

**IN THE HIGH COURT OF KARNATAKA
CIRCUIT BENCH AT DHARWAD**

DATED THIS THE 4TH DAY OF APRIL 2013

:PRESENT:

THE HON'BLE MR.JUSTICE B.V.PINTO

AND

THE HON'BLE MR.JUSTICE H.S.KEMPANNA

CRIMINAL APPEAL NO.2834/2011
C/W. CRIMINAL APPEAL NO 2912 OF 2011

IN CRL.A NO 2834 OF 2011

BETWEEN

SHRI. GAJENDRA SADASHIV SUNADALE,
AGE: 27 YEARS,
OCC:BUSINESS,
R/O SANKESHWAR,
TQ. HUKKERI,
DIST. BELGAUM

... APPELLANT

(By Sri. ASHOK R KALYANASHETTY – ADV.)

AND

THE STATE OF KARNATAKA,
BY ITS STATE PUBLIC PROSECUTOR,
ADVOCATE GENERAL OFFICE,
HIGH COURT CIRCUIT BENCH PREMISES,
DHARWAD

... RESPONDENT

(By Sri. V.M.BANAKAR – ADDL. SPP)

THIS CRIMINAL APPEAL IS FILED U/S 374(2) OF
CR.P.C. SEEKING TO SET ASIDE THE JUDGEMENT OF

CONVICTION AND ORDER OF SENTENCE DATED 18 & 19.07.2011 PASSED BY THE FAST TRACK COURT & ADDL. SESSIONS JUDGE, HUKKERI, IN S.C.NO.118/2008, AND ACQUIT HIM OF ALL CHARGES.

IN CRL.A NO 2912 OF 2011

BETWEEN

1. SRI.SURESH @ PAPU DUNDAPPA MASTI
Age:34 YRS
OCC:AGRICULTURE,
R/O:SOLLAPUR
TQ:HUKKERI,
DIST:BELGAUM
 2. SMT. SHAHIN ILAI YANE RAJESAB NAIKWADI
Age:35YRS
OCC:HOUSEHOLD WORK,
R/O:SOLLAPUR
TQ:HUKKERI,
DIST:BELGAUM
- ... APPELLANTS

(By Sri. SRINAND A PACHHAPURE – ADV.)

AND

THE STATE OF KARNATAKA
BY CPI, HUKKERI POLICE STATION
NOW REP. BY SPP

... RESPONDENT

(By Sri.V.M.BANAKAR – ADDL.SPP)

THIS CRIMINAL APPEAL IS FILED U/S 374(2) OF CR.P.C. SEEKING TO SET ASIDE THE JUDGEMENT OF CONVICTION AND ORDER OF SENTENCE DATED 18.07.2011 PASSED BY THE P.O., FAST TRACK COURT AND ADDL. SESSIONS JUDGE, HUKKERI, IN

S.C.NO.118/2008, FOR THE OFFENCES P/U/S 302, 201 R/W SEC. 34 OF IPC AND ACQUIT THE APPELLANTS, IN THE INTEREST OF JUSTICE.

THESE CRIMINAL APPEALS COMING ON FOR HEARING THIS DAY **H.S.KEMPANNA, J.**, MADE THE FOLLOWING:

JUDGMENT

These two appeals preferred by A2, A1 and A3 respectively are directed against the judgment and order dated 18.7.2011 passed in S C.No.118/2008 by the Addl. Sessions Judge and Presiding Officer, Fast Track Court, Hukkeri convicting them for the offences punishable under Sections 302, 201 r/w.34 of IPC and sentencing to undergo imprisonment for life and to pay fine of Rs 50,000/- each I.D. to undergo R.I. for three years for the offence punishable under Section 302 r/w.34 of IPC and to undergo R.I. for three years and to pay fine of Rs.5,000/- each I.D. to undergo R.I. for one year for the offence punishable under Section 201 r/w.34 of IPC.

2. Since these two appeals preferred by the accused are directed against the same judgment and order of conviction and sentence, they are heard together and are disposed of by this common judgment.

