A SUNIL MAHADEO JADHAV

v.

THE STATE OF MAHARASHTRA

(Criminal Appeal No. 1004 of 2007)

NOVEMBER 19, 2013

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[A. K. PATNAIK AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Penal Code, 1860 – ss. 302, 342, 218, 193 r/w. s. 34 – C *Custodial death – Prosecution of police officials – Circumstantial evidence – Acquittal by trial court – Conviction by High Court – On appeal, held: Since the arrest Panchnama and Arrest Register have been duly proved by PWs 21 and 22 and there is no evidence to show that they* D *were fabricated, the accused cannot be held guilty u/ss. 218 and 193 – The accused also cannot be convicted u/s. 342 because the deceased was a co-accused in a kidnapping case – The injuries on the deceased noticed in the post mortem, which were the cause of death, were not described* E *in Arrest Panchnama – Therefore, it would be inferred that those injuries were caused to the deceased while in police custody – It is established that the deceased was last in the custody of accused No. 1 in the police lock-up – The burden to prove the injuries was on accused No. 1, which he failed –* F *Therefore, accused No. 1 would be held responsible for the injuries – The circumstances of the case established that accused No.1 did not intend to cause death, he can be held guilty of culpable homicide not amounting to murder u/s. 304 – His conviction altered to one u/s. 304 from 302 – Hence, his sentence reduced to seven years RI with fine of Rs. 3000/* G *- – Since accused Nos. 2 and 3 left the Police Station soon after the arrest, the deceased cannot be p said to be in their custody – Hence, they cannot be held responsible for the fatal injuries on the deceased – Therefore, their conviction set aside – Evidence Act, 1872 – s. 106.*

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The appellants-accused, the police officials, were prosecuted for custodial death of one person. The prosecution case was that the deceased was suspect in a kidnapping case. He was arrested from his house in the midnight intervening 16.12.1985 and 17.12.1985 and then lodged in police lock-up. In the morning of 17.12.1985, the deceased was found dead. The three appellants-accused were prosecuted u/ss. 342/ 34, 331/34, 326/34, 302/34, 218/ 34 and 193/34 IPC. Other eight police officials in the police station were also prosecuted u/ss. 218 and 193 r/w. s. 34 IPC.

The defence of the accused persons was that the deceased person was not picked up from his house, but from a Chowk. At the time of preparation of Arrest Panchnama, a number of injuries on the body of the deceased were noticed and recorded and, therefore, the accused persons were not responsible for the injuries.

Trial court acquitted all the accused of all the charges. High Court convicted the appellants-accused (accused Nos. 1, 2 and 3) u/ss. 302, 342, 218 and 193 r/w. s. 34 IPC. The acquittal order, in respect of other accused was maintained by the High Court. Hence the present appeals by accused Nos. 1, 2 and 3.

Allowing the appeals filed by accused Nos. 2 and 3 and partly allowing the appeal of accused No. 1, the Court

HELD: 1.1. In the present case, there is no direct evidence of an eye-witness on how the deceased suffered the injuries which has caused his death and therefore the High Court has relied on circumstantial evidence to convict the appellants for the offences under Section 302 read with Section 34, IPC. In a prosecution based on circumstantial evidence a case against accused can be said to be fully established if the following conditions are fulfilled: (1) The circumstances from which

A 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; (3) The circumstances should be of a conclusive nature and tendency;(4) They should exclude B 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 C been done by the accused. [Para 20] [928-E-H; 929-A]

Sharad Birdhichand Sarda vs. State of Maharashtra (1984) 4 SCC 116 : 1985 (1) SCR 88 – relied on.

1.2. The first circumstance on which the High Court D has relied on to hold the appellants guilty is that the deceased was actually picked up from his house on the night of 16.12.1985 by the appellants and he had no injuries on his body when he was picked up from his house. As proof of this circumstance, the High Court has E relied on the evidence of PW-1, PW-5, PW-6 and PW-7. Their evidence is not convincing. The trial court rightly disbelieved the evidence of PW-1, PW-5, PW-6 and PW-7 and has correctly held that the deceased was picked up from a Chowk and that he had injuries on his body when F he was picked up by the appellants, relying on the evidence of PW-21 and PW-22 who were witnesses to the arrest *panchnama* (Ext.76) as well as the contents of the arrest *panchnama* (Ext.76) and the entry in the Arrest Register (Ext.134). As the contents of Ext.76 and Ext.134 G have been proved by PW-21 and PW-22 and there is no evidence to show that Ext.76 and Ext.134 are fabricated, the appellants cannot be held guilty of the offences under Sections 193 and 218, IPC. Moreover, as the deceased was a co-accused with his brother in a case of kidnapping and was arrested in connection with that case, the H

appellants cannot also be held guilty of the offence under Section 342, IPC. [Para 21] [929-C-G]

1.3. The injuries which have been noticed in the *post mortem* certificate (Ext.58) and which have ultimately caused the death of the deceased are not the same as are described in arrest *panchnama* (Ext.76) and as deposed by PW-21 and PW-22. It, thus, appears from the description of the injuries in Ext.76 that the injuries on the body of the deceased comprised some reddish injury spots and marks and were said to have been caused about 10.30 p.m. on 16.12.1985 by three unknown persons and as the deceased himself did not wish to have a medical treatment for those injuries, the injuries were not of a serious nature. When the deceased was found dead in the lock up of police station at 7.05 am and was taken to Hospital, PW-13 carried out the post mortem during 5.45 p.m. to 7.45 p.m. on 17.12.1985 and noticed the external injuries on the body of the deceased. Many of these external injuries on the body of the deceased noticed during post mortem by PW-13 have not been described in the arrest *panchnama* (Ext.76). The obvious inference would be that after the arrest of the deceased as recorded in the arrest *panchnama* (Ext.76), someone in the Police Station has caused the injuries on the body of deceased which have not been mentioned in the arrest *panchnama* (Ext.76). [Para 22] [929-G-H; 930-E-F; 932-C-D]

