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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.684 OF 2010**

Vinayak Sitaram Barje.	]	
Age – 23 years,	]	
R/o. Gaondevi Milind Nagar, Vakole Pipe Line,	]	
Near Rameshwar School, Santacruz (W),	]	
Mumbai – 400 055.	]	
(At present accused in Nashik Central Prison)	]	... Appellant / (Org.Accd.No.2)

Versus

The State of Maharashtra.	]	... Respondent
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ALONG WITH

CRIMINAL APPEAL NO.459 OF 2010

Kushal Chandrakant Chavan.	]	
Age – 22 years,	]	
Shivkrupa Chawl, Wagri Pada, Datt Mandir,	]	
Vakola, Santacruz (W), Mumbai – 400 055.	]	
(At present accused in Nashik Central Prison)	]	... Appellant / (Org.Accd.No.1)

Versus

The State of Maharashtra.	]	
(At the instance of D.C.B. C.I.D., Mumbai,	]	
vide C.R.No.164/08).	]	... Respondent

Mr. P. G. Kathane i/b Mr. Krishna M. Kadam for Appeal in Criminal Appeal No.684 of 2010.

Mr. Rajiv Singh i/b Mr. Santosh Sanjkar for Appellant in Criminal Appeal No.459 of 2010.

Mrs. S. V. Sonawane, APP for State - Respondent in both Appeals.

**CORAM: B. R. GAVAI &
SARANG V. KOTWAL, JJ.**

DATE: 13th JUNE, 2018

ORAL JUDGMENT: (Per B. R. Gavai, J.)

1] Both these appeals take exception to the judgment and Order passed by the learned Additional Sessions Judge for Greater Mumbai at Sewree in Sessions Case No.85 of 2009, thereby convicting the Appellants for the offence punishable under section 302 read with section 34 of the Indian Penal Code and sentenced to suffer life imprisonment each and to pay fine of Rs 2000/- each and in default thereof to suffer rigorous imprisonment for two months.

The Appellants have also been convicted for the offence punishable under Section 364(A) read with Section 34 of the Indian Penal Code and sentencing them to suffer life imprisonment and to pay fine of Rs 2000/-each and in default thereof to suffer rigorous imprisonment for two months.

The Appellants have been further convicted for the offence

punishable under Section 384 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years each and to pay fine of Rs 500/- each and in default thereof to suffer rigorous imprisonment for 15 days and they have been also convicted under Section 201 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years each and to pay fine of Rs 500/- each and, in default, to suffer rigorous imprisonment for 15 days.

2] The prosecution story, as could be gathered from the material placed on record, is thus :-

3] Deceased P. Ratanrao was a son of the first informant P.W. 1 – Rajan Krishnarao. It is the prosecution case that, on 12th October, 2008, at around 9.15 a.m., deceased had left the house for going on picnic to Vasai alongwith his friends. He was carrying his Mobile No.9819532335 of Sony Ericsson Company which was standing in the name of his father – Rajan Krishnarao. At around 2.00 P.M., on the same day, deceased made a phone call to his father, informing him that, he would come back by 6.00 P.M but he did not come back.

P.W.1 – Rajan Krishnarao tried to contact his son on his mobile but every time his mobile was found switched off. P.W. 1 therefore went to MIDC Police Station on 13th October, 2018 at around 1.30 A.M. and lodged a missing report before P.W. 15 – PSI Babasaheb Gosavi. P.W. 15 - PSI Babasaheb Gosavi recorded the missing report below Exhibit-20, by affixing photograph of deceased P. Ratanrao on the missing report. He also sent one photograph to Crime Branch, Mumbai. At around 11.30 A.M., P.W.1 - Rajan suddenly got a call on his mobile number from the mobile number of his son. The person who had called, told him that his son was in his custody and demanded Rs 10 lakhs for releasing his son. He also told him that, he would give further instructions at 10.00 P.M. in the night. After 5-10 minutes, he again received second call from the same person, threatening him that, if he disclosed this information to police, he would kill his son. P.W. 1 – Rajan Krishnarao requested that person to permit him to talk with his son and give mobile phone to his son. However, he did not give mobile phone to his son and abused him and disconnected the mobile phone. When he tried to phone on the mobile of his son, it was switched off. Thereafter, at about 8.00 P.M., P.W. 1 – Rajan Krishnarao again received phone call from the kidnapper from mobile

phone of his son, asking P.W.1 to come to Andheri Railway Station on Platform No.6 at 10.00 A.M on 14th October, 2008 alongwith money and without police. P.W. 1 therefore gave this information to the Police Station. PSI Gosavi recorded the FIR below Exhibit-18 for the offence punishable under Section 364-A of the Indian Penal Code vide Crime No.648 of 2008.

4] On the next day i.e. on 14th October 2008, at about 10.00 A.M., P.W. 1 alongwith the Officers from Crime Branch and MIDC Police Stations went to Andheri Railway Station at around 10.30 A.M.. At that time, P.W. 1 - Rajan received another call from the same person from mobile of his son, asking him to come to Dadar Railway Station by train. After reaching there, he was directed to go to a restaurant in front of the Railway Station. However, reaching there, kidnapper asked him to keep money in red bag, which was lying on the road. However, P.W. 1 told him that, he would not follow the directions unless he would see his son. He was then asked to go to Elephanta Caves to meet his son but he did not go there. Thereafter, whenever P.W.1 tried to contact the kidnapper, the phone was always found switched off. Thereafter, at about 2.30 P.M., the kidnappers

asked him to go to various locations including Bandra Railway Station. He went there alongwith Police. After going there, he was asked by the kidnapper to go to one School. He went there but did not find anyone.

