

## **Prakash Dhawal Khairnar (Patil) vs State Of Maharashtra on 12 December, 2001**

**Equivalent citations: AIR 2002 SUPREME COURT 340, 2002 (2) SCC 35, 2001 AIR SCW 5111, 2002 (2) SRJ 169, 2002 (1) LRI 92, 2002 SCC(CRI) 281, 2001 (2) JT (SUPP) 243, 2001 (8) SCALE 482, 2002 (1) UJ (SC) 137, (2001) 2 DMC 594, (2002) 1 HINDULR 57, (2001) 4 ALLCRILR 506, 2001 CHANDLR(CIV&CRI) 415, (2002) 1 PAT LJR 412, (2001) 2 RECCRIR 749, (2002) 1 EASTCRIC 279, (2002) 2 MAHLR 19, (2002) 1 RECCRIR 212, (2002) 1 CURCRIR 40, (2001) 8 SUPREME 709, (2001) 8 SCALE 482, (2002) 1 UC 228, (2002) 1 CRIMES 18, (2002) 1 CHANDCRIC 1, (2002) 2 GCD 981 (SC), 2002 (1) ANDHLT(CRI) 173 SC, 2002 (1) ALD(CRL) 245, (2002) 1 ANDHLT(CRI) 173**

**Bench: M.B. Shah, R.P.Sethi**

CASE NO. :

Appeal (crl.) 238-239 of 2001

PETITIONER:

Prakash Dhawal Khairnar (Patil)

Vs.

RESPONDENT:

State of Maharashtra.

DATE OF JUDGMENT: 12/12/2001

BENCH:

M.B. SHAH , R.P.SETHI

JUDGMENT:

WITH CRIMINAL APPEAL NO.489 OF 2001 State of Maharashtra Appellant Versus Sandeep @ Babloo Prakash Khairnar (Patil) Respondent J U D G M E N T Shah, J.

In Sessions Case No.152 of 1999, by judgment and order dated 19.5.2000, Additional Sessions Judge, Nasik convicted Prakash Dhawal Khairnar Patil (A-1) and Sandeep @ Babloo Prakash Khairnar Patil (A-2) for the offence punishable under Sections 302, 120-B, 201, 397 read with Section 34 of the Indian Penal Code and under Section 25(1)(b)(a) of the Arms Act read with Section

120-B of Indian Penal Code. Both the accused were sentenced as under:-

- (1) For the offence punishable under Section 302 read with Section 120-B IPC sentenced to death.
- (2) For the offence punishable under Section 397 read with section 34 IPC to RI for two years and to pay a fine of Rs.1000/-, in default of payment of fine to further undergo imprisonment for six months;
- (3) For the offence punishable under section 25(1)(b)(a) read with Section 3 of the Arms Act, read with Section 120-B of IPC to RI for three years and to pay a fine of Rs.1000/-, in default of payment of fine to further undergo imprisonment for six months;
- (4) For the offence punishable under Section 201 IPC to undergo RI for seven years and to pay a fine of Rs.1000/-, in default of payment of fine to further undergo imprisonment for six months;

Being aggrieved by the said judgment and order accused preferred Criminal Appeal No.400 of 2000 before the High Court of Bombay. For confirmation of death sentence, the matter was referred to the High Court which was numbered as Confirmation Case No.3 of 2000. After considering the evidence on record in its entirety, the High Court dismissed the appeal filed by A-1 Prakash Patil and confirmed his conviction under Section 302 IPC and maintained the death sentence. The Court also convicted him under Section 25(1)(b)(a) of the Arms Act and maintained the sentence. The Court set aside the conviction of the accused under Section 397 read with Section 34 IPC. However, the High Court partly allowed the appeal filed by A-2 Sandip Patil and acquitted him from all the charges except the one punishable under Section 201 IPC and reduced the sentence to the period already undergone. Against the said judgment and order dated 7.12.2000, A-1 has preferred Criminal Appeal Nos.238-239 of 2001 and the State of Maharashtra has filed Criminal Appeal No.489 of 2001 against the acquittal of A-2.