1.4. Entries 108 to 120 in Police Station Diary of the Police Station for 17.12.1985 have been exhibited and proved in trial court by the Inspector of the Police Station (PW-29) and the entry made at 7.05 a.m. on 17.12.1985 marked as Ex.113 in Police Station Diary of the Police Station. The extract from the Police Station Diary would clearly show that the deceased who was arrested by accused No.1 was personally kept in police lock up in the night at 00.45 a.m. and at 7.00 a.m. in the morning when the Police Constable No.1276, 1672, 1627 were

A asked to bring the deceased out, for nature calls and mouth wash, the deceased did not get up and his body had become cold and his breathing had stopped and he had died. Thus, Ext.113 read with the evidence of PW-29 clearly establishes that the deceased was last in the B custody of accused No.1 in the police lock-up about 00.45 a.m. of 17.12.1985 and thereafter the deceased was in the lock-up in no one's custody. [Para 23] [932-E-F; 933-E-F; 934-C]

C 1.5. Section 106 of the Indian Evidence Act states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Since it was accused No.1 who had arrested the deceased at 00.45 a.m. on 17.12.1985 and kept the deceased in police lock up after his arrest was complete, D it was for the accused No.1 to explain the injuries on the body of the deceased other than those which were noticed in Ex.76. Accused No.1 has not stated anything in this regard in his statement under Section 313 of the Code of Criminal Procedure, 1973 nor adduced any E evidence in defence to explain these injuries. In the absence of any explanation by accused No.1 or any evidence adduced on behalf of accused No.1 to explain on these injuries on the body of the deceased, there can be no escape from the conclusion that these injuries F have been caused on the body of the deceased by accused No.1 and no one else. [Para 24] [934-D-G]

1.6. The chain of circumstances proved against accused No.1 are that (i) he had arrested the deceased G on the night of 17.12.1985 between 00.45 a.m. to 1.00 a.m. as per the arrest *panchnama* (Ex.-76), (ii) the injuries noticed by PW-13 as per the post mortem report are different from and more serious than the injuries recorded in the arrest *panchnama* (Ext.76) and (iii) no one else had the custody of the deceased between the time of his H

arrest at 0.45 a.m. on 17.12.1985 till 7.00 a.m. of 17.12.1985. Thus, the only hypothesis before the High Court is that it is accused No.1 who is responsible for injuries on the body of the deceased found at the time of his death. [Para 25] [934-G, H; 935-E-F]

1.7. The circumstantial evidence established against accused No.1 does not show that accused No.1 intended to cause the death of the deceased or intended to cause bodily injuries as he knew is likely to cause the death of the deceased or intended to cause such bodily injuries which were sufficient in the ordinary course of nature to cause the death of the deceased. The circumstantial evidence established against accused No.1 do not also establish that he knew that the injuries caused on the body of the deceased must in all probability cause his death or likely to cause his death. Thus, the ingredients of the offence of murder as defined in Section 300, IPC, have not been established against the accused No.1. Accused No.1 was guilty of culpable homicide not amounting to murder under Section 304, IPC, and considering the fact that accused No.1 had no intention to either cause the death of the deceased or cause such bodily injury as is likely to cause death of the deceased, it will be sufficient to impose on accused No.1 a sentence of seven years rigorous imprisonment and to impose on him a fine of Rs.3,000/- and in default of payment of fine, a further imprisonment of six months. [Para 28] [937-D-H]

1.8. In Criminal Appeal filed by accused No.1, the conviction of the accused No.1 under Sections 193, 218 and 342, IPC is set aside, but he is held guilty of the offence under Section 304, IPC, instead of the offence under Section 302, IPC. [Para 30] [938-B-C]

2. The prosecution, however, has not been able to establish beyond reasonable doubt that accused Nos. 2 and 3 were responsible for causing the injuries on the

A deceased which have resulted in his death. Accused Nos. 2 and 3 were present at the time of arrest of the deceased and when the arrest *panchnama* (Ext.76) was drawn up at the Police Station and the prosecution witnesses have said that accused Nos. 2 and 3 had left the Police Station B soon after the arrest of the deceased. The entry in the Police Station Diary of the Police Station (Ext.113) states that accused No. 1 had personally kept the deceased in the lock-up and there is no mention in the said entry about the presence of accused Nos. 2 and 3 in the lock-C up where the deceased was kept. This being the evidence at the trial, the High Court could not have held that the deceased died while in the custody of accused Nos. 2 and 3. The conviction of accused Nos. 2 and 3 is liable to be set aside. [Para 27] [936-D-H; 937-A-C]

D *State of Rajasthan vs. Kashi Ram* (2006) 12 SCC 254; 2006 (8) Suppl. SCR 501 *State of M.P. vs. Shyamsunder Trivedi and Ors.* (1995) 4 SCC 262: 1995 (1) Suppl. SCR 44 – referred to.

E Case Law Reference :

2006 (8) Suppl. SCR 501	referred to	Para 19
1995 (1) Suppl. SCR 44	referred to	Para 19
1985 (1) SCR 88	relied on	Para 20

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1004 of 2007.

From the Judgment and Order dated 22.03.2007 of the G High Court of Judicature at Bombay in Criminal Appeal No. 1084 of 1988 and Criminal Revision Application No. 82 of 1989.