5] However from 15th October, 2008, the first informant (P.W.1) did not receive any call. On 19th October 2008, at around 2.00 P.M., P.W.1 – Rajan Krishnarao received a call from Shri Wani, ACP, Crime Branch, who asked him to come to Tungreshwar forest. He immediately went there. Mr. Wani showed him dead body in decomposed condition, which was lying on the earth surrounded by heap of stones. On the basis of clothes worn by the deceased, the first informant identified the body to be of his son P. Ratanrao. Police drew inquest panchanama. P.W. 4 – Dr. Neeta Ghuge from Primary Health Centre, Kamanth was called to conduct the postmortem.

6] In the meantime, on 18th October, 2008, the case was handed over to D.C.B. C.I.D. for making further investigation. On 19th October 2008, Senior P.I. Shri Samad Shaikh received information from the informer that, two persons aged 22-25 years were making

phone calls on their mobile under suspicious circumstances. Senior P.I. Shri Shaikh therefore, by preparing pre-trap panchanama, went there alongwith P.I. Shri Nigudkar and nabbed two persons, who are present accused in this case. During personal search of accused No.1 – Kushal Chavan, a black colour mobile of Nokia-1600 having SIM Card No.9969274501 and a box containing bottle of perfume, two diaries and chits were found in his bag. Three blood stains were found on his shoulder bag. During personal search of accused No.2 – Vinayak, a silver colour mobile having Number 99694626103 and one mobile of Sony Ericsson without SIM Card was found. Apart from that, a library card, I-card of Chetna College and membership card were found with him. Both the accused, thereafter, were brought to the Police Station.

7] It is the prosecution case that, during interrogation, they made voluntary statement regarding production of muddemal scale patti with the help of which, they had committed murder of P. Ratanrao, and handsfree of mobile of deceased P. Ratanrao. According to the prosecution, under memorandum under Section 27, they also disclosed the place where dead body was lying and expressed willingness to show the same. On the basis of memorandum under

Section 27, police party went to the spot where the dead body was kept. Accused persons directed them to the place where the dead body was kept. The dead body was identified by P.W. 1 – Rajan Krishnarao to be of his son. Further investigation was carried out. The statement of P.W. 11 – Mohan Prabhu, Manager of Wine Shop from where the accused had purchased bottles of beer and who had identified the accused and that of P.W. 20 – Paresh Rathod, auto-rickshaw driver, who had taken the deceased and the accused persons to Tungreshwar forest, came to be recorded. The blood samples of complainant Rajan and his wife alongwith the right femur bone were sent to F.S.L., Kalina for D.N.A grouping. P.W. 13 – Dr. Varsha, who is the Assistant Chemical Analyser, analyzed the same and issued D.N.A test report with the opinion that, father Rajan and mother Bhuvana were concluded to be the biological parents of deceased P. Ratanrao. The accused were medically examined in which 2 healed scars on palmer aspect of right and left hand of accused Vinayak were found.

8] According to the prosecution, the accused had also given an extra judicial confession to P.W. 7 – Dr. Pratap Anand, P.W. 9 –

Mahesh Mandavkar and P.W. 10 – Prasad Rane. At the conclusion of investigation, charge-sheet came to be filed in the Court of the Metropolitan Magistrate, 37th Court, Esplanade, Mumbai. Since the case was exclusively triable by the learned Sessions Judge, the same was committed to learned Sessions Judge.

9] The learned Trial Judge framed charges for the offence punishable under Sections 364-A, 384, 302 and 201 read with Section 34 of the Indian Penal Code. The accused pleaded not guilty and claimed to be tried. At the conclusion of the trial, learned Trial Judge passed the order of conviction and sentence as aforesaid. Being aggrieved thereby, the present appeals are preferred by the accused/Appellants.

10] Mr. Singh, the learned Counsel appearing for the Appellant in Criminal Appeal No.459 of 2010 and Mr. Kathane, the learned Counsel appearing for the Appellant in Criminal Appeal No.684 of 2010, submitted that, the present case is a case of circumstantial evidence. It is submitted that, the prosecution has failed to establish beyond reasonable doubt even a single incriminating

circumstance. It is submitted that, in any case, the prosecution has utterly failed to establish the chain of circumstances which leads to no other conclusion than the guilt of the accused. The learned Counsel submitted that, the learned Trial Judge has basically relied on CDRs to come to the conclusion that, the prosecution has established the guilt of the present Appellants. The learned Counsel however submitted that, in the absence of certificate under Section 65-B of the Indian Evidence Act, the said evidence cannot be looked into. The learned Counsel, in the alternative, submitted that, in any event, CDRs, even if taken into consideration, do not establish conclusively, a circumstance to establish the guilt of the accused in the present case. The learned Counsel, therefore, submitted that the appeals deserve to be allowed and the Judgment and Order of conviction be set aside.

11] Mrs Sonawane, learned APP, on the contrary, submitted that the perusal of memorandum of the accused recorded under Section 27, would reveal that, they have themselves admitted of using the SIM Card and mobile of the deceased to make phone calls to his father for demanding ransom. She further submitted that, in the memorandum, they have also stated about they causing death of the

deceased. She submitted that, on the basis of memorandum under Section 27, dead body of the deceased has been recovered. She further submitted that, even CDRs, which relate to the telephonic calls about which there is an admission in the statement under section 27 of the accused would show that, mobile phone of the deceased was used by the accused for demanding ransom from the father of the deceased. She further submitted that, from the evidence of P.W. 11 – Mohan Prabhu and P.W. 20 – Paresh Rathod, prosecution has established that, the deceased was last seen in the company of accused, soon before the death of the deceased had occurred. The learned APP further submitted that, from the evidence of P.W.7 – Dr. Pratap Anand and P.W. 10 – Prasad Rane, prosecution has proved extra judicial confession, made by the accused. She submitted that, in view of these circumstances, prosecution has been in a position to establish the chain of proven circumstances, which leads to no other conclusion than the guilt of the accused. The learned APP therefore submits that, the appeals deserve to be dismissed.

