

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO. 432 OF 2012

1. **Balasaheb Gurling Todkari,**
Age. 51years, Occ: Agriculture,
 2. **Popat Dattu Mane,**
Age. 55 years, Occ: Agriculture,
 3. **Shivaji Tulshiram Koyalkar,**
Age. 58 years, Occ: Agriculture,
Nos. 1 to 3 R/o. Ambika Nagar,
Bale, Tal. North Solapur,
District: Solapur.
 4. **Chandrakant Shivaji Shinde,**
Age. 56 years, Occ: Agriculture,
R/o. Bijapur Naka Zopadpatti,
Solapur.
(at present lodged in Yerwada Central
Jail, Pune)
- ... Appellants
(Orig. Accused Nos. 5 to 8)

VERSUS

The State of Maharashtra,
At the instance of Foujdar Chawadi
Police Station, Solapur,
District : Solapur.

... Respondent

Shri U.R. Agandsurve, Advocate for appellant Nos. 1 & 3
Shri Ritesh Thobde, Advocate for appellant Nos. 2 and 4
Shri A.S. Shitole, APP for respondent State.

WITH

CRIMINAL APPEAL NO. 464 OF 2012**Revansidha @ Babu Gursiddhappa Loni,**

Age: 44 years, Occ: -

R/o. 194/5, Gurukrupa Mitranagar,

Samrat Chowk Budwar Peth,

District: Solapur,

At present Yerwada Central Jail,

Pune.

... Appellant
(Orig. Accused No.1)**VERSUS****The State of Maharashtra.**

--- Respondent

Shri D.G. Khamkar, Advocate for appellant

Shri A.S. Shitole, APP for respondent State.

WITH**CRIMINAL APPEAL NO. 597 OF 2012**1. **Navnath Bhikuji Salunkhe,**

Age 25 years,

R/o. Ambika Nagar, Bale,

Tal. North Solapur,

2. **Ambadas Hanumantu Talathi,**

Age 32 years,

R/o. Shama Nagar Zopadpatti,

Modi, Solapur.

(at present lodged in Yerwada
Central Jail, Pune.)... Appellants
(Orig. Accused Nos.9 and 11)**VERSUS****The State of Maharashtra,**

At the instance of Foujdar Chawadi

Police Station, Solapur,

District : Solapur.

... Respondent

Shri Ritesh Thobde, Advocate for appellant No.1
 Shri U.R. Agandsurve, Advocate for appellant No.2
 Shri A.S. Shitole, APP for respondent State.

WITH

CRIMINAL APPEAL NO. 693 OF 2012

Sanjay Narayan Zingdekar,
 Age 26 years,
 Residig at L Modi Khana,
 Zopadpatti, Solapur.
 Presently lodged in Yerwada
 Central Prison, Pune.

... Appellant
 (Orig. Accused No.10)

VERSUS

The State of Maharashtra,
 Through Foujdar Chawadi
 Police Station, Solapur.

... Respondent

Shri Madhav J. Jamdar, Advocate for appellant
 Shri A.S. Shitole, APP for respondent State.

WITH

CRIMINAL APPEAL NO. 1112 OF 2012

Malang Shankar Shende,
 Age - 52 years, Occu. - Driver,
 R/at – Garibi Hatav Zopadpatti No.2,
 Bijapur Naka, Solapur,
 At present Yerwada Central Prison, Pune..

... Appellant
 (Orig. Accused No.4)

VERSUS

The State of Maharashtra.

... Respondent

Shri P.G. Sarda, Advocate for appellant
Shri A.S. Shitole, APP for respondent State.

...
AND

CRIMINAL APPEAL NO. 169 OF 2013

Basavraj Shivsharan Desai

... Appellant
(Orig. Accused No.3)

Versus

The State of Maharashtra

through Faujdar Chavdi Police Station

--- Respondent.

Shri Swapnil Ovalekar, Advocate appointed by Legal Aid Committee
to represent appellant
Shri A.S. Shitole, APP for respondent State.

**CORAM :- SMT. V. K. TAHILRAMANI AND
INDIRA K. JAIN, JJ.
RESERVED ON : 12TH MARCH, 2015
PRONOUNCED ON : 09TH JUNE, 2015**

JUDGMENT [Per Indira K. Jain, J.] :

These appeals arise out of judgment and order dated 21st March, 2012 passed by the learned Ad-hoc Additional Sessions Judge, Solapur in Sessions Case No.60 of 2006. By the said judgment and order, trial Court convicted the Appellants

original Accused Nos.1 and 3 to 11 under sections 364, 365, 368, 302, 120-B, 201 read with 149 of the Indian Penal Code.

The details of the punishment under various sections are as under:

Accused Nos.	Under Sections	Sentence
1 and 3 to 11	120-B of the Indian Penal Code	Rigorous imprisonment for 5 years and fine of Rs.5,000/- each in default 1 year 3 months imprisonment.
1 and 3 to 11	364 read with 149 of the Indian Penal Code	Rigorous imprisonment for 10 years and fine of Rs.5,000/- each in default imprisonment of 2 and 1/2 years each.
1 and 3 to 11	368 read with 149 of the Indian Penal Code	Rigorous imprisonment for 3 years and fine of Rs.1,000/- each in default further imprisonment of 9 months each.
1 and 3 to 11	302 read with 149 of the Indian Penal Code	Imprisonment for life and fine of Rs.1,000/- each in default imprisonment for 6 months.
1 and 3 to 11	201 read with 149 of the Indian Penal Code	Rigorous imprisonment for 2 years and fine of Rs.1,000/- each in default further imprisonment for 6 months each.

2] Accused No.2 Basavraj @ Basu Gurusidhappa Loni was acquitted by the learned trial Judge of all the offences referred above.

