, spoke confidently with her and took a knife from the kitchen room and stabbed her on the neck and other parts of the body. In the scuffle, the victim snatched the knife and attempted to assault the accused with the said knife. When the accused tried to escape, the knife came in contact with the left cheek of the accused and the accused sustained scratch injury on his left cheek. Thereafter, accused went to first floor of the house and took away 905 grams of

gold kept in the godrej almirah, cash of ₹7,000/- and Nokia mobile belonging to the victim, and ran away from the spot. It is further case of the prosecution that as usual, on 27.06.2008, P.W.3-Master Akshay Kumar, son of the deceased, aged 14 years studying in 8th Standard and Urmila-P.W.4, daughter of the deceased, aged 22 years left for their school and college at about 7.30 am and the victim was alone in the house. Further, as usual, at about 4 or 4.30 pm, P.W.3/son of the victim returned home on his bicycle and rang the cycle bell. Usually, his mother used to come out of the house and open the gate to receive him. Since, even after ringing the cycle bell for 5 to 10 times, his mother did not come out, P.W.3 went inside the gate and peeped into the house through window and noticed that his mother was lying on the floor. He pushed the door and went inside the house and found that his mother's face was covered with a pillow. He noticed blood on the floor, near the neck and a blood stained blade on the other side of the body. He was under the impression that his mother was unconscious and therefore, poured water on her face. When there was no response, he went out screaming, to the neighbour house i.e., Smt.Ragamma/P.W.2 and explained her about his mother. Immediately, P.W.3 and PW.2 came to the house of the deceased and called the deceased but there was no response. Thereafter, P.W.2 came out of the house of the victim saying that she would inform the

husband of the victim who was at Abudhabi. Thereafter, neighbours gathered at the spot and somebody informed the police, who came to the spot and saw the dead body.

3. It is further case of prosecution that, P.W.4- daughter of the victim who was pursuing her engineering at Vemana Institute of Technology, Koramangala, as usaual, returned home at 6.30 pm and found that number of people had gathered infront of the house and also noticed the presence of police. Her aunt Mangala informed that somebody had killed her mother. Thereafter, she noticed that almirah and wooden cupboard in the first floor were opened and scattered on the floor and the gold ornaments were missing. She further noticed cut injury on the neck and stab injury on the right side of the stomach of her mother and clothes were blood stained. The Thali chain and gold bangles were missing. Thereby, P.W.3 lodged the police complaint as per Ex.P.1. The jurisdictional police registered a case and after investigation filed charge sheet against the accused for the offence punishable under Section 302 of the India Penal Code. After committal of the matter, the learned Sessions Judge secured the presence of the accused and framed charge for the offences punishable under Sections 302 of the India Penal Code.

4. The trial court, by the judgment of conviction and order of sentence dated 01.08.2012 convicted the accused for the offences made out in Charge and sentenced him to undergo imprisonment for life with fine. Against the said judgment of conviction and Order of sentence, accused filed Criminal Appeal No.200/2013 and this Court by the Judgment dated 25.06.2018, set-aside the judgment of conviction and remanded the matter to the learned Sessions Judge with a direction to provide an opportunity to both the parties with liberty to file application to recall the witnesses for the purpose of further cross-examination and to give opportunity to lead further evidence, if any, on the additional charges framed, if needed and directed to dispose off the matter, in accordance with law.

5. In order to prove its case, the prosecution in all, had examined 24 witnesses as P.Ws.1 to 24 and marked the documents Exs.P.1 to P.62 and material objects M.Os.1 to 94. On behalf of the defense, Exs.D.1 to D.6 were marked. After completion of evidence of prosecution witnesses, the statement of the accused was recorded as contemplated under the provisions of Section 313 of the Code of Criminal Procedure. The accused denied all the incriminating circumstances adduced against him by the prosecution witnesses. He also filed separate statement stating that he was driver under P.W.6-

Ramaswamy and later on left the job. He further stated that, he was arrested on 29.06.2008.

6. After the remand Order dated 25.06.2018 passed in Criminal Appeal No.200/2013, P.W.1 was cross-examined, P.Ws.2, 6, 7, 8 and 11 were further examined and cross-examined. P.W.17 was further examined and cross-examined. P.Ws.14, 9, 12 and 16 were cross-examined, Ex.P.13(b) was got marked. P.Ws.15 and 19 were cross-examined. P.Ws.23, 1 and 21 were further examined and cross-examined. P.W.20 was cross-examined.

II. POINTS FOR CONSIDERATION FRAMED BY THE TRIAL COURT

7. Based on the pleadings, the learned Sessions Judge framed three points for consideration:

> (a) Whether the prosecution proves beyond all reasonable doubt that on 27.06.2008 at about 9.45 am the accused entered the house in No.308, HRBR Layout, 1st Block, 9th D Main Road, Bengaluru, and committed the murder of Smt.Thulasi by stabbing on her right side upper abdomen and over front of middle and left side of neck with a knife, thereby committed an offence punishable under Section 302 of IPC?
>
> (b) Whether the prosecution further proves beyond all reasonable doubt that on the above said date, time and place, the accused had robbed gold ornaments about 905

gms, cash of Rs.7,000/- and Nokia Mobile belongs to the deceased, thereby committed an offence punishable under Section 392 of IPC?

(c) Whether the prosecution further proves beyond all reasonable doubt that on the above said date, time and place, the accused while committing the robbery of the things stated above used deadly weapon i.e., a knife and caused grievous injury and attempted to cause death, thereby committed an offence punishable under Section 397 of IPC?

8. Considering both oral and documentary evidence on record, the learned Sessions Judge answered point No.1 in the affirmative and point Nos.2 and 3 in the negative holding that the prosecution proved beyond all reasonable doubt that on 27.06.2008, at about 9.45 am, the accused entered the house of the victim i.e., No.308, HRBR Layout, I Block 9th D Main, Bengaluru, and committed the murder of Smt.Thulasi by stabbing on her on her right side upper abdomen and over front of middle and left side of neck with knife-M.O.1 and thereby committed an offence punishable under Section 302 of the Indian Penal Code. The learned Sessions Judge further recorded the finding that prosecution failed to prove beyond all reasonable doubt that on the said date the accused had robbed 905 grams gold ornaments, ₹7,000/- cash and a Nokia mobile belonging to the deceased and

thereby committed an offence punishable under Section 392 of the Indian Penal Code, and further failed to prove that, while committing robbery, accused used deadly weapon i.e., knife-M.O.1 and caused grievous injuries and attempted to cause death and thereby committed an offence punishable under Section 397 of the Indian Penal Code. Accordingly, by the impugned judgment of conviction and order of sentence, the learned Sessions Judge acquitted the accused for the offences punishable under Sections 392 and 397 of the Indian Penal Code and convicted the accused with imprisonment for life and to pay fine of ₹10,000/-, in default, to undergo simple imprisonment for a period of six months for the offence punishabie under Section 302 of the Indian Penal Code. Hence the present Criminal Appeal is filed by the appellant/accused.