In this case, dispute of partition of lands led one brother to annihilate entire family of his brother and also to commit murder of his own mother. Appellant Prakash Patil is the father of Sandeep @ Babloo Prakash Khairnar (Patil), A-2. Sandeep who was then aged 17 years was studying in First Year Engineering and was staying in a hostel at MIT, Pune. Supadu Dhawal Patil was the real brother of appellant Prakash Patil. Kesarbai was their mother and Pushpatai was wife of Supadu Patil and they were having one son Rakesh @ Pappu and two daughters, Poonam and Rupali alias Buntitai. Deceased Supadu Patil, his wife Pushpatai, mother Kesarbai, daughters Rupali and Poonam and son Rakesh died due to fire arm injuries on the fateful night of 24th October, 1996. Supadu Patil was working as an agricultural officer at Malegaon and was staying in his own bungalow which was constructed at village Soyagaon, which was at a distance of 2 km. from Malegaon. He was running a nursery in the field adjoining to his bungalow which was virtually a farm house. PW33 Vyankat @ Pintya used to sleep in the shed to the northern side which was at a distance of 225 feet. As per the inspection note, bungalow was at a secluded place. Sister of Supadu Patil Vijaya Zumber Patil was

also living alongwith her husband at Soyagaon. A1 Prakash Patil was staying at Nasik with his family members and was serving in Maharashtra Engineering Research Institute at Nasik as a Water Analyser (Sr. Scientific Assistant) It is the prosecution version that on 23rd October, 1996, A-2 Sandeep had gone to the bungalow of Supadu Patil, his uncle, in Soyagaon, Malegaon, District Nasik to attend the birthday of Rakesh son of Supadu Patil. There was enmity between Supadu Patil and Prakash Patil because of dispute for partition of agricultural land. On occasions there were quarrels and exchange of abuses between them. A-2 Sandeep Patil who came at the residence of Supadu Patil on 23rd October, 1996, stayed there till morning of 25th October, 1996 and left the house after the incident. Vyankat Pagare PW33 who was Supadu Patil's servant and was residing in a shed stated that he heard that Buntitai (Rupali) was crying 'aai ga' (Oh mother) and thereafter Kesarbai saying 'shant ho'. He also heard some fire shots. It is his say that as Supadu Patil used to kill pigs by his gun, he went off to sleep. At about 6 a.m. when he was folding his bed, one Suresh who was living in the farm house of Supadu Patil, came there and told that he went to Supadu Patil's bungalow to bring a bucket for milking the she-buffaloes and found the door of bungalow to be locked and a chit kept thereon, on which it was written - "we are all going out of station. The reason was not to be assigned by us. We are returning on Sunday or Monday. All work should be stopped". Suresh handed over the said chit to him. By that time, Subhash who was working with Supadu Patil came there. PW33 Vyankat Pagare told Suresh and Subhash about what he had heard at night. He took the chit and asked Subhash to go to Viju Atya, sister of Supadu Patil. On receipt of the information, Viju Atya came along with her husband, Zumber Patil. Zumber asked Subhash to call Ashok Anna PW1. On receiving the information, Ashok Anna and the driver of Supadu Patil came there. On their arrival, Vyankat Pagare informed them about what he had seen. They found that the doors and windows of the bungalow were closed and the kitchen door was closed from inside. By pushing the kitchen door, it opened out. They found the keys of Supadu Patil's van lying on the dining table. One Arun took those keys by inserting a bamboo through the grill and thereafter went to Lonkhadi, the house of the parents of Pushpatai. Thereafter, Ashok Anna and others took a round of the bungalow of Supadu Patil. They pushed the rear door of the window of the bedroom and entered the house and saw that Supadu Patil and Pushpatai were lying in a pool of blood. At that juncture, Vyankat Pagare started crying. Ashok Anna left for informing the police on scooter and telephoned Chavani police station. Within a short time police came there. They found that six corpses were lying inside the bungalow. PI More recorded the FIR, prepared inquest reports and sent the dead bodies for the post mortem. A reddish round shaped leather cartridge belt having 16 empty sockets, 9 live 12 bore cartridges and a 12 bore shot gun were seized. The said articles were sent to the Chemical analyst. Dr. Bharat Wagh PW36 who performed autopsy on the dead bodies found that the injuries on the deceased were caused by the fire arms.