WITH

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Crl. A. Nos. 1005 & 1067 of 2007 A

R. Basant, Uday U. Lalit, Sushil Karanjkar, K. N. Rai, Anish R. Shah, Karthik Ashok, Brij Kishor Sah, Shivaji M. Jadhav, Sanjay R. Hegde, Atul B. Dakh, Gaurav Agrawal, Chinmoy Khaladkar, Preshit V. Surshe, Sanjay V. Kharde, Asha Gopalan Nair for the appearing parties. B

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. These are three appeals by way of special leave under Article 136 of the Constitution against the C common judgment dated 22.03.2007 of the High Court of Bombay by which a Sub-Inspector of Police and two Police Constables, have been held guilty for having caused the custodial death of Arun (hereinafter referred to as "the deceased"). D

Facts of the case:

2. The facts very briefly are that a minor girl named Usha fell in love with Chandrakant and both Usha and Chandrakant eloped from Kolhapur where they were residing to Umbrat near E Kankavali in Konkan area in Maharashtra. Usha's father Madhukar lodged a complaint against Chandrakant and three others including the deceased for kidnapping Usha, and Subhash, a Sub-Inspector of Police, was entrusted with the investigation into the complaint of Madhukar. On 16.12.1985 F between 12.00 and 12.30 in the midnight, Subhash with the help of two constables, Sunil Jadhav and Ananda Bhonsale, arrested the deceased, who was the elder brother of Chandrakant, on the suspicion that he had helped Chandrakant to elope from Kankavali with Usha and lodged the deceased G in the lock-up of Shahupuri Police Station at Kolhapur. On the morning of 17.12.1985 at about 7.00 a.m., the deceased was found dead in the lock-up of Shahupuri Police Station. Post mortem on the body of the deceased was conducted by Dr. Vilas Manade and Dr. Baburao Ghatage and in all 19 injuries H

A were found on the body of the deceased besides internal injuries. Investigation was conducted and the charge-sheet was filed against Subhash, Ananda Bhonsale and Sunil Jadav (hereinafter referred to as accused No.1, 2 and 3 respectively) and the charges against accused Nos. 1, 2 and 3 were under B Section 342 read with Section 34 of the Indian Penal Code, 1860 (for short 'IPC') for having wrongfully confined the deceased, under Section 331 read with Section 34, IPC, for having caused grievous hurt to deceased for extorting information regarding the whereabouts of Chandrakant, under C Section 326 read with Section 34, IPC for having caused grievous hurt to deceased and under Section 302 read with Section 34, IPC, for having murdered the deceased. Besides accused Nos. 1, 2 and 3, there were eight other accused persons who were police personnel of the Shahupuri Police Station and all the eleven accused persons were charged D under Section 218 read with Section 34, IPC, for having forged the records of the Shahupuri Police Station and under Section 193 read with Section 34, IPC for fabricating false evidence.

3. The prosecution case in the trial was that the deceased E was picked up from his house in the midnight of 16.12.1985 and taken to the Shahupuri Police Station by accused Nos. 1, 2 and 3, and was beaten and put in the lock-up of the Police Station and as a result of injuries caused by such beatings, the deceased died in the lock-up between 5.00 am and 7.00 am. F The defence case, on the other hand, was that the deceased was not picked up from his house but from the Sonya Maruti Chowk by accused Nos. 1, 2 and 3 and was brought in a police jeep to the Shahupuri Police Station and at the time of preparation of arrest *panchnama*, a number of injuries on the G body of the deceased were noticed and recorded in the arrest *panchnama* and thereafter he was put inside in the lock-up in Shahupuri Police Station and therefore accused Nos. 1, 2 and 3 were not responsible for injuries suffered by the deceased.

4. The trial court rejected the prosecution story that the H

deceased was picked up from his house and held that he was picked up from Sonya Maruti Chowk and was taken to Shahupuri Police Station in a police jeep driven by Shamrao Dattatraya Patil (PW-19) and while PW-19 was waiting in the jeep parked very close to the Police Station, he did not hear any noise of beating or crying inside the Police Station and, therefore, the prosecution case that accused Nos. 1, 2 and 3 gave beatings to the deceased stands disproved by the evidence of prosecution itself. The trial court further found from the medical evidence on record that the injuries on the dead body of the deceased were brownish in colour and could not have been caused on the night between 16.12.1985 and 17.12.1985. The trial court also found that a medical report (Ext.71) dated 02.08.1985 was recovered from the body of the deceased which established that the deceased got his blood and urine examined and accordingly the trial court held that there was reason to believe that the deceased had some ailment. The trial court further found that at the time of arrest of the deceased on the intervening night of 16.12.1985 and 17.12.1985, a *panchnama* (Ext.76) was prepared to which Gundu Satavekar (PW-21) and Tanaji Jadhav (PW-22) were witnesses and both these witnesses have deposed that when the deceased took off his clothes at the time of arrest *panchnama*, there were 2-3 abrasions on his back and a black spot on the waist portion and when the accused No.1 asked the deceased how these injuries were received, the deceased told him that while he was coming from Kavala Naka he was beaten by 2-3 persons with fist blows and kicks and accordingly the *panchnama* (Ext.-76) was prepared. The trial court, therefore, acquitted the accused persons of all the charges including the charge under Section 302 read with Section 34 against accused Nos.1, 2 and 3 by judgment dated 02.09.1988.

5. Aggrieved, the State of Maharashtra filed Criminal Appeal No.1084 of 1988 against all the eleven accused persons and the complainant Balasaheb Namdeo Pandav, brother of the deceased, filed Criminal Revision Application

A No.82 of 1989. After hearing the parties, the High Court held in the impugned judgment relying on the evidence of PW-1, PW-5, PW-6 and PW-7 that the deceased was actually picked up from his house on the night of 16.12.1985 and had no injuries on his body when he was picked up and the story of B the defence of the accused that the deceased was picked up from Sonya Maruti Chowk and that he had injuries on his person given by some unknown persons was false and this story was invented by the accused to escape criminal liability. The High Court further held that all the injuries found on the body C of the deceased must have been caused after the deceased was picked up from his house by accused Nos. 1, 2 and 3 and they were, therefore, guilty of the offences under Sections 302, 342, 218 and 193 read with Section 34, IPC. The High Court, however, maintained the judgment of the trial court acquitting D accused Nos. 4 to 11 from all the charges. Aggrieved, accused Nos. 1, 2 and 3 have filed these appeals.