9. The State/Prosecution has not filed any appeal challenging the impugned judgment of acquittal of the accused for the offences punishable under Sections 392 and 397 of the Indian Penal Code.

10. We have heard the learned counsel for the parties.

III. ARGUMENTS ADVANCED BY LEARNED COUNSEL FOR THE APPELLANT/ACCUSED

11. Sri B.A.Belliappa, learned counsel for the appellant/accused contended with vehemence that the impugned judgment of conviction

and order of sentence passed by the learned Sessions Judge is erroneous, contrary to the material on record and cannot be sustained. He further contended that, the learned Sessions Judge has not considered Ex.D.4-heinous offence report and Ex.D.5-report under Section 146 of the Code of Criminal Procedure sent to the doctor, which clearly prove that the dead body of deceased Thulasi was lying in the house at 7.00 am or 7.30 am on 27.06.2008 and the evidence of P.W.19-Cheluvaraju depicts that on the same day ACP called police team from KG Halli police station and constituted four teams to search and arrest the accused involved in the crime and accordingly the police started to search the accused from 2 pm on the same day. Thereby the investigation started even before lodging of the complaint. Inspite of the same, the accused has been convicted for the offence punishable under Section 302 of the Indian Penal Code, without any basis. He further contended that the trial court erred in holding that the appellant/accused has sustained 15 cms incised injury on the right cheek which was caused by the deceased when the accused attacked the deceased. Admittedly the injury was not noticed by P.W.1 who has last seen the accused while he was coming out from the house of the deceased. P.W.19 and other police officials arrested the accused and P.Ws.13 and 14 are mahazar witnesses. But, the prosecution has not examined five police constables who took the accused to the

hospital and who produced him before the doctor. Admittedly, the doctor who treated the accused has not been examined. But, the medical certificate discloses that the injury was on the left cheek. Admittedly, police have not submitted any medico legal report to show as to where the accused took the treatment. Inspite of the same, learned Sessions Judge convicted accused for the offence punishable under Section 302 of the Indian Penal Code, without any basis.

12. Learned counsel further contended that the learned Sessions Judge erred in holding that the accused was in possession of mobile phone of the deceased and the same was seized by the Investigating Officer and collected call details to prove the movement of the accused on the date of the incident, earlier to it and on the next date. The learned Sessions Judge has come to the conclusion that the prosecution has failed to prove the Charge under Sections 392 and 397 of the Indian Penal Code. The address of the accused and P.W.5 forthcoming in the call details does not tally with their residential address. Even after seizing of phone of the accused, phone was being used by some body. Even on 29.06.2008, calls were made from the phone of the accused and IMEN number sent by the Investigating Officer to the BSNL, differs from calls list. The appellant has stated that the mobile phone No. 9972872992 does not belongs to him.

Inspite of the same, the appellant has been convicted and the same cannot be sustained.

13. Learned counsel further contended that the statement of P.W.4 Urmila as per Ex.P.6 submitted to the ACMM Court on 29.07.2008 does not disclose the name of the accused. Inspite of the same, the learned Sessions Judge blindly accepted the stand of the prosecution that the accused was in police custody from 2.00 pm on 28.06.2008. Contrary to this, P.W.6-Rangaswamy deposed that on the date of the incident, i.e., on 27.06.2008, accused was brought to the spot and gold items were seized on the same day. Even according to P.W.5-Ravishankar, all the gold items seized were seen by him in the police Station on 30.06.2008. Thereby there are contradictions, omissions and improvements and the same is not considered by the learned Sessions Judge. Thereby the impugned judgment conviction cannot sustained.

14. Learned counsel further contended that the learned Sessions Judge having rightly held that accused has not robbed the gold items or any other material objects and also not caused grievous injuries on the body of the deceased, acquitted the accused on the said charges. Then, what is the motive for the murder is not assigned by the learned Sessions Judge. The tampering of FSL report, submitting of finger print reports after 24 months and non-examination of Bengali family

whose house was situated beside the house of the deceased is not at all considered by the learned Sessions Judge. He further contended that the specific charge is that the accused has committed the murder of Thulasi by using deadly weapon-M.O.1, committed robbery of gold, cash and mobile. The learned Sessions Judge though recorded the finding that the accused has not robbed the gold ornaments, cash and mobile and not used deadly weapon like knife, still, erroneously convicted the accused for the offence punishable under Section 302 of the Indian Penal Code and the same cannot be sustained. Therefore, he sought to allow the Criminal Appeal.

IV. ARGUMENTS ADVANCED BY PROSECUTION

15. Per contra, Sri K.Nageshwarappa, learned High Court Government Pleader, while justifying the impugned judgment of conviction and order of sentence, contended with vehemence that the evidence of P.W.1 is consistent regarding presence of the accused at the scene of occurrence before the incident and also recovery is made at the instance of the accused and gold jewellery belonging to the deceased were identified by P.Ws.3 to 5 who are none other than the family members of deceased. He further contended that despite opportunity having been given to the accused to adduce evidence on his behalf while recording statement under Section 313 of the Code of

Criminal Procedure, the accused has not chosen to lead any evidence to rebut the same. He further contended that the prosecution proved its case beyond all reasonable doubts about the presence of the accused at the spot and recovery of gold ornaments, cash and mobile phone has been made at the instance of the accused. The blood stains found on the knife and also injury sustained by the accused during scuffle with the deceased proves that the accused has committed the offence and this Court cannot interfere with the impugned judgment of conviction and order of sentence. Thereby he sought to dismiss the Criminal Appeal.

V. POINTS FOR CONSIDERATION

16. In view of the aforesaid rival contentions urged by the learned counsel for the parties, the only point that would arise for our consideration is:

> "Whether trial court is justified in convicting accused for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to undergo imprisonment for life with fine and default clause?
>
> or
>
> Whether the accused has made out any case to interfere with the impugned judgment of conviction and order of sentence, in the peculiar facts and circumstances of the present case."

17. This court being the appellate Court, it is relevant to consider the evidence of prosecution witnesses and documents relied upon.

(a) PW.1 – Venkatesh - is the driver of P.W.6. He says that, on the date of the incident, he has seen the accused going inside the house of deceased Thulasi and coming back at about 10.30 A.M. He has withstood the lengthy cross-examination and supported the case.

(b) PW.2 – Ragamma - is residing in the same locality where the deceased died. She says that the accused was working as driver of the Indica car belonging to her husband. She is a hearsay witness to the incident.

