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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.162 of 1995

1. **Shri Zahir Ahmed Saeed Ahmed Mistry,**
an adult Indian Inhabitant, Aged about
37 yrs,
2. **Shri Jamil Ahmed Saeed Ahmed Mistry**
an adult Indian Inhabitant, aged about 29 yrs.

Both residents of B-18, Dhakay Nagar, S.V.
Road, Andheri (West), Bombay 400 058.

3. **Abdul Wajid @ Guddu @ Abdul Jabbar S/o
Abdul Gani Shaikh,**
an adult Indian Inhabitant, aged about
30 yrs, resident of 20/20, Purra Faiyaz Ali,
Meerut (U.P.

**.....Appellants
(Orig. Accused Nos. 1 to 3)**

Versus

The State of Maharashtra
(At the instance of Kherwadi Police Station,
Vide C.R.No.33 of 1985)

**..Respondent.
(Original Complainant)**

Miss. Prabha Mane for Appellants.
Smt. V.R. Bhonsale, APP for Respondent-State.

**CORAM: B.P. DHARMADHIKARI &
A.S. GADKARI, JJ.**

**Reserved On : 7th August 2015.
Pronounced On : 7th December 2015.**

JUDGMENT (Per A.S. Gadkari, J.):

1 The appellants, original accused nos.1 to 3, have questioned the correctness of the judgment and order dated 31st March 1995 passed by the Additional Sessions Judge, Bombay in Sessions Case No.264 of 1985 thereby convicting them, firstly under Section 120-B simplicitor and sentenced to suffer rigorous imprisonment for life and secondly under Section 120-B read with Section 302 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life by each of the appellants and thirdly under Section 120-B read with Section 201 of the Indian Penal Code and sentenced to suffer rigorous imprisonment of one year each. The Trial Court has ordered that the sentence passed under Section 120-B simplicitor and under Section 120-B read with Section 201 of the Indian Penal Code shall run concurrently with the substantive sentence awarded under Section 120-B read with Section 302 of the Indian Penal Code. By the same judgment and order, the Trial Court has acquitted the appellants nos.1 to 3 from the charge under Section 120-B read with Section 364 of

the Indian Penal Code. The said judgment and order dated 31st March 1995 is impugned herein.

It is to be noted here that the original accused no.4 namely Sayeed Ahmed Haji Abdul Razak Mistry expired during the pendency of the present appeal and the said fact is recorded by this Court in its order dated 20.3.2009 and 14.2.2011. In view of the fact that the original accused no.4 Sayeed Ahmed Haji Abdul Razak Mistry is dead, the proceedings against him stood abated.

For the sake of brevity, the appellants named hereinabove will be referred to with their original accused numbers, as they were before the Trial Court.

2 The facts which enumerates from record and are necessary for deciding the present appeal can briefly be stated thus:

(i) Smt. Razia Sultana (PW No.1) in the year 1984 was residing with her mother Smt. Khatunbi (PW-3). She was married and her husband was doing embroidery work. She had two brothers namely Adil Rashid and Shaha Nawaz. Adil (deceased) was working as a welder and Shaha Nawaz was working as a carpenter. Her brother Adil Rashid was working with original accused no.4 Sayeed Ahmed Haji Abdul Razak Mistry. The original accused no.4 was her distant relative from her maternal side. Her

brother Adil wanted to set up his own business and in fact he started his business with a partner namely Sherekhan at Gilbert Road, Andheri, Mumbai. As the business of her brother was prospered, the original accused no.4 and his sons i.e. accused nos.1 and 2 developed jealousy. The original accused no.4 had told Smt. Razia Sultana to direct Adil Rashid (deceased) that he should not carry out the said business failing which, he will face serious consequences. Name of the fiancée of Adil with whom he was engaged was Ms. Rana Kaushal. She was residing in the area of Bombay Central. Adil Rashid used to keep the photograph of Rana Kaushal with him. On 15.11.1984 at about 11.30 a.m. her brother returned from bank with Rs.900/-. Adil gave Rs.750/- to her mother Smt. Khatunbi (PW-3) and kept Rs.150/- for his pocket expenses. Adil told Razia and Smt. Khatunbi that he along with the appellants was going to National Park for a picnic. The accused no.2 was accompanying Adil at that relevant time. They were going to National Park by a car. The car was parked outside her house on the road. It was a chocolate colour Ambassador car. The accused nos.1 to 3 and Adil (deceased) left the said place at about 11.30 a.m. on 15.11.1984. Adil did not return till the evening and therefore Smt. Razia (PW-1) and Smt. Khatunbi (PW-3) took his search with the near relative. They also asked the original accused no.4, however, he expressed ignorance about the

same and in turn told Smt. Khatunbi that not to worry about the same as they had gone for a picnic, they might come late. As Adil did not return upto 23.11.1984, Smt. Razia (PW-1) lodged a missing report on 23.11.1984 with the Kherwadi police station bearing no.51 of 1984 which is at Exhibit-8.

(ii) In the meanwhile, on 16.11.1984 at about 7.45 a.m., Pandu Parade (PW-14), a resident of the village Durvesh, Taluka-Palghar, District-Thane saw the dead body of a male person, when he went to attend the nature's call. He thereafter reported the said fact to the police patil of the village. The police patil in turn informed the said fact to Manor police station within whose jurisdiction the dead body was found. In pursuance of F.I.R. lodged by police patil Shri Janardhan Bhaskar Patil of Durvesh village, P.S.I. Shri Laxman Deshmukh (PW-15) registered a crime bearing CR No.196 of 1984 under Section 302 read with Section 201 of the Indian Penal Code against unknown person. PW-15 Shri Laxman Deshmukh drew inquest panchanama (Exhibit-52) and also scene of offence panchanama (Exhibit-53). From the scene of offence he also seized pieces of strings. He sent the dead body for conducting postmortem examination to the Medical Officer, Primary Health Centre at Masvan, Taluka Palghar, District Thane. After conducting the postmortem examination, the body of

the said unknown person was buried as per Islam religion/ rites, as the police and the doctor who conducted autopsy formed the opinion that the deceased person was professing Islam religion. The pieces of strings (Article-11 Colly.) were preserved by PW-15 for the purpose of investigation. The clothes which were on the person of the deceased were taken charge by drawing a seizure panchanama (Exhibit 57). The said clothes were namely a full pant-white in colour, a full shirt with black and red lines and blood stains (Article-2) and underwear white in colour (Article-10).

