

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEALS NO. 2/2017, 16/2017, 72/2016
AND 1/2019

CRIMINAL APPEAL NO. 2/2017

Ravindra Jha,
s/o. Mahesh Jha, aged 30 years,
N/o.103, Gaon, Lakshiminiya,
Anchal Chhatapur,
Dist-Supaul, Bihar,
presently lodged at Modern Central
Jail, Colvale, Bardez, Goa. Appellant.

Versus

1. State
(As represented by the Officer-in-Charge,
Mapusa Police Station),
Mapusa, Goa.

2. The Public Prosecutor,
High Court Building,
Altinho, Panaji, Goa. Respondents.

Mr. Salil Saudagar, Advocate for the Appellant under the Legal Aid Scheme.

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

CRIMINAL APPEAL NO. 16/2017

Srinivas Gauramkondu,
Son of Venkat Gauramkondu,
major of age, N/o. Sangapali,

Post Singoreddy, Dist-Melore,
PS-SR Puram (Mandal)
Andhra Pradesh, A/p Pirni,
Verna Goa and presently undergoing
sentence at Colvale Jail,
Bardez, Goa.

..... Appellant

Versus

The State, through P.P.
High Court of Bombay at
Panaji, Goa.

... Respondent

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

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

CRIMINAL APPEAL NO. 72/2016

Shri Mohammad Imdar Ali @
Rithul M. R. s/o Mohammad Umed Ali,
N/o Guwahati, Distt. Kampur,
Village Mandakatta Kampur,
Police Station Bahihato Sai Ali,
Assam and temporary residing at
Pirni backside of football ground,
Verna,Goa, and presently undergoing
sentence at Colvale Jail, Bardez, Goa.

.... Appellant

Versus

State
through P.P.
High Court of Bombay at
Panaji Goa.

.... Respondent

Mr. Arun de Sa, Advocate for the Appellant.

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

CRIMINAL APPEAL NO. 1/2019

Bijoy Kolita,
son of Prafulla Kolita,
24 years, c/o. Peter D'Souza,
Birla, Vasco Gao,
N/o. Balistra, PS Kayan,
Dist. Kahro, Assam. Appellant.

Versus

The State, through Public Prosecutor,
Panaji, Goa. ... Respondent

Mr. Vivek Angelo Rodrigues, Advocate for the Appellant under Legal
Aid Scheme.

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

Coram : M.S. Sonak &

Prithviraj K. Chavan, JJ.

Reserved on : 25/01/2019

Pronounced on : 08/02/2019

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

In all these appeals instituted under Section 374 of the
Code of Criminal Procedure, 1974 (Cr.P.C.), the appellants challenge
the common Judgment and Order in Sessions Case No.50/2009

made by the learned Sessions Judge, North Goa, at Panaji, convicting the Appellants for the offences punishable under Sections 365, 302, 394 and 201 of the Indian Penal Code, read with Section 120-B of the Indian Penal Code (IPC) and sentencing them, *inter alia*, to undergo Life Imprisonment. The operative portion of the impugned Judgment and Order reads as follows :

“ Accused No.1, 2, 3 and 4 who are found guilty for committing the offence under Section 365 r/w. 120-B of IPC of criminal conspiracy and in furtherance of it abducting deceased Sudan Dabhale and wrongfully confining him are hereby sentenced to suffer imprisonment for a term of 7 years respectively/individually and to pay fine of ₹ 10,000/- each and in default to undergo 6 months Simple Imprisonment.

Similarly, accused no.1, 2, 3 and 4 who are found guilty for the offence of murder of Sudan Dabhale under Section 302 r/2. 120-B of IPC, under the criminal conspiracy, are hereby sentenced to suffer imprisonment for life respectively/individually and to pay fine of ₹ 10,000/- each and in default to undergo 6 months Simple Imprisonment.

Accused no.2 and 3 who are already undergoing sentence of life imprisonment in another matter have to undergo the said imprisonment for life in its strict sense.

Accused no.1,2,3 and 4 who are found guilty for the offence under Section 394 r/w. 120-B of IPC for committing robbery and causing hurt are hereby sentenced to suffer imprisonment for life respectively/individually and to pay a fine of ₹ 10,000/- each and in default to undergo 6 months Simple Imprisonment.

Accused no.1,2,3 and 4 who are found guilty for the offence under Section 397 r/w. 120-B of IPC for committing robbery using deadly weapons and causing death/injuries to the person are hereby sentenced to suffer imprisonment for 7 years respectively/individually and to pay a fine of ₹ 10,000/- each and in default to undergo 6 months Simple Imprisonment.

Accused no.1,2,3 and 4 who are found guilty for the offence under Section 201 of IPC for causing disappearance of evidence are hereby sentenced to suffer imprisonment for 7 years respectively/individually and to pay a fine of ₹ 10,000/- each and in default to undergo 6 months Simple Imprisonment.

All the accused who are in custody are entitled to set-off under Section 428 of CR.P.C. for the sentence already undergone.

All the sentences shall run concurrently.

If the fine amount is paid by the accused persons, the same shall be paid to the widow of the deceased Sudan Dabhale (PW.1) by way of compensation.”

2. Criminal Appeal No.2/2017 has been instituted by Ravi Jha (A.1); Criminal Appeal No.16/2017 is instituted by Srinivas Gauramkondu (A.2); Criminal Appeal no.72/2016 is instituted by Mohammad Ali (A.3) and Criminal Appeal No.1/2019 is instituted by Bijoy Kolita (A.4) in order to question the aforesaid common judgment and order. The learned Counsel for the parties agree that it is only appropriate that all these appeals are considered together

and disposed of by a common Judgment and Order.

3. The case of the prosecution, as alleged in the Charge-sheet, is that all the accused persons hatched a criminal conspiracy and in furtherance of the same, hired a Maruti Van of the deceased Sudan Dabhale (Sudan) from Mapusa Bus Stand on 17 July 2009, bearing registration No.GA-01-R-7954 under the pretext of transporting household goods/articles from Birlanagar to Mapusa and thereafter took the said Sudan, along with his Maruti Van to Cuelim, Cansaulim at an isolated spot to commit his murder, robbed his articles, together with the Maruti Van itself and then dumped said Sudan's dead body at an isolated spot in Cuelim, Cansaulim. It is also the case of the Prosecution that thereafter, the accused persons used the said Maruti Van for kidnapping one Aiyaz, son of Azgar Ali, by replacing the number plate of the Maruti Van with a fake number plate.

4. Mr Arun Bras de Sa, Mr. Salil Saudagar, Mr. Vivek Rodrigues, and Ms. S. Pereira, submitted that the registration of two FIRs and consequently lodging two charge-sheets, in the facts and circumstances of the present case, was illegal and constitutes violation of Article 21 of the Constitution of India. They point out that the incidents based on which prosecution in Sessions Case No.38/2009 and Sessions Case No.50/2009 (present case) were launched, relate

to one and the same offence, or in any case, relate to the incidents which are two or more parts of the same transaction. They submit that such a breach has caused immense prejudice to the accused persons.

5. Mr Arun Bras de Sa, Mr. Salil Saudagar, Mr. Vivek Rodrigues, and Ms. S. Pereira, submitted that in the present case, which rests entirely on circumstantial evidence, the Prosecution has not been able to prove beyond reasonable doubt the circumstances in question. They submit that there are too many holes in the theory propounded by the Prosecution and, therefore, the conviction recorded by the learned Sessions Judge warrants interference. Each of the learned Counsel took us through the evidence on record and contended that such evidence has not at all been appreciated by the learned Sessions Judge in proper legal perspective. They submitted that this is a case where mandatory provisions of Sections 164 and 281 of Cr.P.C. were never complied with and this aspect has missed the learned Sessions Judge. They submitted that there are inherent contradictions in the theories propounded by the Prosecution and this was certainly not a case to convict the accused persons. For all these reasons, they urge that these appeals be allowed and the convictions be set aside.

6. Mr. S.R. Rivankar, the learned Public Prosecutor has

defended the impugned Judgment and Order on the basis of the reasoning reflected therein. Mr. Rivankar submits that the incidents in Sessions Cases No.38/2009 and 50/2009 are distinct and different, having no nexus as such with one another. Merely because there may be some overlap or some common witnesses, that does not mean that the prosecution relates to one and the same offence, or that the incidents in question are two or more parts of the same transaction.

7. Mr. Rivankar submits that some minor discrepancies here and there should, by no means, be sufficient to upturn the conviction recorded by the learned Sessions Judge. He submits that the evidence on record bears a ring of truth and the circumstances against the accused persons have been established by the Prosecution beyond reasonable doubt. Mr. Rivankar submits that in this case, the circumstance of "*last seen*" is proved beyond reasonable doubt and in such circumstances, the onus was upon the accused persons to explain the fate of the deceased Sudan Dabhale. He points out that in the 313 Cr.P.C. statements or, even otherwise, the accused persons have offered no explanation or, in any case, no credible explanation.