3] For the sake of convenience we shall refer the Appellants as they were referred before the trial Court.

4] The prosecution case briefly stated is as under:

That, Shakuntala and Brahrambika were the wives of Gurusidhappa. Shakuntala and Gurusidhappa had two sons and two daughters viz. Mallinath, Chinappa, Shantabai and Sridevi,

Basavraj @ Basu Gurusidhappa Loni, Revansidha @ Bapu Gurusidhappa Loni, Nagratna and Mahadevi, were two sons and two daughters of Mallinath from Brahrambika. Victim Rajesh was the only son of Mallinath and complainant Sunanda.

5] According to prosecution, Complainant Sunanda and her son Rajesh were residing on the second floor, Revansidha alongwith his family was residing on the ground

floor and Basavraj was residing on the first floor of the same building situated at Budhwar Peth, Samrat Chowk, Solapur. They were running business in the name and style “Gurusidhappa M. Loni” dealing in manufacturing food grains, chillies grinding machineries and their spare parts. They had a shop and they were also running lodge “Vijay” and “City Palace”. It was a joint family business looked after by Basavraj, Revansidha and Rajesh.

6] It appears that Rajesh used to leave home for factory at around 09:00 am. In the afternoon at 02:00 pm, he was going home for lunch. Immediately after lunch he used to go to factory and then returning at about 09:00 p.m. or so after closing the factory. Some time, Rajesh was going for dinner with friends outside in hotel and returning home.

7] It is the prosecution case that Revansidha @ Bapu and Basavsidha @ Basu used to raise quarrel with Rajesh. It was relating to business, properties and parking of vehicles. There were two four wheelers i.e. one Ambassador Car and one

Indica Car which were to be used by them for business purpose. It is alleged that Rajesh was denied use of vehicles for business purpose. Both Revansidha and Basavsidha were dominating Rajesh in business. As use of vehicle was denied to him, Rajesh purchased a Santro Car before 8 months of the incident. Revansidha and Basavsidha did not like purchase of Santro Car by Rajesh. There was altercation between them and Rajesh on purchase of new vehicle. Both the brothers were annoyed with Rajesh as he used to park his car in the bungalow.

8] On 17th September, 2005 at around 09:00 pm, Rajesh came home. He was served food. He did not like food and so at around 10.30 p.m., he went to hotel to bring the food. While he was returning, Revansidha called Rajesh and asked him to remove his vehicle. There was hot exchange between Revansidha and Rajesh on parking of car. That time, Revansidha slapped Rajesh and threatened to assault him. Sunanda intervened and took Rajesh home. Revansidha passed adverse remarks against Sunanda. Wife of Revansidha

also came there and tried to take her husband inside the house, but Revansidha slapped her too.

9] On 19th September, 2005, as usual, Rajesh was to leave for factory at about 09:00 a.m. He received telephonic call from Revansidha @ Bapu that he had fallen down in the factory and sustained injuries to his leg. Rajesh immediately rushed to the factory. It was informed to wife of Revansidha also. When Rajesh reached the factory, Revansidha told him that he was feeling giddy and therefore, he fell down. Thereafter, Rajesh returned home.

10] On 20th September, 2005 (Tuesday) at around 09:00 a.m. Rajesh went to factory. He came home for lunch at 2.00 p.m. and at 2.30 p.m. went back to factory. Being Tuesday, Puja was to be performed at the house of Rajesh. So, while leaving the house, he asked his mother to arrange for Puja by the time he returns from factory. Accordingly Sunanda made arrangements for Puja. Till 08:00 pm, Rajesh did not come to the house. So, Sunanda called Rajesh on his mobile phone. It

was switched off. Sunanda was surprised as Rajesh was never keeping his mobile on switched off mode. She was worried and tried to contact at the shop. Satish was the servant working at the shop. He received call from Sunanda. She inquired from him about Rajesh. Satish replied that Rajesh and Bapu @ Revansidha had gone to a shop in search of mobile. After some time, again Sunanda called at the shop. Satish informed her that Rajesh had not returned to the shop. Third time, Sunanda called and that time, Satish told her that Rajesh had gone alongwith his friends. Sunanda was waiting for her son till 10:00 p.m. She inquired from Satish, whether there was any quarrel between Bapu and Rajesh. Satish told her that Rajesh had gone with his friends in a car and Bapu had left for home.

11] Sunanda then informed Revansidha on phone that Rajesh had not come back. It is alleged that Revansidha got annoyed and told her that Rajesh was not a child and he must have gone with his friends. As no one was helping Sunanda to find out whereabouts of her son Rajesh, she phoned her nephew Gururaj and informed him that Rajesh was missing and

she was worried about him. Thereafter, Gururaj alongwith his friend went in search of Rajesh. They had been to the house of Sachin Ashtekar one of the friends of Rajesh. But Rajesh was not found any where.

12] One Qadar was the driver working with Rajesh. Sunanda inquired about Rajesh from Qadar. He told her that Rajesh had gone with Revansidha on the previous night to purchase a mobile.

13] Sunanda then went to the house of Revansidha. Again, she informed him that whereabouts of Rajesh could not be traced. That time, Revansidha and his brother Basavsidha got annoyed and did not help Sunanda in search of whereabouts of Rajesh.

14] Sunanda then went to Tarti Naka Police Chawki and lodged missing report. Initially PSI More inquired into the missing report. Later, it was handed over to PI Shankar Chavan (PW 37). On the report of Sunanda, Missing Entry No.25 of

2005 was recorded. During inquiry, PI Chavan interrogated Complainant Sunanda. It was revealed that due to property dispute, frequent quarrels and dispute on parking of vehicles, Rajesh was kidnapped by Revansidha and Basavraj on 20th September, 2005 at around 07:00 p.m. from the premises of Loni Firm situated at Solapur. On 19th November, 2005, complaint was lodged by Sunanda. PI Chavan recorded complaint lodged by Sunanda and forwarded the same to Foujdar Chawadi Police Station, Solapur.