(iii) On 18.1.1985, Smt. Razia Sultana (PW-1) registered First Information Report with the Kherwadi Police station, Bandra, Mumbai bearing CR No.33 of 1985 (Exhibit-9) thereby expressing suspicion against the appellant nos.1 and 2 being responsible for the disappearance of her brother Adil Rashid. The investigation of the said crime was handed over to P.S.I. Shri Abdul Kadar A. Khan (PW-19). The crime was initially registered under Sections 365 and 114 of the Indian Penal Code. PW-19 PSI Shri Khan conducted investigation. He arrested the accused nos.1 and 2 on 31.1.1985 at Mumbai and accused no.3 on 19.2.1985 at Meerut and brought to Mumbai on 23.2.1985. The further investigation was thereafter transferred to Police Inspector Shri Bhimrao Khambe (PW-21) on

1.3.1985. PW-19 PSI Shri Khan assisted PW-21 Shri Bhimrao Khambe in the further investigation. During the course of investigation, it was revealed that the dead body of Adil Rashid was found within the jurisdiction of Manor Police station and the said police station had registered crime bearing CR.no.196/1984.

(iv) That after receipt of necessary reports from various agencies and after completion of investigation, PW21 Shri Bhimrao Khambe submitted chargesheet in the Court of competent jurisdiction under Section 120-B read with Sections 364, 302 and 201 of the Indian Penal Code. As the offence under Section 302 of the Indian Penal Code was exclusively triable by the Court of Sessions, the learned Trial Court committed the said case to the Court of Sessions as contemplated under Section 209 of Cr. P.C. After committal of the said case, the Trial Court framed charge against the accused persons below Exhibit-1. The said charge was read over and explained to the accused persons to which they denied. The defence of the accused persons was of total denial. With a view to establish its case, the prosecution examined in all 21 witnesses. The learned Trial Court after recording the evidence and after hearing the parties to the said case, convicted and sentenced the accused persons by the impugned judgment and order dated 31st March 1995 as stated hereinabove.

3 Heard Ms. Prabha Mane the learned Counsel for the appellants and Smt. V.R. Bhonsale, the learned APP for the Respondent-State and with their assistance we have perused the entire record of the present case.

4 The learned Counsel for the appellants submitted that the prosecution has utterly failed to prove the theory of 'last seen together' in view of the settled legal position. That the time when the appellants were last seen with the deceased Adil Rashid and the finding of the dead body of Adil by different police station on the next day is after substantial lapse of time. That the time gap between the last seen together and finding of the dead body is too large and the prosecution has failed to put forth the cogent evidence that there is nobody else who might be responsible for committing murder of Adil Rashid. She further submitted that Smt. Razia Sultana (PW-1) while filing the missing report on 23.11.1984 did not give any specific name of any of the accused persons and did not express any suspicion against the appellants. She further submitted that though PW-15 Police Officer Mr. Laxman Deshmukh from Manor Police station was examined by the prosecution, the photograph of the deceased Adil Rashid was not shown to him thereby proving the identity of the deceased Adil beyond reasonable doubt. She further contended that the evidence adduced by the prosecution is of such weak nature that the entire link of

circumstances is not established beyond reasonable doubt and therefore the appellants cannot be held guilty for want of cogent and proper legal evidence. She therefore urged before us that the present appeal may be allowed and the appellants may be acquitted from all charges framed/levelled against them.

Per contra, the learned APP submitted that though the present case is based on circumstantial evidence, the prosecution has proved the motive behind the present crime. She further submitted that the appellants were last seen together with the deceased Adil and thereafter deceased was not traceable for substantial period. She further submitted that the appellant nos.1 and 2 have gave extra judicial confession to PW-5 Kishor Dadhich. That the incriminating articles were discovered at the instance of accused nos.2 and 3 which were belonging to the deceased. She lastly contended that the prosecution has successfully proved the chain of circumstances. She therefore prayed that the conviction and sentence of the appellants may be upheld and the present appeal may be dismissed.

5 With a view to appreciate the submissions advanced by the learned Counsel for the appellants and the learned APP for the State, it is necessary to advert in brief, the evidence of the prosecution witnesses.

6 PW-1 is Smt. Razia the elder sister of the deceased Adil Rashid.

PW-1 has deposed that she was married and her husband was doing embroidery work. That in the year 1984 she was residing with her mother Smt. Khatunbi (PW-3). She had two brothers namely Adil Rashid (deceased) and Shaha Nawaz. Adil was working as a welder with the original accused no.4 Sayeed Ahmed Haji Abdul Razak Mistry. That Sayeed Ahmed Haji Abdul Razak Mistry was her distant relative from her mother's side. The accused nos.1 and 2 are the sons of accused no.4. That Adil Rashid wanted to set up his own business. Adil started his business with a partner namely Shere Khan at Gilber Road, Andheri, Mumbai. That the business of her brother Adil was prospered in due course of time and therefore the original accused no.4 and his sons i.e. accused nos.1 and 2 developed jealousy. The original accused no.4 threatened Adil for the same and administered threats of dire consequences. PW-1 thereafter told accused no.4 that she will try to persuade her brother Adil to give up his work. The said incident occurred in the month of September or October 1984. That the name of fiancée of Adil was Rana Kaushal and Adil was engaged with her. Adil used to keep her photograph with him. Adil used to give his earnings to his mother Smt. Khatunbi (PW-3). That on 15.11.1984 at about 11.30 a.m., Adil came to home from the Bank with Rs.900/- Adil gave Rs.750/- to his mother (PW-3) and kept Rs.150/- for his pocket

expenses. He informed PW-1 and PW-3 that he was going to National Park for a picnic with accused persons. The said accused no.2 was accompanying Adil on that relevant time. They were going to National Park by a car. The car was parked outside her house on the road. The said car was of chocolate colour. That the accused nos.1 and 3 were also present there. After about five minutes, Adil left with accused no.2. At that time her mother Smt. Khatunbi (PW-3) also told Adil that she will also accompany him, however, accused no.2 Jamil told her that the car is not in proper condition. Adil was carrying money purse containing Rs.150/- and a photograph of his fiancée and also railway season ticket. On 22.11.1984 her mother met her sister Zarina (PW-2) in hospital, when her mother complained Zarina that Adil did not return home. Zarina replied that on 16.11.1984 the accused nos.1 and 2 and one more person had come to her house in torn clothes on their person and they stayed there till 22.11.1984. That on 23.11.1984 Smt. Razia visited Kherwadi police station and lodged a missing report bearing no.51 of 1984. On 24.11.1984 Zarina asked original accused no.4 Sayeed Mistry the whereabouts of Adil. She received anonymous telephone call that the accused nos.1 and 2 are at Meerut. She informed the said fact to the Missing Persons Bureau. Therefore the police officer sent one constable alongwith her husband to Meerut. The accused

nos.1 and 2 could not be arrested and brought at Mumbai as they had obtained the bail order from the Court at Meerut on 18.1.1985. She registered FIR (Exhibit-9) at Kherwadi police station, Bandra, Mumbai thereby expressing suspicion against the appellants being responsible for disappearance of her brother Adil Rashid. On 1.2.1985, she came to know that her brother Adil was killed and accused nos.1 to 3 were arrested by the police. Her further statements were recorded by the police on 5.2.1985 and 8.2.1985. She identified various articles belonging to deceased Adil in the Court.