Contentions of the learned counsel for the parties:

6. Learned counsel for the appellants submitted that E before the trial court, the Special Public Prosecutor specifically conceded that there is no evidence to prove the charge of murder under Section 302, IPC, against accused Nos.1, 2 and 3 and it was only necessary to decide as to whether the deceased died of homicidal death and yet the High Court F recorded the conviction of murder under Section 302, IPC, against the appellants. They further submitted that though the State Government had not granted sanction for prosecution of the appellants under Section 193, IPC, the High Court has convicted the appellants under Section 193, IPC. They further G submitted that in the absence of proof that any document was prepared by accused persons, the High Court acquitted the remaining eight accused persons of the charge under Section 218, IPC, but has erroneously held the appellants guilty of the offence under Section 218, IPC.

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7. Learned counsel for the appellants next submitted that there was no direct evidence of any witness to support the finding that the accused Nos.1 to 3 had beaten the deceased before or after his arrest and the finding of the High Court that accused Nos.1 to 3 had caused the injuries on the body of the deceased was based solely on circumstantial evidence. Learned counsel for the appellants submitted that the circumstances which weighed with the High Court to convict accused Nos.1 to 3 of the offence of murder under Section 302, IPC, are that (i) the deceased was picked up from his house by accused Nos.1 to 3 on the night of 16.12.1985; (ii) there were no injuries on his person at the time when he was taken into custody; (iii) the arrest *panchnama* (Ext.76) was falsely created to make it appear that the deceased was arrested from a place other than his house with injuries; (iv) the deceased was found dead in the lock-up of Shahupuri Police Station next morning: (v) the deceased died of injuries mentioned in the post mortem report (Ext.58) and (vi) no explanation has been offered by accused Nos.1 to 3 to discharge their burden of proof under Section 106 of the Indian Evidence Act, 1872.

8. They submitted that this Court has laid down in *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116] the five golden principles which constitute the *panchsheel* of the proof of a case based on circumstantial evidence. According to the learned counsel for the appellants, these five golden principles are not satisfied in this case so as to make out the case for conviction of the appellants under Section 302, IPC. They submitted that the first golden principle is that the circumstances from which the conclusion of guilt is to be drawn should be fully established and even this golden principle is not satisfied in this case as none of the circumstances have been fully established.

9. Learned counsel for the appellants submitted that the first circumstance that the deceased was picked up from his house has not been fully established. They submitted that to record a finding that the deceased was picked up from his

A house by accused Nos.1, 2 and 3, the High Court has relied on the evidence of PW-5, the brother of the deceased, but the evidence of PW-5 is such, as cannot be believed by any prudent person. PW-5 has said that on the night of 16.12.1985 he woke up for the first time on hearing the sound of opening the latch B of the door and he saw that the deceased was being taken away by the police from the gallery and thereafter he slept and did not feel it necessary to go down. Learned counsel for the appellants submitted that it is not believable that PW-5, who was the brother of the deceased, would not go down after he C saw that the deceased was taken away by the police and that he would sleep even after witnessing the police picking up the deceased. They argued that the High Court has also relied on the evidence of PW-1, another brother of the deceased, who has said in his evidence that at about 2.00 a.m. in the morning D of 17.12.1985, his mother woke him up and told him that about two hours back the deceased was taken by the police to Shahupuri Police Station and thereafter he went to Shahupuri Police Station and returned to his house and slept. They submitted that PW-1 had not seen the deceased being taken away by the police and his source of information was his E mother, but his mother has not been examined as a witness. Learned counsel for the appellants submitted that the finding of the High Court, therefore, that the deceased was picked up from his house in the night of 16.12.1985 is not established by cogent evidence.

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10. Learned counsel for the appellants next submitted that the second circumstance recorded by the High Court for holding the appellants guilty of murder under Section 302, IPC, is that there were no injuries on the body of the deceased at the time G he was taken into custody. They submitted that the arrest *panchnama* (Ext.76) which has been signed by PW-21 and PW-22 as witnesses clearly states that the deceased had certain injuries which were minor and not significant. They submitted that the High Court, however, has held that the arrest H *panchnama* (Ext.76) is a false document and has been created

to make it appear that the deceased was arrested at a place other than his house and had injuries at the time of arrest. They submitted that the deceased along with Chandrakant was arrayed as accused in the case of kidnapping of Usha and accused No.1 was entrusted with the investigation of the aforesaid case of kidnapping and accused No.1, therefore, arrested the deceased and prepared the arrest *panchnama* (Ext.76) and also made entry regarding his arrest (Ext.134) in the arrest register of the Police Station and the arrest of the deceased was witnessed by PW-21 and PW-22, Gundu Satavekar and Tanaji Jadhav. They submitted that PW-21 and PW-22 were not police personnel but were independent witnesses called to the Police Station to witness the arrest of the deceased and their evidence would show that when the deceased took off his clothes in the Police Station, there were 2-3 abrasions on his back and a black spot on the waist portion and when accused No.1 asked the deceased how these injuries were received, the deceased said that while he was coming from Kavala Naka he was beaten by 2-3 persons with fist blows and kicks by asking where Chandya (Chandrakant) was and thereafter accused No.1 asked him whether he would like to go to the dispensary but the deceased did not desire to go to dispensary as the injuries were minor in nature and accordingly *panchanama* was prepared and PW-21 and PW-22 signed the *panchnama*. They submitted that a reading of the arrest *panchnama* (Ext.76) would show that the evidence of PW-21 and PW-22 are fully corroborated by Ext.76. They submitted that the finding of the High Court, therefore, that there were no injuries on the body of the deceased when he was arrested as also the finding of the High Court that the arrest *panchnama* (Ext.76) was falsely created to show the injuries on the body of the deceased are contrary to the evidence on record.