3. The brief facts of the case are :-

The appellants/accused were tried on the charges for the offences punishable under Sections 302 r/w.34 of IPC and 201 r/w.34 of IPC. It is alleged on 3.6.2007 at about 1.00 a.m. in front of the farm house of the deceased Ilai @ Rajesab Naikwadi situated within the limits of Sollapur Village coming within the jurisdiction of Sankeshwar police station, the accused in furtherance of their common intention did commit murder of the deceased intentionally by assaulting him with iron rod and thereafter in order to cause disappearance of the evidence of said murder to screen themselves from legal punishment, removed the body from the said place and buried the same in the land

bearing S.No.413 belonging to A1 situated at a distance of about 100 mtrs. from the spot of occurrence and thereby have committed the aforementioned offences

4. It is the case of the prosecution the deceased Ilai @ Rajesab Naikwadi is the husband of A3 and son and brother of PWs 1 and 8 respectively. The deceased along with his wife-A3 and their four children, comprising of PW2 also, were living in the farm house built in the land owned by the deceased situated within the limits of Sollapur Village. PW1, his father and PW8, his brother, were living along with their respective families at Sollapur Village. They are agriculturists by occupation.

5. It is further the case of the prosecution, A1 and A2 were friends of the deceased and were always moving together. A1 and A2 were frequently visiting the house of the deceased. In due course of time, A1 developed illicit connection with A3, who is the wife of the

deceased. The deceased who came to know about the same started quarrelling with his wife-A3. This fact also came to the knowledge of PW1, who is the father of the deceased. Thereafter PW1 and PW6, one of the elderly person in Sollapur village, came to the house of the deceased and advised both A1 and A3 to desist from their illicit connection, but they had not heed to the said advise. They continued their illicit connection. On account of the same, the deceased became dejected and started drinking and quarrelling with his wife-A3.

6. Such being the case, it is the case of the prosecution on the evening of 2.6.2007, the deceased, A3 and their four children, including PW2, were in the house. After taking dinner in the night, A3 and her children including PW2 slept inside the house. The deceased slept outside the house near the katta. Thereafter, it is the case of the prosecution the accused in furtherance of their common intention at about 1.00

a.m. on the intervening night of 2.6.2007 and 3.6.2007 assaulted the deceased with iron rods-MOs 1 and 2 on his head and committed his murder. At that point of time, on hearing the cries of the deceased, PW2 who was sleeping inside the house, got up and on peeping through the window of the house she saw A1 and A2 assaulting her father with iron rods and A3, her mother, standing near them. She saw the assault made on the deceased with the help of the moon light that was there on that night. A3 on noticing PW2 peeping through the window went inside the house, took her by her side, closed her eyes saying that a devil has attacked, she should not come out and made her to sleep. Thereafter, A3 came out of the house and according to the prosecution, accused removed the body of the deceased from the spot, took to the land bearing S.No.413 belonging to A1 situated at a distance of about 100 mtrs and buried the same in order to cause disappearance of the murder committed by them to screen themselves

from legal punishment. PW2 on the morning of 3.6.2007 came out the house and noticed her father was not present who was sleeping in front of the house the previous night. The bed which he had used was also not found at the said place. Thereafter, it is the case of the prosecution since the deceased was not found either in his house or in and around Sollapur village, PW1, the father of the deceased, who came to the house of the deceased, made enquiries with A3 as to the whereabouts of his son the deceased. In response to the same A3 replied PW1 stating that he has gone out and he would return. PW1 did not take any steps. It is also the case of the prosecution, PW1 and PW8 who are the father and the brother of the deceased also took steps to search for the deceased in and around Sollapur village, but they did not trace him. PW1 again came to the house of his deceased son, made enquiries with A3 and since A3 again repeated the same version which she had told earlier, he left the house.

7. It is further the case of the prosecution ultimately on 29.6.2007 PW1 came to the house of the deceased. At that point of time PW2 and A3 were in the house. He made enquiries with them about the whereabouts of his deceased son. At that point of time, it is the case of the prosecution PW2, the daughter of the deceased and A3, started crying. Seeing the same when PW1 forced her to tell as to what happened to her father, PW2 told him that her father, the deceased, had been done to death by the accused by assaulting him with iron rods on 2.6.2007. Thereafter it is the case of the prosecution PW1 proceeded to Sankeshwar police station and there he filed his complaint as per Ex.P1 before PW14-PSI. PW14 on receipt of Ex.P1 registered a case in crime No.139/2007 for the offences u/s.302, 201 r/w.34 of IPC against the accused and issued FIR as per Ex.P.26 to the Jurisdictional Magistrate on the very day i.e. 29.6.2007. Thereafter, he handed over further investigation of the case to PW11, the