8. Mr. Rivankar submits that adverse inference therefore was liable to be drawn against the accused persons or at least such of the accused persons who were last seen along with the deceased Sudan Dabhale. Mr. Rivankar points out that in this case, two of the

accused persons have confessed to the crime and there were no errors in the record of such confession before the Special Executive Magistrate. He submits that the confession can be taken into consideration against the co-accused in view of the provisions of Section 30 of the Evidence Act.

9. Mr. Rivankar submits that the proof conspiracy is always inferential and in the present case, the surrounding circumstances, coupled with the previous and subsequent conduct of the accused persons, establish the conspiracy beyond reasonable doubt. He submits that even though PW. 6 Francis D'Souza was declared as hostile witness by the Prosecution, his testimony is not to be totally excluded. He points out that even PW.6 Francis D'Souza has deposed that he heard the deceased Sudan Dabhale stating to A.1 Ravindra Jha and A.4 Bijoy that he would accept their hire and take them to the place where they intended to. Mr. Rivankar submits that the Prosecution, in the present case, has established all incriminating circumstances against the accused persons beyond reasonable doubt. He, therefore, submits that the conviction of the accused persons is legal, proper and based upon the evidence on record. Mr. Rivankar, therefore, submitted that for all these, the appeals warrant dismissal.

10. Rival contentions now fall for our determination in these Appeals.

11. The learned Counsel for the Appellants, at the very outset, submitted that the two First Information Reports (FIRs), on the basis of which the two charge-sheets, and eventually the two sessions cases i.e. Sessions Case No.38/2009 and 50/2009 (present case) came to be launched relate to one and the same offence or in any case, relate to the incidents which are two or more parts of the same transaction, according to the case put forth by the prosecution itself. Therefore, the learned Counsel for the appellants urged that the lodging of two FIRs in the present matter was an exercise without jurisdiction and since the same has caused very serious prejudice to the appellants, the conviction recorded against them is required to be set aside. They rely upon the rulings of the Hon'ble Apex Court in *Babubhai vs. State of Gujarat*¹ and *Amitbhai Anilchandra Shah vs. State of Gujarat*²

12. Mr. Rivankar, the learned Public Prosecutor, on the other hand, submitted that the two FIRs and consequently the two charge-sheets, relate to different and distinct offences and some minor overlap here and there, is not sufficient to conclude that there was any sameness in the two charge-sheets so as to attract the principles laid down in *Babubhai* (supra) and *Amitbhai* (supra).

1 (2010) 12 SCC 254

2 (2103) 6 SCC 348

13. In order to appreciate the rival contentions, it is necessary to refer to the gist of the charge-sheets in Sessions Case No.50/2009 (present case) and Sessions Case No.38/2009, in which A.2 Srinivas and A.3 (Ali), along with others came to be convicted for the offences punishable under Section 364 IPC and sentenced to Life Imprisonment by the Sessions Court.

14. In Sessions Case No.50/2009 (present case), as noted earlier, gist of the charge-sheet is that all the accused persons, which includes A.2 Srinivas and A.3 Ali hatched criminal conspiracy and in furtherance of it, engaged the Maruti van of the deceased Sudan Dabhale from Mapusa Bus Stand on 17 July 2009 bearing No.GA-01-R-7954 under pretext of transporting household goods/articles from Birlanagar to Mapusa and thereafter took the said Sudan Dabhale along with his Maruti van to Cuelim, Cansaulim at an isolated spot to commit his murder, robbed his articles, together with the Maruti van itself and then dumped the dead body of said Sudan at an isolated spot in Cuelim, Cansaulim and *thereafter, used the said Maruti van for kidnapping one Aiyaz, son of Azgar Ali, resident of Vasco by using a fake registration number on the said van.*

15. In Sessions Case No.38/2009, gist of the charge, *inter alia*, against A.2 Srinivas and A.3 Ali is that on 23 July 2009 they,

along with juvenile accused Parikhit Handique and Suraj Kumar Jha, with common intention, kidnapped Aiyaz, son of Azgar Ali, resident of Chicalim in a Maruti van bearing registration No.GA-01, R-7954, after changing the number plates of the Maruti van to GA 01-S-8404. Then they took him to *Cabo de Rama* and demanded ransom of Rs.15.00 lakhs for his release and further all of them threatened Amir Sayyed with dire consequences that his brother Ayaz Sayyed would be killed if he informs the matter to the police. There was also a charge framed under Section 3, read with Sections 25 and 28 of the Arms Act, since the accused in Sessions Case No.38/2009, which included A.2 Srinivas and A.3 Ali were alleged to have used fire arms for the purpose of kidnapping Aiyaz.

16. From the aforesaid as well as, in particular, from the evidence which has come on record in both the cases, it is the case of the Prosecution that the accused persons hatched conspiracy and in furtherance of the same, engaged the Maruti van bearing No.GA-01,R-7954 of the deceased Sudan Dabhale from Mapusa Bus Stand on 17 July 2009, took the said Sudan Dabhale with his Maruti van to Cuelim, Cansaulim, committed murder of said Sudan Dabhale and thereafter proceeded in the same Maruti van to kidnap Aiyaz by changing the number plates of the said Maruti van to GA-01, S-8404. According to the prosecution, the motive in both the cases was to eliminate one Vijay (PW.43) and his friends, which included Aiyaz

(PW.52), since A.2 Srinivas believed that Vijay and his friends, including Aiyaz were responsible for the breakup/rift between A.2 Srinivas and Sharon (PW.8).

17. According to us, there is ample material on record to suggest that the alleged incident of engaging the Maruti van in question, murder of Sudan Dabhale - driver of the Maruti van and kidnapping of Aiyaz (PW.52) in the same Maruti van, are part of one and the same transaction and can be regarded as two or more parts of the same transaction. There is sameness in the two charge-sheets, in so far as material aspects are concerned. This is not a case where FIRs and consequently, the charge-sheets relate to two separate and distinct offences arising out of two separate and distinct incidents. In fact, the Investigating Officer, Sagar Ekoskar in Sessions Case No.38/2009, in his deposition, has very clearly admitted that there were three different crimes registered against A.3 Ali in different police stations "*regarding the same series of offence*"

18. Mr. Rivankar, the learned Public Prosecutor, however, tried to contend that the FIR which, ultimately led to the lodging of Sessions Case No.50/2009 (present case), was restricted to the conspiracy of engaging the Maruti van bearing No.GA-01 R 7954 at Mapusa Bus Stand, murdering its driver Sudan Dabhale and thereafter using the said Maruti van for kidnapping Aiyaz (PW.52).

He contends that after the accused persons were unsuccessful in kidnapping Vijay, they felt that this was an opportunity to kidnap Aiyaz (PW.52) for ransom, since family members of Aiyaz (PW.52) were in a position to pay such ransom. On this basis, Mr. Rivankar contended that the two incidents or two offences have no serious nexus with one another and, therefore, the Prosecution was justified in registering two separate FIRs and launching two separate prosecutions.

19. The material on record, placed by the Prosecution itself, does not support the aforesaid contention. The charge-sheet which is subject-matter of Sessions Case No.50/2009 (present case) makes reference to kidnapping of Aiyaz (PW.52) by using the Maruti van bearing no.GA-01-R-7954 after changing its number plates. There is significant overlap in the evidence produced by the Prosecution in Sessions Case No.38/2009 and Sessions Case No.50/2009 (present case). Several of the witnesses are also common. It is the case of the Prosecution that consequent upon the arrest of A.2 Srinivas and A.3 Ali in kidnapping for ransom case i.e. Sessions Case No.38/2009 that the Prosecution acquired the knowledge about murder of Sudan Dabhale, the owner of Maruti van bearing No. GA-01-R-7954 which was used for kidnapping Aiyaz (PW.52).

20. Upon cumulative consideration of the material on record, it

transpires that there is significant sameness between the charges in two cases. Prejudice to the accused is also writ large, particularly because the learned Sessions Judge in Sessions Case No.50/2009 (present case) has very liberally referred and relied upon the Judgment and Order dated 20 May 2013 in Sessions Case No.38/2009 for convicting all the accused persons in the present case.

21. In *Babubhai* (supra), the Hon'ble Apex Court has explained that the FIR under Section 154 Cr.P.C. is a very important document. It is the first information of a cognizable offence recorded by the Officer-in-Charge of the Police Station. It sets the machinery of criminal law in motion and marks the commencement of the investigation which ends with the formation of an opinion under Section 169 Cr.P.C., as the case may be, and forwarding of a police report under Section 173 Cr.P.C. Thus, it is quite possible that more than one piece of information be given to the Police Officer-in-charge of the Police Station in respect of the same incident involving one or more than one cognizable offences. In such a case, he need not enter each piece of information in the diary. All other information given orally or in writing after the commencement of the investigation into the facts mentioned in the FIR will be statements falling under Section 162 Cr.P.C.. In such a case, the Court has to examine the facts and circumstances giving rise to both the FIRs and

the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is affirmative, the second FIR is liable to be quashed. However, in case, the contrary is proved, where the version in second FIR is different and they are in respect of the two different incidents/crimes, the second FIR is permissible. In case in respect of the same incident the accused in the first FIR comes forward with a different version or counter claim investigation on both the FIRs has to be conducted. In the facts of the case, the Hon'ble Apex Court, on comparing both the FIRs, held that there was no doubt that both the incidents had occurred at the same place in close proximity of time, and, therefore, were two parts of the same transaction.