11. Learned counsel for the appellants next submitted that the remaining three circumstances found by the High Court to hold the appellants guilty of murder under Section 302, IPC, are that the deceased was found dead in the lock-up on the

A morning of 17.12.1985 and he died of injuries mentioned in the *post mortem* report (Ext.58), but there is absolutely no evidence to establish that the appellants had caused these injuries on the deceased. Rather the arrest *panchnama* (Ext.76) established that these injuries on the body of the deceased were caused B before his arrest. They submitted that there may be some differences in the description of the injuries in the arrest *panchnama* (Ext.76) and the post mortem report (Ext.58) but merely because the injuries on the body of the deceased have not been described with meticulous details by accused No.1 C while preparing the arrest *panchnama* (Ext.76), the appellants cannot be held guilty for having committed the murder of the deceased. They further submitted that the evidence of Doctor (PW-13) who has prepared the post mortem report (Ext.58) would show that the contusions and swelling in other injuries D were with brownish or black discolouration. They submitted that PW-13 has admitted in his cross-examination that considering the brownish colour of the injuries, they could have been caused two to three days before the death.

12. They further submitted that the evidence of PW-13 E suggests that the broken ribs of the deceased might have penetrated the diaphragm and the peritoneal cavity, the pleura of the liver and, thus, caused penetrating injury to the liver and this injury to the liver must have caused bleeding in the liver which, in turn, must have led to death of the deceased. They F vehemently argued that there is actually no evidence to show that the fractured ribs could have caused the injuries to the liver and, thus, it cannot be held that on account of the injuries caused to the ribs, there were injuries to the liver of the deceased and consequently the deceased died. Learned counsel for the G appellants next submitted that at the time of inquest *panchnama* (Ext.71) a pathology report was available in the pocket of the deceased and this pathology report shows that the deceased had gone to a pathology laboratory and had obtained his blood report and urine report. They submitted that this indicated that H the deceased had been suffering from some ailment and if

investigation was directed to find out what particular ailment he was suffering, the exact cause of the death of the deceased would have come to light.

13. Mr. U.U. Lalit, learned counsel for appellant No.1 (accused No.1), referred to the evidence of PW-19, driver of the Jeep, who was from M.T. Section of the police. He submitted that PW-19 was an independent witness and his evidence would show that accused No.1 brought the deceased to the Police Station at 12.40 a.m. in the night and he left the Police Station at 1.10 a.m. in the Jeep for a night round duty and came back to the Police Station at 5.00 a.m. and again left for his residence at 5.15 a.m. He submitted that this being the evidence of PW-19, the deceased was not in the custody of accused No.1 between 12.40 a.m. on the night of 16.12.1985 when the arrest *panchnama* (Ext.76) was recorded and 7.00 a.m. in the morning when the deceased was found dead in the police lock-up and, therefore, accused No.1 could not be asked to explain the injuries leading to the death of the deceased under Section 106 of the Indian Evidence Act, 1872.

14. Similarly, Mr. Basant R., learned counsel appearing for appellant No.2 (accused No.2), and Mr. V. Giri, learned counsel appearing for appellant No.3 (accused no.3), submitted that accused No.2 and accused No.3 left the Police Station soon after the deceased was brought to the Police Station and this will be clear from the evidence of PW-23 (a scooterist) PW-28 (the Magistrate) and PW-29 (Inspector of Police of Shahupuri Police Station). They further submitted that the deceased was never in the custody of accused No.2 and accused No.3 and it was accused No.1 who had arrested the deceased and had directed accused No.2 and accused No.3 to go with him for the arrest of the deceased. They argued that the deceased was brought to the Police Station and handed over to the officials, accused No.2 and accused No.3 left the Police Station and have not been shown to be present in the Police Station in the records of the Police Station. They submitted that as the

A deceased was not in the custody of accused No.2 and accused No.3, no burden was cast on them under Section 106 of the Indian Evidence Act, 1872 to explain the injuries which caused the death of the deceased.

B 15. In reply, learned counsel for the State of Maharashtra submitted that the prosecution has been able to establish three circumstances and these three circumstances are (i) the deceased was arrested on the night of 16.12.1985 by accused Nos.1 to 3 from his house which is at Sonya Maruti Chowk, Kohlapur; (ii) the deceased was taken into police custody; and C (iii) the deceased was found dead in police custody at 7.05 a.m. of 17.12.1985 and the death was an unnatural death. He submitted that all these three circumstances would prove beyond reasonable doubt that it was only the accused Nos.1 to 3 who are responsible for the custodial death of the D deceased.

16. To establish the first circumstance that the deceased was arrested by accused Nos.1 to 3 from his house, learned counsel for the State relied on not only the evidence of PWs-1 E to 5 but also the evidence of PW-7 (Narayan) who was working in the house of the deceased. He submitted that the arrest *panchnama* (Ext.76) showing that the deceased was picked up from Sonya Maruti Chowk and also showing there were black and redish injury spots and some abrasion marks on the body of the deceased, was a fabricated document and there F is no corresponding entry of the arrest of the deceased at the relevant time in the Police Station Diary (Exts.108 to 120). He submitted that entry in the arrest register (Ext.134) is also a fabricated entry as the perusal of the entries in the arrest register would show that the entries are in ink and handwriting G different from the ink and handwriting in the other entries of the arrest register.

17. Learned counsel for the State relied on the evidence of PW-32 (Investigating Officer) who has stated in his evidence H that when a police officer on night duty comes back for *bona*

fide work, an entry has to be made in the Police Station Diary. He submitted that the station diary entry (Ext.108) shows that at 00.10 a.m. in the night the accused No.1 went to night round checking in the area and the station diary entry (Ext.111) shows that at 5.00 a.m. the accused No.1 came back from night round checking in the area under the Police Station and these two entries (Ext.108 and Ext.111) are in the handwriting of the accused No.1. He argued that there was, thus, evidence to establish that accused Nos.1, 2 and 3 were carrying on rounds from the midnight of 16.12.1985 till the morning of 17.12.1985 and during this entire period, the deceased was in the custody of accused Nos.1, 2 and 3.