investigating officer. PW11 on taking over the investigation from PW14, proceeded to the scene of occurrence. There he did not notice any incriminating material near the house of the deceased. Thereafter, he also searched the house of A1 where also he did not find any incriminating articles and to that effect he drew up the panchanama as per P15 in the presence of the pancha PW5. He also made efforts to trace and apprehend the accused. Thereafter, he came to Sollapur village and there he recorded the further statement of PW1 and also the statement of PWs 2, 6 and 8, among whom PW2 is the daughter of the deceased and PW8 is the brother of the deceased. Thereafter, on 30.6.2007 he proceeded to the scene of occurrence and there he drew up the spot panchanama as per Ex.P9 as pointed out by PW2 in the presence of the pancha PW4. After completing Ex.P9 he also drew up the scene of occurrence as per Ex.P17. At that point of time he also got the photographs of the said spot

taken up as per Ex.P2 with the help of the photographer-PW12. Thereafter on the very day he arrested A1 on being produced by PW14-PSI. On his interrogation he recorded his voluntary statement as per Ex.P18. Thereafter, A1 in pursuance of his statement as per Ex.P18, led PW11 and the pancha PW4 to his land and there he pointed out the place where the body of the deceased had been buried. To that effect PW11 drew up panchanama as per Ex.P10 and at that point of time he also got the photographs taken as per Ex.P4. After completing Ex.P4, A1 led the investigating officer and the pancha-PW4 to his house and from his house he produced MOs 5 to 7 which he seized under the panchanama Ex.P11. After completion of Ex.P11, A1 took him to the place where they had burnt the clothes worn by the deceased at the time of occurrence and PW11 seized the burnt ashes under the panchanama Ex.P12 in the presence of the panchas. After completing Ex.P12, A1 led the investigating officer and the panchas

to a bushy place and from there he produced MOs 1 and 2 which came to be seized under panchanama-Ex.P13 in the presence of the pancha-PW4. Photograph-Ex.P14 in respect of the same was also got taken with the help of the photographer-PW12. After completing Ex.P14 and on completion of the arrest formalities of A1, he got him remanded to judicial custody. On 1.7.2007 he gave a requisition to PW15, the Sub Divisional Magistrate to exhume the body of the deceased. In response to the same PW15 issued exhumation order as per Ex.P19 and in pursuance of the same he got the body of the deceased exhumed from the spot where it had been buried and at that time, he drew up the panchanama as per Ex.P3. At that time the photographs as per Exs.P4 to P6 were also got taken with the help of the photographer. The body was got exhumed with the help of PW9. After the body was exhumed it was identified by PWs 1, 2 and 8 as that of the deceased on the basis of MOs 3 and 4, the clothes

which were found on the body of the deceased and taken out from the grave. Thereafter, PW11 sent a requisition to the medical officer to conduct autopsy over the body of the deceased at the spot itself. In response to the same, PW13, the medical officer who was also present at the time of exhumation of the body as per the requisition sent to him by PW15 conducted post mortem over the body of the deceased and issued the post mortem report as per Ex.P22. After completion of the post mortem examination, the body was handed over to PWs 1, 2 and 8 who took steps to cremate the body in accordance with the custom prevailing in their community. Thereafter PW11 visited Sollapur village and there he recorded the statement of the witnesses examined on behalf of the prosecution and also cited in the charge sheet. He also gave requisition to PW10 to issue the residential certificate in respect of A1 and the deceased, in response to which PW10 issued the certificate as per Ex.P16. Continuing the investigation

PW11 forwarded all the seized articles in the case for subjecting to chemical examination to FSL Office and also obtained from the Tahsildar office the RTC extracts in respect of the land where the body had been buried as per Exs.P20 and 21. Thereafter PW11 secured the relevant documents from the concerned authorities, the articles sent for chemical examination from the FSL office and on completion of the investigation filed the final report against the accused before the Jurisdictional Magistrate who in turn committed the case of the accused to the court of sessions which on receipt of the records secured the presence of the accused, framed charges against them as aforesaid to which they pleaded not guilty, but claimed to be tried.

8. The prosecution in support of its case in all examined PWs 1 to 16 and got marked exhibits P1 to P31 and MOs 1 to 8. The accused have not got marked

any defence exhibits in the course of examination of prosecution witnesses.

After the closure of the prosecution evidence, the accused denied all the incriminating circumstances that were put to them found in the evidence of the prosecution witnesses in their examination u/s.313 Cr.P.C. They also submitted that they have no defence to lead. Total denial of the prosecution case is the defence of the accused.

9. The trial Judge on considering the oral and documentary evidence placed on record came to the conclusion that the prosecution has established the charges levelled against the accused and accordingly by the impugned judgment and order convicted and sentenced the accused/appellants as aforesaid.