In the cross-examination, this witness has deposed that on 15.11.1984 when her brother Adil had gone with accused person and not returned home, her mother neither told her nor PW-1 suspected any foul-play in the same. She has admitted that she had seen accused no.3 at Bandra Court for the first time. She has further admitted that in her statement dated 27.11.1984 (23.11.1984), she had neither given the names of the accused persons nor described them. That she did not disclose to the police the description of the car or its make and or its number or its colour as she was in disturbed state of mind on 27.11.1984 (23.11.1984). By this, the defence has in fact brought on record the improvement in the evidence of PW-1 Razia Khan. The further contradiction that she did not state in any

of her statements that Zarina told her mother that on 16.11.1984 the accused nos.1 and 2 and one more person had come to her house with torn clothes on their person has been brought on record. She has further admitted that when she came to the door of her house on the date of incident, she had a glance (zalak) towards road and she saw three boys in the car.

7 PW-2 is Zarina Noor Mohd. She has deposed that PW-1 Razia was her distant relative. The original accused no.4 was husband of her sister. She has deposed that on 16.11.1984, late in the night, the accused nos. 1 and 2 had been to her house. They were wearing shirt and pant. As the accused nos.1 and 2 had been to her house late in the night, she asked about the same to which the accused no.2 Jamil replied that they had come in the area to recover money. They stayed at her house as usual and left in the morning. Again in the afternoon accused no.2 Jamil came to her house, took meals and left the place. Thereafter she contacted accused no.4 on phone and asked him whether he had driven out his children. Thereafter for a period of three to four days continuously the accused no.2 Jamil used to come to her house. On 22.11.1984 she had been to the hospital wherein she met Khatunbi, the mother of deceased Adil. PW-2 asked Smt. Khatunbi (PW-3) whether the accused nos.1 and 2 have been driven out of the house

by their father. Smt. Khatunbi (PW-3) informed her that her son Adil had gone with Jamil (accused no.2) and Zahir (accused no.1). PW-2 informed PW-3 that accused no.2 and another person had been to her house. Smt. Khatunbi (PW-3) waited to the house of PW-2 till 11.00 p.m. on that date for accused no.2 Jamil. The accused persons did not come to her house. That on 23.11.1984 Smt. Khatunbi (PW-3) came with Razia (PW-1) to her house and made enquiry about Adil Rashid (deceased). PW-2 told them that the accused no.2 Jamil with another person had came to her house in the night of 16.11.1984. That Jamil came to her house last time on 22.11.1984. On 27.11.1984 she was called by the police in a room at Kherwadi police station and police officer asked her to identify the accused no.3. She identified accused no.3 Guddu as the said same person who had visited her house on the night with Jamil (accused no.2).

In the cross-examination, this witness has deposed that she had seen the accused no.3 Guddu for the first time on 16.11.1984. That she did not pay any special attention to the accused no.3. No other material which is useful to the appellants has been elicited in her cross-examination.

8 PW-3 is Smt. Khatunbi Shaikh, the mother of deceased Adil Rashid. PW-3 has deposed that she was having six children. Out of them four were daughters and two were sons. Out of four daughters, three

daughters were residing with their respective husbands and fourth daughter namely Razia (PW-1) though married was residing with her along with family. The original accused no.4 was husband of her sister and he was distantly related to her. The accused no.4 was having welding factory at Jogeshwari (West). When her husband died, her son Adil was of 10 years of age. After Adil completed his 4th standard, he was sent for earning livelihood with accused no.4. That the accused no.4 earlier used to pay Rs.20/- per day to Adil when he was working on probation and after Adil learnt the work, the accused no.4 and his sons were asking him to do any sort of work. Although Adil used to work for long time, he was being paid very less. Therefore her son Adil started his own business of welding in partnership at Gilbert Road, near Bhavans College, Andheri. Though her son started his business and had hardly completed one month, his business was lucrative. After Adil started his own business, a period of 15 days thereafter, the accused no.4 came to her house and threatened her son by asking him not to work in partnership but to work with him (accused no.4). Her son Adil refused to do so. That on 10.11.1984 a customer of her son under misunderstanding delivered a cheque to the original accused no.4. When her son came to know that his customer had given a cheque to accused no.4 for the work which he had done, he (Adil) went to accused

no.4 and collected it from him. He deposited the same in the bank on 15.11.1984. Her deceased son went to bank to collect the said amount under the said cheque. He went to the bank at about 10 a.m. and returned at 11.00 a.m. After Adil brought back the said cheque, the accused no.4 visited her house and threatened her that she should warn Adil to behave properly otherwise its result will be unpalatable. PW-3 told accused no.4 that Adil was not interfering with his work and was doing his own work independently. On 15.11.1984 Adil came home alongwith accused no.2 Jamil from the bank. Thereafter accused no.2 Jamil told Adil to accompany him for an outing to National Park at Borivali. The accused no.1 Zahir and another friend were also with him. They were sitting in the car parked on the road. The said car was of chocolate colour. PW-3 also told them that she would accompany them, when accused no.1 said that he along with Adil and Jamil are going to National Park for outing and that the car is not in proper condition. Thereafter they went out of the house. After some time Adil (deceased) came and gave her Rs.900/- and said that if he carries the entire amount, the accused persons would spent all the money. He kept Rs.150/- out of Rs.900/- with him. After Adil (deceased) went outside the house with accused no.2 Jamil, she saw that accused no.1 Zahir was standing near the steering wheel of the car and one more person was sitting

on the rear side of the car. As Adil did not return home till 16.11.1984 she made enquiry with his partner Shera Khan to which Shera Khan replied that he does not know the whereabouts of Adil and he is also waiting for him. That on 18.11.1984 she attended betrothal ceremony of daughter of accused no.4. She made enquiry with accused no.4 about Adil. At that time accused no.4 informed her that he received telephone call from his son Jamil that their car had broken down at Vapi and after it was repaired, they would come back. On 22.11.1984 Zarina (PW-2) met her in hospital and informed that in the night of 16.11.1984 Jamil (accused no.2) was at her house with another boy and stayed in the night. On 23.11.1984 she went to the house of accused no.4 and enquired about Adil to which accused no.4 expressed his ignorance about the same. She informed the said fact to the police. Thereafter her son-in-law Akhtar Khan (husband of PW-1 Razia) and a police constable went to Delhi for making enquiry and returned after a week. Zahir (accused no.1) and Jamil (accused no.2) were arrested by Meerut police and during the enquiry they told that after picnic they dropped Adil at Andheri. Police arrested accused nos.1 and 2 from a Bidi Shop at Nagpada. The police thereafter showed her two photographs which were of Adil (deceased). She identified the said photographs and the person therein. She thereafter attended Kherwadi police station and identified the

articles of her deceased son.