18. Learned counsel for the State submitted that in any case the post mortem report (Ext.58) reveals the actual injuries on the body of the deceased and several of these injuries are not reflected either in the arrest *panchnama* (Ext.76) or in the arrest register (Ext.134). He submitted that PW-13 Dr. Vilas, who conducted the post mortem, has deposed about the injuries which were noticed on the body of the deceased and it will be clear from his deposition that external injuries Nos.7, 12, 13 to 16 shown in the post mortem report were extensive and were not reflected in the arrest *panchnama* (Ext.76) or in the arrest register (Ext.134). He also relied on the evidence of Dr. Baburao (PW-20) who has deposed that the injuries might have been caused 12 to 15 hours before the post mortem examination and submitted that the injuries were, therefore, caused between the night of 16.12.1985 and morning of 17.12.1985.

19. Learned counsel for the State vehemently submitted that burden under Section 106 of the Indian Evidence Act, 1872 was, therefore, on accused Nos.1, 2 and 3 to explain these injuries which resulted in the death of the deceased and since the accused Nos.1, 2 and 3 have not been able to explain the injuries on the body of the deceased, they are criminally liable for the offence of murder under Section 302, IPC. In support of

A this submission, he relied on the decision of this Court in *State of Rajasthan v. Kashi Ram* [(2006) 12 SCC 254]. He also cited the decision of this Court in *State of M.P. v. Shyamsunder Trivedi & Ors.* [(1995) 4 SCC 262] in which this Court has held that in cases of death in the police custody the ground realities, B if ignored by courts, may result in miscarriage of justice and the Courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may loose faith in the judiciary itself. He submitted that considering the facts of this case, the High Court C was right in convicting the appellants for the offence under Section 302, IPC.

Findings of the Court

20. In this case, there is no direct evidence of an eye D witness on how the deceased suffered the injuries which has caused his death and therefore the High Court has relied on circumstantial evidence to convict the appellants for the offences under Section 302 read with Section 34, IPC. A three-Judge Bench has held in *Sharad Birdhichand Sarda v. State of* E *Maharashtra* (supra) that in a prosecution based on circumstantial evidence a case against accused can be said to be fully established if the following conditions are fulfilled:

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

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2. The facts so established should be consistent only with the hypothesis of the guilt of the accused;

3. The circumstances should be of a conclusive nature and tendency;

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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

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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. A

These five golden principles relating to a case based on circumstantial evidence will have to be therefore borne in mind while analyzing the evidence in this case. B

21. The first circumstance on which the High Court has relied on to hold the appellants guilty is that the deceased was actually picked up from his house on the night of 16.12.1985 by the appellants and he had no injuries on his body when he was picked up from his house. As proof of this circumstance, the High Court has relied on the evidence of PW-1, PW-5, PW-6 and PW-7. We have carefully gone through the evidence of PW-1, PW-5, PW-6 and PW-7 and we do not find their evidence to be convincing. We are of the considered opinion that the trial court rightly disbelieved the evidence of PW-1, PW-5, PW-6 and PW-7 and has correctly held that the deceased was picked up from Sonya Maruti Chowk and that he had injuries on his body when he was picked up by the appellants relying on the evidence of PW-21 and PW-22 who were witnesses to the arrest *panchnama* (Ext.76) as well as the contents of the arrest *panchnama* (Ext.76) and the entry in the Arrest Register (Ext.134). As the contents of Ext.76 and Ext.134 have been proved by PW-21 and PW-22 and there is no evidence to show that Ext.76 and Ext.134 are fabricated, the appellants cannot be held guilty of the offences under Sections 193 and 218, IPC. Moreover, as the deceased was a co-accused with Chandrakant in a case of kidnapping and was arrested in connection with that case, the appellants cannot also be held guilty of the offence under Section 342, IPC. C D E F G

22. We, however, find that the injuries which have been noticed in the *post mortem* certificate (Ext.58) and which have ultimately caused the death of the deceased are not the same as are described in arrest *panchnama* (Ext.76) and as deposed by PW-21 and PW-22. In the arrest *panchnama* H

A (Ext.76) this is what has been stated with regard to the injuries on the body of the deceased:

> "His body was inspected and found that on his back some black and reddish injury sports had been seen also abrasion marks on his back and shoulder. Upon asking him how these injuries occurred, he said while he was at Kavalanaka about 10.30 p.m. three unknown persons beat him up by making him fall down by kicks and blows and asking him where is Chandu. Upon being asked whether he wishes to have medical treatment for those injuries he refused to go to a clinic. He did not wish to make any complaint against police. He was arrested, taken in custody in the said crime and was informed about that. This panchnama has been recorded as told by us in our presence, was started at 00.45 and completed at 01.00 hours."

It, thus, appears from the description of the injuries in Ext.76 that the injuries on the body of the deceased comprised some reddish injury spots and marks and were said to have been caused at Kavalanaka about 10.30 p.m. on 16.12.1985 by three unknown persons and as the deceased himself did not wish to have a medical treatment for those injuries, the injuries were not of a serious nature. When the deceased was found dead in the lock up of police station at 7.05 am and was taken to C.P.R. Hospital, Kolhapur, PW-13 carried out the post mortem during 5.45 p.m. to 7.45 p.m. on 17.12.1985 and noticed the following external injuries on the body of the deceased:

> "1. Contusion on top of right shoulder circular 1" in diameter with brown discoloration
>
> 2. Abrasion on right shoulder just posterior to injury No.1.
>
> 3. Contusion on left shoulder ovel 2" x ½" brown

discoloration.

