

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEALS NO.35 OF 2017 &

1 OF 2018.

CRIMINAL APPEAL NO.35/2017

Cyrone Rodrigues,

presently lodged at the

Central Jail, Colvale, through

Mrs. Maria do Ceu F.

Fernandes e Carneiro.

.....

Appellant.

Versus

The State of Goa, through

Police Inspector, Mapusa Police Station,

Mapusa, Goa.

.....

Respondent.

Mr. Ryan Menezes, Advocate for the Appellant.

Mr. S. R. Rivankar, Public Prosecutor for the State-Respondent.

CRIMINAL APPEAL NO.1/2018

Chandrakant Talwar & Pappu

@ Appu, Presently lodged at

Judaical Custody at Central Jail, Colvale.

....

Appellant.

Versus

The State of Goa, through

Police Inspector, Mapusa Police Station,

Mapusa, Goa.

.... Respondent.

Ms. Suzette Pereira, Advocate for the Appellant under Legal Aid Scheme.

Mr. S. R. Rivankar, Public Prosecutor for the State-Respondent.

Coram : M.S. Sonak &

Nutan D. Sardesai, JJ.

Reserved on : 9th August, 2019.

Pronounced on : 11th September, 2019.

JUDGMENT: (Per M.S. SONAK, J.)

Both these appeals are directed against the Judgment and Order dated 6th October, 2016, made by the learned Additional Sessions Judge, Mapusa in Sessions Case no.11/2010, convicting the Appellants for offences punishable under Sections 365, 394, 302 and 201, read with 120-B of the Indian Penal Code (IPC), and sentencing to undergo rigorous imprisonment for various terms in respect of offences other than offence under Section 302 of IPC. In respect of offence under Section 302 of IPC, the Appellants were directed to undergo rigorous imprisonment for life and pay fine of Rs.10,000/- each or in default, to undergo rigorous imprisonment for 3 years.

2. The two Appellants, along with one Grishmi Talwar and one

juvenile offender, are alleged to have conspired and committed murder of one Malti Yadav on 12.10.200 at around 6.30 p.m. These persons were also alleged to have abducted and wrongfully confined the said Malti Yadav and voluntarily caused her hurt, in order to rob her. These persons were alleged to have entered conspiracy for the purposes of commission of such offence.

3. Accordingly, necessary charge was framed against the Appellants and said Grishmi Talwar. We were informed that independent proceedings are pending against the juvenile offender and, therefore, in these Appeals, we are not concerned with the said proceedings.

4. The Prosecution, in all examined 60 witnesses in support of the charge. The Appellants were questioned under Section 313 of the Code of Criminal Procedure (CrPC). But they chose to lead no defence evidence in the matter. By the impugned Judgment and Order dated 6.10.2016, the learned Additional Sessions Judge, Mapusa, as aforesaid, has convicted and sentenced the Appellants. Hence, the present Appeals.

5. The learned Counsel for the parties state that the two Appeals may, in the aforesaid circumstances, be disposed of by a common Judgment and Order, particularly since the challenge in both the Appeals

is to the common Judgment and Order dated 6th October, 2016 made by by the learned Additional Sessions Judge, Mapusa.

6. Mr. Ryan Menezes, learned Counsel for the Appellant in Criminal Appeal No.35/2017 (Cyrone Rodrigues), has submitted at the very outset, that the Prosecution has failed to establish any link between the two Appellants *inter se* or between the Appellants and other accused persons, so as to bring home the charge of conspiracy under Section 120-B of the IPC, is improper and warrants interference.

7. Mr. Menezes submits that there is no cogent and credible evidence on record to establish the conviction of the Appellants on the basis of any circumstantial evidence. He submits that the well settled principles in relation to evaluation of circumstantial evidence have not been applied by the learned Additional Sessions Judge. He relied upon several decisions in relation to the scope of evaluation of the circumstantial evidence. Reference shall be made to some of the Judgments in the course of this Judgment and Order.

8. Mr. Menezes submits that the circumstances relied upon by the Prosecution do not unerringly point out to the guilt of the Appellants. In any case, Mr. Menezes submits that the circumstances have not at all

been proved beyond reasonable doubt by the Prosecution. On these grounds, Mr. Menezes submits that the conviction recorded against the Appellants warrants interference.

9. Mr. Menezes submits that there is no cogent and credible evidence that the Appellants and other accused persons stayed together at Bicholim, Goa between the period from 7.10.2009 and 13.10.2009. He submits that there are discrepancies in the attachment of the hotel register. He submits that PW.21, who is the star witness of the Prosecution cannot be believed, particularly because this witness stated that the Appellant and two others left in two cars i.e. white Zen Car and Red Alto car on 13th October, 2009, after checking out from the hotel. However, from the testimony of PW.32, it is the case of the Prosecution that the white Zen car, allegedly hired by the Appellants was returned on 10th October, 2009 itself and in its place, a red Alto car, was taken. Mr. Menezes submits that this is clearly a glaring inconsistency which renders the entire testimony of PW.21 undeserving of acceptance.

10. Mr. Menezes submits that there is absolutely no evidence brought on record by the Prosecution to indicate that the two Appellants were interacting with each other or were discussing the matter with each other. He submits that merely because the two Appellants may have

checked out allegedly at one and the same time, that, by itself, cannot establish any conspiracy or meeting of minds or for that matter even any nexus. Mr. Menezes submits that inasmuch as these aspects have not been proved, the impugned Judgment and Order warrants interference.