22. In the present case as well applying the test of sameness, it does appear that both the FIRs relate to two parts of the same transaction. In fact, in both the FIRs, in the present case, there is a reference to kidnapping of Aiyaz in the Maruti van No.GA-01-R-7954 acquired by the accused persons after murdering Sudan Dabhale and by changing the number plates of the said Maruti van. The principle laid down in *Babubhai's* case applies to the present case and there was no justification for the Prosecution to register the second or a separate FIR and on that basis launch a separate prosecution against the accused persons.

23. In *Amitbhai Shah* (supra), the Apex Court has held that the second FIR (which is not a cross-case) in respect of an offence or different offences committed in the course of the same transaction, is not only impermissible, but it violates Article 21 of the Constitution. The Apex Court observed that this principle has been laid down in *T.T. Antony vs. State of Kerala*³ and has never been diluted in any subsequent judicial pronouncements even while carving out exceptions. The Apex Court has further held that to determine whether different offences ought to be treated as part of the same transaction, the “*consequence test*” laid down in *C. Muniappan vs. State of T.N.*⁴, may be taken aid of. The said test prescribes that if an offence forming part of the second FIR arises as a consequence of the offence alleged in the first FIR, then offences covered by both the FIRs are the same and, accordingly, the second FIR will be impermissible in law. In other words, the offences covered in both the FIRs shall have to be treated as a part of first FIR. Furthermore, merely because two separate complaints had been lodged did not mean that they could not be clubbed together and one charge-sheet could not be filed.

24. Applying the “*consequence test*” to the case, as presented

³ (2001) 6 SCC 181

⁴ (2010) 9 SCC 567

by the Prosecution itself, it does appear that the offence forming part of the second FIR is a consequence of the offence alleged in the first FIR. From the case presented by the Prosecution itself, nexus between the two incidents does establish the sameness and accordingly, the Prosecution was not at all justified in registering the second FIR in the facts of the present case.

25. However, we do not propose to rest our decision on the aforesaid issues, though we agree with the contention of the learned Counsel for the Appellants that in the present case, the Prosecution was not justified in registering two separate FIRs and further, as a result of registration of two separate FIRs, the accused persons have suffered prejudice in the matter of their defence. This is because even upon examining and evaluating the evidence on record, we are satisfied that the Prosecution has not succeeded in proving beyond reasonable doubt the circumstances upon which it proposes to secure conviction of the accused persons.

26. Secondly, from the impugned Judgment and Order dated 27 June 2016, in the present case, it is apparent that the learned Sessions Judge has not only referred to, but has relied quite exhaustively upon the Judgment and Order dated 20 May 2013 in Sessions Case No.38/2009 in which A.2 Srinivas and A.3 Ali came to be convicted for the offences under Section 364 of IPC. The learned

Sessions Judge, in the present case, has accepted the version of several of the witnesses of the Prosecution on the premises that such version which was deposed to in Sessions Case No.38/2009, already stands accepted in the said sessions case. By a separate Judgment and Order, in Criminal Appeal Nos. 39/2013, 3/2018 and 50/2018, we have already set aside the Judgment and Order dated 20 May 2013 in Sessions Case No.38/2009. As a consequence, most of the reasoning in the impugned Judgment and Order, is rendered quite vulnerable. This is yet another reason as to why the impugned Judgment and Order in the present case may warrant interference.

27. If the impugned Judgment and Order is perused, then it is clear that the learned Sessions Judge has taken a judicial note about the sentence and the Judgment passed in Sessions Case No.38/2009 by the Sessions Court at Margao, of which a certified copy was placed on record in the present case. The Prosecution had, in fact, examined A.3 Suraj Kumar Jha in Sessions Case No.38/2009 in connection with kidnapping of Aiyaz and this witness admitted that he was convicted and sentenced to suffer Life Imprisonment in Sessions Case No.38/2009. The Prosecution also examined Pariket Handique as PW.2, the juvenile who was involved as a juvenile accused in Vasco Police Station Crime No.99/2009 which, ultimately, resulted in institution of Sessions Case No.38/2009. The Prosecution has also relied upon examination of Amir Sayed (PW.53), the brother of Aiyaz

(PW.52) kidnapped victim in connection with Vasco Police Station Crime No.99/2009 which ultimately led to the institution of Sessions Case No.38/2009. The Prosecution has also relied upon the evidence of PW.52 Aiyaz - kidnapped victim who, in the course of deposition, produced his deposition in Sessions Case No.38/2009 (Exhibit 314). The learned Sessions Judge has, at several places in the impugned Judgment and Order, not only made reference to the Judgment and Order in Sessions Case No.38/2009, but actually relied upon the said Judgment and Order to convict the accused persons in the present case. From the perusal of the Judgment and Order, it is apparent that the impact of the Judgment and Order in Sessions Case No.38/2009 was considerable. Now, that Judgment and Order in Sessions Case No.38/2009 is being set aside, obviously much of the reasonings in the impugned Judgment and Order will have to be set aside.

28. However, we make it clear that we do not propose to rest our decision merely upon the circumstance that there was no justification in the present case to register two FIRs or on the basis of our decision in relation to Criminal Appeals No. 39/2013, 3/2018 and 50/2018 by which we have set aside the Judgment and Order dated 20 May 2013 in Sessions Case No.38/2009. This is because, based upon independent evaluation and analysis of the evidence on record, we are quite satisfied that the prosecution has failed to prove its case beyond reasonable doubt. Therefore, the main basis for

interference with the impugned Judgment and Order made by the learned Sessions Judge is our satisfaction that in the present case, the Prosecution has failed to establish the circumstances against the accused persons beyond reasonable doubt.

29. There is no doubt that and it was never even disputed that the entire case of the Prosecution, in the present case, is based upon circumstantial evidence. The law in regard to circumstantial evidence is quite well settled and in fact, requires no reiteration.

30. In *Vijay Kumar vs. State*⁵ and *G. Parshwanath vs. State*⁶, which decisions have, in fact, been relied upon by the learned Sessions Judge, the Apex Court has held that the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, while complying with this principle, a distinction must be made between the facts called primary or basic on one hand and inference of facts to be drawn from them on the other hand. The Apex Court has further observed that although there should not be any mislinking in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have been inferred

⁵[2010 (2) SCC 353]

⁶[2010 (8) SCC 593]

from the proved facts. In drawing these inferences, the Court must have regard to the common course of natural events and to human conduct and their relation to the facts of the particular case. The Court, therefore, has to consider the effect of proved facts and in deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves as, or are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis, except one sought to be proved. This will, however, not apply to any extravagant and fanciful hypothesis which the accused may suggest in a given case. Finally, there must be a chain of events 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 and where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court.

31. It is a trite proposition, judicially evolved, that

circumstantial evidence if it is to form the basis of conviction must be such so as to rule out every possible hypothesis of innocence of the accused and must without any element of doubt unerringly point to such culpability. This enunciation has stood the test of time over the years and the five golden principles propounded by the Hon'ble Apex Court in *Sharad Birdhichand Sarda vs. State of Maharashtra*⁷ which still authoritatively govern the process of appreciation of the circumstantial evidence and constitute the acid test to determine the guilt or innocence of an accused person, are quoted hereunder :

“153. A close analysis of this decision would 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 v. State of Maharashtra (1973) 2 SCC 793 where the following observations were made: (SCC p. 807, para 19)

‘19. ... 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.’

(emphasis in original)

⁷ (1984) 4 SCC 116

(2) the facts so established should be consistent only 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.”

32. The circumstances, which according to the Prosecution point out to the guilt of the accused persons are, therefore, to be examined in the backdrop of the aforesaid legal principles. The circumstances relied upon by the Prosecution, in the present case, have been enumerated by the learned Sessions Judge in the paragraph 9 of the impugned Judgment and Order and the same read as follows :

(I) Last seen theory;

(II) Attachment of the vehicle of the deceased;

(III) The said vehicle used by the accused for kidnapping Aiyaz;

(IV) Recovery of dead body of Sudan at the instance of accused no.2 and recovery of other articles of said Sudan and the papers of the vehicle at the instance of the accused;

- (V) Identification of accused nos. 3 and 4 during the test identification parade and the medical evidence showing homicidal death;*
- (VI) Presence of accused no.2 and 3 at Cabo-de-Rama and their arrest;*
- (VII) Injuries found on the person of accused;*
- (VIII) Call details of the accused;*
- (IX) Recovery of mobile of deceased from Yogendra which was given by accused no.3*
- (X) Motive i.e. to kidnap Ayaz;*
- (XI) The confession statements of accused.*
- (XII) Recovery of knife at the instance of accused no.3.*
- (XIII) CFSL reports.*

33. The learned Sessions Judge in paragraph 31 and 32 of the impugned Judgment and Order has noted that the first aspect which the Prosecution has highlighted “*as main circumstance*” is “*last seen theory*”. It is the categorical case of the Prosecution that A.3 Ali and A.4 Bijoy Kolita were last seen with the deceased driver Sudan Dabhale at Mapusa Taxi Stand between 7 to 7.30 p.m. on 17/7/2009. It is the case of the Prosecution that thereafter the deceased taxi driver Sudan Dabhale was reported as missing and eventually on 26/7/009 his dead body was discovered. It is the case of the Prosecution that since A.3 Ali and A.4 Bijoy were seen with

the deceased taxi driver Sudan Dabhale, the possibility of any persons other than these two persons being involved in the crime, becomes impossible. According to the Prosecution, this circumstance of last seen together, unerringly points out to the guilt of A.3 Ali and A.4 Bijoy. In any case, the Prosecution points out that at least the onus was on A.3 Ali and A.4 Bijoy to explain what happened between themselves and the deceased taxi driver Sudan Dabhale when they were together. The Prosecution relied upon the case of *State vs. Satish*⁸ in support of all these contentions.