4. Multiple minor abrasions on left shoulder posterior to injury No.3.

5. Contusion with brown dis-colouration on left wrist radial aspect circular 1" in diameter.

6. Minor abrasion on left forearm radial aspect 2" above the wrist.

7 There was swelling of left foot on dorsal aspect with brownish black discolouration, incisions black taken on dorsal left foot. There was marked haematoma on dorsum extending on medial and lateral aspect of ankle.

8. Contusion of thin of right tibia, vertical, measuring 3":1" extending from "above the ankle.

9. Contusion on left elbow posterior aspect ovel 1"x ½" brownish discolouration.

10. Contusion on right elbow medical aspect 1"x ½".

11. Contusion on right elbow lateral aspect 1"x ½".

12. Weal mark, on back extending from medial angle of right scapula to inferior angle of right scapula 6"x1" brown discolouration.

13. Weal mark just on right side of throusic spine extending from T1 to T7, 7"x1" brownish.

14. Weal mark on back left side horizontal extending from posterior auxiliary line to middle (spine) 7"x1" brown.

15. Weal mark oblique extending from inferior angle of left scapula to right renal angle 6"x1".

A 16. Weal mark horizontal at the leval of L.4 measuring about 2"x1" brown discolouration.

17. Contusion on right penel angle circular 2" in diameter brownish.

B 18. Contusion on right parietal region circular ½" in diameter.

19. Contusion on left parietal region circular ½" in diameter."

C Many of these external injuries on the body of the deceased noticed during post mortem by PW-13 have not been described in the arrest *panchnama* (Ext.76). The obvious inference would be that after the arrest of the deceased as recorded in the arrest *panchnama* (Ext.76), someone in the Shahupuri Police D Station has caused the injuries on the body of deceased which have not been mentioned in the arrest *panchnama* (Ext.76).

23. The next question which we have to decide is who could be this someone who caused injuries on the body of the E deceased after the arrest of the deceased. Entries 108 to 120 in Police Station Diary of Shahupuri Police Station for 17.12.1985 have been exhibited and proved in trial court by the Inspector of Shahupuri Police Station (PW-29) and the entry made at 7.05 a.m. on 17.12.1985 marked as Ex.113 in Police F Station Diary of Shahupuri Police Station is extracted hereinbelow:

"8.07.05 Ex.113	Entry	At this time, Police Inspector Shahpuri is informed on telephone at his residence bearing phone No.26013 that police arrested accused Arun Namdeo Pandav, age 22 years, resident of 2643, C-Ward, Shaniwarpeth, Chambhar Galli, Kolhapur, who was arrested by PSI Panhale and personally

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	kept in police lock up in the night at 00.45 a.m. in CR No.321/1985, u/Sec.365, 366 r/w 34 of IPC registered with our police station. When by giving locker key, Police Constable No.1276, 1672, 1627 are asked at about 7.00 a.m. in the morning to bring him out for nature's call and mouth wash, then they informed that in lock up room, the said accused does not get up, his body has become cold; then I personally went to the lock up room and saw that his breathing is stopped and his body has become cold and I am sure that he has died, therefore, you should come immediately. Then he said he is coming. Accordingly entry is taken."

The aforesaid extract from the Police Station Diary would clearly show that the deceased Arun Namdeo Pandav who was arrested by accused No.1 was personally kept in police lock up in the night at 00.45 a.m. and at 7.00 a.m. in the morning when the Police Constable No.1276, 1672, 1627 were asked to bring the deceased out for nature calls and mouth wash, the deceased did not get up and his body had become cold and his breathing had stopped and he had died. With regard to the aforesaid entry Ex.113 in the Police Station Diary, PW-29 has also stated in cross examination:

"7. On 17,12,1985 at 7.05 a.m. I got the phone message from the Station House Officer that the accused in the Police lock-up room had died. He informed me that the said accusd was involved in C.R. No.321/85, was arrested at 00.45 a.m. and was kept in the police lock-up. I went to

A the Police Station at 7.20 a.m. Panhale also came to the Police Station as per my order. I orally inquired with the staff members about the arrest and death of that accused person. I got the information on night round after arresting that accused person at 0.45 a.m. and keeping him in the
B lock-up room. I got the information that the accused 2 and 3 left the police station on the bicycles and still that time they had not returned to the police station."

Thus, Ext.113 read with the evidence of PW-29 clearly
C establishes that the deceased was last in the custody of accused No.1 in the police lock-up about 00.45 a.m. of 17.12.1985 and thereafter the deceased was in the lock-up in no one's custody.

24. Section 106 of the Indian Evidence Act states that
D when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Since it was accused No.1 who had arrested the deceased at 00.45 a.m. on 17.12.1985 and kept the deceased in police lock up after his arrest was complete, it was for the accused No.1 to explain the
E injuries on the body of the deceased other than those which were noticed in Ex.76. Accused No.1 has not stated anything in this regard in his statement under Section 313 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') nor adduced any evidence in defence to explain these injuries. In the absence
F of any explanation by accused No.1 or any evidence adduced on behalf of accused No.1 to explain on these injuries on the body of the deceased, there can be no escape from the conclusion that these injuries have been caused on the body of the deceased by accused No.1 and no one else.

G 25. The chain of circumstances proved against accused No.1 are that (i) he had arrested the deceased on the night of 17.12.1985 between 00.45 a.m. to 1.00 a.m. as per the arrest *panchnama* (Ex.-76), (ii) the injuries noticed by PW-13 as per the post mortem report are different from and more serious than
H the injuries recorded in the arrest *panchnama* (Ext.76) and (iii)

no one else had the custody of the deceased between the time of his arrest at 0.45 a.m. on 17.12.1985 till 7.00 a.m. of 17.12.1985. Thus, the only hypothesis before the High Court is that it is accused No.1 who is responsible for injuries on the body of the deceased found at the time of his death.