12] The law with regard to conviction based on circumstantial evidence has been very well crystallized by Their Lordships of the

Supreme Court in the case of *Sharad Birdichand Sarda vs. State of Maharashtra*¹. Their Lordships have in detail laid down the principles which are to be followed while considering the case based on circumstantial evidence. It would be relevant to refer to the following paragraphs from the said judgment:-

“153. A close analysis of this decision show that the following conditions must be fulfilled before a case against an accused can be said to be fully established.

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

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade & Anr v. State of Maharashtra where the following observations were made:

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and must be' is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only

¹ (1984) 4 SCC 116

with the hypothesis of the guilt of the accused, that is to say, 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 must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute panchsheel of the proof of a case based on circumstantial evidence.”

Following the observations of Their Lordships, it can thus be clearly seen that, for resting the conviction based on circumstantial evidence, the prosecution will have to establish each and every circumstance beyond reasonable doubt. Not only that, the prosecution will have to establish the chain of proven circumstances which lead to no other conclusion than that of the guilt of the accused. As held by Their Lordships, hypothesis inconsistent with the guilt of the Accused will have to be ruled out. As has been held by Their Lordships, there is not

only grammatical distinction between “may” and “must” but also a legal distinction. A suspicion, howsoever strong, cannot be substituted for a case proved beyond reasonable doubt.

13] In the light of these guiding principles, we have to examine the evidence, as led by the prosecution in the present case.

14] With the assistance of the learned APP and both the learned Counsel for the Appellants, we have scrutinized the entire evidence on record.

15] From the material placed on record, it is apparent that, the prosecution relied on the following circumstances to prove the guilt of the accused.

[i] Discovery of dead body from the place distinctly within the knowledge of accused under memorandum under Section 27 of the Indian Evidence Act

[ii] Call Detail Reports (CDRs), showing that deceased and the accused/Appellants were together

on 12th October, 2008 and that Appellants between 13th to 15th October, 2008 attempted to contact P.W.1 – Rajan Krishnarao - the father of deceased, from the mobile phone of deceased to demand ransom.

[iii] The accused were last seen in the company of deceased on the basis of evidence of P.W.11 – Mohan Prabhu, the Manger of Wine Shop and P.W. 20 Paresh Rathod, auto-rickshaw driver.

[iv] Extra judicial confession, as is proved from evidence of P.W.7 Dr. Pratap Anand, P.W. 9 – Mahesh Mandavkar and P.W. 10 – Prasad Rane.

[v] Recovery of the handsfree used by the deceased , as is proved from the evidence of P.W. 3 – Hitandra Katkar.

[vi] Recovery of the scale-patti used in the crime, as is proved from the evidence of P.W. 12 – Narendra Singh.

[vii] Recovery of the clothes of the accused, as is proved from the evidence of P.W. 8 - Jaya Kumbhar.

[viii] The injuries sustained by accused No.2 –

Vinayak, as could be seen from evidence of P.W. 7 –
Dr Pratap Anand.

16] The learned Counsel for the Appellants have argued that the the prosecution has even failed to establish that, the dead body which was found was that of son of P.W. 1 – Rajan Krishnarao. We decline to accept the said submission. Apart from the fact that, the dead body has been identified by P.W.1 i.e father of the deceased, we find that evidence of P.W.13 – Dr Varsha Rathod, would also be relevant in this regard. From the evidence of P.W. 13, it would reveal that she has received bone sample of deceased P. Ratanrao in a sealed condition alongwith forwarding letter of Senior P.I., Unit-X, Andheri, D.C.B. C.I.D. She has also received blood samples alongwith the forwarding letter of D.C.B. C.I.D, Unit-X. The said blood samples were collected by the Medical Officer, Police Hospital, Bombay and the same were having the seal of Medical Officer. The blood samples were of Bhuvana Rajan and Padupitri Krishnarao Rajan. She has stated that, accordingly, she has analyzed the bone and blood samples and issued Chemical Analyzer's reports. She has given an opinion, that father Padubidri and mother Bhuvana were concluded to be the

biological parents of P. Ratanrao. It would thus be very clear that the prosecution has proved that the dead body which was recovered pursuant to memorandum of the accused was the dead body of deceased P. Ratanrao, the son of P.W. 1 – Rajan Krishnarao.