11. Mr. Menezes submits that there is no credible and cogent evidence to show that the Appellants took on hire white Zen car and red Alto car from PW.32, the alleged owner of the said cars. He submits that evidence, if any, in respect of the Appellant in Criminal Case No.1/2018, is sought to be used as evidence against the Appellant in Criminal Appeal No.35/2017. He submits that there is ample evidence on record that the Appellants were shown PW.32 before the Test Identification (TI) Parade and, therefore, any identification of the Appellants by PW.32 could be of no avail. He submits that it is not even the case of the Prosecution that the white colour Alto car had any nexus with the alleged crime. He submits that there is also no clear and cogent evidence on record to establish that the red Alto car alleged used for commission of the offence was the same red Zen car, allegedly hired by the Appellants from PW.32. He submits that though the cars were seized in the course of investigation, there was no identification of such seized cars. He submits that all these factors were not even considered by the learned Additional Sessions Judge before holding that the second circumstance about hiring of the two cars

stands proved in the matter.

12. Mr. Menezes submits that the circumstance “*last seen theory*” is not at all proved by the Prosecution. He submits that though PW.40, who is the solitary witness with regard to this circumstance, has merely deposed that on 12.10.2009, he saw a lady in yellow churidar, talking with the occupants of red Zen car, which was parked along side highway. He submits that PW.40 has not deposed to seeing the occupants of the red Zen car. He submits that PW.40 was admittedly travelling in a moving car at the speed of 30 to 40 km./hour. He submits that such evidence is not at all sufficient to invoke the “*last seen theory*”. Therefore, the circumstance regards “*last seen theory*” is not at all proved by the Prosecution in the present case.

13. Mr. Menezes submits that the so called recoveries in the present case can never be regarded as recoveries under Section 27 of the Evidence Act. He submits that the gold ornaments were never identified by PW.46, the brother-in-law of the deceased. The husband of the deceased was never examined as a Prosecution witness, though PW.46 had stated that he is not in a position to identify the gold ornaments and it is the husband of the deceased who would be in a position to identify them. Mr. Menezes submits that this is a fatal lacuna in the Prosecution case.

Mr. Menezes submits that in any case, the recoveries of items, like the purse, cosmetics, etc. were recovered from an open space, which was accessible to one and all. He submits that such a recovery from the open space, can hardly be regarded as recoveries in terms of 27 of the Evidence Act.

14. Mr. Menezes submits that the circumstance that the Appellants absconded after the alleged commission of offence is not established by the Prosecution. He submits that in any case, the mere absconds can hardly be regarded as some incriminating circumstance, as is held by the Hon'ble Apex Court in the case of *Sujit Biswas Vs. State of Assam*, (2013) 12 SCC 406.

15. Mr. Menezes submits that the TI Parades held in the present case are suspect and inspire no confidence. He points out that there was unreasonable delay in holding of the TI Parade. He points out that PW.32 and PW.49, however, have deposed that the Appellants were shown to them in October, 2009 before the TI Parade was held on 14th November, 2009. He submits that the guidelines in the Criminal Manual for holding of TI Parades were observed by the Prosecution only in breach. For all these reasons, he submits that the circumstance relating to TI Parade cannot be held as proved.

16. Finally, Mr. Menezes submits that the alleged confession before the Magistrate could never have been relied upon by the learned Additional Sessions Judge. He points out that such confessions were retracted by the Appellants at the earliest opportunity. Secondly, the statements in the alleged confessions, find no independent corroboration from the other evidence on record. He submits that the material on record itself establishes that the Appellants were tortured and forced to confess to crimes which were never committed by them.

17. For all the aforesaid reasons, Mr. Menezes submits that the impugned Judgment and Order dated 6.10.2016 made by the learned Additional Sessions Judge and the conviction recorded against the Appellants therein warrants interference.

18. Ms. Pereira, learned Counsel for the Appellant in Criminal Appeal No.1/2018, adopts the submissions made by Mr. Menezes. However, she adds that the Appellant, whom she represents, was tortured whilst in custody and this is evident from the material on record. She submits that the so called confession which, in any case, was retracted by the Appellants, could, therefore, never have been relied upon by the Prosecution, in order to sustain the conviction of the Appellants. For all

these reasons, Ms. Pereira submits that the impugned Judgment and Order dated 6.10.2016 , made by the learned Additional Sessions Judge, and the conviction recorded therein warrants interference.

19. Mr. S.R. Rivankar, learned Public Prosecutor defends the impugned Judgment and Order on the basis of the reasonings reflected therein. He points out that there is no error whatsoever in the view taken by the learned Additional Sessions Judge and there is adequate evidence on record to sustain the conviction and the sentences imposed upon the Appellants. He points out that the retractions are belated and inspire no confidence. For all these reasons, Mr. Rivankar submits that these Appeals may be dismissed.

20. Mr. Menezes, Ms. Pereira, as well as Mr. Rivankar referred to certain authorities which shall be considered at the appropriate stage, in the course of this Judgment and Order.

21. As noted, at the very outset, it is the case of the Prosecution that on 12.10.2009 at about 18.30 hours, the accused persons with common intention hatched a conspiracy and in pursuance of such conspiracy, murdered Malti Yadav by smothering and strangulating her neck with the help of a cable wire; robbed her, threatened her, brought her

to an isolated place and set her on fire by pouring diesel on her in order to destroy the evidence.

22. There is no doubt that the demise of Malti Yadav was homicidal. This is evident from the deposition of PW.2-Agnes Mendes and PW.10-Dr. Silvano Dias Sapeco, who conducted post-mortem on the dead body. From this evidence, it is clear that the Prosecution has proved, beyond reasonable doubt, that the death of Malti Yadav was homicidal in nature. The learned Additional Sessions Judge was, therefore, entirely justified in returning a finding to that effect. In fact, there was no serious challenge to this finding on behalf of both the Appellants.