In the cross-examination, this witness has admitted that neither herself nor her deceased son Adil complained about the threats administered by the original accused no.4. That she and her daughter saw the chocolate colour car from distance of about 10 to 12 feet. That her first statement was recorded by the police on 8.2.1985. She did not give description about another boy who was accompanied by accused nos.1 and 2. She had further admitted that she did not tell the police that her son Adil was having purse (article-3) and its contents. She has further admitted that in the year 1983 her son Adil consumed poison and he was treated in Cooper Hospital at Vile Parle.

9 PW-4 is Namdeo Kamble, panch-witness to the recovery of car at the instance of accused no.1. This witness has deposed that accused no.1 made memorandum statement which is at Exhibit 16 and in pursuance thereof car having chocolate colour was shown by accused no.1 which was owned by PW-5 Kishor Dadhich. The discovery panchanama is at Exhibit 16-A. He further deposed that the said car was of chocolate in colour and he did not recollect the make of the said car. That it was night time and he did not see the car number. That the doors of the said car were locked. He further deposed that today he will not be able to identify the said car as he

had seen it during the night time. That he will also not be able to identify the master (owner) of the said car to whom the accused no.1 Zahir had pointed out because of lapse of nearly 10 years. When the car (article-9) was shown to this witness he has deposed that from the number plates, the number of the car and seats which were black in colour was the same car which was seen by him at J.B. Nagar compound, Andheri as the same Ambassador car. He has further deposed that the said car was in chocolate colour and now it is white in colour.

10 PW-5 is Mr. Kishor Dadhich, a Travel Agent from whom the accused no.1 Zahir had taken Ambassador car, which was allegedly used in the present crime. PW-5 has deposed that he was doing travel agency business from his residence since 1984. At that time he owned a vehicle, an Ambassador car bearing no.MMU-3824. It was cherry blossom (chocolate) in colour. He used to give the said car on hire basis. That on 12.11.1984 the accused nos.1 and 2 called upon him along with his mechanic Farooq at about 11.30 a.m. to 12 noon. Farooq informed PW-5 that accused nos.1 and 2 wanted his car on hire basis as the family members of the accused nos.1 and 2 wanted to go to Haji Malang. Farooq also informed that they do not want any driver. Thereafter he gave his car on hire basis for a period of two days i.e. for 13th and 14th November 1984. Farooq took the responsibility of

bringing back the said car. The accused nos.1 and 2 took the car on 13.11.1984 at about 9.00 a.m. PW-5 made necessary entry in the movement register. The said car did not return on 14.11.1984. On 15.11.1984 also the said car did not return. On 16.11.1984 he received telephone call from accused no.1 to the effect that the car had gone out of order at Vapi and he should sent his mechanic to get it repaired. On 16.11.1984 at about 5 p.m. the accused nos.1 and 2 along with another person called upon him. They reported that “some problem had occurred at their hands and police are behind them”. When he asked them what they mean by problem, to which they stated that “a murder had taken place at their hands and that he should not discuss the said fact to anybody else”. Thereafter the accused nos.1 to 3 left his place by saying that his car was at Advent Pharma at Vapi and he should bring it back to Mumbai. That after half an hour, the accused no.1 again came to him and told him to give his mechanic so that he will get the said car repaired. At that time one Subash Singh was working with PW-5 and PW-5 sent Subash Singh along with appellant no.1. After 15 minutes said Subash Singh returned and told him that Zahir had left him and was not traceable. PW-5 thereafter contacted Farooq and took the residential address of the accused persons. PW-5 met the father of accused no.1. He narrated the incident to the father of accused nos.1 and 2 and also the fact

about their committal of murder. The accused no.4 requested PW-5, not to lodge complaint to the police as the name of his family will be tarnished. The accused no.4 subsequently gave him authority letter to bring the car back from Advent Pharma company at Vapi. The accused no.4 gave a letter in hand writing addressed to one Mr. Kavishwar of Advent Pharma company saying that he should take Rs.100/- from the person and give the car. That on 19.11.1984 PW-5 went to Vapi and met Mr. Kavishwar (PW-11) at Advent Pharma. PW-5 paid Rs.100/- to Mr. Kavishwar to which he (PW-11) passed a receipt for the same. PW-5 took the keys of the car and came back to Mumbai. He kept the car at J.B. Nagar, Andheri in garage. That during the course of investigation the police seized his car. That on 16.3.1985 he was called by Kherwadi Police station for identification. He identified the accused no.3 as a person who had come with accused nos.1 and 2 on 16.11.1984 to threatened him.

In the cross-examination, this witness has admitted that he did not recollect, whether he had made statement before the police that he told them that the accused nos.1 and 2 had come to him and they had taken his car. That they had committed murder and that they had not returned his car. That he did not recollect that the accused persons had taken his mechanic and left him in the way. That he did not recollect whether he should report

to the police about the said incident.

The close scrutiny of this witness makes it clear that most of the statements made by this witness in his examination-in-chief are either improvements or omissions which have been brought on record at the instance of the appellants in the cross-examination. At this stage itself we may note here that the alleged extra judicial confession given by the appellants to this witness according to us is not trustworthy and reliable because the PW-5 was a total stranger to the accused person and confiding with him about the crime committed by the accused persons appears to be improbable, as various omissions and improvements have been brought on record by the appellants and we are of the considered opinion that this witness is not trustworthy and his testimony is not reliable. It is also to be noted here that the alleged extra judicial confession is not inculpatory and is very vague as far as the precise act by any of the accused is concerned. The tenor of the alleged extra judicial confession is that all the accused jointly confessed before PW-5 about their act and there is no in-depth specification about culpability of the crime and therefore it will be unsafe to rely on the said alleged extra judicial confession in the present case.

11 PW-6 is Hashmatali Sayyed, a panch-witness to the spot which was pointed out by the accused no.1 where according to the prosecution the

appellants had thrown the dead body of Adil Rashid (deceased). This witness has proved the memorandum panchanama (Exhibit-28) and the spot panchanama (Exhibit-28-A).