15] On the basis of report of Sunanda, Crime No.261 of 2005 was registered at Foujdar Chawadi Police Station for the offences punishable under Sections 364, 365, 120-B read with 34 of the Indian Penal Code. Investigation was entrusted to PI Chavan.

16] During investigation, I.O. visited spot from where Rajesh was kidnapped. Spot Panchanama was drawn in the presence of two Panch Witnesses, Satish Patil and Pandit. It was found that Revansidha and Basavraj were absconding. In

search, Revansidha was found in a lodge at Hubli. On 20th November, 2005, he was taken in custody.

17] On 21st November, 2005, two police officials were sent to Pune to arrest Basavraj Desai. Basavraj Desai was arrested and brought to Solapur. In further investigation, two mobile phones were recovered from Revansidha. They were seized and its seizure Panchanama was drawn in the presence of Panchas.

18] On 22nd November, 2015, both the accused were arrested and produced before the learned Judicial Magistrate First Class, Solapur. The police custody of these accused was sought.

19] On 23rd November, 2005 when Basavraj-Desai was in police custody one mobile found with him was seized. On the same day, Basavraj-Desai had shown spot to police where they got down for purchase of mobile. During interrogation Basavraj-Desai named some other persons as accused. One mobile

phone was seized from Padmakar Waghmode. One Tata Sumo was seized from Malang Shende. During investigation search of house of Revansidha was taken. One revolver was found in his house. It came to be seized under Panchanama. A motorcycle of Chandrakant Shinde, a mobile from Umesh Popat were recovered. Supplementary statement of Sunanda was recorded. Many other witnesses were examined in the course of investigation.

20] When investigation of C.R. No.261 of 2005 registered at Foujdar Chawadi Police Station, Solapur was in progress, CPI Najirsab Mokashi attached to Baswan Bagewadi Police Station, received a telephonic call on 21st September, 2005 at 03:00 pm from PSI, Kolar Police Station that a dead body of an unknown person was found lying on the boundary of village Shirnal in the land belonging to Gurupudappa. On receiving message, CPI Mokashi went to the spot. He took over investigation from PSI, Kolar Police Station, which was within the jurisdiction of Baswan Bagewadi Police Station. CPI Mokashi drew Inquest Panchanama of the dead body of

unknown person aged between 25 and 30 years. Several injuries were noticed on the dead body. CPI Mokashi recorded statements of witnesses who were present on the spot. One Green Plastic Rope, earth mixed with blood and simple earth were seized from the spot. Accordingly, Spot Panchanama was drawn before the Panchas. CR No.175 of 2005 under Sections 302 and 201 of the Indian Penal Code was registered at Kolar Police Station. PI Chavan collected the papers of CR No.175 of 2005 from Kolar Police Station. The photo of dead body was shown to mother of Rajesh and other witnesses. They identified the same as of Rajesh.

21] In further investigation blood stained clothes and ornaments on person of deceased Rajesh, identified by complainant Sunanda were seized. Investigating Agency prepared a CD of visits to all the places. CDR of the calls from mobiles of accused was collected. In all 11 accused were found involved and they were arrested. As many as 30 different Panchanamas were drawn. The seized muddemal articles were forwarded to CA. On completing investigation, charge-

sheet was submitted to the Court of Judicial Magistrate First Class, Solapur who in turn committed the case for trial to the Court of Sessions at Solapur.

22] Charge came to be framed against the Appellants vide Exhibit 39. Appellants accused pleaded not guilty to the charge and claimed to be tried. Their defence was of total denial and false implication. Prosecution examined in all 37 witnesses. On going through the evidence of prosecution witnesses and hearing the parties, learned Adhoc Additional Sessions Judge convicted and sentenced the Appellants as stated in paragraph No.1 above. Hence these appeals.

23] We have heard the learned Advocates for the Appellants and the learned APP for State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, the Judgment delivered by the trial Court and the evidence on record, for the reasons stated below, we are of the opinion that prosecution has failed to bring home the guilt of the

accused beyond reasonable doubt and the impugned judgment and order of conviction and sentence does not sustain for the reasons stated hereinbelow.

24] Needless to state that in a case of murder, exclusive burden lies on the prosecution to establish that death of a human being is caused. Further, the prosecution has to overrule by adducing reliable and convincing evidence the possibility of natural, accidental or suicidal death indicating totally the homicidal death beyond reasonable doubt. In the present case, it can be seen from the judgment of the trial court, that no specific finding on the factum of homicidal death has been recorded. To prove that death in question was a homicidal death evidence of the Medical Officer, who performed Post Mortem on the dead body was essential. Prosecution in its own wisdom chose not to examine the Doctor who performed the Post Mortem.

25] Prosecution examined PW-2 Vitthal Dalwai, PW-3 Sagarappa Jakkal, PW-24 Gurupadappa and PW-35 CPI

Mokashi, to establish that the death in question was unnatural death. According to PW-2 Vitthal, Police visited their village. He saw that a dead body was lying in a pit besides road of Kirsyal village in the farm of Gurupadappa. There were injuries on the head of the dead body. Those injuries were probably caused by assault with stones. PW-2 could not identify the dead body from the photograph shown to him but stated that it was of the person of age group of around 36 years or so.

According to PW-3 Sagarappa, who acted as Panch on Inquest Panchanama, he saw the dead body of a person aged about 25 years or so lying between Kirsyal village and Nirgundi village. It was in the farm of PW-34 Gurupadappa. He stated that one plastic rope was lying near the dead body. He did not see the blood lying on spot. He saw one injury on the head of dead body. He stated that Inquest Panchanama was drawn in his presence.