(c) PW.3 - Akshay kumar - is the son of the deceased. He says he has lodged the complaint which is marked as Ex.P1. He has identified M.O.1 to M.O.6.

(d) PW.4 - Urmila Ravishankar - is the daughter of the deceased Thulasi. She says that the accused was well acquainted with her family and he used to take them to the functions of their family in his car. She identified the gold jewellery of her mother.

(e) PW.5 – Ravishankar - is the husband of the deceased and hearsay witness about the incident. He further says, that the Police called him to Banasawadi Police Station on 30.06.2008 and showed the gold ornaments, mobile phone, and cash of ₹2,545/-

(f) PW.6 – Ramaswamy - was residing in the locality where the deceased Tualsi and family were residing before her death. He is the hearsay witness.

(g) PW.7 - Bhagath Singh - is the son of P.W.2 and P.W.6. He says that he has seen the accused on 27.06.2008 at about 10.00 a.m. to 10:30 a.m. who was talking with his driver - P.W.1. He further says that he has asked the accused why he had come there even after he was removed from the work. The accused replied that he came to the house of Thulasi to get the form filled for applying to BBMP. He has supported the case.

(h) PW.8 - Nagaraj - is the witness to the seizure mahazar – Ex.P3 and also witness to the inquest mahazar – Ex.P4. Supported the case of the prosecution.

(i) PW.9 – Dr.K.H.Manjunath – is the Doctor who conducted the postmortem of deceased Thulasi and issued a report as per Ex.P5. Supported the case of the prosecution.

(j) PW.10 – Sanjay, Junior Engineer working at AEE Office, VV Tower, Bengaluru. He has prepared the spot sketch and submitted his report as per Ex.P8. Supported the case of the prosecution.

(k) PW.11 – Krishnaprakash, PSI, working in Finger Print Expert Office at Commissioner of Police Office. He has conducted the investigation about the examination of the spot and he has issued a certificate as per Ex.P11 and has issued Ex.P55. Supported the case of the prosecution.

(l) PW.12 – Radha S., FSL Officer, has examined 17 articles and submitted her report as per Ex.P12 and Ex.P13.

(m) PW.13 – K.Jayaram, is witness to seizure mahazar which is marked as Ex.P14 under which M.O.7, M.O.11 to M.O.15, and M.O.19 to M.O.20 were identified. Supported the case of the prosecution.

(n) PW.14 – Chandra is the witness to seizure mahazars which are marked as Ex.P15, Ex.P16 to Ex.P18, and Ex.P19. He has supported the case of the prosecution.

(o) PW.15 – N.C.Shankaraiah, PI of Banaswadi Police Station. He has conducted an investigation and submitted the charge sheet.

(p) PW.16 – Dr.B.N.Nagaraj, says that he has examined the accused and collected scalp hair and submitted his report as per Ex.P57 and he has identified M.O.77 – scalp hair. Supported the case of the prosecution.

(q) PW.17 – Mallikarjuna, Police Constable of Banaswadi Police Station, was deputed to take the accused to the hospital for examination and collected the sample of scalp hair. He has supported the case of the prosecution.

(r) PW.18 – Vijaykumar, Police Constable of Banaswadi Police Station, has carried 17 items to FSL Officer and handed over the same to the Officer and obtained acknowledgment, and handed over the same to the I.O.

(s) PW.19 – Cheluvaraju, Police Constable of K.G.Halli Police Station, says that he was deputed to search the accused.

He along with CW.32 and CW.34 have apprehended the accused on 28.06.2008 and produced him before the I.O.

(t) PW.20 – Mallikarjuna, was the photographer. He has taken photographs and also videography of the recovery of golden articles at the instance of the accused at Kengeri. He has produced a receipt for having received Rs.3,800/- from the police. The same is marked as Ex.P59. Supported the case of the prosecution.

(u) PW.21 – D.C.Ravindra, was working as Scientific Officer in FSL, Bengaluru. He has examined several articles seized at the spot of occurrence i.e., M.O.6, M.O.7, M.O.1, M.O.4, M.O.57, and M.O.3, and issued a report as per Ex.P60. Supported the case of the prosecution.

(v) PW.22 – Malleshaiah, Police Constable of Banaswadi Police Station, was deputed to carry the dead body for postmortem. After postmortem, he received the clothes of the dead body and handed over the same to the I.O. Supported the case of the prosecution.

(w) PW.23 – K.J.Arun, was resident of HRBR Layout. He is the witness to Ex.P4 – Inquest Mahazar. Supported the case of the prosecution.

(x) PW.24 – Dr.Harinarayanan, was working as RMO at Dr.B.R.Ambedkar Medical College, Bengaluru. He has produced MLC Register which is marked Ex.P29. Supported the case of the prosecution.

18. Based on the aforesaid material witnesses and the documents relied upon, the learned Sessions Judge acquitted the accused for the offences punishable under Sections 392 and 397 of the Indian Penal Code and convicted him for the offence punishable under Section 302 of the Indian Penal Code. Admittedly State has not filed any appeal challenging the acquittal of the accused for offences punishable under Sections 392 and 397 of the Indian Penal Code.

VI. CONSIDERATION

19. The gist of the case of the prosecution as per Ex.P.1-complaint lodged by P.W.3-Akshay Kumar, son of the deceased is that, on 27.06.2008, he went to the school at about 7.30 am for project work and his sister-Urmila-P.W.4 also left the house at the same time. When he returned home at 4 pm, as usual, he rang the bicycle bell. Usually, his mother used to open the gate. But, on the date of the

incident even though he rang the cycle bell many times, his mother did not come out and he noticed that the gate was open. He went and peeped through the window and noticed that his mother was lying on the floor and her face was covered with a pillow. The door was open and he went inside and tried to wake up his mother. When she did not respond he went and called his neighbour-Ragamma, who came and when checked by moving pillow from his mother's face, found that his mother was bleeding on account of stab injuries and she was murdered by some one. Then he went to the master bed room in the first floor and found that the cupboard was opened and all the clothes and jewellery box were lying on the floor. Since jewellery box was empty he assumed that somebody has killed his mother to steel the jewellery and cash. Therefore, he filed the complaint requesting to arrest the person who murdered his mother and stole cash and jewellery and to punish the accused in accordance with law. The same was registered in Crime No.292/2008 initially under Section 302 of the Indian Penal Code and later Sections 392 and 397 of the Indian Penal Code were inserted.

20. It is relevant to state at this stage that, since there was no opportunity given for the accused to cross-examine the witnesses, the matter was remanded to conduct fair trial by the Order dated 25.06.2018 passed by this Court in Criminal Appeal No.200/2013.