23. There is also no serious challenge to the identity of the dead body as being that of Malti Yadav. PW.46-Suraj Singh, brother-in-law of the deceased has identified the body. There was no challenge to the deposition of PW.46 in the course of cross examination, on behalf of either of the Appellants. Thus, there is no serious issue of identity of the dead body, involved in the present Appeals and, in fact, no contentions on this issue were raised by the learned Counsel for the Appellants.

24. The case of the Prosecution rests on circumstantial evidence. The Prosecution has also relied upon the confession of the Appellants. However, according to us, the case of the Prosecution based upon

circumstantial evidence, is required to be evaluated, to begin with.

25. The Court relied upon several decisions on scope of evaluation of circumstantial evidence. All the decisions, substantially state that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests :

- A) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- B) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- C) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- D) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

26. Accordingly, there is no necessity to deal with each of the decisions relied upon by the parties on the aspect of evaluation of the

circumstantial evidence. However, we will have to apply the aforesaid principles whilst evaluating the circumstantial evidence on record.

27. The Prosecution has relied upon the following circumstances to establish the charge against the Appellant:

(A) That all the accused persons stayed together at Hotel Prabhu Smaran at Mayem Bicholim between the period 7.10.2009 and 13.10.2009;

(B) That the accused persons hired the white Zen car and red Alto car from PW.32; and the red Alto car which was established as having nexus with the murder of Malti Yadav;

(C) That the deceased, Malti Yadav was last seen with the Accused persons on 12.10.2009 at about 6.30 p.m. which was hardly within hours before which she was murdered in the red Alto car by smothering and strangulation.

(D) Recoveries of gold ornaments and other material, including identity card of Malti Yadav on the basis of statement to the police. The prosecution has invoked the provisions of Section 27 of the Evidence Act in this regard;

(E) Abscondence of the accused persons after the commission of the offences;

(F) Identification of the Appellants by the witnesses in the TI Parade;

(G) Confessions of the Appellants before the Magistrate.

28. According to us, the aspect of confession by the Appellants before the Magistrate will have to be dealt with independently. This is because, the confession was ultimately retracted and scope of retracted confession deserves independent consideration. Besides, the confession, even if proved, must be considered so as to buttress the other evidence on record and not vice versa. (See *Aloke Nath Dutta and ors. vs. State of West Bengal*, (2007) 12 SCC 230).

29. The first circumstance that the accused persons stayed together at the hotel Prabhu Smaran between 7.10.2009 and 13.10.2009 has been proved by the Prosecution beyond reasonable doubt on the basis of the evidence of PW.12, PW.20, PW.26 and PW. 57. There is some minor discrepancy in the statement of PW.21, when such statement is compared with the statement of PW.32. However, in our opinion, this discrepancy is by itself not sufficient to reject the otherwise clear and cogent testimony of PW.21 as regards this first circumstance.

30. PW.12 is the Panch to the Panchanama for the seizure of the hotel register. PW.20 is yet another Panch who identified the signature of Grishmi Talwar, who was Accused No.3 in the present matter, but who

has since been acquitted. PW.26 is the witness witness in whose presence simple signatures of the accused persons came to be taken. PW.57 is the Handwriting Expert, who has opined that the signature of Accused No.2 was also found on the Hotel Register for the relevant period. Primary evidence thus supports the case of the Prosecution that the accused persons stayed at Prabhu Smaran hotel on certain dates between 7.10.2009 and 13.10.2009. The Prosecution has, in fact, established that Chandrakant and Grishmi stayed at the said hotel between 7.10.2009 and 13.10.2009 and Cyrone and the juvenile offender stayed at the same hotel between 8.10.2009 and 13.10.2009.

31. PW.21 – Ranjana Karbhatkar has deposed that the guest house Prabhu Smaran belongs to her uncle and she along with her family members stays on the ground floor of the said guest house, which is, in fact, on the first floor. She has deposed that on 7.10.2009, Chandrakant along with one lady, and a small child checked into the guest house. In the Court she identified Chandrakant and Grishmi. She deposed to making necessary entries in the hotel register and accepting advance payment from the accused persons. She deposed that on 8.10.2009, Cyrone and another female also checked into the guest house. Name given by the said Cyrone was Meldrigus. She deposed that she was not present at the reception counter at the time when sets of guests actually

checked in. But one Uday Parab was present. There is no dispute that Uday Parab has since expired. However, PW.21 has deposed that on the next date, she actually saw the Appellants and it is she who made the necessary entries in the register. She identified the Appellants in the Court and also deposed to the amounts paid by the Appellants for their stay at the guest house. Finally, she deposed that on 13.10.2009, in the morning hours all the four guests checked out of the guest house and left in one white colour Zen car and red colour Alto car. She has deposed that both the cars were parked in the hotel premises.

32. Mr. Menezes and Ms. Pereira have challenged the testimony of PW.21 by pointing out to testimony of PW.32, who has stated that initially, the accused persons had hired white colour Zen car, but returned the white colour Zen car on 10.10.2009 and hired the red Alto car by way of substitution. The learned Counsel for the Appellants, therefore, submit that there is clear inconsistency between the deposition of PW.32 and PW.21 and, therefore, the testimony of both these witnesses is suspect and deserves rejection.