34. In the first place, the circumstance relating to last seen theory does not apply to A.1 Ravidra Jha and A.2 Srinivas, since it is not even the case of the Prosecution that these two accused persons were last seen along with the deceased taxi driver Sudan Dabhale at the Mapusa Taxi Stand or at any other place. This circumstance, even according to the Prosecution, applies only to A.3 Ali and A.4 Bijoy. In support of this circumstance, the Prosecution has examined PW.1 Milan Dabhale – wife of the deceased taxi driver Sudan Dabhale, PW.3 Dina Dabhale – brother of the deceased Sudan Dabhale, taxi drivers at the Mapusa Taxi Stand PW.4 Nandkishor Rankla and finally PW.6 Francis D'Souza, another taxi driver at the Mapusa Taxi Stand, according to the Prosecution, is alleged to have actually seen A.3 Ali and A.4 Bijoy sitting in the Maruti van of the deceased Sudan

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Dabhale and proceeding away along with the deceased Sudan Dabhale.

35. On analysis of the depositions of PW.1, PW.3 and PW.4, it is very apparent that none of these witnesses state that they actually saw A.3 Ali and A.4 Bijoy with the deceased Sudan Dabhale on 17 July 2009 at the Mapusa Taxi Stand. Their deposition is almost entirely on the basis of the information which they claim to have received. There are serious discrepancies as to the source, as well as the timing of the receipt of such information. In any case, it is very apparent that these witnesses have deposed on the basis of what information received by them and consequently, the evidence tendered by them on the aspect of last seen theory would amount to hear-say evidence, unacceptable in law.

36. PW.1 Milan Dabhale has deposed that when her husband – deceased Sudan Dabhale did not return home on 17.7.2009, she visited the Mapusa Tax Stand in order to find him out. She has, at one place, deposed that there were no taxi drivers at the Mapusa Taxi Stand at the time when she went there. However, at another place, PW.1 Milan Dabhale has deposed that she was informed that her husband Sudan had left the taxi stand without any passenger. At yet another place, Milan Dabhale has deposed that she was informed that the deceased Sudan left the taxi stand with two passengers. In

any case, neither PW.1, nor PW.3, nor PW.4 have deposed that they actually saw A.3 Ali and A.4 Bijoy along with the deceased Sudan Dabhale on 17.7.2009.

37. It was not even the case of the Prosecution that these witnesses actually saw A.3 Ali and A.4 Bijoy, along with the deceased Sudan, but it was only the case of the Prosecution that these witnesses saw A.3 Ali and A.4 Bijoy at the Mapusa Bus Stand in the evening of 17.7.2009. It was, however, the case of the Prosecution that it was Francis D'Souza (PW.6) who actually saw A.3 Ali and A.4 Bijoy, negotiating fare with the deceased Sudan and leaving the Mapusa Taxi Stand, along with the deceased Sudan in the Maruti van. Therefore, even according to the Prosecution, the most vital witness to establish the last seen theory was PW.6 Francis D'Souza. Therefore, it is necessary to very closely scrutinize the deposition of PW.6 Francis D'Souza.

38. PW.6 Francis D'Souza has deposed that on 17.7.2009, when he was at the taxi stand at Mapusa, between 16:30 to 17:00 hours, two young boys in the age group of 20 to 30 years approached him speaking in Hindi. He stated that since he was barely conversant with Hindi language, he merely asked them if they wanted a taxi and both of them replied in the affirmative. He then deposed that one of them told him that some household articles such as TV, gas

stoves, etc. were to be shifted from some place. He has deposed that PW.3 – Dina Dabhale and PW.4 Nandkishor Rankla were available at the taxi stand at that time. As regards deceased Sudan, this is what PW.6 Francis D'Souza stated in his examination-in-chief :

“Sudan, since deceased was normally available at the taxi stand but I cannot say if he was available at that time.”

39. Upon PW.6 Francis D'Souza making the aforesaid statement in the course of examination-in-chief, the Public Prosecutor before the Sessions Court, applied to declare him hostile and sought leave to cross examine PW.6 Francis. Such permission was granted by the learned Sessions Judge looking to the previous statement of PW.6 Francis. PW.6 Francis, in his cross examination, admitted that his statement was recorded by the Police at the Taxi Stand itself on 19.7.2009. He admitted having stated to the Police that he had heard voice of Sudan stating “*jayaga jayaga*” at about 19.30 hours whilst he was at the taxi stand. However, he maintained that he had not stated to the Police that he saw those two persons sitting in the vehicle of Sudan and leaving. His previous statement was shown to him and contradiction was also marked through the Investigating Officer. He reiterated that it is not true that he had made any statement to the Police that he had seen those two persons sit and leave. Finally, PW.6 Francis made it clear that he would not be in a position to identify those two persons whom he had seen on

17.7.2009, if shown to him.

40. Therefore, on the circumstance of last seen theory, only vital and reliable witness was PW.6 Francis D'Souza. From the deposition of PW.6 Francis, it is apparent that even this witness had never seen the two persons sit in the vehicle and leave the taxi stand on 17.7.2009. Finally, PW.6 Francis very clearly stated that he would not even be in a position to identify those two persons whom he had seen on 17.7.2009 at the Mapusa Taxi Stand, if shown to him. On the basis of a single sentence that PW.6 Francis D'Souza had, in his statement to the Police, stated that he had heard the voice of Sudan saying "*jayaga jayaga*" at about 19:30 hours on 17.7.2009, we are not prepared to hold that the Prosecution has succeeded in establishing beyond reasonable doubt the "*main circumstance*" that A.3 Ali and A.4 Bijoy were last seen with the deceased Sudan Dabhale at the Mapusa Taxi Stand on 17.7.2009 at 19.30 hours.

41. The stray sentence from out of the deposition of PW.6 Francis D'Souza has to be considered along with his statement in examination-in-chief, where PW.6 Francis clearly admitted that Sudan, the deceased was normally available at the Taxi Stand, but he was not in a position to say whether Sudan was actually available at the taxi stand on 17.7.2009 or at the time when PW.6 Francis had some interaction with the two persons at the taxi stand. Besides,

PW.6 Francis has very clearly deposed that he was not in a position to identify the two persons whom he spoke to on 17.7.2009 at the Mapusa Taxi Stand between 16.30 hours to 17.00 hours on 17.7.2009 if shown to him. PW.6 Francis has also clearly deposed that he neither saw the two persons sit in the taxi of the deceased Sudan, nor leave taxi stand with Sudan.

42. Besides, PW.6 Francis has stated that his statement was recorded by one police by name Brandon. However, it is the case of the Prosecution that statement of PW.6 Francis D'Souza was recorded by PSI Sandip Kesarkar. The learned Sessions Judge, at paragraph 145 of the impugned Judgment and Order, has stated that there could be a mistake on the part of the said witness in identifying the said officer as Brandon and only the change in the name of the officer will not show anything against the said witness. This may be correct. However, we do not agree with the further observations made by the learned Session Judge in the same paragraph that “*the only missing link is the denial of PW.6 regarding he witnessing the said two persons going with deceased Sudan in his taxi from Mapusa taxi stand.*”

43. The learned Sessions Judge has, thereafter, adverted to the evidence of PW.3-Dina Dabhale and PW.4 Nandkishor Rankla and also the evidence of PW.10 Yeshwant Jadhav, working as a waiter in

Shrikrishna Bar and Restaurant at Mapusa and PW.14 – Laxmikant Samant – the owner of the bar and restaurant and on such basis, held that A.3 Ali and A.4 Bijoy were last seen in the company of deceased Sudan Dabhale at the Mapusa Taxi Stand on 17.7.2009 at about 19.30 hours stands established by the Prosecution beyond reasonable doubt.

44. According to us, the learned Sessions Judge was not right in laying so little emphasis on what he describes as “*the only missing link*”. According to us, the evidence of PW.6 Francis D'Souza was extremely crucial. It was in fact the case of the Prosecution that PW.6 Francis D'Souza was the only witness who had actually seen A.3 Ali and A.4 Bijoy sit in the Maruti van along deceased Sudan and leave the Mapusa Taxi Stand at about 19.30 hours. This witness has clearly denied having seen any such thing. This witness made it clear that he was not in a position to identify the two persons whom he spoke at the taxi stand between 16.30 hours to 17.00 hours on 17.7.2009. The depositions of PW.3 and PW.4 were clearly hit by the doctrine of hearsay.