After the matter was remanded, after examination of 23 witnesses, two more charges for the offences punishable under Sections 392 and 397 of the Indian Penal Code came to be framed at the instance of the prosecution. Thereafter, P.W.1 was cross-examined, P.Ws. 2, 6, 7, 8 and 11 were further examined cross examined. Though in terms of the order dated 30.08.2018, summons were issued to P.Ws.1 to 5 to cross-examine the said witnesses, the order sheet depicts that P.W.1 had left the address, P.Ws.3 to 5 were in abroad and their whereabouts were not known. Inspite of best efforts made, prosecution could not secure the presence of P.Ws.2 to 5 for cross-examination.

21. The learned sessions judge, considering the material on record, acquitted the accused for the offence punishable under Sections 392 and 397 of the Indian Penal Code, recording a finding that admittedly there is no cross-examination of P.Ws.3 to 5 with regard to additional charges framed under Sections 392 and 397 of the Indian Penal Code. The learned Sessions Judge further recorded a finding that evidence of P.Ws.3 to 5 is essential to prove the guilt of the accused under Sections 392 and 397 of the Indian Penal Code. Since P.Ws.3 to 5 did not subject themselves to cross-examination , prosecution failed to prove guilt of the accused under Sections 392 and 397 of the Indian Penal Code. The other materials available on record are sufficient to

convict the accused for the offence punishable under Section 302 of the Indian Penal Code. The prosecution has proved the same beyond reasonable doubt and thereby accused was convicted and sentenced to undergo imprisonment for life with fine of ₹10,000/- with default clause for the offence punishable under Section 302 of the Indian Penal Code.

22. In order to re-appreciate the case of the prosecution as per Ex.P.1-complaint lodged by P.W.3 and material documents produced to prove the involvement of the accused in commission of the offences punishable under Sections 302, 392 and 397 of the Indian Penal Code, it is relevant to consider the evidence of the material witnesses. The entire case of the prosecution is based on the circumstantial evidence. Except the evidence of P.W.1 who is alleged to have last seen the accused coming out from the house of the deceased holding a letter in his hand, there is no other corroborative evidence produced by the prosecution to prove the guilt of the accused.

23. In order to prove the circumstantial evidence, the following five golden principles which may constitute the panchsheel of the proof of a case have to be established by the prosecution:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

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

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

(4) they should exclude every possible hypothesis except 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.

24. Keeping in view the aforementioned five golden principles/ panchsheel, it is relevant to consider the evidence of P.W.1-Venkatesh who deposed that he knows P.W.6-Ramaswamy under whom he is working as driver since 3 years. C.W.5 is wife of P.W.6, and C.W.8 is the son of P.W.6. Their house is situated at Kalyananagara, 9th D Main, bearing Door No.309. By the side of the said house, deceased Thulasi was having her residential house. P.W.3-Akshay Kumar and

P.W.4-Urmila are the son and daughter of the deceased. The husband of the deceased was working in Dubai. After about two months of his joining as driver under C.W.6, he was introduced to the accused by one Monappa. About 5 or 6 months thereafter, one day, around 9.15 am while he was cleaning the car infront of the house of C.W.6, the accused came there and asked him whether he could identify him, for which he told that his memory was not working properly, for which the accused told that he was working as driver under C.W.6.

25. In further examination-in-chief, P.W.1 deposed that at about 10 am, the accused was entering the house of the deceased and he came out from the said house at about 10.30 am carrying one letter in his hand and he asked the accused as to what was the said letter, to which the accused told that he was applying for the post of driver in BMTC. Then the accused went away. He further deposed that on the next date at about 10 am he was cleaning the Indica car by parking it infront of the house of C.W.6. Then he went to pass urine and returned and when he was standing in front of one building which was under construction, at that time, he saw the accused coming out from the house of deceased and went away by opening the gate. Then he removed his car and went to Ramamurthynagara. In the cross-examination, P.W.1 deposed that he has not stated before the police

that the husband of the deceased had been to Dubai and, the deceased, C.Ws.1 and 2 were residing together, since the police did not enquire him in that regard. He also deposed that, he has not stated before the police that whenever C.W.1 used to come before the house, he used to ring the bell of his bicycle and his mother used to open the gate, since such enquiry was not made by the police. He further deposed in the cross-examination that, it is true to say that he was not familiar with deceased Thulasi and he had never been to the house of deceased Thulasi prior to that date. He further deposed that it is true to say that family members of C.W.6 and that of Thulasi were cordial. When the accused left the house of the deceased, the gate was open. He further deposed that, it is not true to say that accused had not come to home of Thulasi and even he had not come to that area. He further deposed dead body of Thulasi was in the house till 8 pm and lateron he returned to his house. He further deposed that, it is not true to suggest that the police suspected him in the offence. He further denied the suggestion that, to avoid his liability, he is deposing falsely at the instance of police and blaming the accused. He denied the suggestion that he is seeing the accused for the first time before the Court. P.W.1 further deposed in his cross-examination that, on the next day of the incident, he was informed by the police that murder was committed by Shiva-accused. He also came to know in

the police station that for the sake of gold ornaments, accused committed murder of Thulasi. On the next day of the incident, on the request of the police, he went to Banaswadi Police Station. He further deposed that police were not discussing in his presence that the dead body was in the house since 7.30 am. He does not know the name of the police who gave him the information that Shiva murdered Thulasi. But the said police was from Banaswadi police station. The witness volunteered that he informed the police that accused was going out of the house of the deceased and he noticed scratch injury on the face of the accused in police station. The evidence of P.W.1 clearly depicts that he has informed the police that he saw accused going out of the house of the deceased Thulasi and he is not an eye witness to the incident.

26. P.W.2-Ragamma, the neighbor of the deceased, deposed that she knows the accused who was working as driver of Indica car and her husband had removed the accused from the duty of driver about one year two months prior to the date of the incident. She further deposed that it was 9.30 am when deceased had some talks with her grand son-Rushi. Then she took her grand son inside the house. In the cross-examination, she deposed that, if it is put to her that she has not stated before the police that her son told her that the accused had come there whom he had abused, she was told by her son that he

used to come to the house of the deceased as to why he had abused him, she would say that she has not stated before the police, since they had not enquired to that effect. If it is put to her that she has not stated before the police that at about 9.00 am, she had a formal talk with the deceased while she was purchasing the vegetables, she would say that she has not stated before the police, since the police had not enquired her to that effect. She further deposed that the police have not recorded any statement. The accused worked as driver with them for more than a month. Her husband did not like the behaviour of the accused as driver and therefore, removed him from service. Thereafter, accused joined as temporary driver of Thulasi. In the cross-examination, she denied the suggestion that the accused not used to come to their area and volunteered that, twice she had seen the accused near the house of the deceased.