33. According to us, there is documentary evidence which establishes that the Appellants did stay at the Prabhu Smaran guest house during the specified period. That apart, the testimony of PW.21 otherwise

inspires confidence. There is really no good reason shown to doubt her testimony. No doubt, there is discrepancy when PW.21 says that she noticed two sets of guests depart on 13.10.2009 in a white colour Zen car and red colour Alto car. However, this discrepancy is not of such nature as to discard the otherwise clear and cogent testimony of PW.21. Rather, we accept the explanation furnished by Mr. Rivankar that this statement was prompted by the fact that between 8.10.2009 and 10.10.2009 white colour Zen car was in fact parked in the guest house premises. Therefore, some confusion may have arisen in the matter. Based upon such discrepancy, we are not prepared to hold that the entire testimony of PW.21 deserves rejection. According to us, the first circumstance has been proved beyond reasonable doubt by the Prosecution and, there is no reasons to disagree with the learned Additional Sessions Judge on this aspect.

34. Besides, in the present case, PW.21 has not only identified the two Appellants in the course of the IT Parade, but further she has specifically identified the Appellants in the Court. Identification in the Court, according to us, is a substantive evidence. Since the Appellants stayed at the guest house for a considerably long period i.e. between 7.10.2009 and 13.10.2009. PW.21 had sufficient opportunity to familiarise herself with the identities of these Appellants. Besides, PW.21

has deposed that Chandrakant was accompanied by a lady and a small child. All this is sufficient to hold that the first circumstance has been proved by the Prosecution beyond reasonable doubt.

35. The identification by PW32 and PW19 in the Court, according to us, is substantive evidence. The other evidence on record amply establishes that both PW32 and PW19 had more than sufficient opportunities to remember the identities of the appellants and thereafter to identify them in the Courts. From the cross examination of PW19 or for that matter PW32 is quite clear that there is no serious dent made to the testimony of these witnesses, which accordingly deserves acceptance.

36. In the matters of evaluation of circumstantial evidence, it is not as if every small or trivial discrepancies or contradictions should lead to rejection of testimony of such witnesses. Unless discrepancies and contradictions are so material and substantive and that too are vital in respect of facts deposed by the witnesses cannot be straightaway contradicted and their evidence discarded in entirety. This proposition is laid down in *Joseph Vs State of Kerala* (2000) 5 SCC 197.

37. The second circumstance relied upon by the Prosecution is that the Appellants hired a white Zen car and a red Alto car from PW.32.

This is a relevant circumstance since, ultimately, the Prosecution has established that the murder of Malti Yadav took place in the red Alto car on 12.10.2009.

38. In support of the second circumstance, the Prosecution has examined PW.6, Panch to the seizure of the cars from PW.32, PW.11 PSI, who was contacted by PW.32, after he read in the newspaper about the murder. PW.32 is the owner of the two cars, PW.5 is the witness who produced the receipt of the rental cars in relation to the recovery of the amounts from Chandrakant and PW.30 is the Panch before whom Chandrakant made disclosure and took the police and the Panch to various locations where the acts having nexus with the crime took place. According to us, there is ample evidence on record in support of the second circumstance which has been proved beyond reasonable doubt by the Prosecution.

39. The most important witness in support of the second circumstance is PW.32, Mohamad Gaus, the owner of the two cars. He has deposed that the two cars are in fact owned by him, though the registration may have been in the name of his sister-in-law. He has deposed that he used to give these cars on rent for Rs.600 to Rs.650/- per day. He has identified the accused persons in the Court. In his deposition,

he has no doubt stated that he was shown the accused persons before the TI Parade was held. However, according to us, this makes no difference because PW.32 had already seen the accused persons on 8.10.2009, when he came to hire car from him. Besides, PW.32 had already seen both, Chandrakant and Cyrone on 9.10.2009, when both of them came to take the car on hire. PW.32 had also seen the accused persons on 10.10.2009 when they had come to exchange hired car and on 13.10.2009, when they came to return the red Alto car. This means that PW.32 had sufficient opportunity to see and interact with the accused persons. Identification by PW.32, therefore, assumes significance and deserves to be accepted.

40. PW.32 has deposed that on 8.10.2009, Chandrakant Talwar came to him at about 2.30 p.m. and sought to hire a car. PW.32 has deposed that he checked the licence of Chandrakant, but since the licence was from the State of Maharashtra, he insisted upon some local witness. PW.32 has deposed that on the next day i.e. on 9.10.2009 at about 5.30 p.m. Chandrakant came to him, along with Cyrone, who disclosed his name as Donjoe. PW.32 has deposed that since said Donjoe was speaking Konkani fluently, PW.32 did not insist upon any further identification proof, but accepted photo copy of the licence of Chandrakant, noted down his phone number, and took his signature. PW.32 has stated that he

also took the address and phone number of Cyrone and made entries in the registration book. After all this, PW.32 has deposed that he gave the accused persons a white colour Zen car on hire.

41. PW.32 has then deposed that on 10.10.2009, at about 5.30 p.m. the accused persons, along with two ladies and the child came to his office and told him that there was some problem with the door of the Zen car. PW.32 even identified the ladies who had come to him to his office. PW.32 then deposed that he checked the door and found that there was indeed some problem with the door and, therefore, PW.32 gave him the red colour Alto car in lieu of the white Zen car.

42. According to us, all the aforesaid evidence is more than sufficient to establish beyond reasonable doubt that it is the appellants who took on hire the white Zen and red Alto car from PW32. The findings to this effect recorded by the learned Addl. Sessions Judge accordingly warrant no interference.

43. The third circumstance relied upon by the prosecution is the circumstance that the deceased was last seen in the company of the appellants and the time gap between such sighting and murder was also minimal that the onus lay upon the appellants to explain whether there

could have been another intervening event leading to murder of the deceased. This means that the prosecution has invoked “ *last seen theory*” in support of its case.