17] We find that, in the present case, the most important incriminating circumstance is that of discovery of the dead body. From the memorandum of accused under Section 27 and from the material placed on record, it would reveal that on 19th October, 2008 Senior P.I. Shaikh had received an information that two persons aged 22-25 years were making phone calls frequently in Vakola area under flyover bridge under suspicious circumstances. On receipt of this information, Senior P.I. Shaikh and P.W. 21- Sunil Nigudkar who is an Investigating Officer called panchas, including P.W. 2 – Suka and drew pre-trap panchanama below Exhibit-23. After the pre-trap panchanama, under the post-trap panchanama below Exhibit-24, the accused persons were apprehended on 19th October, 2008 at around 12.15 hours. In the said panchanama, certain material, including mobile phone came to be seized from the accused persons. It would reveal that, thereafter, memorandum of both the accused came to be

recorded under Section 27 between 13.20 hours and 14.00 hours. The said memorandum below Exhibit-34 has been proved in the evidence of P.W. 3 - Hitandra Katkar, the pancha witness. The said memorandum contains many statements made by the accused persons, including conspiracy between the two accused persons to kidnap the deceased and take him to Tungareshwar forest in Vasai. The memorandum also contains statement about telephonic conversation between accused and the deceased on 11th October, 2008 and meeting at Andheri Railway Station on 12th October, 2008 and thereafter going to Vasai by train. It also contains statement about purchasing of beer bottles and going by auto-rickshaw to Tungareshwar. It also contains the statement that, thereafter, all three of them by a Kachha Road went on hillock, drank beer and the deceased was taken to the isolated place. It contains a statement that, after the deceased was intoxicated and listening to the songs on his handsfree, the accused took out steel scale patti and strangled the deceased with the use of the same. It contains a statement that, when the deceased was trying to free himself, the accused – Kushal assaulted the deceased on his head with a big stone, due to which the deceased fell on the ground and thereafter both of them, by throwing stones on

him, killed him. It contains a statement that, thereafter, the accused – Vinayak took out mobile from the person of the deceased and thereafter both of them came to their house. It also contains the statement that, thereafter, they contacted the father of the deceased from the mobile of the deceased to demand ransom of Rs 10 lakhs. It further contains the confession of the accused and the statement of the accused that, they are willing to show the place where the dead body of the deceased was concealed by them. In the evidence of very same witness i.e. P.W. 3 – Hitandra Katkar, panchanama of disclosure of the place where dead body was concealed by the accused and discovery of the dead body from the said place at the instance of the accused, has also been proved. The said panchanama is below Exhibit-34-A.

18] The learned APP wants us to believe all the admissions made by the accused persons. Their Lordships of the Apex Court, recently, in the case of *Charandas Swami vs. State of Gujarat and Others*¹ have discussed the entire law on section 27. It could thus be seen that, only such fact which is deposed to and which leads to consequential discovery, whether it amounts to confession or not,

¹ (2017) 7 SCC 177

would be admissible in view of section 27 of the Indian Evidence Act. Though, as per memorandum below Exhibit-34, many confessional statements of the accused have been recorded, we are of the considered view that, only such distinct information which has led to the discovery of the place from where the dead body of the deceased was recovered, would be admissible under Section 27. We are therefore of the view that, in view of memorandum and discovery Panchanama below Exhibit-34 and 34-A which have been proved in the evidence of P.W. 3 - Hitandra Katkar alongwith the evidence of P.W. 21 – IO Sunil Nigudkar. It could be seen that, the prosecution has proved that the dead body of the deceased was discovered from a place distinctly within the knowledge of the accused on the basis of the information given by them on a memorandum under Section 27 of the Indian Evidence Act.

19] The next circumstance on which the prosecution relies is the Call Detail Reports to establish that, the deceased and the accused/Appellants were together on 12th October, 2008 and that the Appellants between 13th to 15th October, 2008 attempted to contact P.W. 1 – Rajan Krishnarao - the father of the deceased, from the

mobile phone of the deceased to demand ransom.

20] The learned Counsel for the Appellants heavily relied on the judgment of the Apex Court in the case of *Anvar P.V. vs. P.K. Basheer and Others*¹ in support of their submissions that, since there was no certificate under Section 65-B of the Indian Evidence Act, the CDRs cannot be read into evidence. However, it is to be noted that, in the subsequent judgment, in the case of *Sonu Alias Amar vs. State of Haryana*², Their Lordships of the Supreme Court have held that, the objection that CDRs are unreliable due to violation of procedure prescribed under Section 65-B(4). cannot be permitted to be raised, if such objection was not taken when CDRs were adduced in evidence before the learned Trial Court. In that view of the matter, we are not inclined to entertain the said objection.

21] We have therefore in detail considered the CDRs placed on record. Upon perusal of the same, we are of the view that even if evidence of CDRs is taken as it is, the only fact that the CDRs would establish is that, the mobile phones of the Appellants and the deceased

1 (2014) 10 SCC 473

2 (2017) 8 SCC 570

were in one area at Mumbai on the morning of 12th October, 2008. No doubt, that the CDRs would also show that from 13th to 15th October, 2008, certain calls have been received on the mobile number of P.W.1 – Rajan Krishnarao from the mobile number of the deceased P. Ratanrao. The prosecution, in this respect, again relied on the evidence of P.W.2 – Suka and P.W. 1 – Rajan Krishnarao to contend that, since the mobile of Sony Ericsson was seized from Accused No.2 – Vinayak in the post-trap panchanama below Exhibit-24 and since the said mobile phone has been identified to be the phone belonging to deceased, it is proved that mobile phone calls between 13th to 15th October, 2008 were made to P.W. 1 – Rajan Krishnarao by the accused persons. The learned APP also submitted that, since in the memorandum below Exhibit-34, accused have admitted of making calls to the father of the deceased, seeking ransom, the same admission can also be used against the accused.