27. In the further examination-in chief, P.W.2 deposed that Thulasi was holding hair in her right hand fist. She got the information that huge quantity of gold were missing from her house and the said gold was recovered from the accused by the police. The accused was not regular driver of Thulasi and he used to attend duty whenever he was called by Thulasi. She cannot say in which year and in which month the accused worked as driver with Thulasi and she does not know how much wages were paid to the accused by Thulasi. She further

deposed that after seeing the dead body of Thulasi, she was scared and therefore, did not observe the injuries and gold ornaments on the dead body. She volunteered that she corrected the dress on the dead body and she has not seen the articles near the dead body. P.W.2 further deposed that she has not stated any facts to the police and it is incorrect to suggest that accused after leaving service in her house, never came near her house. Accused used to come to house of Thulasi for driving the car. House of Thulasi was situated by the side of her house and accused was not coming her house.

28. P.W.3-Akshaya Kumar, complainant and son of the deceased, reiterating the averments made in the complaint Ex.P.1, deposed that in the first week of February 2008, there was a marriage ceremony of the daughter of his maternal uncle at Gnanapeetha Lakshmi Venkateshwara Choultry, Mysuru Road. His deceased mother was wearing golden ornaments like golden chain, golden bangles, golden necklace and golden chain. He attended the said marriage along with his deceased mother Thulasi, C.W.2-Urmila, in the vehicle of the accused. The accused took them to the choultry and dropped back to the house in his car. He further deposed that he has seen the pair of earrings and pair of toe rings on the dead body of his mother Thulasi. However, remaining ornaments were missing from her body. His mother used to wear pair of gold bangles, pair of green glass bangles

and mangala suthra. In the cross-examination, P.W.3 deposed that they used to have breakfast before leaving the house to school. Once in six months his father used to come home from Dubai. The door of their house was facing West. C.W.6 was having his house towards South, towards North of his house, there was a house belonging to Bengali family, however, he does not remember their name. He further admitted that, it is true to say that at the time of preparing complaint-Ex.P.1, he was not having state of mind to prepare the same. His elder cousin Srinivas helped him to prepare Ex.P.1. He further deposed that, it is true to say that Ex.P.1 is not in his hand writing and in the complaint Ex.P.1, he has not stated that the accused was working as a driver in the house of C.W.5 for one and a half month. He admitted that he has not stated in the complaint that when P.W.1 was appointed, accused was working in a call centre. He further deposed that, it is true to say that he has not stated in his complaint that accused took himself, his mother and C.W.2 to the marriage, in his car. He further admitted that the police have also not recorded his statement to that effect. He further admitted that, he has not stated in the complaint and also not stated in the statement before the police that his mother was wearing the ornaments while she had been to the marriage in the car of the accused. He further admitted that he has also not stated before the police that they left the house to attend the

marriage at about 5.00 pm and accused dropped them back at about 10 pm. P.W.3 further stated in cross-examination that, it is true to say that he has not stated in the complaint-Ex.P.1 regarding observing of the blade on one side of the dead body of his mother and the handle on the other side, besides spreading of green bangle pieces on the ground. He admitted that he has not stated in his compiaint and also not stated in his statement before the police that he observed the scratches on the face of his mother. He admitted that in the complaint, he has not stated about missing of other golden ornaments of his mother and only observed pair of ear rings and pair of toe rings. He further stated that he had seen the accused while he was cleaning the car of P.W.6. However, he had no acquaintance. He denied the suggestion that after leaving his service with P.W.6, the accused had not come to that area and he had not seen him. He further deposed that he was not in complete understanding of what was going on since he was under shock. He admitted that usually he was not paying visit to the master bed room and further deposed that if it is put to him that he was not having knowledge as to who used to pay their visit to his house in his absence, he would like to say that his mother used to tell some times.

29. P.W.4-Urmila, daughter of the deceased has deposed that, once, when herself and her mother were walking, accused came to them and

told that he was not having any work and if her mother wants to go any where, she may take his help and he had also taken the telephone number of their residence i.e., 25420360. She further deposed that on 26.06.2008, accused telephoned her mother and asked whether the witness was at house for which her mother told him that the witness is at home. Her mother asked the accused as to why he was enquiry about her daughter, to which, the accused told that he wanted to file an application for driver post in BMTC. Later, accused came to their house at about 11.00 am and accused told her that he wanted to file an application to the BMTC and asked her to write the application. She told that she will write the application in Kannada, for which the accused told that he wants the application to be filled in english. The accused gave his address and experience of his driving. She wrote a formal application in English and handed over the same to the accused. In the cross-examination, P.W.4 admitted that she had not stated before the police that towards north of her house there was the house belonging to Bengali family, however, she would say that the police had not enquired and therefore, she had not stated the said fact before the police. She further admitted that she had also not stated before the police that prior to the Bengali family, the said house was in occupation of the trust to run the orphanage. She further admitted that accused was not her family friend and she is not remembering the

date on which accused met her and her mother while they were on the walk. It is further stated in cross-examination that she has not stated before the police that in the first week of March 2008, the accused had taken her mother in his car to attend a marriage.

30. PW5-Ravishankar, husband of deceased Thulasi deposed that in the month of July 2007 while he was cleaning his Indica car in front of his house, accidentally, he sustained injury with glass piece and it started bleeding. The accused who was sitting next to his house rushed to help, removed the glass piece from the injury. He was made to sit and coffee was provided. He enquired the accused regarding his name for which he told that his name was Shivanna and he was working with C.W.6. He heard that Shivanna used to have formal talks with his wife and other family members, however, he not used come inside. Then he went to Abudabi for his work. In the cross-examination, P.W.5 deposed that, he used to collect the details from P.W.3 and P.W.4 while he reached the house of Srinivasa Rao. He came to Bengaluru in the month of April 2008 and was in Bengaluru till May 2008. However, he does not remember the date. He further deposed that it was about 6.30 or 7.00 pm when he went to the police station. He had not seen the accused in the police Station. He was in the police station till 7.30 pm. Ex.P.2 is the handwriting of Gopinath Rao. He had not put his signature to Ex.P.2. He also

accompanied him to the police station. He admitted that he had not suspected anybody in Ex.P.2-List of articles. He denied the suggestion that Ex.P.2 was prepared by him keeping the ornaments available. He also denied the suggestion that he is deposing falsely. He further admitted that he had not stated before the police that in the month of July he had sustained injury.