26. PW-13 has further stated in the evidence that on internal examination on the body of the deceased, he had noticed the following injuries:

"1. Haematoma on right parietal region circular 2" in diameter.

2. Haematoma on left parietal region circular 2" in diameter.

3. Coverings of brain normal, brain congested weight 1200 grams.

4. Fractured ribs 7th, 8th on right side posterorily 2" from spine. Pheura normal Traches food particles, right lung, left lung were conjested. Feil cardian was normal. Heard I weight 400 grams, lung vessels empty.

5. The walls of abdomen were normal, Peritonjern normal except tear on posterior surface. Cavity-about 2 liters of blood, buckle cavity all teeth were present. Oesophabes no abnormality detected. Stomach and its contents:- about half WATI brownish fluid containing rice small intestine and its contents:- Semi digested food, large instatine and its contents:- faecal matter. Liver: - Wt. 1.5, laceration postero superior surface of right lobe of liver 2"x1" X 1" bleeding plus, laceration on posterior surface of right lobe of the liver just above inferior border 3"x½" X ½" bleeding plus."

PW-13 has further stated in evidence that according to his opinion the cause of death was shock due to hemorrhage due to laceration of liver, due to fracture of ribs with multiple injuries. PW-20, a medical officer of C.P.R. Hospital, who had also

A carried out the post mortem on the body of the deceased along with PW-13 has deposed before the Court that the death of the deceased was mainly on account of breaking of the ribs of the deceased and the ribs penetrated through peritoneum, diaphragm and pleura and affected the liver. PW-20 has also B deposed that the injuries were caused between 12 to 15 hours before post mortem. The *post mortem* was conducted between 5.45 p.m. and 7.45 p.m. and 15 hours from 5.45 p.m. would be around midnight of 16.12.1985. It is thus established beyond reasonable doubt that the injuries caused on the body of the C deceased and in particular the injuries to ribs were the cause of the death of the deceased and accused No.1 was responsible for causing these injuries on the deceased.

27. The prosecution, however, has not been able to establish beyond reasonable doubt that accused Nos.2 and 3 D were responsible for causing the injuries on the deceased which have resulted in his death. As we have found, accused Nos.2 and 3 were present at the time of arrest of the deceased and when the arrest *panchnama* (Ext.76) was drawn up at the Shahupuri Police Station and the prosecution witnesses have E said that accused Nos.2 and 3 had left the Police Station soon after the arrest of the deceased. PW-23 has stated that between 00.30 a.m. and 1.00 a.m. of 17.12.1985 the light of the scooter went off near the Gokul Hotel and accused No.1 asked him to come to the Police Station and he went to the Police Station F and some time was required for making the receipts of fine which he paid and thereafter he left the Police Station and in his cross-examination he admitted that after the jeep went away, two policemen in ordinary dress also left the Police Station before him. The Additional District Magistrate, Kolhapur, who G conducted the inquiry into the death of the deceased under Section 176, Cr.P.C., has stated that it appears from the statements of various police constables recorded during the inquiry that accused Nos.2 and 3 left the police station after the arrest of the deceased at about 1.00 a.m. on 17.12.1985. PW-H 29, the Inspector of Police of Shahupuri Police Station, has

also stated that he got information that the accused Nos.2 and 3 left the police station on bicycles and till 7.20 a.m. of 17.12.1985 they had not returned to the police station. The entry in the Police Station Diary of Shahupuri Police Station (Ext.113) states that Panhale (accused No.1) had personally kept the deceased in the lock-up and there is no mention in the said entry about the presence of accused Nos.2 and 3 in the lock-up where the deceased was kept. This being the evidence at the trial, the High Court could not have held that the deceased died while in the custody of accused Nos.2 and 3. We are of the opinion that the conviction of accused Nos. 2 and 3 is liable to be set aside.

28. The only other question that we have to decide is as to the nature of offence that the accused No.1 has committed. The circumstantial evidence established against accused No.1 does not show that accused No.1 intended to cause the death of the deceased or intended to cause bodily injuries as he knew is likely to cause the death of the deceased or intended to cause such bodily injuries which were sufficient in the ordinary course of nature to cause the death of the deceased. The circumstantial evidence established against accused No.1 do not also establish that he knew that the injuries caused on the body of the deceased must in all probability cause his death or likely to cause his death. Thus, the ingredients of the offence of murder as defined in Section 300, IPC, have not been established against the accused No.1. In our considered opinion, the accused No.1 was guilty of culpable homicide not amounting to murder under Section 304, IPC, and considering the fact that accused No.1 had no intention to either cause the death of the deceased or cause such bodily injury as is likely to cause death of the deceased, it will be sufficient to impose on accused No.1 a sentence of seven years rigorous imprisonment and to impose on him a fine of Rs.3,000/- and in default of payment of fine, a further imprisonment of six months.

A 29. We, therefore, allow Criminal Appeal Nos.1004 of 2007 and 1005 of 2007 of accused Nos.2 and 3 and set aside their conviction under Sections 193, 218, 342 and 302, IPC and direct that the bail bonds of accused Nos. 2 and 3 shall stand discharged.

B 30. In Criminal Appeal No.1067 of 2007 filed by accused No.1, we set aside the conviction of the accused No.1 under Sections 193, 218 and 342, IPC, but hold him guilty of the offence under Section 304, IPC, instead of the offence under Section 302, IPC, and sentence him to seven years rigorous C imprisonment and a fine of Rs.3,000/- and in default of payment of the fine amount, a further imprisonment of six months. The accused No.1 who is on bail will be forthwith taken into custody for undergoing the remaining period of sentence. Criminal Appeal No. 1067 of 2007 stands disposed of.

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Kalpana K. Tripathy Appeals disposed of,