44. According to us, Mr. Menezes and Ms. Pereira are quite right in submitting that this circumstance has not been substantially proved by the prosecution. The solitary witness in support of this circumstance is Narendra Morajkar, Hawaldar on Robert 24 Van (patrolling van)) who was examined as PW40 in this case.

45. PW40 has deposed that on 12.10.2009 while he was in the Robert 24 van on patrolling duty, at about 6.30 p.m., near Lupin company bus stop at National Highway 17, he noticed a red colour Alto car parked. A lady wearing yellow colour churidar was standing outside the car and talking to someone inside the car. He deposed that he did not notice how many occupants were inside the car and that the patrolling van was being driven at a speed of about 30 to 40 kms per hour as it was rush hours in the evening. He has also deposed that he noticed that the said lady then sat inside the car beside the driver and car moved towards Agassaim side.

46. PW40 then deposed that on 20.10.2009, Police Inspector

Manjunath Dessai had come to Verna Police Station in connection with a murder which took place at Khorjuem, Aldona and had brought with him a photograph of the face of the deceased, he noticed that this is the same face he had seen on 12.10.2009 standing near Lupin company bus stop and it is this lady who thereafter sat inside the red Alto car. No serious dent has been made to the deposition of PW40 in the course of cross examination.

47. However, the deposition of PW40 at the highest suggest that the deceased was seen talking with the occupants of red Alto car at about 6.30 p.m., on 12.10.2009 at the Lupin company bus stop. The evidence further suggests that the said lady got into the said car and sat by the side of the driver and left towards Agassaim side. However, PW40 has himself admitted that he did not notice the number of the occupants in the car nor was he in a position to identify the occupants in the car. Accordingly, the deposition of PW40 fall short of making good last seen theory. Accordingly, based upon the testimony of PW40, we agree with Mr. Menezes and Ms. Pereira that the circumstance of last seen theory, cannot be said to have been fully proved beyond reasonable doubt.

48. This does not however mean that the deposition of PW40 is quite useless in the context of present case. The case of the prosecution is

that the deceased was wearing yellow colour churidar and further murder took place in red Alto car. The case of the prosecution is also that the deceased, who was working in Lupin company and was returning home after her duty hours from the company at or about the same time when she was spotted at the bus stop, was offered a lift by the appellants in red Alto car and which proceeded towards Agassaim side. It is the case of the prosecution that the deceased was strangled and smothered while she was sitting on the front seat of red Alto car in the evening of 12.10.2009. Though, the deposition of PW40 fall short of making good last seen theory, the deposition of PW40, to which no serious dent has been made in the course of the cross examination is corroborated by other circumstances established by the prosecution beyond reasonable doubt. Therefore, we add that though the deposition of PW40 may not be sufficient to prove the last seen circumstance, nevertheless, such deposition, cannot be discarded as worthless because same corroborates several material particulars, otherwise established by the prosecution beyond reasonable doubt and by way of independent evidence.

49. The next circumstance relied upon by the prosecution is the recovery under Section 27 of the Evidence Act. In so far as recovery of gold ornaments are concerned, we again agree with Mr. Menezes and Ms. Pereira that this circumstance cannot be said to have been proved by the

prosecution beyond reasonable doubt. The reason for this is that the prosecution only examined PW46 the brother-in-law of the deceased, in support of this circumstance. The brother in law, in his deposition very clearly stated that he is not in a position to identify the gold ornaments and that the husband of the deceased, who is brother of the witness will be in a position to identify the same. Admittedly, the husband of the deceased was never examined by the prosecution and therefore, there is no identification of the gold ornaments. In these circumstances, it cannot be said that the recovery of the gold ornaments has been established by the prosecution.

50. There is recovery of several other items, out of which, the recovery of identity card of the deceased Malti, according to us, is the most significant. In this regard, amongst other witnesses the deposition of Sameer Gawas (PW8) pancha witness to the recovery proceedings, is quite material.

51. Sameer Gawas (PW8) has deposed that he was employed in Food and Drug Administration and he has acted as panch witness for recovery of certain articles in relation to crime which is the subject matter of the present case. He deposed that the appellants made a statement that on 13.10.2009, they had thrown fake ornaments and other articles after

putting them in a plastic bag by the side of the road and they also indicated their willingness to show the spot where the bag alongwith the articles was thrown by them. He deposed that the appellants stated that the bag was covered with insulin tape and same was thrown “*inside a fencing and in the bushes*” in particular.

52. PW8 has then deposed that in pursuance of disclosure statement, he along with three police constables and PI Sunita Sawant, one constable driver and another pancha witness proceeded as per the directions of Appellants. He has deposed that at a particular place at Mayem road, the accused requested them to stop the vehicle. He has deposed that one of the police constables inquired with passers by about the name and place and was informed that this is place known as '*Sashtri wada*'. PW8 has deposed that there was a structure at a place where Cyrone took them and the structure was a Mill which was closed. The property was fenced with barbed wire. Cyrone indicated that this was the place where he had thrown the bag with articles. There were bushes, cashew trees and coconut trees in the said property. Thereafter they entered into the property and Cyrone, after search found the said bag in the bushes, Cyrone then handed over the bag to one of the constables. The bag was then brought to the Sumo jeep and its contents were emptied in the dickey after removing the insulin tape. There were in all

33 items in the bag which included lipstick, hair pins, small mirror, comb, bracelet, bangles, tablets etc. However, what is most significant that this bag contain ID card with name of Malti Yadav, address and photograph. All this was recorded in the panchanama. The witness deposed that in addition to the ID card, there was attendance sheet in the name of Malti Yadav. This witness has identified the articles.