On 26.10.96, while PI More was taking search of the bungalow of Supadu Patil, he found black coloured pants belonging to Supadu Patil inside which a chit addressed to Supadu Patil's daughter Poonam was found. He attached it under a panchnama Ex.48. The said chit was written by Sandeep Patil and bore his address as Room No. 120, Maharashtra Institute of Technical Boys' Hostel, Paud Road, Kothrud, Mahaganesh Colony, Pune-29. Consequently, he deputed PSI Ugale to go to Pune and obtained the handwriting of Sandeep Patil. On 27.10.96, PSI Ugale in the presence of panch Shailendra Joshi PW4 seized the chit under a panchnama Ex.61 which was taken out by Sandeep Patil from the wooden cupboard of his room at MIT Hostel, Pune. On 28.10.96, appellant Prakash

Patil and Sandeep Patil were arrested.

During the investigation, A-2 Sandeep moved an application dated 8.11.1996 (Ex.113) before Judicial Magistrate First Class, Malegaon (PW19) for revealing the true account of the incident. The Magistrate took up the application for consideration on 9.11.1996 and gave time of 24 hours for reflection. On 10.11.1996, A-2 was again produced before the Magistrate and as he was willing to give statement, his statement was recorded after necessary formalities. In his confessional statement, he has stated as under:-

On.19.10.1996, after the studies of his Engineering Semester were over, he had gone to Nasik. On 21.10.1996 i.e. on Dussehra day, he and his father went to a shop by name 'Kumar Shirts' for purchasing shirt. He told his father that he wanted to go to his uncle's house at Soyagaon. His father told him that there was hearing of the case on 24.10.1996 in Malegaon Court and for that reason and to look for purchaser for sale of the plot situated in Soyagaon, he would also go to Soyagaon. On 23.10.1996 he had gone at his uncle Supadu Patil's house. On that day, he told his uncle that his father would come for the case on 24.10.1996. After having meals etc. and after watching TV and chatting, he had gone to sleep. On 24.10.1996, as there was a hockey match, the deceased Rakesh left in the morning at 8.00 a.m. He and Poonam (deceased) studied in the bedroom upto 12.00 noon. Thereafter, his uncle left for attending the court case. In the afternoon at about 2.15 p.m., Poonam left as she wanted to attend college. Immediately thereafter, Pappu (Rakesh) came and thereafter between 2.45 and 3.00 p.m., Rupali and Supadu Patil both had left for agricultural field at Dubhadi by a vehicle and they returned between 6.30-7.00 p.m. As it was Rakesh's birthday on that day, Supadu Patil had brought 'pedhas' from outside. Owalani (to move a lamp bin in a circular motion before God and man) was done before him between 9.00-9.30 p.m. Thereafter, they all had their meals and had been watching TV. As his uncle and aunt were observing fast on that day, they did not have their meals. In the night at 10.30 p.m., his uncle, aunt and Poonam went to sleep in the bedroom. He along with Rakesh and Rupali was watching TV up to 11.30 p.m. At that time, they both went to sleep in the same room where the TV was kept. As per his habit in the hostel, he spread mattress next to Rakesh and sat for doing his studies. In the night between 2.00 to 2.15 a.m., he kept the book on the table and went to sleep on the mattress. However, he could not sleep. At about 2.30 a.m., he heard his father's voice calling him. He opened the door. After entering into the bungalow, his father asked him whether everybody had gone to sleep?' He replied in the affirmative and asked whether he should wake them up. Thereupon, his father refused him by saying that he himself would wake them up.