In the cross-examination, this witness has admitted that there were about 25 huts where the jeep was halted near the spot and the police did not make any enquiry with the hutment dwellers in his presence.

12 PW-7 is Sharad Raut. The accused no.3 Abdul @ Guddu in presence of this witness made a demonstration that a pant which was found on the dead body of Adil Rashid fits him. It is the case of the prosecution that after committing the murder of Adil, a full pant of Adil was worn by the accused no.3 and accused no.3 in turn put on his pant on the dead body of Adil. It is to be noted here that the clothes which were found on the dead body of Adil were already in possession of the police and the aforesaid demonstration in presence of PW-7 according to us is a redundant and futile exercise to connect the link in the chain of circumstances. According to us the evidence of this witness cannot be taken into consideration for connecting alleged link of chain of circumstances put forth by the prosecution. It appears from the evidence of this witness that a pant which was recovered in the presence of this witness, which according to the prosecution was of Adil was not shown to any of the witnesses for its

identification. We therefore keep aside the evidence of this witness from our consideration.

13 PW-8 is Surajbali Patel, a panch-witness to the discovery of the incriminating articles at the behest of the accused nos.2 and 3. This witness has deposed that on 20.3.1985 at the instance of accused no.2 a wallet of deceased which he had thrown in the adjoining company of Advent Pharma was discovered at his instance. At the instance of accused no.3 four nylon pieces of strings, 8 to 9 pieces of torn railway ticket were discovered from an open ground of the Advent Pharma company wherein the grass had grown upto 1 and ½ feet. The accused no.3 also produced 4 to 5 torn pieces of a photograph of a girl from the said place. In the same process the accused no.2 also discovered a wallet of the deceased from an open space. PW-8 has stated that there was nala at that place and accused no.2 jumped over the said nala and went inside the compound from the side of nala. That there was grass at the said place. That the accused no.2 jumped over the barbed-wire and went inside the compound. The said place was opposite of Advent Pharma Company. This witness did not recollect the name of the company. The accused no.2 searched for the wallet and traced it out. In the wallet there was visiting card having writing something like Shera Company or Shera Welding.

It is to be noted here that the evidence of PW-8 is absolutely silent about the exact place from where the incriminating articles were discovered at the instance of the accused nos.2 and 3. It is to be noted here that the date of incident in question is 15.11.1984 or there about and the discovery at the instance of the accused nos.2 and 3 was effected on 20.3.1985 i.e. after about four months from the date of incident. The evidence so also the said discovery panchanamas at Exhibits 33 and 33-A are silent about the condition of the articles, particularly the papers which were smeared by soil, so also their stage of degradation and its appearance and the depth of ditch/pit dug by accused no.3. There is another aspect of the Exhibits 33 and 33-A. The memorandum panchanama of accused nos.2 and 3 is a joint memorandum which is at Exhibits 33 and in pursuance of the joint memorandum panchanama, the said articles were discovered. It is to be noted here that the statement made by accused no.3 Guddu first in point of time, it is apparent that the police had already knowledge about the place wherein the accused no.3 had either buried the articles in presence of accused no.2. It further appears to us that the discovery at the instance of accused nos.2 and 3 though projected as a separate discovery is in fact a joint discovery and according to us is not safe to rely upon it. We may note here that the police officer who effected the discovery in pursuance of joint

memorandum statements which is Exhibit 33 is ignorant about legal implications of joint discovery at the instance of accused persons.

14 PW-9 is Jogabhai Patel, the owner of the hotel adjacent to Advent Pharma Company at GIDC, Vapi. It appears that this witness has been examined with a view to establish the fact that four months prior to 20.3.1985 the accused persons had been to his hotel early in the morning.

15 PW-13 is Jayant Aher, the hand-writing expert who has examined the letter given by accused no.4 in favour of Mr. Jagannath Kavishwar (PW-11) for releasing the car by PW-5 Kishor Dadhich. As the accused no.4 is expired and the case against him stood abated, the evidence of this witness cannot be taken into consideration from the point of deciding the present appeal.

16 PW-16 is Haji Abdul Bidiwala from whose shop the accused nos.1 and 2 were arrested on 31.1.1985 by the police. This witness has failed to identify the accused persons in the Court. PW-17 is Sukhdeo Dhaktode, Police Constable who had gone to Delhi along with PW-18 Akhtar Khan (husband of PW-1 Razia) in search of accused nos.1 and 2 on 9.12.1984. The record discloses that the statements of aforesaid three witnesses i.e. PW-16, PW-17 and PW-18 came to be recorded after lapse of 10 years and just prior to the commencement of the trial and therefore it

creates strong doubt in our mind about the reliability of their evidence and we refrain ourselves from taking into consideration the evidence of these three witnesses.

17 PW-10 is Bahadursingh Ramsingh, a peon who was working in the Advent Pharma Co. at GIDC, Vapi. PW-10 has deposed that he was working in the said company four to five years prior to 1985. That accused no.1 was one of the workers of Advent Pharma Co. and he was working in Fabrication department. That accused no.1 was working for 10-15 days in the fabrication department of Advent Pharma Co. That accused no.1 come one day in the company at about 10 a.m. in an Ambassador car of brown/chocolate colour bearing no.MMU-3824. That accused no.1 wanted to meet Iqbal Bhai, Manager of the company. That Iqbal Bhai was not present on that day. At that time, Mr. Kavishwar (PW-11) the Plant Manager and Mr. Sudame the cashier were present. That he was called on 4.3.1985 at Kherwadi Police station and he identified the accused no.3 in the identification parade.

In the cross-examination, this witness has admitted that the accused no.1 came to the company and accused nos.2 and 3 were sitting in the Hotel of PW-9 Jogabhai Patel. He has further admitted that he did not ask accused no.1 as to what work he had with Iqbal Bhai.

18 PW-11 is Jagannath Kavishwar, Officer of Advent Pharma Company. PW-11 has deposed that he was working with Advent Pharma Co. since 1977. He has deposed that on 11.11.1984 at about 10 a.m. accused no.1 came in the office of the factory and enquired about the Manager Iqbal Bhai. That Iqbal Bhai was not present in the factory. That the accused no.1 came in an Ambassador car having chocolate colour. The said car was parked outside the gate and later on it was brought in the company. That the accused no.1 waited for Iqbal , however, Iqbal did not come to the office. The accused no.1 wanted some money for going to Mumbai. The accused no.1 took Rs.100/- from the Accountant Shri Sudame and thereafter went away. The accused no.1 kept the said car in the compound. After two days they received telephone call from the accused no.4 that he is sending Rs.100/- with the person to collect the car. The accused no.4 gave authority letter on his letter-head. On 20.11.1984 at about 11.00 a.m. Mr. Kumar came to collect the car. Mr. Kumar first met Sudame to pay Rs.100/-. He showed the authority letter to him. After reading the said letter, it was revealed that the car was to be collected by one Kishorbhai. He handed over the possession of the said car to Kishorbhai. In the cross-examination, this witness has identified that the said person Kumar (PW-5) who had came to his Company earlier. He has

admitted that he did not know whether his Company maintains correspondence file or not.