45. Since the learned Sessions Judge has referred to and relied upon the deposition of PW.10 Yeshwant Jadhav, it is necessary to analyse his evidence on the aspect of last seen theory. It is the case of the Prosecution that A.3 Ali and A.4 Bijoy visited the hotel

Shrikrishna Bar and Restaurant at Mapusa before they proceeded to the Mapusa Taxi Stand on the evening of 17.7.2009. Apart from the fact that such circumstance does not *ipso facto* support the last seen theory, it is necessary to note that PW.10 Yeshwant Jadhav, whilst admitting that he was a waiter at the said hotel, stated that the restaurant opens in the evening at 18.30 hours and continues till 22.00 hours. PW.10 in the context of the presence of A.3 Ali and A.4 Bijoy at the Bar in the evening of 17.7.2009 has made the following statement, in his examination-in-chief: *“They were in the hotel from 18.30 hours onwards and continued till around closing time”*.

46. Aforesaid means that even, according to PW.10 the witness for the Prosecution, A.3 Ali and A.4 Bijoy were in Shrikrishna Bar and Restaurant at Mapusa between 18.30 hours and until around closing time i.e. till 22.00 hours. PW.10 claims to have served them as a waiter with drinks and cashewnuts. If at all, his evidence is entitled to greater weight as compared to the evidence of the restaurant owner PW.14 Laxmikant Samant. Accordingly, we cannot agree with the reasoning of the learned Sessions Judge that primary fact that A.3 Ali and A.4 Bijoy were indeed present at the Mapusa Taxi Stand in the evening of 17.7.2009 stands proved beyond reasonable doubt by the Prosecution and therefore, an inference can be legitimately drawn that A.3 Ali and A.4 Bijoy

indeed engaged and were last seen with Sudan getting into his Maruti van and leaving the Mapusa Taxi Stand at 19.30 hours.

47. Taking into consideration the deposition of PW.6 Francis D'Souza, as also the deposition of PW.10 Yeshwant Jadhav, according to us, the learned Sessions Judge was not even right in concluding that the primary fact stands established beyond reasonable doubt by the Prosecution. In any case, the inference which the learned Sessions Judge has chosen to draw on the basis of such primary facts, according to us, could not have been drawn in a criminal trial where the accused persons have been charged of committing serious offences.

48. Besides, in the present case, the Prosecution has failed to establish time of death of Sudan Dabhale either with precision or even with some degree of approximation. Medical Evidence, through deposition of PW.25 - Dr. Siddharth Benaulikar places the death of demise of Sudan Dabhale as within 10 to 15 days from the date of examination which took place on 2.8.2009. The case of the Prosecution is that the incident took place on 17 July 2009.

49. It is well settled that last seen theory comes into play when where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased

is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt. This proposition flows from *State of U.P. vs. Satish* (supra) relied upon by the Prosecution itself.

50. Further, in the case of *Niranjan Panja vs. State of West Bench*⁹ the Apex Court has held that where the Prosecution depends upon the theory of '*last seen together*', it is always necessary that the Prosecution must establish the time of death. In the present case, there is no clear evidence that A.1 Ravindra Jha and A.4 Bijoy Kolita were last seen in the company of the deceased Sudan Dabhale. There is no proper evidence on record to establish the time of death. Accordingly, it is not possible to infer the magnitude of time gap between the alleged company of A.1 Ravindra Jha and A.4 Bijoy Kolita with the deceased Sudan Dabhale. Therefore, by applying the principles in the *State of U.P. vs. Satish* (supra) and *Niranjan Panja* (supra), it will not be safe to hold that this circumstance stands proved beyond any reasonable doubt.

⁹ 2010 STPL 13719 SC

51. Adverse inference can be drawn against the accused for failure to explain the incriminating circumstance only if the incriminating circumstance stands fully proved or otherwise. Since, in the preset case, the incriminating circumstance of '*last seen*' has not been proved, there is no question of drawing any adverse inference against the accused persons. This proposition was explained by the Apex Court in *Raj Kumar Singh vs. State of Bihar*¹⁰

52. Accordingly, for all the aforesaid reasons, we are satisfied that the Prosecution has failed to prove the "*main circumstance*" that A.3 Ali and A.4 Bijoy were last seen along with the deceased Sudan at the Mapusa Taxi Stand on 17.7.2009, at about 19.30 hours.

53. The second circumstance relied upon by the Prosecution is attachment of the vehicle of Sudan Dabhale at the *Cabo-da-Rama*. In this regard, it is necessary to note, at the outset, that we have made some observations as regards the incident of 24 July 2009, on which date, the vehicle i.e. the Maruti van bearing registration No. GA-01-R-7954 was found and attached by the Police Authorities at the picnic spot near *Cabo-da-Rama* in our Judgment and Order in Criminal Appeals No.39/2013, 3/2018 and 50/2018. These observations apply to the very same circumstance in the present

10 (2013) 5 SCC 722

case as well.

54. The case of the Prosecution in Sessions Case No.38/2009, as well as in the present case, i.e. Sessions Case No. 50/2009, was that the Police Constable Nilesh Sawant (PW.42 in the present case) and Police Constable Nagendra Parit (PW.60 in the present case), upon instructions from P.I. Ekoskar (the Investigating Officer in Sessions Case No.38/2009) proceeded to the picnic spot at *Cabo-da-Rama* and noticed one white colour Maruti van parked behind the bushes and one person sitting in the van.

55. The Police Constables have deposed that since they were already shown the photographs of the kidnapped victim (Aiyaz PW.52) they recognized him. They have deposed that they noticed two persons at a distance of 100 metres and they apprehended the said two persons and kept them in the Maruti van, along with the victim Aiyaz. They have even deposed that they informed PI Ekoskar on phone that they had discovered the kidnapped victim Aiyaz (PW.52), apprehended the two kidnappers and gave PI Ekoskar direction to reach the spot where the van was parked, along with Aiyaz (PW.52) and the two kidnappers therein. They have even deposed that whilst they were waiting, they noticed two persons coming towards them from a distance of about 50 metres from the van. Police Constable Nagendra (PW.60) went towards the said two

persons, one of the two persons removed a pistol and pointed out it to P.C. Nagendra. However, P.C. Nagendra pushed the said persons and started running away. The said persons fired a shot from the pistol, but both, PC Nilesh and PC Nagendra managed to run away from the spot. When they came near the main road, they saw PI Ekoskar coming towards them and then together with the PI Ekoskar and other members of the Police party returned to the van, but found that the kidnappers and the victim managed to escape.

56. There are some discrepancies between the version presented by Police Constable Nilesh Sawant and Police Constable Nagendra Parit in Sessions Case No.38/2009 and in Sessions Case No.50/2009 (present case). However, even if we proceed on the basis that these discrepancies are not very significant and the same are required to be ignored, then there are serious discrepancies in the versions of the kidnapped victim Aiyaz (PW.52), PC Nilesh Sawant and PC Nagendra Parit, *inter se* as regards what actually transpired at the picnic spot at the *Cabo da Rama* where the Maruti van was allegedly parked.

57. There was a reference to some scuffle between one of the accused persons and PC Nagendra, in which, it was stated that one of the accused persons attempted to hit the PC Nagendra with a beer bottle on his head, but the blow was missed and struck on his

shoulders. The two Police Constables deposed that whilst they were running, they were fired at by the accused persons. Though the two witnesses were Police Constables, there was absolutely no clarity as to the nature of the weapon from which they were allegedly fired. The Police Constable referred to the weapon as “*gun*”, “*revolver*”, “*pistol*” and “*katta*”. Admittedly, no such weapon was discovered and consequently, the accused persons in Sessions Case No.38/2009 were acquitted of the offences under the Arms Act. Importantly, the Prosecution did not even care to find out the empty cartridges at the site where the Maruti van was parked and firing alleged to have taken place. The Prosecution did not even care to find and attach the beer bottle with which one of the Police Constables claims to have been actually assaulted by one of the accused persons.

58. There is absolutely no clarity as to the circumstances in which the kidnapped victim (PW.52) was ultimately rescued from the site. Aiyaz (PW.52) at least, in his deposition in Sessions Case No.38/2009 which is admitted and even relied upon by the learned Sessions Judge in the present case, deposed that he was forced to run away with his kidnappers in the jungle. He has then deposed that the Police team caught up with them and even succeeded in apprehending one of the kidnappers. But significantly Aiyaz (PW.52) has not deposed to the place from where he was rescued or as to the distance between such place and the parked Maruti van at the picnic

spot at *Cabo da Rama*. All this was extremely important considering the version of the PI Ekoskar as to the circumstance of rescue of the kidnapped victim Aiyaz (PW.52).

59. PI Ekoskar who was the Investigating Officer in Sessions Case No.38/2009 and who has also been examined as a witness in the present case, has deposed that Aiyaz was rescued by the Police at Khola, near ONGC. Now the distance between the spot at which the Maruti van was parked at *Cabo da Rama* beach and Khola near ONGC is quite considerable. There is absolutely no explanation as to how the rescue took place at this place when the evidence of PC Nilesh Sawant and PC Nagendra suggest that soon after they caught up with PI Ekoskar, they returned to pursue the kidnappers. What is most surprising is a statement made by PI Ekoskar that it was the Police Inspector Angle and Police Inspector Siddharth Shirodkar who apprehended one of the kidnappers and rescued Aiyaz (PW.52) and for this purpose PI Siddharth Shirodkar had to fire four rounds in air from the service revolver.

