

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1234 OF 2013

Manohar Murlidhar Phatak
Age:37 years, Occ.: Professor,
R/o. Punjabi Plot, Nirmal Nagar,
Near Ahmedabad Highway, Khar (E).
District – Mumbai.
(At present lodged in Kolhapur Central Prison ... Appellant
at Kalamba) (Orig. accused
no.1)

V/s.

1. State of Maharashtra
2. Baptist Maulis Fernandes, Age 43 yrs.,
Occ. Taxi Driver, R/o. Nirmal Nagar,
Punjabi Plot, Near Ahemadabad
Highway, Khar (E), ... Respondent
Mumbai.

WITH
CRIMINAL APPEAL NO.1284 OF 2013

Anwar Dastageerali Sayyad,
Age : 22 yrs. Occ.: Service,
R/at : Shivalik Ventures Camp,
Room No.102, 1st Floor, A wing,
CHS : 27, 29, 30, Golibar Road,
Near Shiv Shakti Bldg., Santacruz (E), Appellant
Mumbai 55. (Orig. Accused
(At present in Thane Prison) ... No.2)

V/s.

The State of Maharashtra
(At the instance of Inspector of Police,
Virar Police Station) ... Respondent

Mr. Anil Joshi a/w Ms. Sandhya A. Mailagir, Advocate for the Appellant in Appeal/1234 of 2013.

Ms. Payoshi Roy i/b. Dr. Yug Mohit Chaudhry for the Appellant in Appeal/1284/2013.

Ms. P.P. Shinde, APP for the Respondent - State.

Mr.S.R.Phanse, Appointed Advocate for the Complainant/ Respondent No.2.

**CORAM : SMT. SADHANA S. JADHAV &
N.J. JAMADAR, JJ.**

RESERVED ON : 7th JANUARY 2021

PRONOUNCED ON : 21st JANUARY 2021

JUDGMENT :

1. The appellants herein are convicted for the offence punishable under section 302 of Indian Penal Code and sentenced to suffer RI for life with fine of Rs.10,000/- each in default to suffer RI for six months by the Additional Sessions Judge, Vasai in Sessions Case No.13 of 2010 in Crime No.189 of 2009. The appellants are also convicted for the offence punishable under section 201 of IPC and sentenced to suffer RI for six months.

2. The Court has further directed that an amount of Rs.20,000/- from the amount of fine shall be paid to the father of the victim viz. Baptist Fernandes by way of compensation. Hence, this appeal.

3. Such of the facts necessary for the decision of this Appeal are as follows:-

(i) On 8.8.2009, Tukaram Thakre (P.W.1) had been to his agricultural land as usual. He noticed that a dead body of a 25 year unknown male was abandoned in the bushes near a pit. He further noticed that the said person suffered a slit injury on his neck and that he had succumbed to the said injury. He had also noticed that both the hands of the deceased were tied with a coir rope. P.W.1 informed Chandrakant Bhoir (P.W.2) about the same. He had also seen that the hands of the deceased were tied to a rope. P.W.1 along with P.W.2 had been to the house of police patil and informed him about the same. They visited the police station and brought the police along with them. The identity of the said deceased was determined as Melvin.

(ii) The inquest panchanama was recorded and on the basis of the information given by P.W.1 Crime No.189 of 2009 was registered at Virar Police Station against unknown persons for the offences punishable under sections 302 and 201 of Indian Penal Code.

(iii) On 26.10.2009, the Police had arrested the present appellants along with three others who were juveniles in conflict with

law. The charge sheet was filed and the case was registered as Sessions Case No.13 of 2010. The prosecution has examined as many as 14 witnesses to bring home the guilt of the accused.