19 PW-14 is Pandu Parade. PW-14 in his testimony has stated that he was residing at Palghar since his childhood. On 16.11.1984 at about 7.45 a.m. in the morning while he was coming from Kharadpada Road to answer the nature's call, he saw the dead body of a male person. At that time one Ramji Waghan was with him. He told said Ramji to wait near the spot. PW-14 went to report about the dead body to the police patil of the village namely Janardhan Patil and Sarpanch Suresh Samre. He contacted them and reported the matter orally to them. The dead body was of a stranger. He saw tyre marks of a light motor vehicle towards the direction of Mumbai at the said spot. He alongwith other inspected the dead body and found black mark on his neck of strangulation by the string.

20 PW-15 is Laxman Deshmukh, Police Sub Inspector then attached to Manor Police station. PW-15 has deposed that on 16.11.1984 at about 9.45 a.m. Police Patil Janardhan Patil of Durvesh village came to the police station and lodged his complaint. He recorded the statement and treated it as First Information Report and registered a crime bearing CR No.196 of 1984 under Sections 302 and 201 of Indian Penal Code (Exhibit-56). He conducted the inquest panchanama (Exhibit 52) and scene of

offence panchanama (Exhibit-53). He seized one stone and pieces of strings (Articles 11 and 12 respectively). He called a photographer and took photographs of the dead body and the spot. PW-15 sent the dead body for postmortem examination to the Medical Officer, Primary Health Centre at Masvan, Taluka Palghar, District-Thane. He recorded the statements of Pandu Parade (PW-14) and other witnesses. After receipt of the postmortem notes, the dead body was disposed off on 19.11.1984 as per Muslim religious rites. The Police Constable brought the clothes of the deceased viz. full pant-white in colour, a full shirt with black and red lines and blood stains and an underwear white in colour. The said clothes were taken charge by the Head Constable Shri Patil by effecting seizure panchanama (Exhibit-57). That on 2.2.1985 Police Inspector Shri Khambe and PSI Shri Khan of Kherwadi police station came to Manor police station along with the arrested accused persons. The said accused persons were concerned with CR No.196/1984 registered at Manor Police station. He handed over the case papers and articles pertaining to CR registered at Manor police station to the officer from Kherwadi police station for further investigation. On 4.3.1985, his statement was recorded by Police Inspector Khambe (PW-21).

21 PW-20 is Dr. Subhash S. Patil, the then Medical Officer at

Masvan Primary Health Centre, Taluka Palghar, District-Thane. PW-20 has deposed that on 16.11.1984 at about 2.30 p.m. the dead body of unknown person was brought from village Durvesh by the police from Manor Police station. He performed the postmortem on the said dead body between 3.00 and 5.00 p.m. on that date. That the dead body was of a male person of age 25 years and might be from Muslim community. The dead body was having full shirt with brown and chocolate colour strips and light green spots and also ash coloured full pant and a white brief underwear inside. The clothes were in dry condition. The shirt was having blood stains which was oozing from nostrils. The Rigor Mortis was absent. The tongue was inside the mouth and blood stained fluid oozing from nostrils. There were no external injuries to genitals and penis was circumcised. During the course of postmortem, he observed and noticed the following things:

“All four limbs were in extended position. Fists were open and fingers partially flexed at the interphalangeal joints. No sand or earth under the nails. Face:-(Petachial Hemorrhage, defined as subastaneous hemorrhage and ranging from 2 m.m. to 3mm incise. Petaehial hemorrhage over the lower half of the face. Both eye lids were swollen and black in colour, skin of the face was congested. Conjunctival hemorrhages were present. Eye bolls were appeared to be protruded Neck: Ligature mark was seen on the neck in between the larynx and the chin as a dark

brown depression. The length of which was about 33 cm. About 9 cm of posterior surface of the neck was without the mark. Breadth of the ligature mark was 2 cm in the anterior surface of the neck in between the two sterno cleidomastoids just above the thyroid cartilage. (Sterno cleidomastoids is the name of a muscle of the neck which is situated in the anterior surface of the neck, the attachment of muscle be mastoid process and the midea end the collar bone. Laterally the mark was branching of both sides of the neck. Three separate ligature marks were seen braching from the left lateral end of the ligature mark, as, dark drown depression crossing each other. Abrasions and bruises. Multiple present over anterior surface of neck, round about the ligature mark and lower half of the face in the form of small round and oval patches. Some bruises were also seen over upper part of chest anteriorly, and there colour was brown. Another injuries was noted. Small intestine contained completely digested liquid flood. Large intestine contained matter. Liver was congested. Spleen and kidneys were congested. Bladder was empty.”

After conducting the postmortem examination, PW-20 was of the opinion that cause of the death was Asphyxia due to strangulations. This witness has proved the postmortem notes at Exhibit-74. In question put by the Court, PW-20 has stated that the injures present over the neck in the form of ligature mark had been caused by ligature or a string or rope.

He had further stated that injuries noted in the postmortem examination might be caused due to strings like Article-14 shown to him.

22 PW-12 is Udaychandra Panickar, the Special Executive Magistrate who had conducted test identification parade on accused no.3 Guddu. As far as evidence of this witness is concerned who has conducted the test identification parade, we may note here that this witness in his examination in chief itself has stated that the test identification parade was held in the premises of police station which is contrary to the settled position of law till date laid down by this Court. Secondly the memorandum of identification parade (Exhibit 39) a contemporaneous document on record discloses in equivocal terms that this witness had given suggestions to the witness prior to the test identification parade and the concerned witness thereafter identified the accused no.3. We are of the considered opinion that the same cannot be countenanced. For these two stated reasons we discard the test identification parade held by PW-12 from our consideration.