22] It is to be noted that P.W. 21 - IO Sunil Nigudkar has specifically admitted in his evidence that, the mobile phone which was seized from the accused No.2 and which accused No.2 had confessed to be the one belonging to the deceased P. Ratanrao, is freely available

in the market. It is further to be noted that, the Investigating Agency could have very well made an investigation to find out IMEI number of mobile phone which was seized from accused No.2 and as to whether the calls which were received by P.W. 1 – Rajan Krishnarao between 13th to 15th October, 2008 were from the instrument having IMEI number of the mobile handset of the deceased. It can further be seen that, the Investigating Officer has admitted that whenever complainant had received calls of the accused, he was always with the complainant. Even according to Investigating Agency, P.W. 1 – Rajan Krishnarao had received number of calls from the persons, demanding ransom. The Investigating Agency could have very well recorded the voice of the persons making calls to P.W.1 and compared the same with the voice sample of the accused persons to establish that, the calls which were made on the mobile phone of P.W.1 were made by the accused persons. However, only on the basis of recovery of Sony Ericsson mobile phone from accused No.2, which is identified to be the one belonging to the deceased by P.W.1 and on the basis of a confessional statement under Section 27, that the calls were made by accused to P.W.1 from the said mobile phone, we find that, it cannot be conclusively held that the mobile phone calls which were made to

P.W.1 for demanding ransom were made by the accused persons from the mobile phone of the deceased. In this respect, it would also be relevant to note the admission of the Investigating Officer that, the phone which was seized from the accused was easily available in the market. It would further be relevant to note the admission of P.W.1 – Rajan Krishnarao in his cross-examination that, he had not given IMEI number or receipt of mobile phone of his son to the police while lodging the complaint. We find that, finding of the location of the accused persons and deceased in the area of one tower on one occasion on 12th morning, cannot be said to be the circumstance established beyond reasonable doubt against the present Appellants, particularly when both the Appellants are residents of the same area. To a pertinent query as to whether the CDRs show that there was conversation of the deceased only with the present Appellants or with other persons also, the learned APP, on instructions of the Officer present in the Court, fairly concedes that CDRs do not show that the deceased had conversation only with the present Appellants.

23] The next circumstance on which the prosecution relied is that the accused were last seen in the company of the deceased. In

this respect, prosecution relied on the evidence of P.W. 11 – Mohan Prabhu, Manager of the Wine Shop and P.W. 20 – Paresh Rathod, auto-rickshaw driver. No doubt, circumstance of the accused last seen in the company of the deceased and death of the deceased occurring in the near span of time, could be very relevant circumstance.

24] We have scrutinized the evidence of both the witnesses and compared the same with the evidence of IO at a greater detail. The statement of P.W.11 – Mohan Prabhu is recorded on 25th October, 2008 i.e after 12 to 13 days from the date of alleged visit of the accused and deceased to Vasai. He has stated that, on 25th October, 2008 two policemen came to him and one of them introduced himself as P.I. Nigudkar. He informed him that, he has come there to make inquiry about the crime. He told him that, two persons have been arrested in one crime and he has come there for making inquiry in that case. He showed one photograph. After seeing the photograph P.W. 11 and his colleague Ramesh Gupta realized that, the said boy had been to their shop before 12-15 days on Sunday alongwith two other boys. He states in his evidence that the boy whose photograph was identified (deceased) and two other boys had purchased four

bottles of beer for Rs 288/- and paid Rs 300/- out of which, Rs 12/- were returned to them. He states that, out of three, one was wearing spectacle and he was playing with calculator which was kept on the counter. He pressed one button of the calculator and some figures and symbols came on the screen of calculator. His colleagues Ramesh asked him how this symbol and figures came, on which he told that “we are college students”. Thereafter, they all went back and their bottles were lying on the counter. After sometime, the boy in the photograph and the boy who was having shoulder bag came to take beer bottles and the boy of light complexion who was wearing spectacle, was standing on the road. He states that, he remembers the faces because they had left beer bottles in the shop and one of them was playing with calculator. This witness has also identified the accused in the test identification parade.

It is to be noted that, this witness has admitted in his cross-examination that there is always rush of the customers every Sunday in the shop. He has further admitted that, even at the time of heavy rush of the customers, he remains on the counter. He has further admitted that, at the time of heavy rush, immediately after taking

money, they supply bottles and attend other customers. He has further admitted that, at the time of heavy rush, they have no time to see minutely every customer, as to whether he is of black, fair or wheatish complexion. The reasoning given by this witness for remembering the accused and the deceased is that, one of the accused was playing with the calculator and since they had left beer bottles and came back to take them again, he remembered them. However, it is to be noted that both these facts are omission in the statement u/s 161 and have been made for the first time before the Court. He has admitted in his evidence that, today, except his bare words, he has no evidence to show that four bottles of King Fisher Brand were sold to the accused persons from his shop on 12th October, 2008. The witness must be credited with elephantine memory, that he recollects three persons who had purchased four bottles of beer, that too of a particular Brand on Sunday, wherein, on account of heavy rush, he is otherwise not even able to remember the complexions of persons who visited the shop. No doubt, in the test identification parade, this witness has identified the accused persons, however, in view of the aforesaid discussion, we find that much reliance could not be placed on identification parade of such a witness.