Thereafter, A-1 asked him for his sweater. He shown him a sweater lying in front of the cupboard in the devghar (the room of the household goods). A-1 put on his sweater and went to the bedroom and TV room and returned. Thereafter, he removed sweater and shirt and put on T-shirt which was hanging on the wooden peg in front of the basin. A-1 again went to the bedroom and he himself (A-2) went to W.C. When he came out from the W.C. and washed and cleaned his hands and went to

the kitchen room for drinking water, he heard the noise of firing of bullet from TV room. Immediately, he heard a loud cry of Rakesh shouting "Aai Ga (Oh mother)", then he heard another round of fire and heard a cry "Aai", probably of Rupali. When he came near the curtain of TV room, he saw his father wrapping a scarf on his face, putting on spectacles and holding a gun. He ran towards the bath room. He saw Pappu was lying on the mattress and Rupali was lying on the sofa. Both had sustained bullet shots. As he was standing near the curtain, Poonam came there running and as she could not identify him, she had a sharp clash with him in which he sustained scratches on his nose because of her nails. He then shook her and apprised of his identity. He thought that his uncle and aunt would wake up and they might think that he himself had killed them and out of this fear he tried to go outside through the kitchen door but he could not go as the door was locked. When he was in kitchen room, he heard his aunt, grandmother and Poonam saying 'bring vehicle and make a telephone'. He peeped into the kitchen and saw his uncle going to the bedroom. He also heard the sound of opening the cupboard. At that time, his father was standing in the passage in front of the bathroom and W.C. from where he fired a shot. His aunt and Poonam rushed from the TV room and they pushed his father into the prayer room up to the fridge. There was a sharp clash, during which he heard the sound of the bullet shot. Immediately, Poonam collapsed on the floor of the prayer room. He further saw his grandmother going to the bedroom and crying there. Thereafter, his father went to the bedroom and he heard sound of two bullets shot. He heard the cries of his aunt and grandmother at the same time. His father came to the kitchen and asked him to prepare for leaving the bungalow. A-1 put off his spectacle. He (A-2) found tears in the eyes of his father and that he was frightened. He put on his own clothes and brought his sweater lying in the kitchen. When he was keeping his white shirt, hanging on the string, in his bag, his father had gone to WC. His father came out from WC wearing slippers and went to the bedroom. He followed him to see as to what his father was doing. His father wiped the gun with a handkerchief and hung the same on the nail. He put the cartridge belt in the Godrej cupboard. Thereafter, he collected keys lying on the floor near the cupboard and came out from the bedroom. At that time, he started putting on his shoes kept beneath the basin opposite the bathroom. At that time, his father partially shut the door to open the cupboard kept behind the door of the devghar. For that purpose, he pushed aside his suit case which was kept nearby. He could not see as to what he took out from the cupboard. When he was putting on his socks, he thought of going to W.C. Hence, he removed his socks. Thereafter, he went to W.C. and came out within five to ten minutes and washed his feet and put his shoes. Then, his father handed over to him his suit case and school bag. His father went to TV room and brought one pen (Reynold) and paper and asked him to write as per his dictation. When he asked him the reason, his father got annoyed and threatened him saying that he should obey his order. Then he wrote the matter in a panic stricken condition. Thereafter, his father put that pen into his bag. His father further brought a torch from devghar. Then, they came out of the bungalow. His father closed the door of the bungalow, locked it and affixed a chit on that lock. On the road, his father took out bundle of notes of rupees hundred from his pocket in the illumination of battery and handed over to him. After the boundary of Mala (agricultural field) was over, his father threw away keys by the side of that road. He went up to Ekatamata chowk on foot. From there, they reached to Malegaon S.T. Stand by an auto rickshaw. His father was waiting on one side and he went to enquire as to when the bus would go to Nasik. At that time, it was 5 a.m. Thereafter, they boarded one jeep which was going to Nasik. His father alighted at Nimani bus stop and he got down at C.B.S. Nasik and boarded the bus leaving for Pune from Nasik. Thereafter, he reached his MIT hostel on auto rickshaw. There was

some quarrel regarding fare between him and the auto rickshaw driver and he sustained injury at the hands of auto rickshaw driver. On the same day i.e. on 25.10.1996, in the night between 8 to 8.30 p.m. when he removed the articles from his bag, he found one blood smeared T-shirt, handkerchief, gloves, a pair of white slippers and six empty cartridges. He thought that his father might have kept the said articles in his bag when he had gone to W.C., because his father had given him the said bag when he came out from the W.C. He dropped the above articles from Mhatre bridge situated on the Karve Road. In the night between 2.00 am to 2.30 am, police of Kothrud police station took him to the said police station for making enquiry and PSI Ugale came to Kothrud police station from Malegaon in the morning to take him away. Thereafter, in the night of 27.10.1996, he was produced before the Addl. S.P., Malegaon. He told the incident to him. On 28.10.1996, he was arrested by PW42 Ramesh D. More, Investigating Officer.