The appellants/accused being aggrieved by the judgment and order of conviction and sentence are in appeal before this Court.

10. Sri.Ashok R.Kalyanshetty and Sri.Srinand A.Pachhapure, learned counsel appearing for the appellants/ accused contended that absolutely there is no evidence which is cogent and clinching pointing towards the guilt of the accused placed on record by the prosecution. It was contended according to the prosecution PW2 is the only sole eye witness to the occurrence. Though according to her she has seen the accused committing the murder of the deceased on the intervening night on 2.6.2007 and 3.6.2007, she has not whispered about the same to any one either at Soliapur village or to her class mates where she was studying in the school or to her teacher or to her own grandfather- PW1 or her uncle-PW8. She has come out with the version of having seen the murder only on 29.6.2007 nearly about 26 days after the occurrence. Having regard to her conduct in not disclosing the occurrence to anybody till 29.6.2007 though she has moved from her house to Sollapur Village, to her school

along with her other sisters, no reliance can be placed on her testimony. Apart from the same they also contended the evidence does not disclose that she identified the body of the deceased on the basis of MOs 3 and 4 whereas PW1 claims that he identified the body on the basis of circumcision done to his deceased son which is also falsified from the evidence of PW13, the medical officer who states that he did not notice any circumcision on the private part of the deceased. The evidence of PW13 reveals that the body was highly decomposed. There is absolutely no evidence placed on record to show that the body exhumed from the grave is that of the deceased in view of the evidence of PWs 1 and 2 whose testimonies cannot be believed they identified the body on the basis of MOs 3 and 4 and the circumcision done to the private part of the deceased. They also further contended the conduct of PW1 also does not inspire any confidence. They further contended PW1 though in his complaint has claimed

that his grand daughter-PW2 revealed to him that the accused committed murder of the deceased on the night of 2.6.2007, he has not stated so in his evidence before the court. Having regard to the conduct of PW2 in not disclosing to anybody till 29.6.2007, the claim of PW1 and the prosecution that the deceased was done to death on the intervening night of 2.6.2007 and 3.6.2007 is also doubtful. They also further contended the evidence on record does not clinchingly establish that PWs 1, 2 and 8 have identified the body as that of the deceased. According to them there is no identification of the body as that of the deceased which was got exhumed by PW15, the Sub Divisional Magistrate. They also further contended the prosecution has also not placed any clinching evidence to show that the land where the body has been buried belongs to A1. Ex.P16 the certificate that has been obtained from the Village Accountant-PW10 discloses that the house of A1 is situated in S.No.413 at Sollapur village. Mere issuance

of the residential certificate does not go to show that the land belongs to A1. In this connection they also drew our attention to Exs.P20 and P21, the RTC extracts which disclose S.No.413 does not stand either in the name of A1 or his father, on the other hand it stands in the name of one Masti Sadashiva Gundappa and others which would go show that the land where the dead body was buried does not belong to A1. Insofar as PW6 is concerned, before whom extra judicial confession has been made by A3 in the presence of A2, they contended it being by itself a weak type of evidence, as the same has not been corroborated from any independent quarters, the same also does not inspire any confidence to place reliance on the same. They also further contended the prosecution has failed to establish that the alleged murder has taken place in front of the house of the deceased as there is no clinching material worth collected by the investigating agency and proved through the prosecution witnesses. Insofar as the

recovery of the articles at the instance of A1 pursuant to his voluntary statement-Ex.P18, they contended the same cannot be believed since the direct evidence relied upon by the prosecution is untrustworthy and the land where the body has been recovered also does not belong to A1. Therefore, they contended as direct evidence is untrustworthy and recovery is also not proved, it cannot be held that accused are guilty of the charge levelled against them.

Insofar as A2 and A3 are concerned, the learned counsel submitted absolutely there is no material on record connecting both the accused. According to the counsel for A2 he submitted A2 hails from Sankeshwar which is not the place of either A1, A3 and the deceased. Though the evidence of PW2 reveals that he was visiting the house of deceased along with A1, the evidence on record reveals that he was not present at the time PW1, PW6 advised A1 and A3 to desist from

their illicit connection. Apart from the same, no recovery has been made at the instance of both these accused. Since the direct evidence of PW2 is untrustworthy, there is no evidence whatsoever connecting these two accused with the murder of the deceased. The learned trial Judge without appreciating these aspects in its right perspective has come to an erroneous conclusion in holding that the prosecution has proved the guilt beyond reasonable doubt which finding being contrary to the evidence on record and perverse cannot be sustained, it be set aside, the accused to acquitted of the charge levelled against them.