PW-34 Gurupadappa was the owner of field in which dead body was found. He stated that on 20.09.2005, at 8.00

a.m. he had seen dead body of young boy in his land at village Krisyal on Bagewadi road. One gunny sack and one plastic rope was also lying there. The evidence of this witness creates doubt that the dead body was of Rajesh as he was found missing after 7.00 p.m. on 20.09.2005.

Even otherwise from the evidence of the above 3 witnesses, it cannot be positively stated that the dead body found in the field of PW-4 Gurupadappa was the dead body of Rajesh.

PW-35 – CPI Mokashi was attached to Baswan-Bagewadi police station at the relevant time. On 21.9.2005, at 3.00 p.m. he received a telephonic call from PSI Kolar Police Station that an incident of murder was reported. It took place on Baswan-Bagewadi – Nirgundi Road. On receiving information, he rushed to the spot and conducted Inquest Panchanama on the dead body. CPI Mokashi stated that dead body was of unknown person aged about 25 to 30 years. He drew Inquest Panchanama in the presence of Panch witnesses. The injuries which were found on the body were mentioned in the Inquest Panchanama.

From Inquest Panchanama (Exhibit 224) the oral evidence of panch witnesses and the testimony of PW-35 CPI Mokashi, it is apparent that the dead body was not identified by any one of them. Prosecution, however, placed reliance on the photograph of the dead body shown to PW-5 Sunanda mother of deceased Rajesh. She identified that the dead body shown in the photograph was of her son Rajesh. The clothes and ornaments on the person of deceased which were seized at Kolar police station were also shown to complainant Sunanda. She identified the same as of her son Rajesh. On the basis of photos articles A to E and clothes and ornaments of the deceased, prosecution tried to contend that death was homicidal death. It is pertinent to note that a nylon rope was found near the dead body. Except head injury, no other injuries were noticed on the dead body. In such circumstances, examination of the Doctor who performed Post Mortem was utmost necessary. Non-examination of the Medical Officer creates doubt regarding the cause and mode of death as homicidal.

Even if it is assumed for a moment that the dead body which was recovered from the field of PW-34 Gurupadappa was of a human being and particularly of Rajesh and the death was homicidal, that *ipso facto* would not relieve the prosecution from proving that the accused were responsible for causing the death.

26] There is no direct evidence in the matter. So far as authorship of the accused is concerned, prosecution case exclusively rests on circumstantial evidence. On the law relating to circumstantial evidence, learned counsel for accused No.1 placed reliance on ***Balwinder Singh Vs. State of Punjab***¹ and learned counsel for accused No.10 relied upon ***Dhan Raj @ Dhand Vs. State of Haryana***².

We have gone through these authorities referred by learned counsel for accused. They reiterate the settled propositions of law on circumstantial evidence.

It may be stated that for a crime to be proved, it is not necessary that the crime must be seen to have been committed and must, in all circumstances, be proved by direct

1 1996 Cri. L. J. 883 (Supreme Court)

2 2014 (6) SCC 745

or ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or “factum probandum” may be proved indirectly by means of certain inferences drawn from “factum probans” i.e. evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence on various other facts in issue that taken together forms a chain of circumstances from which the existence of a principal fact can be legally inferred or presumed.

27] It has been consistently laid down by the Apex Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. A legal trend would further show that for a conviction in murder case on circumstantial evidence, following conditions must be fulfilled :

- i) The circumstances from which the conclusion of

guilt is to be drawn should be fully established.

ii) 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.

iii) The circumstances should be of a conclusive nature and tendency.

iv) They should exclude every possible hypothesis except the one to be proved.

v) 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 and the accused alone.

28] Keeping in view the ratio laid down by the Hon'ble Apex Court, we have to examine the circumstantial evidence on which reliance is placed by the prosecution. In the present case, prosecution has relied upon the following incriminating circumstances, which according to the prosecution, prove the

guilt of the accused beyond reasonable doubt.

[a] Deceased was last seen in the company of accused Nos. 1 and 3.

[b] Recovery of incriminating articles at the instance of accused Nos. 1,3,4,9,10,11 and sons of accused Nos. 6 and 8.

[c] Call Details Record (CDR) in respect of accused Nos. 1,3,6 and 8.

[d] Motive against accused No.1.

At the outset, it is to be mentioned here that PW-1, PW-20, PW-27 and PW-33, are the translators. Evidence of PW-10, PW-12, PW-13 and PW-26 is not of any assistance to the prosecution as they have been declared hostile and they have not supported the prosecution.

29] **[a] Deceased was last seen in the company of accused Nos. 1 and 3 :-**

On the law relating to theory of Last Seen Shri Khamkar, learned counsel for accused No.1 placed reliance on **Mallesappa Vs. State of Karnataka**³ wherein the Hon'ble Apex

³ 2008 ALL MR (Cri.) 280 (S.C.)

Court held as under:-

“The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.”

In the case on hand, PW-4 Rahematulla Samiullah Qadri (Exhibit 110) is the star witness on the theory of last seen. Rahematulla was working as Driver on the vehicles of the firm. In 2005, he was driver with accused No.1. He used to clean the vehicles and proceed to the house of Revansidha. He was also attending the domestic work of the family of accused No.1. After attending domestic work, he was going to the shop where accused No.1 was running a flour mill. From 9.00 a.m. to 2.00 p.m. PW-4, Rahematulla was working in the

flour mill. After one hour recess for lunch, he was returning to the shop and remaining there till 8.00 p.m. or so.