In appeal, the High Court has relied upon the following circumstantial evidence to connect Prakash Patil A-1 with the crime:-

1. Motive.
2. Recovery of blood stained shoes.
3. Recovery of blood stained shirt and pants on 31st October.
4. Presence of injury over the right surface of his shoulder.
5. He was seen at Malegaon on 25th October at 5.00 a.m. when he left by taxi of one Uttam Thethe, PW 15.

After considering the aforesaid circumstantial evidence, the Court referred to the confessional statement of A-2 Sandip Patil as one circumstance connecting A-1 Prakash Patil with the crime.

The learned counsel Mr. Gupte also submitted that assuming that the circumstances as alleged by the prosecution are proved, they are not sufficient to connect the accused with the crime. It is his contention that the investigation in the present case is totally faulty and the investigating officer has only relied upon the confessional statement without verifying finger-prints at the scene of offence.

It is true that there is some force in the contention of the learned counsel for the accused that the investigation in this case is to some extent faulty and the investigating officer has not tried to collect other evidence after recording the confessional statement. In our view, both the courts have rightly relied upon the circumstantial evidence for connecting A-1 with the crime, which is sufficient to connect the accused with the crime. The circumstances, except the confessional statement of A-2 Sandeep, even though the learned counsel for the appellant has taken us through the relevant evidence, we do not think that the appreciation of evidence by courts below is in any way erroneous. Still however, in short, we would refer the relevant part of the evidence.

Motive To prove motive, the prosecution examined two witnesses, namely, PW33 Vyankat Pagare and PW34 Raosaheb Patil. PW33 Vyankat Pagare, who was a servant of Supadu Patil stated that he knew Supadu Patil's brother Prakash Patil because Prakash Patil used to visit Supadu Patil. His evidence shows that A-1 Prakash Patil used to tell Supadu Patil that the land should be partitioned and he should be given his share and Supadu Patil used to tell him that he would think on it later. On this score, there used to be quarrels and exchange of abuses between them. It is the say of Vyankat that whenever Prakash Patil was going to Soyagaon he was staying at his sister Viju Atya's house and not at Supadu Patil's house. PW34 Raosaheb Patil, brother-in-law of Supadu Patil has also stated there was illwill between Supadu Patil and Prakash Patil. His evidence shows that Pushpatai had told him that the dispute between Prakash Patil and Supadu Patil was on account of partition of agricultural land. He also stated that about 4 months prior to the incident, when he had gone to Supadu Patil's house, he found Supadu Patil, Prakash Patil and son of their paternal aunt talking in the drawing room. When he asked his sister Pushpatai as to what was going on, she replied that they were talking about carving of plots and it was the usual dispute.

Both Vyankat Pagare, PW33 and Raosaheb Patil PW34 stated that Prakash Patil had threatened to kill Supadu Patil. The High Court considered that had their relations been good, then appellant Prakash Patil's wife and daughters would also have visited Supadu Patil, but the evidence of Vyankat shows to the contrary. The dispute between two brothers was with regard to partition of agricultural land and deceased Supadu Patil, it appears, was evading in giving share of the land to A-1 Prakash Patil.

Recovery of blood stained shoes, shirt and pants.

At the time of his arrest on 28.10.1996, appellant Prakash Patil was putting on blood stained shoes which were seized under a panchnama. From the evidence of Prabhakar Shewale, PW7 and PI Ramesh More PW42 and the recovery panchnama of the shoes Ex.58, it is established beyond doubt that the shoes put on by A-1 were having blood-stains. The defence version that when Prakash Patil, on learning about the multiple murders, entered the house, his shoes might have been stained with blood is rightly not believed by the High Court. The High Court rightly pointed out that the evidence of PW33 Vyankat Pagare and PW1 Ashok Bachav shows that on 25.10.96 at 1.30 to 2.00 p.m., A-1 Prakash Patil came at the place of the incident. Further, a perusal of the inquest report shows that it was conducted between 10.45 a.m. to 12.10 p.m.. on 25.10.96. By the time accused Prakash Patil reached the place of the incident, the six corpses had already been sent for autopsy and, therefore, there was no reason of his entering inside the house and seeing them. Further, the shoes were sent to the Chemical Analyst and the blood of 'A' group, which matched with the blood group of the deceased Kesarbai, was found on them. The nail clippings of the feet of the appellant-Prakash Patil were also sent to the Chemical Analyst and blood of 'O' group was found on them which is that of the appellant-Prakash Patil.