11. Per contra, Sri. V.M.Banakar, learned Addl. SPP supporting the impugned judgment and order contended absolutely there is no material brought on record to discard the direct testimony of PW2 who is none other than the daughter of the deceased and A3.

He also further contended her testimony is fortified not only from the medical evidence of PW13, but also the evidence of her grandfather and uncle viz. PWs 1 and 8. It is further fortified from the evidence of PW6 before whom A3 has made extra judicial confession in the presence of A2. Apart from this, the recovery of the articles seized in the case at the instance of A1 would further point towards the guilt of these accused. The learned trial Judge on appreciation of the entire material on record has come to the right conclusion in holding that the prosecution has established the charge levelled against the accused beyond reasonable doubt. The said finding of the trial Judge does not suffer from any infirmity calling for interference in this appeal and hence, it be dismissed.

12. In the wake of the submissions made at the bar, the evidence and the documents on record, points that arise for our consideration are :-

- i) Whether the prosecution has established that the deceased Ilai @ Rajesab Naikwadi has died an homicidal death?
- ii) If so, whether the prosecution has established that accused are responsible for the homicidal death of the deceased and further they have also caused disappearance of the evidence of murder to screen themselves from legal punishment?
- iii) Whether the impugned judgment and order of the trial Judge calls for any interference?

13. Re. Point No.1.

The prosecution, in order to establish that the deceased Ilahi @ Rajesab Naikwadi has died an homicidal death, have relied upon the evidence of P.W.15 – the Sub-Divisional Magistrate, who has got the body exhumed from the grave, P.W.13 – the Medical Officer, who has conducted autopsy over the body of the

deceased and has issued post-mortem report as per Ex.P.22.

14. The evidence of P.W.15 – the Sub-Divisional Magistrate reveals, on receiving the requisition from P.W.11-Investigating Officer, he passed the order of exhumation as per Ex.P.19. Thereafter, he secured P.W.13 – the Medical Officer and left to the spot where the body had been buried, which, according to the prosecution, had been pointed out earlier by accused No.1, accompanied by the Investigating Officer and P.W.13. On reaching the spot, he got the body exhumed with the help of P.W.9. To that effect, he drew up panchanama as per Ex.P.3. After completing Ex.P.3, P.W.11 – the Investigating Officer held inquest over the body of the deceased and drew up inquest panchanama as per Ex.P.7. Thereafter, the body was got subjected to post-mortem examination at the hands of P.W.13 – the Medical Officer.

15. The evidence of P.W.13 reveals the upper part of the body i.e., thorax, neck, shoulder, upper limb and skull were decomposed and partially skeletonised; abdomen, pelvic region and lower limbs were comparatively less decomposed and muscle bulk was intact; the ligaments and tendons of vertebrae, upper limb and thorax were fully decomposed and bones were easily detachable from each other, which reveal that death had taken place more than four weeks back. Left upper limb had been completely skeletonised and separated from the body; left front of the skull reveals bony deficit with fracture line passing through and through the left upper jaw; skull cavity contained only brain coverings; dark brown scalp hair was found here and there on skull; right side ear was intact; no other soft tissue of the skull was seen; some teeth were found in places and empty teeth sockets were also found which suggested that death of the person might have taken place more than four weeks back. His evidence further

reveals, head was separated from the body at atlanta-occipital joint; the body was in flexed position; lower limbs were flexed at both knee and hip joints; left front half of the skull revealed irregular fracture and deficit of bone; fracture of left frontal and left parietal and left maxillary bone; piece of brain layer seen at lower skull cavity; brain was not seen in the skull cavity due to liquefaction and draining; chest wall revealed partially skeletonised intact rib cavity; ribs were easily detachable on account of decomposition; the right and the left lungs could not be identified, heart and heart layer size were reduced; minimum heart tissue was present because of decomposition and heart vessels could not be identified due to the same reason; right and left kidneys were decomposed and reduced in size; urine bag was empty and intact; penis, scrotum with testis were intact. He has further stated that death is due to head injury on account of blunt force impact on left upper part of the head. He has issued post-mortem report as per Ex.P.22.