It appears from the evidence of PW-4 Rahematulla that on 20.9.2005, at around 7.30 p.m. he was sitting in front of the shop. Satish Huge (PW-36) and other servants were lighting incense stick (Agarbatti). That time, one person came with a mobile to the shop. He showed that mobile to Revansidha in his cabin inside the shop. Then Revansidha called Rajesh. He asked PW-4 Rahematulla to keep watch on the shop as he was proceeding to purchase another mobile. PW-4 Rahematulla identified the person in the dock who came with mobile. He was accused No.3 – Basavraj Desai. It is stated by PW-4 Rahematulla that he saw Revansidha, Rajesh and Basavraj Desai then proceeding on foot towards Bhagwat Theater. At around 9.00 p.m. or so, Revansidha alone returned to the shop and asked Rahematulla to remove the motorcycle of Rajesh which was parked inside the shop and to park the same outside. Accordingly, Rahematulla removed the motorcycle of Rajesh from the shop and parked it outside. Thereafter, they

closed the shop and went away.

In his further evidence, Rahematulla stated that on 21.9.2005, at about 9.30 a.m. he went to the house of Revansidha. Mother of Rajesh called him from second floor while he was cleaning the car. So, Rahematulla went up. She enquired from him whether he was knowing anything about Rajesh as he had not returned home since night. That time, Rahematulla informed her that on the previous evening Revansidha, one person and Rajesh had proceeded together towards Bhagwat theater. Thereafter, Sunanda, mother of Rajesh, came down and made enquiry from accused No.1 Revansidha.

Another witness on the theory of last seen together examined by the prosecution is PW-36 Satish Huge. He was an employee in Gurusiddhappa Loni firm. On 20.09.2005, in the evening at 7.00 p.m, or so, he was in the shop. He stated that he alongwith Rajesh, Bapu Loni and one employee Qadar was present in the shop. As heater was not working, he went

to Dnyaneshwar Electronics for getting a coil. At 7.30 p.m., he came back to the shop. He was lighting incense stick (Agarbatti). One person came there with a mobile. He identified accused No.3 Basavraj Desai in the dock as the same person. He stated that the said person had shown mobile to Bapu. Then Bapu called Rajesh. Three of them proceeded on foot towards Bhagwat Theater to see a mobile.

It appears from his evidence that then Bapu reached the shop at around 9.30 p.m. Sunanda - mother of Rajesh called on phone and enquired about Rajesh. Satish picked up the phone and informed her that Rajesh, Bapu and one person had gone towards Bhagwat Theater for seeing a mobile. He admitted in unequivocal terms in the extensive cross-examination that third time when mother of Rajesh called on phone and enquired about Rajesh, he informed her that Rajesh had gone in a car alongwith his friends.

If evidence of PW-5 complainant - Sunanda is looked into, it can be seen that on 20.09.2005, Rajesh had been to the house for lunch at 2.30 p.m. He asked her to prepare for Puja and told that he would come back by 8.00 p.m.

As he did not return she tried to contact him on mobile. His mobile was switched off. She was worried as Rajesh was never keeping his mobile on switched off mode. So, she phoned at the shop at 9.30 p.m. PW-36 Satish received the phone. When she enquired, he told her that Satish was taken by Revansidha to purchase a mobile. Thereafter again, Sunanda phoned at the shop. Satish picked up the phone. He informed her that Rajesh had gone in a car with his friend and Bapu Malak had left for home.

It is significant to note that the statement of these two star witnesses PW-4 Rahemtullah and PW-36 Satish came to be recorded on 26.11.2005 i.e. after 2 months of the incident. There is no whisper in the entire evidence of the witnesses including the investigating Officer to explain delay in recording statements. Further admissions elicited in cross examination of PW-4 Rahemtulla and PW-36 Satish, clearly shows that last seen ceased to be a circumstance against accused Nos. 1 and 3 as according to witnesses and complainant, Rajesh had gone with his friend in a car and accused No.1 Revansidha returned to the house.

30] In this background, we hold that theory of last seen is not established by the prosecution against accused Nos. 1 and 3. So far as other accused are concerned, it is not the prosecution case that deceased Rajesh was last seen in their company.

31] **[b] Recovery of incriminating articles against accused Nos. 1,3,4,9,10,11 and sons of accused Nos. 6 and 8 :-**

So far as recovery of incriminating articles from the accused is concerned, according to prosecution, following articles were recovered in pursuance to the information given by the accused.

Accused Number	Item recovered
Accused No.1	[I] Two mobiles [ii] 0.32 Bore Revolver and 5 bullets
Accused No.3	A Mobile
Accused No.4	[I] Tata Sumo [ii] one knife [iii] one Nylon Rope [iv] one pant
Accused No.6	One mobile from his son Umesh

Accused No.8	[I] One mobile from his son Ramesh [ii] One motorcycle
Accused No. 9	[i]Shirt [ii]Pant
Accused No.10	[I] Knife [ii] Gold ring [iii] Gold Chain [iv] Shirt.
Accused No.11	[I] Shirt [ii] Pant [iii] Sattur with blood stained mud

On the law relating to recovery of articles, particularly, under Section 27 of the Indian evidence Act, learned counsel for accused No.1 strongly relied upon **Salim Akhtar alias Mota Vs. State of Uttar Pradesh⁴**, learned counsel for accused Nos. 5 to 8 and 9 to 11, placed reliance on **Vijay Kumar Vs. State of Rajasthan⁵**.

In **Wakkar and another. Vs. The State of Uttar Pradesh⁶** relied upon by the learned counsel for accused No.10, the Hon'ble Apex Court held as under:

“The scope of this provision was explained by the Privy Council in the well known case of Pulukuri Kottaya and others v.

4 2003 Cri. L. J. 2302 (Supreme Court)

5 (2014) 3 Supreme Court Cases 412

6 2011 (3) SCC 306

Emperor, AIR 1947 PC 67, wherein it was held that it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to the past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Therefore, what is admissible is the place from where the polythene bag containing pistol and other articles was allegedly recovered. The fact that some terrorist organisation had given the pistol and other articles to the appellant or its use would not be admissible."