25] The next witness on the point of last seen is P.W. 20 – Paresh Rathod, auto-rickshaw driver, who has allegedly taken the deceased and the accused from auto-stand near railway station to Tungareshwar. Again, statement of this witness is recorded on 25th October, 2008. He states that, when on 25th October, 2008, he was standing near railway station, police officers of D.C.B. C.I.D. came in civil dress with one photograph to make inquiry of a murder case. They showed him that photograph. He identified that person in the photograph by saying that, 10-15 days before, the said person and other boys had come to Tungareshwar forest in his auto-rickshaw. He gives description of the persons regarding their complexion, clothes worn by them and the places where they were sitting. He also states that the person, who was sitting on the rear side, was having shoulder bag containing beer bottles. He states that, while sitting in auto-rickshaw, those three persons asked him about his charges and he told them that he would charge Rs 12/- person. He states that, apart from these three persons, some ladies were also sitting in the auto-rickshaw. He states that, ladies left auto-rickshaw at Satavali phata and, thereafter, he took these three persons to Tungareshwar phata, by

taking additional charges. No doubt, this witness has also identified the accused in the identification parade. In his cross-examination by the defence, he has stated that though he remembers description of the accused and the deceased, he did not pay much attention to the ladies in auto-rickshaw and therefore was not in a position to give their description. We need not detain ourselves much on this witness, inasmuch as, it will be suffice to refer to the following deposition of P.W. 21 – I.O. Sunil Nigudkar in his examination-in-chief itself:-

“On the same day evening, I found the rickshaw driver who had taken the accused persons and deceased to Tungareshwar forest. His name was Paresh Rathod. I showed him photograph of accused persons and deceased. He identified all and accordingly, I recorded his statement.”

In view of the fact of I.O. showing photograph of deceased alongwith the accused persons to P.W. 20, we do not wish to say anything much with regard to credibility of the said witness. As already discussed hereinabove, both these witnesses viz. P.W.11 and P.W.20 have remembered description and everything about these three persons i.e. two accused and the deceased, including their clothes etc. worn by them after 12 to 13 days and that too when the day concerned was

Sunday which is of heavy rush and as such, we find that no reliance could be placed on the evidence of these two witnesses to prove the circumstance of the accused last seen in the company of the deceased.

26] The next circumstance on which the prosecution relied is the extra judicial confession, allegedly given by the accused to P.W. 7 – Dr. Pratap Anand, P.W. 9 – Mahesh Mandavkar and P.W. 10 Prasad Rane. No doubt that, if the extra judicial confession is voluntary, cogent and in clear terms and is of a nature which inspires confidence in the mind of the Court, it can very well be used as incriminating circumstance. We will consider the evidence of all the three witnesses to consider the nature of extra judicial confession allegedly made to them.

27] P.W. 7 – Dr. Pratap Anand is a Medical Officer attached to Nagpada Police Station. On 22nd October, 2008, he had examined accused – Vinayak, who was brought by PN 28047 of D.C.B. C.I.D. Unit-10. He states in his evidence that, the patient told him the history that, he had killed his friend on 12th October, 2008 at about 3.00P.M. by pressing his neck by metal scale during which he got

injury on his both hands. He states that, he found the following two injuries on the hands of the accused – Vinayak.

“(i) Healed scar on palmer aspect of right hand at place of index finger about 2 cm in length, ½ cm width/black in colour non tendered scab fallen.”

“(ii) Healed scar on palmer aspect of left hand at place of index finger about 1 ½ cm in length ½ cm width/ black in colour non tendered scab fallen.”

However, it is to be noted that the accused was examined on 22nd October, 2008, whereas the injuries were allegedly sustained by the accused on 12th October, 2008. In his cross-examination, he has admitted that he cannot give any confirm opinion regarding the age of injuries on accused – Vinayak.

28] P.W. 9 – Mahesh Mandavkar is said to be the friend of accused – Vinayak and he was residing in the same area. He states that, he knew accused – Kushal since Vinayak had introduced him to Kushal before one month of the incident. In his evidence, he states that, on 21st October 2008, at around 3.00 P.M., he was called at MIDC, Crime Branch, Unit-X, Andheri. Police Officer Shri Nigudkar

and Samar Shaikh were present there. On his asking them as to for what purpose he was called there, they told him that, they have arrested two accused in a case of murder and kidnapping and both the accused had told to police that, they had demanded Rs 10 lakhs from the father of P. Ratanrao by his mobile phone and they kept the said mobile with him and for that purpose he was called at the Police Station.

P.W 9 further states that, thereafter, he told the police that on 15th October, 2008 both the accused had been to his home, took him on the ground besides his home and asked him to purchase mobile phone of black colour of Sony Ericsson. On his asking the price of the phone, they told him that they would sale it for Rs 5500/-. On his asking them as to from where they had brought the said mobile, they told him that, they had kidnapped a friend of kushal. After hearing this, he became frightened and refused to purchase that mobile. He is alleged to have identified the said mobile in Police Station.

29] It is to be noted that, this witness (P.W.9) has admitted

in his cross-examination that, the mobile handset like article-A would be freely available from the market and there was no special identification mark on the same. This witness, in his cross-examination, categorically states that, he did not feel it necessary to disclose the fact of kidnapping by accused persons to his family members or to his friends.

30] Another witness for proving the circumstance of extra judicial confession is P.W. 10 – Prasad Rane. His evidence is almost similar to that of P.W. 9 – Mahesh Mandavkar. He also states that, the accused persons had offered him to sell the said mobile at Rs. 5500/- and informed him that they had kidnapped a boy and the mobile was of that boy.

31] From perusal of testimony of these two witnesses viz P.W. 9 and P.W. 10, it would thus reveal that, both these witnesses stated that though they were informed by the accused that the mobile which was being offered to them for sale was of the friend of the accused who had been kidnapped by them, they did not feel it necessary to inform about the same to anyone, including their family members and

other friends. We find that, conduct of these two witnesses appears to be totally unnatural. Insofar as the alleged extra judicial confession given by them to P.W. 7 – Dr. Pratap Anand is concerned, it cannot be said that, the said piece of evidence is such which would inspire confidence in the mind of the Court. We are therefore of the considered view that, it cannot be said that the prosecution has proved the circumstance of extra judicial confession against the present Appellants beyond the reasonable doubt.