A perusal of evidence of P.W.13 would go to show that the body that was exhumed had fractures to the skull which had resulted in the death. To the extent that body having sustained fractures to the skull which had resulted in its death, as opined by the Medical officer is not disputed before us. On the other hand, the contention of the counsel for the accused is that, that body is not that of the deceased Ilahi @ Rajesab Naikwadi.

16. According to the prosecution, the body was identified as that of the deceased by P.Ws.1, 2 and 8. P.W.1 has stated in his evidence that he identified the body as that of his deceased son on the basis of the circumcision that had been done on the penis of his deceased son. P.W.13, the Medical Officer, claims P.W.1 identified the body as that of his son on the basis of teeth, M.Os. 3 and 4 – the shirt and the underwear, which were found on the body of the deceased. Though

P.W.1 claims that he identified the body on the basis of circumcision done on the penis of his deceased son, the evidence of P.W.13, the Medical Officer, who has conducted autopsy, reveals that though the penis was intact, he did not notice any circumcision having been done to the penis. If that is so, the claim of P.W.1 that, he identified the body as that of his son is doubtful. Further P.W.13 claims P.W.1 identified the body as that of his deceased son Ilahi @ Rajesab Naikwadi on the basis of teeth and M.Os.3 and 4. A careful perusal of the evidence on record does not reveal as to what were the clothes worn by the deceased on the night of 02.05.2007. The best person to speak to that effect is P.W.2. P.W.2, the daughter of the deceased does not say that on the night of 02.06.2007, the deceased was wearing M.Os.3 and 4. P.W.1 himself does not claim that he identified the body as that of his son on the basis of M.Os.3 and 4. In that view of the matter, it is difficult to

believe the testimony of P.W.1 that the body that was exhumed from the grave was that of his deceased son.

17. Now, coming to P.W.2, she is none other than the daughter of the deceased. Nowhere in her evidence before the Court, she claims that she identified the body as that of her deceased father on the basis of M.Os.3 and 4. Her evidence reveals that she identified the body on seeing the same. As already pointed out, she has not stated either before P.W.1 or before the Court that her deceased father was wearing M.Os.3 and 4 on the night of the occurrence. Apart from the same, during her examination before the Court, M.Os.3 and 4 have not been confronted to her to prove that the deceased was wearing M.Os.3 and 4 on the night of the occurrence.

18. P.W.8, who is the brother of the deceased, claims that he identified the body of the deceased on seeing the same. On what basis, he identified the body of the deceased as that of his brother is not proved with

cogent evidence. The evidence of P.W.15 – the Sub-Divisional Magistrate, who has got the body exhumed and that of P.W.11 – the Investigating Officer in the case, would reveal that the body was identified as that of the deceased since P.Ws.1, 2 and 8 identified the body as that of the deceased, which we have already adverted to the above.

19. The testimony of P.Ws.1, 2 and 8 does not clinchingly establish that the body that was exhumed is that of the deceased Ilahi @ Rajesab Naikwadi. We have come to this view on a careful consideration of the entire evidence on record. In addition to this, we have the evidence of P.W.9 with whose assistance, P.Ws.11 and 15 have got the body removed from the grave. His evidence reveals, at the time he removed the body from the grave, he found it in a squatting position in the grave which, normally, would not be the position in which a mohammedan body would be buried. The evidence of the

doctor also reveals that the head had been separated, which may be on account of decomposition of the body. At any rate, on a close scrutiny of the evidence on record, we are of the view that the prosecution has failed to establish that the body that was exhumed from the grave was that of the deceased Ilahi @ Rajesab Naikwadi. On the other hand, we are of the view that the body that was exhumed from the grave had met with an homicidal death on account of the fracture sustained to the skull as opined by P.W.13. In the light of this, we are of the view that though the prosecution has established that the body that was exhumed from the grave had met with an homicidal death, it has failed to establish that the body exhumed is that of Ilahi @ Rajesab Naikwadi.

20. Though we have held as above that the prosecution has failed to connect that the body that was exhumed from the grave was that of the deceased Ilahi @ Rajesab Naikwadi, we have examined the evidence in

detail further, whether the accused have any nexus with the murder of the deceased Ilahi @ Rajesab Naikwadi.

21. The prosecution in order to connect the accused with the murder of deceased Ilahi @ Rajesab Naikwadi have relied upon the direct testimony of P.W.2, who is none other than the daughter of the deceased and accused No.3. According to the prosecution, the accused, in furtherance of their common intention, committed the murder of the deceased on the intervening night of 02.06.2007 and 03.06.2007 in front of the house of the deceased by assaulting him with M.Os.1 and 2-iron rods and, thereafter, to cause disappearance of the evidence of murder committed by them shifted the body from the said place and buried it in the land of accused No.1 situated at a distance of 100 mtrs. from the spot of occurrence, to screen themselves from the legal punishment.