Recovery of the blood stained shirt and pants on 31.10.96 from the house of his brother-in-law Zumbar Patil in Soyagaon.

In this connection, evidence of PI More PW42 shows that on 31.10.96 he interrogated Prakash Patil and during the course of his interrogation, he shown his willingness to produce the clothes which he had worn at the time of the incident and stated that he had kept the same in the house of Zumbar Patil. Consequently, in presence of Panchas Prakash Chitalkar PW2 and Nagesh More PW3 the willingness of Prakash Patil was recorded vide panchnama Ex.55 and at the house of Zumbar Patil, the appellant produced pants and shirt which were hanging on the western side of the wall and which were stained with blood. Blood of 'O' group was found on the said pants. The learned counsel for the appellant, however, contended that the aforesaid evidence is not reliable because there was no necessity of keeping the said clothes hanging in the house of Zumbar Patil, his brother-in-law. He contends that the evidence of panchas and the panchnama become doubtful and could be at the instance of investigating officer. In our view, there is no reason to discard the evidence of independent panch witnesses and the courts below have rightly relied upon the same. In any case, it does not call for any interference in this appeal.

Injury on surface of shoulder.

Prakash Patil was medically examined on 29.10.96 at 6.25 a.m. by Dr. Wagh PW36 and he found superficial abrasion with formation of scab with dark colouration over right superior surface of shoulder 1 inch medial to acromion prominence one inch in length and the direction was obliquely downward on right side. According to the prosecution, the said injury was suffered by the accused Prakash Patil when he was repeatedly firing from the gun during the course of the incident. The High Court pointed out that neither in his statement under Section 313 Cr.P.C. nor in the written statement accused Prakash Patil furnished any explanation as to how he sustained the said injury. The Court held that the injury is located near that part of right shoulder where the gun is held at the time of firing and as there was no explanation by the appellant as to how he suffered it. It was probable that he sustained as a result of the impact of the gun by repeated firing. The learned senior counsel Mr. Gupte submitted that courts below have erroneously relied upon the aforesaid circumstance to connect A-1 with the crime. It is his say that as the accused had lost his mother, brother and other relatives, he was required to go for cremation and naturally carry the dead body on his shoulders and, therefore, he must have sustained that injury at that time. In our view, this so-called explanation comes for the first time before this Court. Accused has not given such explanation under section 313 Cr.P.C. or in his written statement nor such submission was made before the High Court. In this view of the matter, it is difficult for us to accept it as a reasonable explanation for the injury sustained by the appellant.

Accused were seen leaving Malegaon after the incident.

Both the accused left Malegaon on 25.10.96 at about 5 a.m. in the taxi of Uttam Thethe PW15, who has identified them in the test identification parade conducted on 22.11.96. He stated before the Court that he is a driver and that he used to carry the bundles of newspapers from Nasik to Malegaon by a jeep. For this, he was leaving Nasik at about 2.30 a.m. and reaching at Malegaon at 4.45 - 5.00 a.m. After handing over the bundles of newspapers at Malegaon S.T. stand, he used to take some passengers for the purpose of his miscellaneous expenses to go to Nasik. On 25.10.1996, A-1 and A-2 had travelled by his jeep. In our view, there is no reason to disbelieve the evidence of



this witness and the High Court has rightly not given any importance to the contention raised by the learned counsel for the appellant that the evidence of PI More reveals that he interrogated witness on 18.11.1996, yet in his application dated 13.11.1996, Ex. 191 for holding the TI Parade, name of the witness is mentioned by observing that there was some confusion on the part of witness PI More with regard to the date as the name of the witness is specifically mentioned in the application dated 13.11.1996. In any case, this mistake of date would have no bearing on the identification of the accused in TI Parade.