60. If this is what was the case of the Prosecution, then surely the Prosecution was obliged to examine the PI Angle or PI Siddharth Shirodkar. The Prosecution was also required to produce at least some evidence to establish that four rounds were indeed fired by PI Siddharth Shirodkar from his service revolver. Ballistic evidence

would have certainly been available and was required to be produced by the Prosecution. However, neither was PI Angle, nor PI Siddharth Shirodkar were examined by the Prosecution. No ballistic evidence was ever produced by the Prosecution. There are inconsistencies between the deposition of Aiyaz (PW.52), PC Nilesh Sawant and PC Nagendra Parit. In such circumstances, the attachment of the Maruti van at the picnic spot near *Cabo de Rama* can hardly be stated to be any incriminating circumstance or, in any case, we are not prepared to hold that this alleged incriminating circumstance stands proved by the Prosecution beyond reasonable doubt.

61. This is also a clear instance where the accused persons have been prejudiced on account of the Prosecution registering two separate FIRs and launching two separate prosecutions. Mr. Rivankar, learned Public Prosecutor was at pains to point out that the evidence in Sessions Case No.38/2009 ought not to be even referred to in the present case i.e. Sessions Case No.50/2009. However, the impugned Judgment and Order makes it clear that it is the learned Sessions Judge who has admitted the depositions of certain key witnesses in Sessions Case No.38/2009 as evidence in the present case i.e. Sessions Case No.50/2009. Further, the learned Sessions Judge has not only referred to the evidence, but has also relied upon such evidence.

62. On the aspect of second circumstance, it is necessary to observe that it is the case of the Prosecution that after the Maruti van was attached at the spot near *Cabo da Rama*, the number plates of the vehicle were alleged to have been changed or painted upon, and were actually attached and sealed in the presence of the Panchas.

63. However, PW.22 a relation of the deceased Sudan Dabhale, in his deposition has stated that he was shown the Maruti van in the Vasco Police Station and at that time he saw the number plate kept in the van having original number plate and painted over it. This witness was the brother-in-law of the deceased Sudan Dabhale. The learned Sessions Judge has, therefore, concluded that this was a minor improvement made by this witness and this will not affect the Prosecution case that the number plates were indeed attached and sealed at the spot.

64. If the deposition of PW.22 was to be examined in isolation, then perhaps the learned Sessions Judge might have been right. However, in the matter of this nature, the evidence of PW.22 was not required to be examined in isolation. The same was required to be examined in light of the evidence of other witnesses as well, as to the circumstances in which the attachment of the vehicle took place, coupled with the circumstances in which certain incidents as

alleged by the Prosecution took place near the Maruti van in question. Upon cumulative construction, it cannot be said that the deposition of PW.22 is required to be dismissed as some minor improvement.

65. The evidence by the investigating agency in the form of attachment of small pebbles upon which some white paint was noticed, hardly inspires any confidence. The case of the Prosecution that the number plates were painted upon at this spot and the white paint which was used for such painting was also detected on this small pebbles. Based upon such material, we are not prepared to hold that the second circumstance relied upon by the Prosecution stands proved beyond reasonable doubt.

66. The third circumstance relied upon by the Prosecution is that the Van bearing registration No.GA-01-R-7954 was used for kidnapping of Aiyaz (PW.52). In order to hold that this circumstance stands proved, the learned Sessions Judge has almost entirely relied upon the Judgment and conviction dated 20 May 2013 in Sessions Case No.38/2009. Since, we have set aside the said Judgment and conviction dated 20.5.2013, obviously this circumstance cannot be said to have been proved by the Prosecution beyond reasonable doubt.

67. The fourth circumstance relied upon by the Prosecution is recovery of the dead body of the deceased at the instance of Accused No.2. In this regard, it is necessary to note that PW.59 Vaibhav Naik, Police Sub-Inspector attached to the Vasco Police Station, deposed that on 25 July 2009, he conducted the arrest panchanama of A.2 Srinivas in connection with Crime No.99/2009 which eventually was the subject-matter of Sessions Case No.38/2009. He has deposed that at that stage he noticed several injuries on the person of A.2 Srinivas. He has, however, deposed that A.2 Srinivas was initially handed over to him by PI Edwin Colaco of Colva Police Station, along with one green colour shoulder bag containing various articles.

68. In the context of arrest of A.2 Srinivas, this is what PW.59 Vaibhav Naik, PSI has deposed : “... *I say that the said accused no.2 was initially handed over to me by PI Edwin Colaco of Colva Police Station, along with one green colour shoulder bag and upon verifying the said bag, we found the following items :*

- i) ...
- ii) ...
- iii) ...
- iv) ...
- v) ...
- vi) ...
- vii) ...
- viii) ...

ix) ...”

69. In the present case, admittedly, the PI Edwin Colaco of Colva Police Station was never examined. Therefore, the Prosecution has not explained as to how A.2 Srinivas was in the custody of PI Edwin Colaco and under what circumstances PI Edwin Colaco had handed over A.2 Srinivas to PSI Vaibhav Naik (PW.59) along with one green colour shoulder bag containing several articles which now the Prosecution has used to incriminate A.2 Srinivas. The articles, *inter alia*, include mobile phone, spice mobile phone, spice charger, knife cover with mud stains, documents belonging to the deceased Sudan Dabhale, wallet containing cash in different denominations, one blue colour smart card cover containing MDL licence of the deceased Sudan Dabhale, one SIM card, one Hutch SIM card of the deceased Sudan Dabhale.

70. If the Prosecution wishes to rely upon the circumstance of recovery of the dead body on the basis of the statement made by A.2 Srinivas, and also upon all such incriminating articles which according to the Prosecution were recovered from the person of A.2 Srinivas, then it was incumbent upon the Prosecution to explain the circumstances of the arrest of A.2 Srinivas. PW.59 Vaibhav Naik who has been examined for this purpose has merely stated that A.2 Srinivas was handed over to him by PI Edwin Colaco of Colva Police

Station with one green colour shoulder bag containing the aforesaid numerous incriminating articles. The Prosecution, in such circumstances, was duty bound to examine PI Edwin Colaco of Colva Police Station as to the circumstances in which A.2 Srinivas was in his custody and the circumstances in which he handed over A.2 Srinivas to PSI Vaibhav Naik. Since the Prosecution has failed to examine PI Edwin Colaco and failed to explain these very vital circumstances, we are not prepared to hold that even this circumstance stands proved beyond reasonable doubt.

71. Fifth circumstance is homicidal death of Sudan Dabhale. There is some issue regarding the identification of the dead body and whether the same was indeed that of Sudan Dabhale. The evidence, according to us, is not extremely clinching and, therefore, the Prosecution having collected the DNA samples from the family members of the deceased Sudan Dabhale, ought to have placed on record the results of DNA identification, if indeed undertaken. However, we notice that there was no serious challenge on this aspect of identification. There was also no serious challenge to the medical evidence brought on record on the aspect of homicidal nature of the injuries on the deceased Sudan Dabhale. The witnesses have deposed that the dead body was in a state of very high decomposition. One of the witnesses has deposed that the dead body was identified by the relative on the basis of certain fragments of the toe. In any case, even

if we proceed on the basis that there is evidence to establish that the death of the deceased was homicidal, that by itself does not take the case of the Prosecution too far.

72. The sixth circumstance relied upon by the Prosecution relates to the articles of the deceased being found with A.2 Srinivas. As already discussed earlier, PW.59 Vaibhav Naik, PSI who is stated to have conducted the arrest panchanama of A.2 Srinivas, had stated that A.2 was initially handed over to him by PI Edwin Colaco of Colva Police Station along with a green colour shoulder bag containing certain articles and upon verifying the said bag, incriminating articles, some of which belonged to the deceased Sudan Dabhale, were found therein. Further, as discussed earlier, PI Edwin Colaco was never examined. Therefore, crucial issue as to who really arrested A.2 Srinivas and in what circumstances, has not at all been explained by the Prosecution. The learned Sessions Judge has not at all adverted to the aspect of non-examination of PI Edwin Colaco, even though PSI Vaibhav Naik (PW.59) in categorical terms admitted that A.2 was handed over to him by PI Edwin Colaco with green colour shoulder bag containing certain articles. In this light of the evidence, we cannot say that sixth circumstance stands proved beyond reasonable doubt.

73. The learned Counsel appearing for A.2 Srinivas points

out that in the original statement of Milan Dabhale (PW.1) wife of deceased Sudan Dabhale and in the statements of Rima and Raksha Dabhale, both the daughters of deceased Sudan Dabhale, there was no reference to any ATM card. However, it is only much later that supplementary statements were taken in order to introduce the aspect of ATM Card which was allegedly recovered from the person of A.2 Srinivas. In paragraph 218 of the impugned Judgment and Order, the learned Sessions Judge has also held that the so called recovery on 27 July 2009 in the present case I.O. PI Manjunath Desai cannot be considered as evidence under Section 27 of Evidence Act, since the said place was already known to the investigating agency prior to making disclosure by accused no.1. Accordingly, we are not prepared to hold that even the sixth circumstance stands proved beyond reasonable doubt in the present case.