53. In the course of the cross examination, according to us no serious dent was made to the testimony of PW8. The circumstance that in pursuance of the disclosure statement made by Cyrone, the identify card and attendance sheet of the deceased came to be discovered, is quite significant circumstance, which can said to have been proved beyond reasonable doubt, by the prosecution. Such disclosure can be regarded as a recovery for the purpose of Section 27 of the Evidence Act. Therefore, that part of the disclosure statement made by Cyrone, pursuant to which the articles in question came to be discovered, is certainly admissible in evidence and is rightly relied upon by the learned Additional Sessions Judge.

54. Only a attack of Mr. Menezes and Ms. Pereira as regards the aforesaid circumstance was that, according to them, this was discovered from “*open space*”. In this regard, the learned counsel placed reliance

upon rulings in *Bharat Vs State of MP* (supra), *Kora Ghasi Vs State of Orissa* (supra), *Salim Akhtar Vs State of U.P.* (supra) and *Shahul T. Hamid Vs State of Goa* (supra).

55. According to us, the aforesaid decisions, turn their own facts. In the present case, it is not as if the recovery was from an open place accessible to all. PW8 has clearly deposed that the discovery was made from inside the property which was fenced by barbed wire. Further, discovery was made from bushes where plastic bag containing said articles was thrown. PW8 has deposed that one had to go into the property, which was closed Mill, which was fenced by barbed wire. All these materials clearly indicate that the plastic bag containing articles was not at a spot easily accessible or at a spot which was visible to any and every person who would care to pass by. Accordingly, the decisions relied upon by the learned counsel for the appellants, which, as stated above, turn their peculiar facts of the case and can be of no assistance to the appellants in the state of evidence in the present matter. According to us, this circumstance is therefore established by the prosecution, beyond reasonable doubt.

56. In *State of H.P. Vs Jeet Singh* (1999) 4 SCC 370, the Hon'ble Supreme Court has held that place should be accessible to others

but whether it was ordinarily visible to others. Further, the fact discovered embraces the place recovered and the knowledge of the accused as to it and not object recovered. Applying this ruling to the facts of the present case, it cannot be said that recovery is vitiated or is required to be assigned has no evidentiary value. In fact, the decision of the *Jeet Singh* (supra) is sufficient to reject the contention raised and on behalf of the appellants in the context of recovery.

57. The next circumstance relates to abscondence of the appellants. The depositions of PW35 and PW36 establish that the appellants fled from Goa on 13.10.2009 when according to the prosecution, the murder of Malti was committed on 12.10.2009. Thus, though this circumstance is established, the weight to be given to this circumstance will be governed by ruling of the Hon'ble Apex Court in the case of *Sujit Biswas Vs State of Assam*, 2013 (12) SCC 406 which holds that mere abscondence, without anything further does not suggest any guilt on the part of the absconders. In the present case, the prosecution has not relied upon circumstance of mere abscondence. This is a circumstance which will have to be considered together with all other relevant circumstances.

58. The circumstance that the appellants were identified in the

course of TI parade, is yet another circumstance relied upon by the prosecution. Mr. Menezes and Ms. Pereira however submit that both PW32 and PW49 have deposed that the appellants were shown to them some time in October, 2009 prior to conduct of TI parade on 14.11.2009.

59. According to us, in so far as PW32 is concerned, there was not even any necessity of conducting any TI parade. This witness, was owner of two cars hired by the appellants. This witness, as noted earlier, had opportunity of seeing and interacting with the appellants on almost two to three occasions during the period between 7.10.2009 and 13.10.2009. On the first occasion, Chandrakant contacted PW32 on 8.10.2009 in order to hire a car. On this occasion, PW32 saw the licence document presented by Chandrakant and declined to hire any car on the ground that Chandrakant was not a local.

60. PW32 has deposed that on 9.10.2009 Chandrakant arrived along with Cyrone. He has deposed that since Cyrone spoke Konkani fluently, PW32 hired a white Zen car to the appellants. PW32 then deposed that on 10.10.2009 both the appellants again came to him complaining that the door of the white Zen car was not functioning properly and sought for replacement of the car to red Alto. Finally,

PW32 has deposed that on 13.10.2009, the appellants came to return the red Alto car and on that occasion requested him to arrange a driver to drop them at bus stand. PW32 has deposed that he arranged for his cousin brother Mofaq Mamlekar to drop them to the Mapusa bus stand. In these circumstances, there is nothing disbelievable in PW32 identifying the appellants at the TI parade. This witness, has also identified the appellants in the course of trial and it is such identification which is in fact substantive evidence.

61. In the aforesaid circumstances, we are unable to appreciate the contention of Mr. Menezes and Ms. Pereira that the TI parade was not proper or was in breach of guidelines in the Criminal Manual. Several witnesses, including in particular PW32 has clearly identified the appellants and there is no good reason to interfere with the findings recorded by the learned Additional Sessions Judge on this aspect. But even if we assume that there were some infirmities in the T.I. Parade, the other evidence on record is more than sufficient to accept identification. Therefore, we agree with the learned Additional Sessions Judge that even this circumstance is proved beyond reasonable doubt.

62. In *Vijay Vs State of M. P.* (2010) 8 SCC 191 the Hon'ble Apex Court has held that holding of the Test Identification Parade is not a

substantive piece of evidence, yet it may be used for the purpose of corroboration for believing that a person brought before the Court is the real person involved in the commission of the crime. However, the Test Identification Parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant. The Test Identification is a part of the investigation and is very useful in a case where the accused are not known before hand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The actual evidence what is given by the witnesses in the court.