23 PW-19 is Abdul Kadar A. Khan, PSI then attached to Kherwadi Police station. PW-19 has deposed that on 23.11.1984 at about 6.40 p.m. one Mrs. Razia Khan (PW-1) came to police station and lodged a missing complaint of her brother. The same was entered at serial no.51 of 1984

(Exhibit-8). On 27.11.1984 he received instructions from the Senior Inspector of Police to conduct detailed enquiry in the matter and accordingly he recorded statements of Razia (PW-1) and Zarina (PW-2) and accused no.4 and submitted a report to the Senior Inspector of Police. He also sent wireless messages to all the police stations pertaining to said Adil Rashid. That on 12.12.1984 the accused no.4 met him and informed that the accused nos.1 and 2 were also missing with Adil Rashid and were traced by Civil Line Police Station, Meerut and they had been released on bail by his younger brother. That on 15.12.1984 he received letter from the Senior Inspector of Police Missing Persons Bureau, Crime Branch that the said officer has conducted enquiry into the matter and submitted a report (Exhibit-69). In the said report, it was stated that when Civil Line Police Station, Meerut enquired with Zahir and Jamil (accused nos.1 and 2), it was informed to them by the accused persons that the missing person (Adil) departed with them from Andheri Railway station on the said date. That on 19.1.1985 under the orders of Superiors he registered CR No.33 of 1985 under Sections 365 and 114 of the Indian Penal Code against the accused nos.1 and 2 at Kherwadi police station. The said FIR is at Exhibit-9. PW-19 thereafter went to Meerut and Delhi in search of Adil. However, Adil was not found. He also searched accused nos.1 and 2. But they were

also not found. That when he contacted Civil Line Police Station, Meerut, the officer therein informed him that on 28.1.1985 the accused no.4 took the custody of his sons (accused nos.1 and 2) and promised to produce them at Mumbai. That on 31.1.1985 at about 6.30 p.m. he arrested accused nos.1 and 2 from the shop of Haji Abdul Bidiwala (PW-16). He subsequently added Section 302 of the Indian Penal Code to CR No.33 of 1985. That the further investigation was handed over to Police Inspector Shri Khambe (PW-21) to whom PW-19 assisted in the case.

24 PW-21 is Shri Bhimrao Khambe, Police Inspector then attached to Kherwadi Police station. PW-21 has deposed that on 1.2.1985 he took over the further investigation of CR No.33 of 1985 registered at Kherwadi police station from PSI Shri Khan (PW-19) as per the orders of the Superior Officer. He collected the papers of investigation. PSI Shri Khan (PW-19) assisted him in the said case. On 2.2.1985 the accused no.1 made voluntary statement and expressed his willingness to show the place where the dead body of Adil was thrown. The accused nos.1 and 2 led the police to village Durvesh village on Western Express Highway near the mile stone no.443/4 and accused no.1 pointed out the place where the body was thrown. The detail panchanama came to be recorded which is at Exhibit 28. The accused no.1 thereafter led the police to the Advent Pharma Co. at

Vapi and pointed out the person namely Kavishwar (PW-11). This witness has deposed about various facts pertaining to the steps taken by him during the course of investigation upto the stage of filing of chargesheet in the Court.

25 After scrutinizing the entire evidence available on record minutely, it is thus clear that the present case is based on circumstantial evidence. It is the settled position of law that in a case of circumstantial evidence the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. In a case resting on circumstantial evidence, it is incumbent for the prosecution to prove each and every circumstance on which it proposes to rely. The circumstances so proved should be of conclusive nature i.e. they should have a definite tendency of implicating the accused. The circumstances so established should form a complete chain which should exclude every hypothesis of innocence and unquestionably point towards the guilt of the accused. In other words the circumstances should be conclusive i.e. accused and the accused alone has committed the crime.

26 The Supreme Court in its celebrated judgment in the case of Hanumant Govind Nargundkar V. State of M.P., reported in 1952 SCR 1091: AIR 1952 SC 343: 1953 Cri L.J. 129 has held that:

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

27 It is further the settled position of law that in order to sustain a conviction for murder on circumstantial evidence, the following conditions must be fulfilled:

- (1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.
- (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is, they should not be explainable on any other hypothesis except that the accused is guilty.

- (3) The circumstances should be of a conclusive nature and tendency.
- (4) They should exclude every possible hypothesis except the one to be proved and
- (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and it must show that in all human probability the act must have been done by the accused.

28 The minute scrutiny of evidence on record discloses that following circumstances have been put forth by the prosecution against the appellants/accused persons:

- (1) motive;
- (2) last seen together;
- (3) extra judicial confession given to PW-5;
- (4) abscondance after the alleged commission of crime/going to Meerut and staying there;
- (5) destruction of evidence;
- (6) incriminating articles discovered at the instance of accused nos.2 and 3

29 In the present case the identity of deceased Adil Rashid is not in dispute as the mother of deceased (PW-3) had identified and admitted the photograph of Adil in her testimony.

30 The learned Counsel for the appellants submitted that in the

present case the chain of circumstances has not been proved by the prosecution and it has been broken at various stages and therefore the benefit of doubt may be advanced to the accused persons. She has further submitted that as the place of recovery of dead body was not in exclusive possession of the accused persons, the accused persons cannot be held responsible for the same. In support of her contention, she relied on two decisions of the Supreme Court reported in AIR 1956 SC 316 in the case of Eradu & Ors. Vs. State of Hyderabad and 1992 Cri. L.J. 4027 in the case of Anant Bhujangarao Kulkarni Vs. State of Maharashtra.

31 It is to be noted here that the deceased was last seen together with the accused person by PW Nos.1 and 3 i.e. sister and mother of the deceased Adil. These witnesses have stated that on 15.11.1984 at about 11.30 a.m. they saw Adil in the company of accused persons in chocolate colour Ambassador car. It is to be noted here that these witnesses have not given any specific and/or distinctive features and/or number of the said car at the inception to the police. As far as PW-1 Razia is concerned, it has been brought on record by the defence that the description given by her is an omission. PW-4 is a panch-witness to the discovery of car at the instance of accused persons, has stated that when he saw the car in the Court it was a white colour car. Thus a person who due to darkness could

not see the registration number or make of car and could not have seen the colour of seats in it as doors were locked, identifies it after 10 years due to its number plate though its colour was changed. This identification of car (Art.9) is after 10 years. Identity of car in this matter is the most important link. Even its owner PW-5 – Kishore or then PW-10 – Bahadursingh (Peon at Advent Pharma) are not asked to identify it. PW-11 – Kavishwar, a Chemist at Advent Pharma who speaks about visit of accused Zahir on 16.11.1984, though gives registration number of car, does not depose that he saw that car in company premises. In chief, at first place he speaks of visit of Zahir on 11.11.1984 while at other place he points out that date to be 16.11.1984. In xerox copy of visit book dated 19.11.1984, visit of PW-5 appears to be recorded as visit by one Kishore Sharma. Thus, last name of PW5 is not correctly recorded. Even entry of visit of Zahir on 16.11.1984 appears to be not proper. Name Zahir appears to be stated later on and at end vehicle number is also written. PW-11 mentions this visit book as inward register and its original is not produced by the prosecution. Thus, the entire evidence is not convincing to conclude visit of Zahir to M/s. Advent Pharma on 16.11.1984 or leaving of a car by him there. In our opinion, the prosecution has failed to prove by leading cogent evidence with respect to specifications of the car by which the accused persons along

with deceased Adil travelled on 15.11.1984.