74. The seventh circumstance relates to call details of the accused. On this aspect, there are two crucial factors to which no sufficient importance appears to have been attached by the learned Sessions Judge for convicting the accused persons.

75. In so far as A.4 Bijoy is concerned, the arrest panchanama indicates that there was no recovery of cell phone or any SIM card from him. The Prosecution alleges that the accused was using the cell phone No.976581443 and the call details of this

number were called from the service provider. However, no such call details were produced as evidence by the Prosecution. It was also the case of the Prosecution that this accused was using mobile phone having SIM no. 9673172512 at the time of commission of the offence.

76. It is the case of the Prosecution that mobile no. 9673172512 was owned by one Kanaklata, wife of Bijoy Kolita. There is no credible evidence produced on record to establish that Kanaklata was indeed the wife of A.4 Bijoy Kolita. However, even if it is presumed that there is some material regards this aspect, admittedly, mobile phone having same No. 9673172512 is not registered in the name of Kanaklata. The Prosecution examined PW.45 Digamber Borkar who has deposed that said mobile phone/SIM number was with him and he is the one who had given the same to Kanaklata. Such evidence hardly inspires any confidence. Digamber Borkar has deposed that even though Kanaklata had any mobile phone, at her request he gave this mobile card to Kanaklata. Digamber Borkar has, in turn, deposed that even SIM Card bearing no. 9673172512 was not owned by him, but that he had taken it from his neighbour Harishchandra Naik. According to us, this is too convoluted a manner to link SIM card no. 9673172512 to A.4 Bijoy Kolita.

77. Mr. Rivankar, the learned Public Prosecutor submitted that if Kanaklata were to have been examined as Prosecution witness, in all probabilities she would not have supported the Prosecution case. This cannot be a valid ground for not examining a material witness. Irrespective of whether or not Kanaklata was examined, the Prosecution has failed to establish that A.4 Bijoy had any nexus with SIM card no. 9673172512 and in the absence of any evidence on this count, it cannot be said that the circumstance based upon any call detail records can be said to have been proved as against A.4 Bijoy Kolita.

78. In so far as A.2 Srinivas is concerned, the record indicates that the mobile phone, along with the SIM card allegedly attached from person of A.2 Srinivas stands registered in the name of one Maurya. Admittedly, the Prosecution failed to examine said Maurya. In these circumstances, obviously it cannot be said that the circumstance arising out of the call detail records, can be said to have been proved as against A.2 Srinivas.

79. In fact, the learned Sessions Judge, at para 254 of the impugned Judgment and order has also held that this circumstance cannot be said to have been satisfactorily explained by the Prosecution. This is clear from the following observations in Paragraph 254 of the impugned Judgment and Order, which read

thus :

“254. PW.39 Surendra identified the said articles found with accused no.2 when shown to him including the mobile phones. The said panchanama is at Exh.197 wherein the details of both the mobiles along with sim cards have been disclosed. However, the prosecution has not examined said Maurya and therefore it is not clear as to how accused no.2 is having the said mobile with him with a sim card which is claimed by the prosecution as used by accused no.2 and 3. No doubt the evidence with regard to call details is not conclusive evidence but it is only supporting material to prove a circumstance. There is some discrepancies with regard to the use of mobile phone by the said accused persons which has not been satisfactorily explained by the prosecution including the aspect of relevant call details.”

(emphasis supplied)

80. In so far as call detail records relating to A.1 Ravindra Jha are concerned, in the first place, there is nothing incriminating as such, in so far as the same are concerned. According to the Prosecution, there were three calls made to A.1's mobile phone No.9657896030 on 17.7.2009 from mobile phone no.9923315170, allegedly belonging to A.2 Srinivas. Now, admittedly, mobile phone no.9923315170 belongs to and is registered in the name of one Pradip Kumar Maurya. This Pradip Kumar Maurya was never examined by the Prosecution as a witness. Therefore, it is not known as to how this mobile phone/SIM Card was allegedly found with A.2. There is accordingly missing link which was for the Prosecution

to prove. In fact, even the learned Sessions Judge has held that this circumstance cannot be said to have been proved beyond reasonable doubt. We agree that such circumstance can neither be regarded as incriminating circumstance, nor can be said that such a circumstance has been proved beyond any reasonable doubt.

81. Accordingly, it cannot be said that the Prosecution has established beyond any reasonable doubt the circumstances emerging from out of the call detail record of the accused persons. Therefore, the seventh circumstance cannot be held as proved by the Prosecution beyond reasonable doubt.

82. The eighth circumstance relates to injuries on the accused persons. At the outset, it is necessary to note that it was not even the case of the Prosecution that A.4 Bijoy Kolita was actually involved in any scuffle with the deceased Sudan Dabhale or in the alleged stabbing of the deceased Sudan Dabhale and the disposal of his dead body. In fact, it was the case of the Prosecution that A.4 Bijoy and A.3 Ali were involved in bringing the deceased Sudan in his Maruti van from Mapusa Taxi Stand upto Verna and thereafter A.4 Bijoy is stated to have parted the company from the remaining accused persons from this spot. Despite this, the Prosecution has tried to explain that the injuries on the person of A.4 Bijoy are related to possible scuffle between A.4 Bijoy Kolita and the deceased Sudan

Dabhale. Obviously, this is a major contradiction and casts a serious doubt on the prosecution theory.

83. In so far as injuries found on the person of A.1 Ravindra Jha are concerned, PW.20 Dr. John Anthony Fernandes has deposed that the injuries found on person of A.1 were 2 to 3 days old. Now the case of the Prosecution is that deceased Sudan Dabhale was murdered on 17.7.2009 and A.1 was arrested on 26/7/2009. Therefore, the injuries on the person of A.1 Ravindra Jha really have no nexus with scuffle with the deceased Sudan Dabhale, alleged to have taken place on 17.7.2009. Therefore, the so called injuries on A.1 Ravindra Jha can hardly be regarded as incriminating circumstance, in so far as A.1 is concerned.

84. In the present case, there is no clear evidence as to the precise date, or time of the death of the deceased Sudan Dabhale. The dead body was found to be in highly decomposed state and the medical evidence is that the death must have taken place within a period of two weeks from the date of examination. There are discrepancies with regard to the injuries on the accused persons at the time of arrest and at the time they were actually taken for medical examination. There is, in fact, no clear evidence on record that the accused persons were taken to medical examination within 24 hours of their arrests. Therefore, even this eighth circumstance cannot be

said to have been established by the Prosecution beyond reasonable doubt. In fact, considering the nature of the evidence, we would not be off the mark if we were to observe that it is the Prosecution which has failed to explain the injuries on, at least, some of the accused persons.

85. Ninth circumstance relates to CFSL reports. According to us, there is nothing conclusive in the CFSL reports. Merely because some human blood was found on the clothes of some of the accused persons or on the knife which is alleged to have been recovered at the instance of A.3. it cannot be said that same incriminates any of the accused persons. Such circumstance, does not in any case, unerringly point out to the guilt of the accused persons.

86. Tenth circumstance relates to motive for commission of the crime. Motive, per se cannot be regarded as a circumstance, as such |_Again the version of the Prosecution is not quite clear. It is the case of the Prosecution that A.2 Srinivas wanted to eliminate or kidnap Vijay because A.2 Srinivas believed that Vijay was responsible for the rift between himself and Sharon. It is also the case of the Prosecution that since Vijay, Aiyaz and others were part of one group and A.2 Srinivas regarded this group to be responsible for the rift between himself and Sharon, A.2 Srinivas wanted to kidnap Aiyaz. It is also the theory of the Prosecution that Aiyaz was kidnapped for ransom. The Prosecution has failed to establish beyond any

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out as per Order
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reasonable doubt either of the motives. Besides, it is little difficult to believe that the accused persons would conspire in the first place to kidnap Vijay or Aiyaz, but in furtherance of the same would also manage to hire a taxi from Mapusa Taxi Stand, murder its driver, change the number plates of the taxi, roam around with the taxi for almost 5 to 6 days and thereafter kidnap Aiyaz and demand for ransom. There is no clear evidence on this aspect of motive. This crucial aspect has been dealt by us in some details in our Judgment and Order in relation to Sessions Case No.38/200 and the reasoning therein will equally apply to the present case, as well

87. Eleventh circumstance relates to conspiracy. Again we are afraid, there is hardly any cogent and material evidence to establish the conspiracy. The Prosecution has itself chosen to charge only A.3 and A.2 as accused persons in both the Sessions Cases No.38/2009 and 50/2009. As indicated earlier, the accused persons have been prejudiced on account of registration of two different FIRs and launching two separate prosecutions. The instance of prejudice is evident from various circumstances referred to earlier. At this stage, it is necessary to refer to the deposition of PC PW. 60 Nagendra Parit who stated that on 24 July 2009 at the time when he along with PC Nilesh Sawant discovered the victim and two of the kidnappers, even A.1 Ravindra Jha was present. Now, it is not even the case of the Prosecution that A.1 Ravindra Jha was anywhere near the site of

kidnapping on 24 July 2009. In fact, A.1 Ravindra Jha has not even been charged for the offence of kidnapping for ransom. The learned Sessions Judge had explained this circumstance by observing that Ravindra Jha is the brother of Surajkumar Jha and since both of them look similar, the witness might have been confused. There could have been no occasion for confusion, had the Prosecution registered a single FIR, which in the facts and circumstances of the present case, they ought to have. Though it is true that the evidence in respect of conspiracy is hard to find in the present state of evidence, it is really difficult to infer the conspiracy.