#### Confessional Statement of A-2.

In the light of the above stated evidence, we may consider the confessional statement of Sandeep Patil (A-2) which is Ex.116 recorded by the Judicial Magistrate on 10.11.1996. The High Court arrived at the conclusion that the confessional statement of Sandeep Patil was voluntary and not the result of any duress or coercion by the police and was recorded by JMFC after due warning and after giving him sufficient time to reflect whether he wanted to make it.

Learned senior counsel Mr. Gupte submitted that the High Court has given benefit of doubt to A-2 with regard to conspiracy for commission of murders and, therefore, as he is acquitted for the main offence, his confessional statement is not admissible in evidence. This submission, in our view, is without any substance. Firstly, the confessional statement of A-2 recorded under Section 164 Cr.P.C. by the Magistrate would be admissible in evidence as accused Nos. 1 and 2 were jointly tried. The said statement is proved by examining the Magistrate who recorded the same. (Re. Ghulam Hussain vs. The King [(1950) 52 BLR 508] Only question would be to what extent it can be used against A-1. In the present case, conviction of A-1 for the offence for which he is charged is based on circumstantial evidence. Conviction of A-2 for the offence punishable under Section 201 is also based on circumstantial evidence and after taking into consideration confessional statement. The circumstantial evidence which gets corroboration from the confessional statement of A-2 for connecting A-1 with the crime could be relied upon. This Court in Aghnoo Nagesia vs. State of Bihar [(1966) 1 SCR 134], held that confessional statement includes not only admission of the offence but also other admissions of incriminating facts relevant to the offence such as motive, preparation, absence of provocation, concealment of weapon, and subsequent conduct which throw light upon the gravity of the offence and the intention and knowledge of the accused. The Court also observed that each and every admission of incriminating fact contained in the confessional statement is part of the confession.

Further, explanation to Section 30 of the Evidence Act clarifies that "offence" as used in the Section includes the abetment of, or attempt to commit, the offence. Dealing with the scope of Section 30, this Court in State vs. Nalini [(1999) 5 SCC 253] has held that a plain reading thereof discloses that when the following conditions exist, namely, (i) more persons than one are being tried jointly; (ii) the joint trial of the persons is for the same offence; (iii) a confession is made by one of such persons (who are being tried jointly for the same offence); (iv) such a confession affects the maker as well as such persons (who are being tried jointly for the same offence); and (v) such a confession is proved in court, the court may take into consideration such confession against the maker thereof as well as against such persons (who are being jointly tried for the same offence). The Court further observed

thus:-

"In Kashmira Singh vs.State of MP [1952 SCR 526] this Court approved the principles laid down by the Privy Council in Bhuboni Sahu vs. R. [AIR 1949 PC 257] and observed:

"But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

In this case, the High Court has not relied upon the confessional statement as a substantive piece of evidence to convict accused no.1. It has been used for lending assurance to the proved circumstances. The High Court held that the proved circumstances would not involve accused no.2 for the offence punishable under Section 302 IPC and the circumstantial evidence does not establish that there was any common intention or conspiracy between the father and the son to commit the offence. However, the Court held that Sandeep had seen his father committing multiple murders and when he destroyed the evidence relating to those murders by throwing the articles from Mhatre bridge on two separate occasions, it was absolutely clear that he did this with primary object of saving his father and, therefore, he would be liable to be convicted for the offence under Section 201 IPC. Hence, it cannot be said that confessional statement is wholly exculpatory.