Keeping in view the settled law in respect of recovery of articles in pursuance to the information given by accused, under Section 27 of the Evidence Act, it would be essential now to consider the prosecution evidence.

PW-7 Dinesh Suhas Pandit is the Panch Witness examined on the following 30 panchanamas recorded within a span of 2 months by the investigating agency.

Sr. No.	Date of Panchanama	Type of Panchanama	Exhibit No.
1	20/11/2005	Spot Panchanama	124
2	21/11/2005	Common Arrest panchanama of accused No.1 Revansidha and accused No.2 Basavraj and seizure of two mobiles from accused No.1 Revansidha	125
3.	23/11/2005	Arrest-cum-seizure Panchanama of mobile from accused No.3 Basavraj Desai	126
4.	24/11/2005	Seizure Panchanama of Tata Sumo and green nylon rope	133
5.	26/11/2005	Seizure of Nokia 6600 mobile from Sachin Waghmode	134
6	26/11/2005	Seizure Panchanama of 0.32 bore revolver and 5 bullets at the instance of Revansidha Loni	135
7	26/11/2005	Seizure Panchanama of mobile of motorola company and motorcycle of Boxer company from Ramesh Chandrakant Shinde, son of accused No.8	136
8	26/11/2005	Seizure Panchanama of mobile of Nokia company from Umesh mane	137
9	28/11/2005	Memorandum Panchanama with respect of burning of certain papers – accused No.2 Basavraj Loni	138
10	28/11/2005	Recovery Panchanama of burnt papers – accused No.2 Basavraj Loni	139

11	29/11/2005	Memorandum Panchanama with respect to readiness to show knife – accused No.4 Malang Shende	140
12	29/11/2005	Seizure Panchanama of knife – accused No.4 Malang Shinde	141
13	30/11/2005	Seizure Panchanama of clothes of accused No.4 Malang Shende	143
14	30/11/2005	Seizure Panchanama of clothes of accused No.9 Navnath Salunke	144
15	01/12/2005	Memorandum Panchanama with respect to readiness to show knife – accused No.10 Sanjay Zingadekar	145
16	01/12/2005	Seizure Panchanama of Knife and clothes - accused No.10 Sanjay Zingadekar	146
17	01/12/2005	Seizure Panchanama of gold chain – accused No.10 Sanjay Zingadekar`	147
18	02/12/2005	Seizure of one American diamond gold ring – accused No.10 Zanjay Zingadekar	148
19	13/12/2005	Panchanama of opening and again sealing of two knives for showing them to doctor	149
20	15/12/2005	Seizure Panchanama of clothes of deceased Rajesh Loni	150
21	13/01/2006	Arrest Panchanama of accused No.11 Ambadas Talathi	151
22	15/01/2006	Seizure Panchanama of accused No.11 Ambadas Talathi	152

23	16/01/2006	Memorandum Panchanama with respect to readiness to show Sattur – accused No.11 Ambadas Talathi	153
24	16/01/2006	Recovery Panchanama of Sattur – accused No.11 Ambadas Talathi	154
25	18/01/2006	Panchanama of opening and again sealing of Sattur for showing them to Doctor	155
26	19/01/2006	Seizure of Video CD prepared by Videographer PW 30 Anand Arun Gangaji	156
27	19/01/2006	Panchanama of record of Call details of mobiles of Chandrakant Shinde, Popat Mane and Basavraj Desai received from IDEA Company 27 pages	157
28	19/01/2006	Seizure Panchanama of Airtel Company call details report 58 pages	158
29	19/01/2006	Seizure Panchanama of IDEA company call details report - 35 pages	159
30	19/01/2006	Seizure Panchanama of IDEA company call detail report – 33 pages	160

32] Commenting upon the manner in which articles were seized learned counsel for accused submitted that no efforts were made to get independent Panch witness and this itself is enough to discard the evidence of Panch witness. In

support thereof, learned counsel relied upon **Salim Akhtar alias Mota Vs. State of Uttar Pradesh (Supra)**, in which the Hon'ble Apex Court held as under :

“P.W. 1, N.P. Rai, has stated that after reaching P.S. Lisari Gate, he had summoned two public witnesses, namely, Vipin and P.W.3 Anuj Kaushik out of whom only one has been examined in Court. P.W. 3 has deposed that he works as a photographer for a magazine known as 'Sachi Duniya'. He had received a phone call from his office that there was a traffic jam near Medical College and accordingly he started for the said place on his scooter to take photographs. However, he saw some police personnel near Lisari Gate Chaupal and inquired from them why they were standing there and on their asking he accompanied the police party. He has admitted that he often goes to the police stations in the city and he had been paid Rs. 640/- for taking the photographs but he had not issued any receipt for the same. The statement of this witness shows that he is a frequent visitor to the police stations and this may be on account of the fact that the police may have been obliging him by asking him to take photographs on those occasions in which taking of photographs was considered necessary. It is not possible to accept his statement that though he was paid Rs. 640/- by the police for taking the photographs but he did not issue any receipt. P.W. 1

has admitted that though Lisari Gate locality was only two or three furlongs from the place from where recovery was made but no witness was summoned there. It, therefore, shows that the police made no effort to get any independent public witness at the time when the alleged recovery was made at the pointing out of A-1 and the only public witness examined, appears to be a person who was not only intimate but was also obliged to them.”