31. P.W.6-Ramaswamy, adjacent owner of the deceased deposed that he knows Thulasi. She was having two kids and they were school going children. Husband of the deceased was residing in Dubai. He further deposed that the deceased, her son and daughter were residing together. He knows the accused who worked under him as driver for about two months. Since his driving was not proper, he discontinued the services of the accused. Later, he appointed P.W.1-Venkatesh as his driver. About two years back, one day between 3 to 4 pm, while he was sleeping in his house, his wife awakened him and told that Thulasi had fell in her house and therefore they have to go there. She told that Thulasi's son called her. The witness noticed that people had gathered near the home of the deceased and they told that there was a murder. Police came and then he returned house. In the further examination, he deposed that police informed him that accused had murdered Thulasi. The witness identified the accused present before court. Police seized gold which belonged to Thulasi. In the

cross-examination, P.W.6 deposed that he came to know that accused had murdered Thulasi on 27.06.2008 during evening. He had not informed the police that he suspected the accused. He further deposed that on the date of murder of Thulasi, during night hours, police brought the accused to the house of Thulasi. But he had not seen the accused. He deposed that he cannot say the time at which the accused was brought to the house of Thulasi. He deposed that he has not seen the gold and also not seen the gold seized from accused.

32. P.W.7-Bhagath Singh, Son of Ramaswamy-P.W.6 deposed that a day prior to the incident at about 10 pm, when he came out from his house, he saw that accused was talking with his driver Venkatesh-P.W.1. He enquired the accused as to why he was coming near their house, once he left the job as driver. The accused told him that he had come to the house of Thulasi for filling up the application form. Then, the witness went to temple. In the cross-examination, P.W.7 deposed that it is true to say that when he came near the house of Thulasi, so many persons had gathered. The police had also arrived. At that time, police not enquired him anything. He also did not say anything to the police. He was in front of the house of Thulasi till 10.00 pm. He has seen the police coming out from the house of Thulasi. On that day he had not been to police station, however, next day, he went to the police station. In the further cross-examination,

P.W.7, deposed that on 28.06.2008, police arrested the accused in Majestic, Bengaluru. At that time, he was at the said spot. He was little away from the spot of arrest. Therefore, he could not see the ornaments worn by the accused or any injury on his body. He further deposed that the Police traced out the presence of the accused in the Majestic bus stand on the basis of the mobile number of the accused furnished by him to the police. He further deposed that, when he went to the place of arrest, three police persons were at the spot and they were in civil dress. Three days after the arrest, the accused was brought to the house of the deceased. But he cannot says the exact date on which the accused was brought to her house. He further deposed that Ravinshankar and Thulasi owned Indica car. Earlier, father of Ravishankar was driving the car. After his death, accused was called to drive the car as per the information given to him by his mother. He has not personally seen the accused driving the car of Thulasi. P.W.7 further deposed that on the date of the incident at about 5.45 or 6 pm, he went to the house of Thulasi. On the date of incident, he came to know that accused murdered Thulasi. He denied the suggestion that he has not stated before the Investigating Officer that he was suspecting the accused for commission of the said crime.

33. P.W.11-Krishna Prakash, PSI, finger print expert deposed that, on careful examination of the entire scene of occurrence, he could not

collect any articles near the dead body. There were no articles near dead body contained with the finger prints. C.W.35 took him to the first floor which was having entrance inside. They went to the bed room in the first floor, saw empty jewel boxes of plastic spread on the bed. He also saw one plastic water bottle by the side of the bed. He also saw one steel almirah, four wooden cup board in the said bed room. He observed that they were opened. He applied silver nitride powder on the said articles and found one chance print on the right side of the steel almirah. He marked the said chance print as 'A' and lifted the same by applying the cellophane tape. He shifted the said print to plastic sheet. Accordingly, he issued the Certificate on 28.06.2008. In the cross-examination, P.W.11 admittedj that he used silver nitrate powder for taking the prints and denied the suggestion that if the said powder is left for considerable period while taking the print, there is possibility of change of colour into black. He denied the suggestion that there is also possibility of change of ridges on account of the use of ink while taking the said prints. He deposed that, in studying the ridge characteristic bifurcation is one of the important characteristic and denied that if the method of upper bifurcation is adopted, it would give different result on the event of using downward bifurcation method. He further deposed that there is an attendance register in his office in which he used to put his initial. He further

deposed that he has not mentioned in Ex.P.11-Examination Certificate (finger print) regarding noticing of the pillow and knife. The two doors of steel almirah was placed on the right side of the door. Except the steel almirah, on the other articles he noticed chance prints. He further deposed that he found single print on the almirah and the said prints may remain for a week. He further deposed that 'chance print' means the 'print of the person other than the person using the almirah'. He further deposed that one has to eliminate the prints of the user of the almirah for finding out the chance print and that he had not taken the finger prints of the inmates of the house and also not taken the finger prints of the dead body. He has not mentioned place of the chance print, at how many height from the bottom he notice it. Likewise, he has also not mentioned at how many distance from the top, he noticed and he has not taken the photos of the print. The witness volunteered that since he lifted the finger print, he felt that it was not necessary to take the photo.

34. The aforesaid oral evidence of the prosecution witnesses clearly depicts that, except P.W.1-Venkatesh, who has last seen the accused coming from house of the deceased with a letter in his hand, none of the prosecution witnesses have spoken about involvement of the accused in the homicidal death of deceased-Thulasi. All the

prosecution witnesses have spoken about robbery of the ornaments, cash, mobile and recovery thereon.

35. It is undisputed fact that the learned sessions Judge considering the oral and documentary evidence on record, recorded the finding that the prosecution failed to prove beyond reasonable doubt that the accused has committed an offence punishable under the provisions of Sections 392 and 397 of the Indian Penal Code and accordingly, acquitted him of the said Charge. Admittedly, the said acquittal order has not been challenged by the prosecution and the same has reached finality. Once the accused is acquitted for the offence punishable under Sections 392 and 397 of the Indian Penal Code, the burden shifts on the prosecution to prove the involvement of the accused in homicidal death of the victim to attract the provisions of Section 302 of the Indian Penal Code. The entire evidence of the prosecution witnesses does not prove the involvement of the accused in the homicidal death of the deceased. Further, as admitted by P.W.1, the injury on the face of the accused was not noticed by him on the date of the incident while the accused was coming out of the house of the deceased. P.W.19 and other police officials arrested the accused and P.Ws.13 and 14 are mahazar witnesses. The prosecution has not examined the five constables who took the accused to hospital and produced him before the doctor and admittedly the prosecution has

not examined the doctor who treated accused in the hospital. No report is submitted by the police in this regard and the said aspect of the matter has not been considered by the learned Sessions Judge while convicting the accused for the offence punishable under Section 302 of the Indian Penal Code.