In this view of the matter, we would briefly refer to the confessional statement of A-2 which lends assurance to the circumstantial evidence. Firstly, the important circumstance that after the incident accused nos.1 and 2 left Malegaon at about 5.00 a.m. in the taxi of PW15 Uttam Thethe. Secondly, A-2 threw plastic bag containing blood stained T-shirt, handkerchief, gloves, pair of white sleepers, six empty cartridges in Mhatre Bridge, Pune and on the basis of information given by him the said bag was recovered near Mhatre Bridge, Pune. From the bag, the articles mentioned above were found. In the confessional statement, it is stated that at the time of incident his father has put on T-shirt which was hanging on the wooden peg in the bungalow. On the T-shirt blood stains were found of group 'A' and 'O'. Thirdly, A2 also produced a torch and a blood stained school bag and currency to the tune of Rs.7100/-, which is proved and gets corroboration from the confessional statement. Fourthly, it is proved that A-2 came to the house of deceased on 23.10.1996 and left in the early morning without informing anyone by keeping a chit, which was placed on the door. Coupled with the aforesaid circumstance, it is to be borne in mind that at 2.30 a.m. (night-time) he facilitated A-1 Prakash Patil to enter the house through the kitchen gate without informing anyone. It appears that he was waiting for his father to come at night time. He did not make any attempt to save the deceased, who were closely related to him nor raised any hue and cry when he heard fire shots. From his confessional statement it is clear that after committing the five murders, when his father was removing all the evidence from the scene of offence, like wiping the gun with a handkerchief, putting the cartridge belt in the Godrej cupboard, then going to the devghar and going to WC, he (Sandip Patil) had ample opportunity of running out of the house or making hue and cry or informing someone, but he did not do so. On the contrary, he preferred to wait and watch his

father wiping all the clues from the scene and thereafter left the premises along with his father. Hence, it would be totally wrong to say that his statement is exculpatory and the High Court has rightly referred to inculpatory part and has used the same for lending assurance to the circumstantial evidence brought on record. In this view of the matter, we confirm the conviction of the accused Prakash Patil for the offence punishable under Section 302 IPC and under Section 25(1)(b)(a) of the Arms Act.

Sentence:

Learned counsel for the appellant however submitted that this would not be a rarest of rare case so as to impose the death penalty. He submitted that because of long standing dispute for partition of the properties, the incident occurred wherein the act was committed under total desperation. Further, he submitted that the circumstantial evidence relied upon by the Court, even if are sufficient for convicting the accused, it is not safe enough to act upon such circumstances for putting out a life.

From the record, it is revealed that accused Prakash Patil did not have any criminal tendency. He was working as Water Analyser (Sr. Scientific Assistant). The facts and circumstances of the case reveal that he killed his brother, brother's wife and children because of frustration, as he was not partitioning the alleged joint property. No doubt, it is heinous and brutal crime but at the same time it will be difficult to hold that it is rarest of rare case. It is also difficult to hold that appellant is a menace to the Society and there is no reason to believe that he cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. [Re: Om Prakash vs. State of Haryana [(1999) 3 SCC 19]. Even A-2 in his confessional statement has stated that after the commission of the offence, he found tears in the eyes of his father, A-1. This may indicate that A-1 may repent for rest of his life for commission of such ghastly act. However, at this stage, for imposing appropriate punishment, we would refer to the decision rendered by this Court in Shri Bhagwan vs. State of Rajasthan [(2001) 6 SCC 296] wherein while reducing the death sentence to imprisonment for life, Court considered Section 57 of IPC and referred to the following observations in Dalbir Singh vs. State of Punjab [(1979) 3 SCC 745 para 14]:-

"The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in Rajendra Prasad vs. State of U.P. [(1979) 3 SCC 646]. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the man's life, but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless

physically liquidated the culprit may at some remote time repeat murder.

(emphasis added)"

The Court also observed that though under the relevant Rules a sentence for imprisonment for life is equated with a definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose. The Court, thereafter, directed that the accused shall not be released from prison unless he had served out at least 20 years of imprisonment including the period already undergone by the appellant. In this case also, considering the facts and circumstances, we set aside the death sentence and direct that for murders committed by him, he shall suffer imprisonment for life but he shall not be released unless he had served out at least 20 years of imprisonment including the period already undergone by him.

In the result, Criminal Appeal Nos.238-239 of 2001 filed by A1-Prakash Dhawal Khairnar is allowed to the aforesaid extent. Criminal Appeal No.489 of 2001 filed by State of Maharashtra against A-2 is dismissed.

.J.  
(M.B. SHAH)

New Delhi  
December 12, 2001.

....J.  
(R.P. SETHI)