22. A perusal of the evidence of P.W.2, goes to show, on the night of 02.06.2007, after taking dinner, she along with her mother, her two sisters and brother slept inside the house. Her father i.e., the deceased slept outside the house near a 'katta'. On the intervening night of 02.06.2007 and 03.06.2007, she woke up on hearing the cries of her father saying "ayyo ammage, ayyo ammage". Thereafter she came near the window of their house and peeped through the same. At that time, she saw accused No.1 and accused No.2 assaulting the deceased with M.Os.1 and 2 and her mother-accused No.3 standing at the said place. Her evidence further reveals, accused No.3, on noticing her, came inside the house, closed her eyes saying she should not see as devil has come and thereafter made her to sleep. After she was made to sleep, as already pointed out, the accused removed the body from the said spot and buried in the land of accused No.1. On the morning of 03.06.2007, P.W.2 on coming out of her house did not notice either

her father or the bed on which he had slept on the previous night. Her evidence further reveals, thereafter she did not reveal to anybody till 29.06.2007 about the occurrence. It is only on 29.06.2007, she has come out before P.W.1 – her grandfather on being threatened by him, that the accused have committed the murder of her deceased father. This P.W.2, as on the date of occurrence, was aged about 13 years and was prosecuting her studies in 7th standard. At the time of tending her evidence before the Court, she was 16 years and was married. The evidence of P.W.2 reveals from 03.06.2007 till 29.06.2007, she was freely moving and was attending to the school regularly along with her sisters and brother, which school, according to the evidence on record, is at a distance of about 5 kms. from their house. In this interregnum period, though she claims that she was freely moving in the village and also was going to the school, she has not whispered a word

about the occurrence either to her grandfather-P.W.1, her uncle-P.W.8 or to anybody in the village.

23. The evidence of P.W.1, who is the grandfather of P.W.2, reveals after finding that his son's whereabouts are not known, he had come to the house of the deceased and made enquiries with accused No.3, who is his daughter-in-law. According to him, accused No.3 told him that deceased has gone out and would return. Thereafter, according to P.W.1, he along with another son P.W.8 searched for the deceased in and around Solapur village, but he was not traced. His evidence further reveals that he had come to the house of the deceased on two occasions prior to 29.06.2007. At that point of time, P.W.2 was present in the house. According to him, he had made enquiries about the whereabouts of the deceased on those occasions, but P.W.2 had not whispered anything before him on those occasions. It is only on 29.06.2007 with a raised voice when he asked

about the whereabouts of his deceased son, P.W.2 came out with the version that her deceased father had been murdered by the accused in her crying mood. The conduct of P.W.2 in not divulging to anyone much less to her own grandfather and P.W.8 till 29.06.2007 despite P.W.1 having come to their house on more than two occasions making enquiries about the deceased would go a long way to place any reliance on her testimony that she had seen the accused committing murder of the deceased in front of her house on the intervening night of 02.06.2007 and 03.06.2007. A perusal of the evidence of P.W.11-Investigating Officer reveals, this P.W.2 was prosecuting her studies studying in the house of P.W.1. If this evidence is taken into consideration coupled with the fact of P.W.2 not coming out with the version of she having seen the occurrence for nearly 26 days within which time she had no hindrance whatsoever from any angle her conduct would go a long way to place any reliance on her testimony. According to the prosecution,

P.W.1 has filed the complaint on 29.06.2007 at about 7.00 p.m. before P.W.14 – the PSI by which time, he had come to know about the occurrence through his grand-daughter-P.W.2. The evidence on record reveals that his deceased son had friendship with accused No.1 and accused No.2. His evidence does not reveal that after he learnt about missing of his deceased son he made any enquiries with accused No.1 and accused No.2 or he made any efforts to find out their whereabouts. All these evidence would go to show that the claim of P.W.2 that she had seen the accused committing the murder of the deceased does not inspire confidence to place any reliance on her testimony. In the light of this direct evidence, the evidence of P.W.1 also, in our view, is untrustworthy.