36. The learned Sessions Judge erred in holding that the accused was in possession of the mobile of the deceased seized by Investigating Officer. The call details were collected to prove the movements of accused on the date of incident and earlier to it and on next day of the incident. However, the address of the accused and P.W.5 forthcoming in the call details are not tallying with their residential addresses. Even after seizure of the mobile, the same was being used by some body. Even on 29.06.2008, calls were made from the house of the accused. The IMEN numbers sent by the Investigating Officer to BSNL differs from call list. Admittedly, the call details issued by authority are neither produced nor examined. Certificate as contemplated under Section 65B (4) of the Indian Evidence Act, 1872, has not been produced before the Trial Court. Thereby, the learned Sessions Judge erred in convicting the accused based on call details. Admittedly, the General Manager, Airtel, who furnished call details has not been examined. The said material fact

also has not been considered by the learned Sessions Judge while convicting the accused.

37. Admittedly, Ex.P.1-complaint lodged by Akshay Kumar-P.W.3 who is none other than the son of the deceased is against an unknown person. Ex.P.6- statement of Urmila, daughter of the deceased made before ACMM Court does not disclose the name of accused. Inspite of the same, the learned Sessions Judge accepted the stand of the prosecution that the accused was in custody from 2 pm, contrary to which, Rangaswamy-P.W.6, neighbour of the deceased deposed that accused was brought to the spot and ornaments seized on the same day. Even according to P.W.5-Ravishankar, husband of the deceased, all the gold items were seen by him in the Police Station on 30.06.2008. There are contradictions, omissions and improvements in the evidence of prosecution witnesses and the same has not been considered by the learned Sessions Judge while convicting the accused for the offence punishable under Section 302 of the Indian Penal Code.

38. The Investigating Officer, based on the complaint conducted the investigation, filed charge sheet against the accused under the provisions of Sections 302, 392 and 397 of the Indian Penal Code. The main case of prosecution is 'murder for gain' by the accused. Based on the evidence of prosecution witnesses supra, the learned Sessions

Judge recorded the finding that the prosecution failed to prove the offence punishable under Sections 392 and 397 of the Indian Penal Code and acquitted the accused for the said offences. Admittedly, the said order of acquittal has reached finality.

39. Very strangely, the learned Sessions Judge proceeded to convict the accused for the offence punishable under Section 302 of the Indian Penal Code holding that there is sufficient material available to prove the guilt of the accused in the homicidal death of the deceased. Absolutely no material has been produced by the prosecution to show that robbery and murder formed part of the same transaction. The presumption that the accused committed murder cannot be drawn merely on the basis of the recovery. Admittedly, prosecution has failed to prove beyond reasonable doubt that the murder for gain is committed by the accused.

40. The material on record clearly depicts that though the learned Sessions Judge framed the Charge of robbery for personal gain and the homicidal death of the deceased so as to attract the provisions of Sections 392 and 302 of the Indian Penal Code, the evidence of prosecution witnesses depicts the recovery of gold from accused, but there are no circumstances proved beyond reasonable doubt by the prosecution that robbery and murder took place on the same

transaction. In the absence of any eye witness, and since the prosecution has not proved the chain of circumstances connecting the accused in the homicidal death of the deceased, it is not safe to convict the accused for the offence punishable under Section 302 of the Indian Penal Code, in the absence of any corroborative evidence with regard to involvement of accused in the homicidal death of the deceased.

41. On meticulous of reading of the evidence of prosecution witnesses, none of the witnesses have deposed about the involvement of the accused in the homicidal death of the deceased. Absolutely no material has been produced to prove involvement of accused in the murder of the deceased. Except the alleged recovery of jewels and cash based on voluntary statement, there are no materials produced by the prosecution to prove the guilt of the accused. Thereby, the learned Sessions Judge acquitted the accused for the offences punishable under Sections 392 and 397 of the Indian Penal Code and the said order has reached finality.

42. At this stage, it is relevant to refer to the provisions of Section 27 of the Indian Evidence Act, 1872 reads as under:

"27. How much information received from accused may be proved:

Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to confession or not, as relates distinctly to the fact thereby discovered, may be proved.

43. By careful perusal of the provisions of Section 27 of the Indian Evidence Act, it makes it clear that the said section based upon the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. But where the facts are such as indicting reasonable doubt as regards the guilt of the accused, benefit of the same should be given to the accused persons.

44. The Hon'ble Supreme Court while considering the circumstantial evidence in the case of ***Varun Chaudhary v. State of Rajasthan,*** reported in ***AIR 2011 SC 72***, at paragraphs 20 and 23 held as under:

*"**20.** Home Guard Pawan Kumar (PW 3), had seen three persons on a motorcycle. However, he stated that he could not identify the persons on the motorcycle. Similarly, Police Constable Pooran Singh (PW 6) had stated that around 12 midnight on 22-8-2000, he had seen two*

persons going on a motorcycle and one of them was the deceased. After some time he had seen another motorcycle which was Suzuki, but he could not read the complete number of the motorcycle, but he could read one of the digits, namely, number '9'. He whistled so as to stop the said motorcyclist but the motorcyclist did not stop. Thereafter, he had seen another motorcycle, being Hero Honda which had hit a dog near Santoshi Mata Temple. It is pertinent to note that the aforestated two witnesses did not say that they had seen any of the accused. Possibly they did not even see the faces of the three persons, who were on the motorcycle. Possibly, in these set of circumstances, having an identification parade would be futile and, therefore, there was no test identification parade. Thus, nobody had seen any of the accused. So far as identification of the motorcycle is concerned, PW 6 merely stated that he saw one digit of registration number of the motorcycle, which was '9'. In our opinion, on the basis of one digit of the registered number, it would be dangerous to believe that the motorcycle recovered, which also had digit '9' in its number, was used in the offence. In our opinion, on such a scanty evidence it cannot be said that the accused had been identified or the motorcycle which had been recovered was the one which was used by the accused at the time of the offence.

23. *It is also pertinent to note that the prosecution could not establish the purpose for which the deceased was murdered by the accused. Of course, it is not necessary that in every case motive of the accused should*

be proved. However, in the instant case, where there is no eyewitness or where there is no scientific evidence to connect the accused with the offence, in our opinion, the prosecution ought to have established that there was some motive behind the commission of the offence of murder of the deceased. It was the case of the prosecution that the deceased, an Income Tax Officer had raided the premises belonging to some scrap dealers and, therefore, he had received some threats from such scrap dealers. It is an admitted fact that the accused are not scrap dealers or there is nothing to show that the accused had been engaged by scrap dealers to commit the offence. Thus, there was no motive behind the commission of the offence so far as the accused are concerned.