32] The next circumstance is the recovery of handsfree used by the deceased, as is sought to be proved from evidence of pancha P.W. 3 – Hitandra Katkar, who has recorded the panchanama at Exhibit-34 and Exhibit-34-A. The same pancha witness was again called on 2nd November, 2008 to record the panchanama of discovery of the handsfree below Exhibit-35 on the basis of information given by accused Kushal. The information that he gave under Section 27 was that, he would show the place where he kept the handsfree of mobile of P. Ratanrao and accordingly the panchanama of discovery of the said handsfree came to be recorded. Thereafter, the panchanama recorded by this witness at Exhibit 35-A would show that, the accused

Kushal took panchas and police party to Andheri Railway Station and thereafter took them in a shop by name “Jay Ambe Lottery Shop” and showed a man with whom he had kept the handsfree of mobile of P. Ratanrao and the name of that man was Dipak Chavan. The said person identified the accused Kushal and handed over handsfree to the police. Police seized the same. The Exhibit-35-A would reveal that, the said Dipak Chavan had given the said hands-free from the drawer of the counter. It therefore cannot be said that, discovery of the said handsfree was from the place which was distinctly within the knowledge of the accused Kushal. Apart from that, pancha P.W.3 has admitted in his cross-examination that the said handsfree was easily available in the market.

33] The next circumstance on which the prosecution relied is the recovery of scale patti at the instance of the accused Kushal. In this respect, the prosecution relied on the evidence of P.W. 12 – Narendra Singh. However, even accepting the said evidence in toto, the said scale patti cannot be said to have been recovered from the place distinctly within the knowledge of the accused Kushal. In any case, it is difficult to appreciate as to why a person would keep the weapon

alleged to have been used in crime on the counter of a shop, rather than concealing it. In that view of the matter, we find that the said evidence is also not of any assistance to the prosecution case.

34] The next circumstance on which the prosecution relied, is the recovery of clothes of the accused. In this respect, the prosecution relied on the memorandum of accused under section 27, with regard to place where the accused had concealed their clothes. The said memorandum has also been proved in the evidence of panch P.W. 8 - - Jaya Kumbhar below Exhibit-63. Seizure of the clothes of accused Kushal alleged to have been worn by him while making the crime is from the peg (khunti) in the house of accused Kushal. Perusal of testimony of this witness would reveal that, when police party along with panchas went to his house, the said house was inhabited by mother of the accused Kushal. Similarly, insofar as accused Vinayak is concerned, seizure of the clothes is from the loft of his house, which was inhabited by his mother and his brother when the said clothes were seized. As such, it cannot be said that the said discovery is from the place which was exclusively within the knowledge of the accused.

35] The next circumstance on which the prosecution relied, is the injuries sustained by accused No.2 Vinayak. P.W. 7 – Dr. Pratap Anand has clearly admitted that, he was not in a position to give exact age of the injuries. As such, it cannot be said that the prosecution has proved beyond reasonable doubt that the said injuries were caused to accused Vinayak, when he was trying to strangle the deceased.

36] The learned APP heavily relied on the judgment of the Apex Court in *Pawan Kumar Alias Monu Mittal vs. State of Uttar Pradesh and Another*¹ in support of her proposition that, the entire incriminating material given by the accused in his memorandum under Section 27 below Exhibit-34 would be admissible in evidence.

37] It will be relevant to refer to the following observations of the Apex Court in the said case i.e. *Pawan Kumar* (supra).

“29. It is settled principle of law that statements made before a police official which amount to confession is barred under Section 25 of the Evidence Act. This prohibition is, however, lifted to some

¹ (2015) 7 SCC 148

extent by Section 27 which reads thus :

“27. How much of information received from accused may be proved.- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

In the light of Section 27 of the Evidence Act, whatever information given by the accused in consequence of which a fact is discovered only would be admissible in the evidence, whether such information amounts to confession or not. The basic idea embedded under Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but it results in discovery of a fact it becomes a reliable information (see *State of Maharashtra vs. Damu* [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088])”

“30. The “fact discovered” as envisaged under Section 27 of the Evidence Act embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.”

It could thus be clearly seen that, the information which would be admissible under Section 27, must be the one which must relate

distinctly to the “fact discovered”. In the present case, at the most, what Exhibits-34 and 35 would establish is that, the place where the dead body of the deceased was hidden, was discovered on the basis of the information given by the accused under Section 27. The question that we would be called upon to answer is, as to whether that circumstance in itself would be sufficient to prove the guilt of the accused. As held by Their Lordships in the case of *Sharad Birdhichand Sarda* (supra), every hypothesis inconsistent with the guilt of the Accused will have to be ruled out. As has been held by Their Lordships, there is not only grammatical distinction between “may” and “must” but also a legal distinction. A suspicion, howsoever strong, cannot be substituted for a case proved beyond reasonable doubt. In the present case, prosecution heavily relied on the circumstance of discovery of the place where dead body of the deceased was hidden. On the basis of memorandum under Section 27, prosecution wants us to come to the conclusion that the prosecution has proved its case beyond reasonable doubt.

38] It will be relevant to refer to the following observations of Their Lordships of the Privy Council in a celebrated case of *Pulukuri*

*Kottayya and others vs. The King Emporror*¹.