63. The identification by PW. 32 and PW.19 in the Court, according to us, is substantive evidence. The other evidence on record amply establishes that both PW.32 and PW.19 had more than sufficient opportunities to remember the identities of the appellants and thereafter to identify them in the Courts. From the cross examination of PW.19 or for that matter PW.32 is quite clear that there is no serious dent made to the testimony of these witnesses, which accordingly deserves acceptance.

64. According to us, there is ample evidence on record to establish the theory of conspiracy put forth by the prosecution and to sustain conviction under Section 120B of the IPC. The appellants' contention that there is no cogent evidence to indicate that the appellants had any truck with one another at Prabhu Smaran hotel deserves no acceptance. However, even if the evidence in relation to stay of the appellants at Prabhu Smaran guest house is excluded, there is evidence of PW32, the owner of two hired cars as well as evidence of Mofaq Mamlekar (PW19), which clearly establishes that the appellants were together in the deeds which they committed. Ultimately, in the matter of conspiracy the direct evidence is rarely possible. Reasonable inferences have to be drawn from the proved facts. In the present case, inference drawn from the proved fact is quite reasonable. PW32 has deposed as to how two appellants came together to hire cars and as to how two appellants were together at the time of returning the car and how the two appellants requested PW32 to arrange for a driver to drop them at Mapusa bus stand, since they were getting late. Mofaq Mamlekar (PW19) has clearly deposed that it was he who dropped the appellants to the Mapusa bus stand at the request of PW32. In the light of such evidence, it is quite futile for the appellants to contend that they do not know each other or they have no truck whatsoever with each other.

65. The circumstances which have been proved by the prosecution beyond reasonable doubt are quite sufficient to sustain the conviction recorded by the learned Addl. Sessions Judge.

66. In addition, this is a case where both the appellants have confessed to the commission of the crime before the Magistrate. These confessions were recorded before the Special Judicial Magistrate Maria Mascarenhas. The confession statements have been reproduced in the impugned judgment and order and therefore, are not once again reproduced in this judgment and order.

67. Ms. Pereira, learned counsel for the appellant in Criminal Appeal No.1/2018 submitted that two confessions were verbatim copies of one another and that by itself suspicious. Upon comparison of confessions, we find that this contention is not at all made out. Though, it is true that two confessions, in material aspect are quite similar to one another, that by itself can never be a ground to reject the two confessions. In fact, two confessions are quite consistent with one another.

68. In the context with serious injuries on the person of Chandrakant, Ms. Pereira contended that these injuries were inflicted by the police, in order to force the appellant to confess. She referred to the

statement of retraction made by the police in the year 2016 i.e. almost six years after the date of record of confession to submit that this statement very clearly speaks about torture.

69. In this case, confessional statements were recorded before the Special Judicial Magistrate in January, 2010. Upon perusal of the testimony of Special Judicial Magistrate, (PW34) we are satisfied that all the procedural safeguards mandated by law as well as procedure prescribed were duly complied with. Besides, we note that the Special Judicial Magistrate who was examined as a witness in the matter was not even cross examined seriously on the aspect of any torture or police atrocities. Even the I.O. was not cross examined on this aspect with degree of seriousness.

70. The retraction of confession comes in the year 2016 by the application dated 05.04.2016 at Exhibit 165 and 01.04.2016 at Exhibit 160.

71. The retraction statement of Chandrakant is dated 05.04.2016 at Exhibit 165 and the same reads thus :

“The accused no.1 most respectfully states and submits as under :-

1. *That on the last date of hearing the advocate appearing for the accused No.1 told accused No.1 about his the confessional statement and replied that he has never signed any confessional statement.*
2. *That after going through the said confessional statement the accused told the advocate representing before this Court under free legal aid that he had never made any such kind of statement before any magistrate.*
3. ***That the accused No.1 prior to his arrest in the above case met with an accident by which the right hand got injured.***
4. *That by taking the advantage of the above fact of the accused No.1 police used to hold his hand in such a manner that it used to give terrible pain.*
5. *That exact date is not getting recollected by the accused No.1, the police took accused No.1 to flat at Tonka, Tiswadi Goa where in one lady was present whose name he came to know as Maria Mascarenhas, when she came to depose before this Court, the police kept the accused No.1 in the said flat for whole day without food.*
6. *That in between the police used to come and says to accused no.1 that his hand is already injured and if the accused No.1 does not sign the pages which will be given to accused no.1 then they will do encounter or if that is not been possible then the right hand will be broken to the extent that it will never be recovered in future.*
7. *That being in the above situation put on the accused No.1, the accused No.1 puts his signature on the 10 to 11 pages out of which only two pages were printed and showed to sign where the accused No.1 name's appear and the rest blank papers were made him to sign in the margin. The accused no.1 was not given a time to go through the said*

printed things.

8. That when said lady came to depose before this Court the accused No.1 did not recollect the above fact as the time he was already forgotten and when the advocate showed the confessional statement recollected the above fact.

9. That the accused No.1 was under the influence, coercion and threat from the police which fact was known to the said lady. The said lady did not explain as to the contents of the two pages printed one nor asked any questions to the accused No.1.

10. That this present application is been prepared at the instruction of accused no.1 and after going through the undersigned accused No.1 found same to be true.

It is therefore prayed that the confessional statement filed by the said lady should not be read in evidence.”

72. In the retraction statement, Chandrakant has stated that prior to his arrest he had met with an accident by which his right hand got injured. Then he has stated that the police used to hold his hand in such a manner that it used to give terrible pain and that it is in this manner the confession was extracted from him.