33] In the instant case facts are identical. It is significant to note that all disclosures, discoveries and even arrests have been made in the presence of PW-7 Dinesh. He admitted in cross-examination that Faujdar Chawadi Police Station was at the distance of 4-5 Kilometers from his house. His evidence shows that within a span of two months, he visited police station for about 18 times. According to him, he used to sit in the shop of his paternal uncle. His paternal uncle was running a Xerox/STD shop. The shop used to open at 9.00 a.m. and close at 10.00 p.m. He stated that he was not paid cash by way of salary but his uncle was maintaining his family comprising his parents, brother and himself. He had no other business or trade. Since 10 to 12 years he was sitting in his

uncle's shop. He admitted that there were many residential houses surrounding Faujdar Chawadi police station. In view of these admissions, moot question that arises here is whether reliance can still be placed on the testimony of PW-7 Dinesh Pandit.

So far as requirements of law are concerned, in such cases, Investigating Officer is required to call upon some independent witness of the locality and if such person is not available, or is not willing to act as panch then another independent and respectable person can be called as a Panch witness. Without any further consideration of the matter, one thing can be more or less with certain amount of conclusiveness stated here, that choosing a person who is not of the locality as a Panch on 30 Panchnamas, when other independent Panch could have been easily available, creates a serious doubt. The ingenuity devised by the prosecution in the instant case knew no bounds. From the admissions elicited in cross-examination of PW-7 Dinesh, it cannot be attributed to be sheer coincidence. On the contrary, it appears to be deliberate, as a person who was working without salary was chosen as a Panch on series of

panchanamas recorded during the period of 2 months. Investigating Officer could not give plausible explanation for not choosing independent Panch witnesses for number of panchanamas. The manner in which investigating agency had acted creates strong suspicion about the fairness of investigation as it frustrates the object of :-

[i] preventing unfair dealings on the part of investigating agency;

[ii] safeguarding the rights of the subject and to ensure that search and seizure is conducted honestly;

[iii] ensuring confidence in the public in general that anything incriminating which may be found shall really be found and shall not be planted;

[iv] to obtain as reliable evidence as possible and exclude the possibility of concoction and malpractice of any kind; and

[v] to ensure genuine search and recoveries.

34] In the light of the above, we do not find it necessary to go into further details of evidence of PW-7 Dinesh on the

recoveries of various articles at the instance of accused persons. Suffice it to state, that under the circumstances brought on record, his evidence does not inspire confidence and no reliance can be placed on such testimony. Even otherwise, mere proof of panchanamas would not help the prosecution unless recovery of various articles are connected with the commission of the alleged crime by the accused.

PW-19 Avinash Patil had carried 25 articles alongwith one Tata Sumo jeep to the Chemical Analyser. His evidence shows that the articles were not in sealed condition. This important admission is elicited in his cross-examination. PW-35 CPI Mokashi also admitted in cross-examination that Muddemal was not sealed. None of the CA reports connect either of the accused with the commission of any act as the results were mostly inconclusive. If it is so there is no point in considering the evidence of PW-8 Maruti Vedphatak, PW-11 Sohail Abdul K. Alim, PW-14 Santosh Pawar, PW-15 Munna Kazi, PW-16 Vaibhav Kadam and PW-22 Sachin Ashtikar as it would be a futile exercise and better course would be to keep their testimonies out of consideration. In this premise, we hold

that prosecution has failed in proving this circumstance too.

35] [c] Call Details Record (CDR) in respect of accused Nos. 1,3,6 and 8 :-

It is the prosecution case that, at the relevant time, there was exchange of calls amongst accused Nos. 1,3,6 and 8. To prove CDR, prosecution examined PW-24 Sachin Shinde and PW-32 Suresh Shilgire. PW-24 Sachin Shinde (Exhibit 199) was serving as Nodal Officer with Idea Cellular Ltd. On 28.11.2005, company received a letter from Deputy Police Commissioner to provide call details of the mobiles mentioned in the letter. Accordingly, call details were furnished. Same are proved at Exhibits 157 (1) to (157). These call details were pertaining to mobiles of accused No.1 son of accused No.6 and accused No.8.

PW-32 Suresh Shilgire (Exhibit 218) was working in Airtel company. Police visited the company and sought information regarding incoming and outgoing calls on mobile of Vaibhav Kadam, which was stolen and allegedly used by accused No.3 Basavraj Desai. This mobile was recovered from

accused No.3. CDR report is at Exhibit 219.

On CDR, learned counsel for accused No.1 strenuously submitted that there is no compliance of the mandatory provisions of Section 65B of the Indian Evidence Act and therefore, CDR reports cannot be admitted in evidence. In support, Shri Khamkar, learned counsel placed vehement reliance on **Anvar P. V. Vs. P. K. Basheer and others**⁷. In this case, the Hon'ble Supreme Court overruled its previous decision in **AIR 2005 SC 3820** and held in para 19 & 22 as under:-

“19. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete Code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.”

“22. The evidence relating to electronic record, as

⁷ AIR 2015 Supreme Court 180

noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

36] It is pertinent to note that in the State **(NCT of Delhi) Vs. Navjot Sandhu** two Judge Bench of the Hon'ble Apex Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerized records of the calls pertaining to the cellphones it was held that secondary evidence is permissible in the absence of certificate under sub-section (4) of Section 65-B of the Indian Evidence Act. This judgment was overruled in Anvar's case (supra).

In the present case the requisite certificate on Call Details Record as per law was not filed. In view of the ratio laid down in the above authority absence of such certificate would render the CRD inadmissible in law. Being inadmissible, same cannot be considered.

37] **[d] Motive :-**

Prosecution had attributed motive to accused No.1 to eliminate the life of Rajesh in view of the disputes over :-

[a] Business;

[b] landed property; and

[c] parking of vehicles.

To establish motive, prosecution relied upon evidence of PW-4 Rahemtulla, PW-5 Sunanda, PW-6 Gurupad, PW-21 Sunita, PW-23 Shivsharnappa, PW-25 Vasanti John, PW-28 Kumar Harihar, PW-29 Shrikant Tiwari, and PW-31 Dr. Natraj.