“S. 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the “fact discovered” is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of S. 27, little substance would remain in the ban imposed by the

¹ 60 L.W. 258

two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction, their Lordships think that the proviso to S. 26, added by S. 27, should not be held to nullify the substance of the section. In their Lordships' view 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 past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

High Courts in India have generally taken the view as to the meaning of S. 27 which appeals to their Lordships, and reference may be made particularly to *Sukhan v. The Crown* [I.L.R. 10 Lah. 283] and *Ganu*

Chandra Kashid v. Emperor [I.L.R. 56 Bom. 172] on which the appellants rely, and with which their Lordships are in agreement. A contrary view has, however, been taken by the Madras High Court, and the question was discussed at length in a Full Bench decision of that Court in *In Re Athappa Goundan* [I.L.R. (1937) Mad. p. 695 = 46 L.W. 152 (F.B.)] where the cases were referred to. The Court whilst admitting that the weight of Indian authority was against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under S. 27. In that case the Court had to deal with a confession of murder made by a person in police custody, and the Court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag, which, according to the confession had been used in, or were connected with, the commission of the murder, and the objects were in fact produced. The Court was impressed with the consideration that as the objects produced were not in themselves of an incriminating nature their production would be irrelevant unless they were shown to be connected with the murder, and there was no evidence so to connect them apart from the confession. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into S. 27 something which is not there, and admitting in evidence a confession barred by S. 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.

In their Lordships' opinion *Athappa Goundan's case* [I.L.R. (1937) Mad. p. 695 = 46 L.W. 152 (F.B.)] was wrongly decided and it no doubt influenced the decision now under appeal.

The statements to which exception is taken in this case are first a statement by accused No.6 which he made to the Police Sub Inspector and which was reduced into writing and is Ex. "P". It is in these terms :

"The mediators written at 9 A.M. on 12th January, 1945, in front of Maddineni Verrayya's choultry and in the presence of the undersigned mediators.

Statement made by the accused Inala Sydayya on being arrested. About 14 days ago, I, Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Boddupatti Chinna Sivayya and Subbayya, to death. The remaining persons, Pullaya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kotayya."

(Sd.) Potla China Mattayya,

(Sd.) Kotta Krishnayya,

(Sd.) G. Bapaiah,

12th Jan, 1945

Sub-Inspector of Police

The whole of that statement except the passage "I

hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come” is inadmissible. In the evidence of the witness Potla China Mattayya proving the document the statement that accused 6 said “I Mattayya and other went to the corner of the tank land. We killed Sivayya and Subbayya” must be omitted.

A confession of accused 3 was deposed to by the Police Sub-Inspector, who said that accused 3 said to him :

“ I stabbed Sivayya with a spear, I hid the spear in a yard in my village. I will show you the place.”

The first sentence must be omitted. This was followed by a Mediatornama, Ex. Q.1, which is unobjectionable except for a sentence in the middle.

“ He said that it was with that spear that he had stabbed Boddapati Sivayya,”

which must be omitted.”

(emphasis supplied)

We are of the considered view that, the aforesaid observations are aptly applicable to the case at hand. As held by Their Lordships, 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. As has been held by Their Lordships, 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. As has been held by Their Lordships that, information supplied by a person in custody that “I will produce a knife concealed in the roof of my house” leads to the discovery of the fact that knife is still in the house of the informant to his knowledge and if the knife is proved to have been used in the commission of offence, the fact discovered would be a very relevant fact. However, if to the said statement the words be added “with which I stabbed A” the said words would be inadmissible in evidence, since they do not relate to the discovery of knife in the house of the informant. Their Lordships have clearly held that, contrary view taken by Full Bench of the Madras High Court in *In re Athappa Goundan*¹ was not correct.

39] It will also be relevant to refer to following observations of Their Lordships of the Apex Court in the case of *Kanbi Karsan Jadav vs. The State of Gujarat*²

“9. The mere fact that the dead body was

1 I.L.R. (1937) Mad. p. 695 = 46 L.W. 153 (F.B.)

2 1962 Supp (2) SCR 726 : AIR 1966 SC 821 : 1966 Cri LJ 605

pointed out by the appellant or was discovered as a result of a statement made by him would not necessarily lead to the conclusion of the offence of murder.....”

40] In that view of the matter, we are of the considered view that mere fact that, the dead body was discovered from the place on the basis of memorandum of the accused under Section 27, that by itself would not be sufficient to lead to the conclusion that the present Appellants are guilty of committing murder of the deceased. In the present case, we find that the prosecution has even utterly failed to establish by cogent evidence that the accused and the deceased were friends. There is no material to show that, they were so close to each other that on the invitation of the accused, the deceased would go for picnic to the deserted place. As already discussed hereinabove, apart from CDRs which show that in the evening of 11th October 2008, there were some exchange of words between the accused and the deceased on the morning of 12th October, 2008, the accused and the deceased were together in the area of one tower, there is no other material even to remotely come to the conclusion that the accused and the deceased were friends. As already discussed hereinabove and in view of the law laid down by the Apex Court, the extra judicial confession obtained by

the Investigating Agency wherein the accused have given incriminating statements cannot be read in evidence, except the information given, leading to discovery of the dead body of the deceased. We find that the prosecution has failed to prove the chain of complete circumstances, which leads to no other conclusion than the guilt of the accused. We are of the considered view that, there is no material on record to come to the conclusion that it is the Appellants and the present Appellants alone, who could have committed the crime in question. The Appellants are therefore entitled to be acquitted by giving them a benefit of doubt.

41] We therefore pass the following order :-

ORDER

- (i) The Appeals are allowed.
- (ii) The Order of conviction and sentence is set aside.
- (iii) The Appellants are acquitted of the charges charged with.
- (iv) The Appellants are directed to be set at liberty, if not required in any other case.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)