45. The Coordinate Bench of this Court while considering the provisions of Section 27 of the Indian Evidence Act, 1872, in the case of ***State of Karnataka v. Kantharaj*** reported in ***2016(2) KCCR 1175*** (DB) has held at paragraphs 21 and 22 as under:

21. *Learned SPP, Mr. P.M. Nawaz has relied on the recovery of mobile phone purported to be belonging to the deceased, from the accused. It is true that if one were to accept that the phone was recovered at the instance of the accused, there must be clinching evidence to show that the mobile belonged to the deceased. It is true that the wife of the deceased who is examined as PW-30 has identified the said mobile as that of her husband. Identification of the mobile can be conclusively established only with reference*

to IMEI number. We do not know whether the SIM card found in the mobile actually belonged to the deceased. In fact, police have not collected any materials to that effect and therefore this Court is unable to accept that as a material circumstance to link the accused with the murder of the deceased.

22. *One more important aspect noticed by this Court is sending M.O.3, chopper alleged to have been recovered at the instance of the accused, to FSL. It is mentioned that it had contained some blood over the blade. If the FSL report marked as Ex. P 15 were to be true, it is ununderstandable as to how the chopper which was in the tank water for quite some time could still retain blood stains. This can also be viewed from another angle. Ex. P4-mahazar drawn in connection with M.O.3 is at the instance of the accused. If really it had blood stains, nothing came in the way of the 10 to have mentioned about it. In the absence of such mention in Ex. P4, the opinion found in Ex. P15-FSL report cannot be given much credence.*

46. The Coordinate Bench of this Court in the case of ***Sridhara v. State of Karnataka*** reported in ***ILR 2005 Kar.2576*** held that unless there is some concrete evidence, though the evidence may point out the possibility of the accused being culprits, that does not unerringly point out to their guilt with certainty and hence the accused are entitled to the benefit of doubt. At paragraph 13 of the said judgment, it is held as under:

> ***13.*** *But even if we accept this prosecution theory that the accused had some ire or ill-will towards the deceased few days prior to the incident, it would not lead to an irresistible conclusion that it is these accused who had committed the crime in question. Possibility of the accused resorting to such crime is not sufficient to hold them guilty of the crime. Some concrete evidence is required. In this regard the next two circumstances relied upon by the prosecution are material, namely evidence regarding indication given by the police dog and the evidence regarding recovery of incriminating articles on the information stated to have been furnished by the accused (admissible under section 27 of the Indian Evidence Act).*

47. From careful perusal and meticulous examination of the evidence on record, and the evidence of P.Ws.1, 2, 3, 4, 5, 6 and 11, there are so many omissions and contradictions and the entire fabric of the prosecution case appears to be ridden with gaping holes. It is true that due to passage of time, witnesses do deviate from their statements as their memory fades to some extent. Reasonable allowance can be made for such discrepancies. But when such discrepancies make the foundation of the prosecution case shaky, the Court has to take strict note thereof. On perusal of the evidence of the prosecution witnesses, the discrepancies are noticed and the witnesses have discredited themselves. However, the learned Sessions Judge proceeded to convict the accused erroneously, mainly

on the basis of the evidence of P.Ws.1 to 6 and 11, without there being any corroboration. Therefore, the same cannot be sustained. It is clear from the evidence of the prosecution witnesses and medical evidence that two views are possible. It is well settled that there is no embargo on the Appellate Court reviewing the evidence upon which an order of conviction is based. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent.

48. It is also relevant to note at this stage that, after remand of the case as per the Order dated 25.06.2018 passed by this Court in Criminal Appeal No.200/2013, P.W.1 was cross-examined, P.Ws.2, 6, 7, 8 and 11 were further examined and cross-examined. P.W.17 was further examined and cross-examined. P.Ws.14, 9, 12 and 16 were cross-examined, Ex.P.13(b) was got marked. P.Ws.15 and 19 were cross-examined. P.Ws.23, 1 and 21 were further examined and cross-examined. P.W.20 was cross-examined. A perusal of the records indicates that charge sheet was filed for the offence punishable under

Section 302 of the Indian Penal Code. Initially, the Trial Court framed charge against the accused for the said offence. Later on, after examination of 23 witnesses, two more charges under Sections 392 and 397 of the Indian Penal Code came to be framed at the instance of the prosecution. P.W.3, complainant-son of the deceased, P.W.4-daughter of the deceased and P.W.5-husband of the deceased, did not subject themselves for cross examination inspite of giving sufficient opportunity. The learned Sessions Judge has rightly held that, 'it appears doubt with regard to seizure panchanama vide Ex.P.14 done on 01.07.2008 at Pantarapalya'. Accordingly, learned Sessions Judge held that prosecution has failed to prove the seizure of eight items of ornaments said to have been seized under panchanama-Ex.P.14. The learned Sessions Judge also recorded that merely because Ex.P.14 is not proved, the entire case of the prosecution cannot be ignored since death was caused and allegation is that accused has killed the victim. However, it is tobe noticed that, in the absence of any motive, last seen theory and recovery being proved, the learned Sessions Judge is not justified in convicting the accused for the offence punishable under Section 302 of the Indian Penal Code. Once the prosecution failed to prove the 'murder for gain' and acquitted the accused for the offence punishable under Sections 392 and 397 of the Indian Penal Code, in the absence of any material produced by the prosecution to the effect

that robbery and murder took place on same transaction and in the absence of any eye witness to the incident, it is not safe to convict the accused under Section 302 of the Indian Penal Code. On that ground also impugned judgment of conviction is liable to be set aside.

49. It is also not in dispute that during pendency of the proceedings before the learned Sessions Judge, even though while submitting process fee, there was an order of Court to retain seized articles since charge sheet was filed, it was released in favour of P.W.5-husband of the deceased, without an order of the Court. The learned Sessions Judge erred in holding that the accused did not claim said articles. I feel, it amounts to only procedural irregularity and benefit of doubt has to be given to the accused.

50. For the reasons stated above, the point raised for consideration in the present Criminal Appeal has is answered in the negative holding that the Trial Court is not justified in convicting the accused for the offence punishable under Section 302 of the Indian Penal Code and the second point is answered in the affirmative holding that the appellant/accused has made out a case to interfere with the impugned judgment of conviction and order of sentence.

VII. RESULT

51. In view of the above, we pass the following:

ORDER

(i) The criminal appeal filed by the appellant/accused is hereby ***allowed***.

(ii) The impugned judgment of conviction and order of sentence dated 19.03.2019 made in S.C.No.365/2009 on the file of the XXXII Additional City Civil and Sessions Judge and Special judge for CBI Cases, Bengaluru, insofar as convicting the accused for the offence punishable under Section 302 of the Indian Penal Code is hereby ***set-aside***.

(iii) The accused is hereby ***acquitted*** for the offence punishable under Section 302 of the Indian Penal Code.

(iv) The concerned jail authority is directed to release the appellant/ accused forthwith, if he is not required in any other case.

(v) Registry is directed to return the Trial Court Records.

Sd/-
JUDGE

Sd/-
JUDGE

kcm