88. Twelfth circumstance relied upon by the learned Sessions Judge relates to confession made by A.1 Ravindra and A.4 Bijoy. The learned Judge has rightly observed that in the present case the confession was retracted by both, A.1 Ravindra Jha and A.4 Bijoy Kolita. The learned Sessions Judge has, however, held that even retracted confession can be taken into consideration if there is general corroboration from independent sources. Indeed, this is the correct position in law. However, when it comes to consideration of retracted confession, there are certain additional safeguards to be kept in mind. The Courts are required to adopt double test in such matters which requires the Courts to ascertain as to whether the confession was voluntary and whether the confession was true and trustworthy. The learned Sessions Judge, in the present case has not

laid sufficient emphasis on this doubt test.

89. The learned Sessions Judge has noted that the retraction in the present case was almost after one and half year from the date of recording of the confession. The learned Counsel for the Appellants have explained and, according to us, quite correctly that since the copy of the confession was never furnished to A.1 Ravindra Jha and A.4 Bijoy Kolita they really had no occasion to retract the confession. However, no sooner such copies were made available to them along with the Charge-sheets, they have retracted their confession.

90. The alleged confession made by A.1 Ravindra Jha and A.4 Bijoy Kolita, as rightly observed by the learned Sessions Judge, could not have been made basis for conviction of the co-accused i.e. A.2 Srinivas and A.3 Mohammad Ali even though the same could be taken into consideration against the said co-accused persons as well.

91. Though, in terms of Section 30 of the Evidence Act, the confession of a co-accused can be taken into consideration, it must be treated that the confession statement of a co-accused is not by itself any substantive piece of evidence against the co-accused and at best can be used to lend assurance to the other evidence against the co-accused. That is what is held by the Apex Court in *Surrender*

Kumar Khanna vs. Intelligence Officer, Directorate of Revenue Intelligence (2018) 8 SCC 271

92. In *Haricharan Kurmi vs. State of Bihar* AIR 1964 SC 1184, the Apex Court has held that there is no doubt that the confession made voluntarily by an accused person can be used against the maker of the confession, though as a matter of prudence criminal courts generally require some corroboration to the said confession, particularly if it has been retracted. When Section 30 provides that the confession may not be evidence as strictly defined by Section 3 of the said Act, it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non-technical way. But it is significant that like other evidence which is produced before the Court, it is not obligatory on the Court to take the confession into account. In dealing with a criminal case where the Prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the Court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the Court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. Therefore, such confession of a co-accused can be used to lend

assurance to the other evidence against the co-accused.

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93. In the present case, we are not satisfied that the learned Special Executive Magistrate has complied with the procedural safeguards set out in Section 164-A Cr.P.C. to be read with Section 281 Cr.P.C.

94. In so far as A.1 Ravindra Jha is concerned, there is no dispute whatsoever that said accused person only knows to speak and understands Hindi language. Yet, there is no certification issued by the learned Special Executive Magistrate that the confession was read over to A.1 Ravindra Jha and explained to him in Hindi.

95. Mr. Rivankar, learned Public Prosecutor, however, contended that absence of certification may only be an irregularity, but not an illegality. He submits that in the course of deposition, the learned Special Executive Magistrate has stated that such statement was actually read over and explained to A.1 Ravindra Jha. If this was the only irregularity pointed out, then, this explanation could have been accepted. However, there are certain other issues as well in the present case.

96. The Special Executive Magistrate (PW.19) has deposed that she can read, write and understand Hindi. Section 281 Cr.P.C.

provides that record of confession shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court. The Special Executive Magistrate, in the course of cross examination, was asked as to why she did not record the confession of A.1 Ravindra Jha in Hindi because, admittedly, this was the language in which he was examined. To this, the Special Executive Magistrate responded that since the language of the Court is English, she recorded the confession in English. This cannot be a valid explanation. The confession could have been recorded in English if it was not practicable for the Special Executive Magistrate to record the same in the language in which the Accused person was examined. The Special Executive Magistrate has not deposed that she had any difficulty in recording the examination in Hindi, rather she has deposed that she knows to read, as well as write in Hindi. The Special Executive Magistrate has not deposed as to why it was not practicable to record the examination in the language in which A.1 Ravindra Jha was examined.

97. Besides, upon perusal of the actual examination, we find that there is some minor discrepancy as regards the precise date on which the confession came to be recorded. In order to record the confession, A.1 Ravindra Jha was brought before the Special Executive Magistrate on 9/10/2009 and on this date, the Special Executive Magistrate has stated that she gave A.1 Ravindra Jha 24

hours to retract or whether or not to make a confession. However, the actual confession is stated to have been recorded on 10/10/2009. The record, however, indicates that even the actual confession was recorded on the 9/10/2009 itself. However, some leeway can be granted to the Prosecution, as it is possible that this was an inadvertent error. Significantly, this very error is to be found in the record of confession of A.4 Bijoy Kolita, as well. Similarly, timing recorded suggests that two confessions were almost simultaneously recorded. Here again some leeway can be extended to the Prosecution as this may be a case of simple carelessness.

98. However, we find that when it comes to the date of arrest of both the accused, A.1 Ravindra Jha as well as A.4 Bijoy Kolita, the column is blank. Now, it was very important for the Special Executive Magistrate to obtain all details as regards arrest and custody of the accused persons, with a view to satisfying himself or herself as to the voluntary nature of the confession. If there are no details recorded as to the date of arrest or since when the accused persons are under arrest, it cannot be said that the Special Executive Magistrate, in the present case, had satisfied herself that the statement that was being given was voluntary.

99. The learned Counsel for the Appellants have also pointed out that the contents of such confession also have no ring of truth.

They pointed out that the contents of such confession are not corroborated by any other independent evidence on record in so far as at least certain credible aspects are concerned. According to us, in the facts of the present case, it will not be safe to act upon the two confessions.

100. This means that, in the present case, the Prosecution has failed to prove beyond reasonable doubt the circumstances from which any conclusion of guilt could have been recorded against the accused persons. Most of the circumstances listed by the learned Sessions Judge did not apply to all the accused persons, simultaneously, or otherwise. There is hardly any evidence on record to establish the conspiracy. The circumstances cannot be said to be of conclusive nature or tendency, so as to exclude every possible hypothesis, except the one to be proved. In this set of evidence, we cannot say that the chain of evidence was so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused or to conclude that in all human probability the act must have been committed by the accused persons.

101. Besides, we find in the present case, there was really no justification to register two separate FIRs and to launch two separate prosecutions. Such registration of two separate FIRs in respect of the same incidents or in respect of two or more parts of the same

incidents has, undoubtedly, caused prejudice to the accused persons. The impugned Judgment and Order, in the present case, had substantially relied upon the conviction recorded in Sessions Case No.38/2009. By a separate Judgment and Order made today, we have set aside the conviction of A.2 Srinivas and A.3 Ali in Sessions Case No.38/2009. As indicated earlier, even if we were to exclude the aspect of registration of two FIRs and setting aside of the conviction of A.2 Srinivas and A.3 Ali in Sessions Case No.38/2009, we are still satisfied that the Prosecution has failed to prove the charge against the Appellants, beyond any reasonable doubt.

102. In a matter of this nature, we have to remind ourselves of the principles laid down by the Hon'ble Apex Court in *Rajiv Singh vs. State of Bihar and another*¹¹ that it is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction, however grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well established canon of criminal justice is “fouler the crime higher the proof”. In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge beyond all reasonable doubt. Suspicion, however

¹¹ (2015) 16 SCC 369

grave it may be, cannot take the place of proof, and there is a large difference between something that '*may be*' proved and '*must be proved*'. The mental distance between '*may be*' and '*must be*' is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The Court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.

103. In *Kali Ram vs. State of H.P.*¹², the Apex Court has held that if two views are possible on the evidence adduced in the case, one pointing out to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

104. Similarly, the Apex Court has held that presumption of innocence serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system.

12 (1973) 2 SCC 808

105. Therefore, upon cumulative consideration of the material on record, as well as the legal position in such matters, we set aside the Judgment and Order dated 27 June 2016, in Sessions Case No.50/2009 made by the learned Sessions Judge, North Goa, Panaji and acquit the Appellants. The Appellants are directed to be released forthwith, if not required in connection with any other case. ~~Bail bonds of the Appellants stand discharged.~~

Corrections
carried out as per
Order dated
12/02/2019.

(Prithviraj K. Chavan, J.)

(M.S. Sonak, J.)