On motive learned counsel for accused No.1 Shri Khamkar, submitted that the prosecution has failed to prove that accused were responsible for causing the death of Rajesh and so motive, howsoever strong, would not be sufficient to establish the guilt of the accused. To substantiate his submission Shri Khamkar, placed reliance on **State of Punjab Vs. Sucha Singh and others**⁸, in which the Hon'ble Apex Court observed:-

“Mr. Walia, learned counsel, lastly contended that there is a strong motive connecting the accused with the crime for the reasons being that Kuldip Singh, nephew of accused Sucha Singh was murdered by the complainant party and the accused had nursed a grudge against the complainant party for revenge. This plea is of no help to the prosecution case. When the basic foundation of the prosecution case crumbled down, the motive becomes

8 AIR 2003 Supreme Court 1471

inconsequential. At the same time, animosity is a double edged sword. It could be a ground for false implication, it could also be a ground for assault. In the instant case, in view of the facts and circumstances as discussed above, the motive, however, strong merely creates a suspicion. Suspicion cannot take the place of proof of guilt.”

38] In the case on hand, prosecution had miserably failed to prove any of the circumstances against the accused. Therefore, assuming that there were internal bickerings between accused No.1 and Rajesh relating to business, landed property and parking of vehicle, that alone would not be sufficient to hold the accused guilty of commission of alleged murder of Rajesh.

39] As discussed above, statements of material witnesses do not help the prosecution to bring home the guilt of the accused persons beyond reasonable doubt. It is also evident that the testimonies of main witnesses is wholly unreliable, unbelievable, unnatural, untrustworthy and self-contradictory. The entire prosecution evidence bristles with improbable version and material lacunas. There are series of

circumstances which are self speaking to indicate that prosecution case is overlain with number of doubts and mass of lies so embedded that its impossible to separate the truth from falsehood. The major deficiencies emerged in the prosecution case are -

[i] In missing report lodged by PW-5 Sunanda, she did not attribute any specific role to the accused though she admitted that she was informed by PW-4 Rahemtulla and PW-36 Satish that accused Nos. 1 and 3 had taken Rajesh alongwith them;

[ii] PSI More, who enquired into missing report was an important witness. He was kept away from the witness box for the reasons best known to prosecution;

[iii] Medical Officer on Post Mortem report not examined;

[iv] Doctor to whom weapons were sent for opinion was not examined;

[v] PW-7 Dinesh was chosen as a Panch on 30 Panchanamas recorded during the span of two months.

[vi] Articles which were seized during investigation were

sent to Chemical Analyser after 30 to 35 days of alleged seizure and in unsealed condition;

[vii] FIR was lodged on 19.11.2005. Inordinate delay in lodging FIR not explained; and

[viii] It has come during evidence that Rajesh was close to a girl named Jullie. No investigation was made in that direction despite the statement of witnesses that he lastly went in a car with his friend.

The above infirmities are inherent in nature. We find this case as an example once again to remind the Investigating Agency and prosecution of its onerous duty to place the truth before the Court with utmost sensitivity instead of adopting its own approach in such a serious crime where the question of life and death of persons is involved.

40] So far as approach of the trial court is concerned less said is the better. On 26.10.2009, the learned Additional P.P. submitted an application (Exhibit 127A) during the course of trial. By the said application, a request was made to allow

the prosecution to prove memorandum statement of accused No.3 Basavraj Desai recorded on 23.11.2005. Vide order dated 2/11/2009, this application was dismissed.

41] It is shocking that the same Presiding Officer relied upon memorandum statement of accused No.3 Basavraj Desai recorded during the course of investigation, despite rejection of permission to exhibit the same and held that accused Nos. 1 and 2 planned before 5 months of the incident to kill Rajesh and conspired with accused Nos. 3 to 11, to whom Rs. 3 Lakhs were given as contract killing money and then executed the plan.

42] The observations of the learned trial judge in para.134 of the impugned judgment clearly indicate lack of simple understanding of the provisions of Sections 26 and 27 of the Indian Evidence Act. It appears that the learned trial judge has turned blind eye to these important provisions and wrongly considered the same. The reasonings recorded by the trial court are not in consonance with the record. On the contrary, they are totally in disregard to the settled provisions resulting in

grave miscarriage of justice to the accused. In this background, we find that the impugned judgment and order of conviction and sentence does not legally sustain and needs to be quashed and set aside.

43] In the result, we pass the following order :-

[a] The impugned judgment and order of conviction and sentence in Sessions Case No. 60 of 2006 passed by the learned Ad-hoc Additional Sessions Judge, Solapur, is hereby quashed and set aside ;

[b] Accused Nos. 1 and 3 to 11 are acquitted of the offences punishable under Sections 120B, 364 r/w.149, 368 r/w. 149, 302 r/w. 149 and 201 r/w. 149 of IPC;

[c] Accused No. 1 Revansidha Loni, Accused No.3 Basavraj Desai, Accused No.4 Malang Shende, Accused No. 10 Sanjay Zingadekar and Accused No.11 Ambadas Talathi, who are in jail, shall be released forthwith, if not otherwise required in any other case;

[d] Bail bonds of accused Nos. 5,6,7,8 and 9 shall

stand cancelled and they are set at liberty forthwith;

[e] Registry to communicate this order to the accused in jail through the concerned Jail Authorities;

[f] We quantify the fees to be paid by the High Court Legal Services Committee, to the appointed Advocate for accused No.3 Shri Swapnil Ovalekar, at Rs. 5,000/-.

[INDIRA K. JAIN, J.]

[SMT. V. K. TAHILRAMANI, J.]

grt/-