24. Apart from this, it is the prosecution case that accused No.3 had made extra-judicial confession before P.W.6 in the presence of accused No.2 after P.W.1 filed

the complaint before the police on 29.06.2007. The evidence of P.W.6 does not reveal as to when exactly accused No.3 had come to him and had made an extra-judicial confession in the presence of accused No.2. It is needless for us to say that extra-judicial confession by itself is a weak type of evidence unless it is corroborated from independent quarters. In this particular case, we have already held that eye witness account of P.W.2 is untrustworthy. This extra-judicial confession made by accused No.3 before P.W.6 in the presence of accused No.2 is after filing of the complaint-Ex.P.1 before the police. Therefore, we find it difficult to accept the evidence of P.W.6 in this regard because accused No.3 could not have ventured to make any extra-judicial confession before him as by that time her daughter had revealed to P.W.1 that she, along with accused Nos.1 and 2, had committed murder of the deceased. The evidence on record, more particularly, that of P.W.11-Investigating Officer reveals that he has

recorded the statement of P.W.6 on 29.06.2007. Though according to him, accused No.3 had made extra-judicial confession, the same cannot be believed because his statement had been recorded on 29.06.2007 itself. Taking from any angle, on a close scrutiny of the evidence on record, the extra-judicial confession made by accused No.3 in the presence of accused No.2 before P.W.6 also does not inspire confidence in us to place reliance on the same.

25. Excluding these two circumstances, the other strong circumstance that the prosecution has pressed into service is, tracing of the body on the information of accused No.1. We have already held, the body that has been exhumed has not been proved to be that of deceased Ilahi @ Rajesab Naikwadi. According to the prosecution, the body had been buried in the land belonging to accused No.1 situated in Sy.No.413 of Solapur village. The Investigating Officer has collected

the record of rights of Sy.No.413 of Solapur village from the concerned Tahsildar's office which are at Exs.P.20 to P.21. A perusal of Ex.P.20 reveals it pertains to Sy.No.413 of Solapur village the owner in possession of the land in the said Ex.P.20 has been described as one Masti Sadashiva Dundappa and six others. Ex.P.21 is another record of rights pertaining to Sy.No.415 of Solapur village. A perusal of that goes to show that it is the land belonging to the deceased and his family members. Either Ex.P.20 or Ex.P.21 does not disclose that the land in Sy.No.413 belongs to either accused No.1 or his family members. In that view of the matter, the case of the prosecution that accused had buried the body of the deceased Ilahi @ Rajesab Naikwadi in the land belonging to accused No.1 is also not proved. Further, as already pointed out, the prosecution has also not proved by placing cogent and reliable evidence to establish that the body of the deceased that was

exhumed from the grave is that of deceased Ilahi @ Rajesab Naikwadi.

26. The next piece of evidence pressed into service is that of recovery of M.Os.1 and 2 under Ex.P.13, M.Os.5 to 7 under Ex.P.11, M.O.8 under Ex.P.12 at the instance of accused No.1. In view of we having held that the direct evidence is untrustworthy and the extra-judicial confession made by accused No.3 before P.W.6 in the presence of accused No.2 is untrustworthy and as the prosecution has also failed to establish that the body that has been recovered from the grave is that of Ilahi @ Rajesab Naikwadi, these recoveries, in our view, does not in any way point towards guilt of any of the accused. Further, we find from the material on record there is no incriminating material worth collected as against accused Nos.2 and 3. Admittedly, accused No.2 is residing at Sankeshwar and not at Solapur village. Further, the material on record also does not reveal that

accused No.2 was present at the time when P.Ws.1 and advised accused Nos.1 and 3 to desist from their illicit connection though accused No.2, according to the prosecution, was a close friend of accused No.1 and the deceased. Therefore, taking from any angle, we are of the clear view that the prosecution has failed to establish the charge levelled against the accused beyond reasonable doubt.

27. The learned Trial Judge, in our view, without appreciating these materials on record in its right perspective has come to an erroneous conclusion in holding that the prosecution has proved the guilt of the accused beyond reasonable doubt which finding, in our view, being contrary to the evidence on record and perverse cannot be set aside and it deserves to be set aside. Accordingly, we proceed to pass the following:

ORDER

- (i) Both the appeals are allowed.

- (ii) The impugned judgment and order dated 18th July 2011 passed in S.C.No.118/2008 by the Additional Sessions Judge & Presiding Officer, Fast Track Court, Hukkeri, is set aside.
- (iii) The appellants/accused are acquitted of the charges levelled against them. They are in judicial custody. They are ordered to be set at liberty forthwith, if not required in any other case.

Sd/-
JUDGE

Sd/-
JUDGE

rs/kms