73. The retraction statement dated 05.04.2016 completely negates the contention now raised that Chandrakant sustained injuries to the hand as a result of police torture and that his hand was actually fractured. The retraction statement acknowledges that Chandrakant had

already met with an accident prior to his arrest in which his right hand got injured.

74. The aforesaid according to us is sufficient to discount the contention of torture or coercion by the police to extract any confession from the police.

75. The confession of Cyrone was recorded some time in January, 2010. The retraction was however by application dated 01.04.2016 at Exhibit 160 and the same reads thus :

“The Accused No.2 states and submits as under :-

1. The Accused states that the Accused has not made any confessional statement before magistrate under Section 164 of Cr. P.C., and was unaware of any alleged confessional statement being recorded on his behalf and became aware of the said statement before magistrate only when the said statement under Section 164 of Cr. P.C., at Exb. 143 was shown to him by his advocate under Free Legal Aid.

2. That the alleged confessional statement recorded by magistrate Mrs. Maria Mascarenhas under Section 164 of Cr. P.C., was under threat, coercion and undue influence by Police Officer Sunita Sawant as the Accused was threatened by Sunita Sawant, that in case he refuses to sign certain documents before magistrate, than he will be shot by PI Sunita Sawant. The Accused fearing his life signed certain documents which he later found out through his advocate was a confessional statement at Exb.143.

3. The Accused states that Accused never made a voluntary statement before Magistrate. The Accused states that the Accused was taken by PI Sunita Sawant to the residence of Magistrate Maria Mascarenhas at Tonca, Caranzalem, where he was forced and threatened to sign on papers in front of magistrate, the content of which was never explained to the Accused and not given opportunity to read at any point of time.

4. The Accused states that the contents of Confessional statement recorded by Magistrate was not as per the say of the Accused and that the Accused was forced to sign the said confessional statement.”

76. The aforesaid retraction statements together with other circumstances on record is sufficient to discount vague allegation of torture or coercion in the matter of record of confession.

77. According to us, the confession was rightly relied upon by the learned Additional Sessions Judge to record the conviction of the appellants.

78. In this case we find that procedural requirements in the matter of record confessions were complied with by the Special Executive Magistrate. The appellants were granted more than sufficient time to reflect upon their proposal to confess. The Appellants were administered

the necessary warnings. The Special Executive Magistrate has deposed in the mater and there is no dent made to the testimony in the course of cross examination. The allegations of torture made after six years warrant no acceptance. Most importantly, there is other evidence on record to corroborate the confessions. On basis of all this we find that the learned Additional Sessions Judge quite correctly relied upon the confessions to buttress the other independent evidence on record and not vice versa.

79. In *Shankaria vs. State of Rajasthan*, (1978) 3 SCC 435, the Hon'ble Supreme Court held that the Courts, in matters of evaluation of retracted confessions, must apply a double test: (1) whether the confession was perfectly voluntary; (2) if so, whether it is true and trustworthy. Satisfaction of the first test is a sine qua non for its admissibility in evidence. If the confession appears to the Court to have been caused by any inducement, threat or promise such as is mentioned in Section 24, Evidence Act, it must be excluded and rejected *brevi manu*. In such a case, the question of proceeding further to apply the second test, does not arise. If the first test is satisfied, the Court must, before acting upon the confession reach the finding that what is stated therein is true and reliable. For judging the reliability of such a confession, or for that matter of any substantive piece of evidence, there is no rigid canon of universal application. Even so, one broad method which may be useful

in most cases, for evaluating a confession may be indicated. The Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If one such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, may be taken to have satisfied the second test.

80. Applying the aforesaid double test to the evidence on record in the present case, we are satisfied that the confessions were perfectly voluntary notwithstanding their belated retractions after 6 years. Further, the confessions were both, true and trustworthy particularly because there is other evidence on record which corroborates the confessions.

81. In *Permananda Pegu vs. State of Assam*, (2004) 7 SCC 779, Hon'ble Supremo Court has held that in order to be assured of the truth of confession, the Hon'ble Apex Court has, in series of decisions, evolved a rule of prudence that Court should look to corroboration from other evidence. However, there need not be corroboration in respect of each and every material particulars. Broadly, there should be corroboration so that the confession taken as a whole fits into the facts

proved by other evidence, in substance the Court should have assurance from all angles that the retracted confession was, in fact, voluntary and it must have been true.

82. There is corroboration regards the circumstance that the appellants and others staying at Prabhu Smaran guest house; about the hiring of cars; about picking up the victim at the bus stop near Lupin factory; medical evidence about smothering and strangulation of the victim; about disposal of articles belonging to the victim and about the flight to Mumbai after the commission of the crime. According to us, this corroboration constitutes sufficient corroboration of material particulars, rendering it quite safe to even rely upon the belatedly retracted confessions of the two appellants. The confessions, taken as a whole fit into the facts proved by other evidence on record. Therefore, we are satisfied that the double test formulated in *Shankaria* (supra) stands fulfilled in the present case. Besides, this is not a case where we are sustaining the conviction only on the basis of the confessions. In fact, we are relying upon the confessions merely to fortify our conclusion, based upon, other evidence on record. The learned Addl. Sessions Judge was, accordingly, quite justified in relying upon the confessions to buttress the other evidence on record and to convict the appellants.

83. Therefore, upon cumulative consideration of the evidence on

record, and upon application of well settled principles relating to evaluation of circumstantial evidence, we are quite satisfied that the conviction recorded against the appellants in the present matters, deserves to be sustained.

84. We, accordingly, dismiss these appeals.

Nutan D. Sardesai, J.

M.S. Sonak, J.