A useful reference at this stage can be made to a decision of the Supreme Court reported in 2015(9) SCALE 513 in the case of Nizam & Ors. Vs. State of Rajasthan, wherein in paragraph-18 the Supreme Court has held that, where the time gap is long, it would be unsafe to base conviction on 'last seen theory'. It is further held that it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. In the present case, the deceased was last seen in the company of accused persons on 15.11.1984 at 11.30 a.m. The dead body was found/noticed on 16.11.1984 at about 7.30 a.m to 7.45 a.m. by Pandu Parade (PW-14) at village Durvesh, Tal-Palghar District-Thane. In view of the ration laid down by the Supreme Court in the case of Nizam & Ors (supra) the time gap between last seen together and finding of dead body is too long to hold the appellants guilty for the murder of Adil on the said count, only on the basis of last seen together theory. It is to be noted here that the accused persons have since beginning taken consistent stand that they departed with Adil at Andheri railway station. The said fact can also be enumerated from Exhibit 69 a letter written by the Senior Inspector of Police of Missing Persons Bureau to the Senior Inspector of Police of Kherwadi Police station. In our considered opinion, the appellants cannot

be held guilty for and only on this count. The prosecution has failed to establish the fact that the possibility of any other person other than the accused persons committing the murder of Adil, cannot be ruled out by leading succinct and cogent evidence in that behalf. It is also to be noted here that though the accused no.1 in presence of PW-6 pointed out the place where the dead body of Adil was thrown, the police of Manor police station were already aware of the said spot and therefore pointing of place by the accused no.1 loses its significance. The lapse of non-coordination between the two investigating agencies cannot be held to be an aggravating circumstance against the accused persons.

32 As far as the alleged motive behind the crime i.e. deceased Adil has separated from accused no.4 and started his own business, the newly started business of Adil was flourished and therefore the accused persons were having jealousy against the deceased Adil. The said motive has been proved by Razia (PW-1) and Smt. Khatunbi (PW-3).

33 The next circumstance of abscondance of the accused persons till their arrest itself cannot be treated as clinching circumstance against them. The learned Counsel for the appellants relied upon the decision of the Supreme Court reported in 1992 Cri. L.J. 2320 in the case of Rajinder Singh alias Kada Vs. State of Punjab wherein in paragraph-13 the Supreme

Court has held as under:

“ The abscondance of the accused relied upon by the High Court remains of no consequence. In the first place it is not a determining factor and not one which could outweigh the other material appearing on the record. It by itself does not establish the guilt of the appellant beyond reasonable doubt.

It is a settled principle of law that absconding may lend weight to the other evidence establishing the guilt of an accused, but, by itself, is hardly any evidence of guilt. The conduct of an accused making himself scarce for some period is relevant under S.8 of the Evidence Act and may be indicative to some extent of a guilty mind, but it would not be conclusive evidence of his guilt. Even innocent persons may, when suspected of grave crimes, attempt to evade arrest. Such is the instinct of self- preservation in an average human being. Absconding is a weak link in the chain of circumstances and is not conclusive either of guilt or a guilty conscience. Even assuming that the fact of absconding has been established by the prosecution, it cannot be held that the appellants were the author of the crime in the absence of evidence pointing to their guilt. Thus merely because the accused persons were absconding after a particular date itself cannot be treated as determining factor and their guilt in the present

offence.

34 The learned Counsel for the appellants then would contend that the alleged extra judicial confession given to Kishor Dadhich (PW-5) cannot be relied upon as it was given to a total stranger. In support of her contention, she relied upon the decision of the Supreme Court in the case of Tarseem Kumar Vs. The Delhi Administration reported in AIR 1994 SC 2585 wherein the Supreme Court has held that extra judicial confession made before stock witness who was casually knowing accused is not acceptable. In the present case also as we have stated in the forgoing paragraph, PW-5 Kishor Dadhich was a total stranger to the accused persons and the accused persons on two occasions confiding with him and making an extra judicial confession about their guilt, is highly improbable. PW-5 was neither their friend nor of acquaintance with whom they can easily make confession. It is further worth to be noted that even after the accused persons made confession with the said PW-5, PW-5 did not report to the police immediately. PW-5 has given clarification that as the accused no.4 has requested him not to mention the same to the police with a view to save his reputation, is unacceptable. We find the testimony of PW-5 is untrustworthy and unreliable.

35 This leads us to last circumstance of discovery of incriminating

articles at the instance of accused nos.2 and 3 from the Advent Pharma Company. The date of incident in the present case is stated to be between 15th November 1984 and 16th November 1984. The articles belonging to Adil Rashid were discovered at the instance of accused nos.2 and 3 from the Advent Pharma Company at Vapi on 20.3.1985 i.e. after about four months from the date of incident. It is to be noted here that the contemporaneous documents i.e. memorandum panchanama Exhibits 33 and discovery panchanama Exhibit 33-A are absolutely silent about the specification of the ditch/pit from where the accused no.3 Guddu discovered nylon strings, 10 torn pieces of Western railway season ticket, 9 pieces of torn visiting card, four torn pieces of photograph of a girl etc. It is to be noted here that the evidence of PW-8 and the said contemporaneous documents Exhibits 33 and 33-A are absolutely silent about the condition of the said articles found after a gap of four months that whether those were degraded, decomposed/smeared with soil or otherwise. The evidence depicts the picture that the said articles were in proper condition as if they were new. It is therefore very unsafe to rely on the evidence of PW-8 and those contemporaneous documents Exhibits 33 and 33-A (discovery panchanama) for basing the conviction of the accused persons on the said circumstance.

36 In view of the above, we are of the considered opinion that the prosecution has not proved the guilt of the appellants satisfactorily and beyond all reasonable doubts. We therefore give benefit of doubt to the appellants and allow the present appeal and set aside the conviction and sentences awarded to the appellants. The bail bonds of the appellants stand cancelled.

37 The Appeal is accordingly allowed.

(A.S. GADKARI, J.)

(B.P. DHARMADHIKARI, J.)