4. The conviction of the accused is based upon circumstantial evidence. The circumstances against the accused no.1 are as follows :-

- (i) That accused no.1 is conducting tuition classes in the name and style of “Hindustani Classes” at Santacruz and Khar.
- (ii) That the accused no.1 had written defamatory comments against Cerel, the brother of P.W.4 (Paternal uncle of deceased Melvin) in the common toilets of the chawl where they resided.
- (iii) That he had nurtured a grudge against P.W.4 - Baptist Maulis Fernandes i.e. the father of the deceased Melvin.
- (iv) The accused no.1 was last seen in the company of deceased Melvin.
- (v) There is a recovery of a razor from the bushes close to the place where the dead body of Melvin was found abandoned.

Two incriminating circumstances against accused no.2 are as follows :-

- (i) The evidence against the accused no.2/appellant in Criminal Appeal No.1284 of 2013 is the recovery of the cell phone handset, which belonged to the deceased.
- (ii) The evidence against accused no.2 is also in the nature of “last seen” in the company of the deceased. That he was driving the jeep in which the deceased was taken to the scene of offence.

5. The prosecution in order to establish the said circumstances has examined P.W.4 – father of the deceased on the point of motive. According to P.W.4, the accused no.1 was resident of the same chawl. That his brother Cerel was taking tuitions from the accused no.1. The accused no.1 had written defamatory comments against Cerel in the common toilet which was the cause of a quarrel between the accused no.1 and Cerel. P.W.4 had intervened in the said quarrel and at that time, he was assaulted and bitten by accused no.1. That the cell phone used by the deceased was registered in the name of P.W.4.

6. It is the case of the prosecution that P.W.5 - Siddhesh Vichare was taking tuitions from accused no.1 when he was studying X standard but even thereafter, he had cordial relations with the accused

no.1. According to P.W.5, on 7.08.2009, the accused no.1 had asked P.W.5 to bring his Qualis Jeep near Hindustani Class at Khar. P.W.5 had obliged. While he was waiting for accused no.1. He received a phone call from accused no.1 asking him to bring the jeep near his class. At the class he saw accused no.1 was in the company of four other unknown persons who boarded the jeep along with accused no.1. P.W.5 was directed to take the jeep near the Children's Complex where P.W.5 incidentally met his friend Vikrant. Accused no.1 had asked P.W.5 to alight from the jeep at that juncture and wait near the highway. He further obliged. The accused no.2 Anwar was driving the jeep. P.W.5 then boarded the jeep at Children's Complex. He saw an unknown person who had boarded the jeep in the intervening period. Vikrant had followed the jeep on his motorcycle. They had proceeded towards Mumbai Ahmedabad highway. P.W.5 was driving the jeep. The accused no.1 had introduced the unknown person as Melvin son of Baptist and had further informed that the Baptist had troubled him a lot. Accused no.1 had further divulged his intention to assault Melvin and had told the occupants that they had a choice to alight from the jeep if they were scared. Hence, P.W.5 - Siddhesh and Aakash had alighted from the jeep and waited for accused no.1 at the highway. At about 12.00 to

12.30 am accused no.1 returned in the said jeep along with three persons only and Melvin was missing. At that time also Anwar was driving the jeep. Then they all returned. They spent the night in the jeep and returned home at 6.00 am. On the very next day, P.W.5 received information from Virar Police Station to the effect that Melvin had died a homicidal death. P.W.5 was summoned to the Police Station and he was shown the photograph of Melvin which he identified.

7. P.W.5 has candidly admitted in the cross-examination that he is not sure as to what he meant by “tyala marnar aahe”. It could be assault or murder. The witness has admitted that on 7.08.2009 when they all boarded the jeep he only knew the names of Aakash and Sushant and none other. He has admitted that his father was the registered owner of the jeep bearing no.MH-04-DD-8893 which was purchased in June 2009.

8. Similarly, P.W.6 - Vikrant was also a student of accused no.1 and was taking tuitions in Hindustani Classes run by accused no.1. According to P.W.6 on 7.08.2009, when he was at the class he met Ankit, Shushant, Kunal, Siddhesh and Aakash at the class as usual. Accused no.1 had asked P.W.6 to fetch the motorcycle of his father as

there were many boys in the vehicle and they all wanted to go for an outing with accused no.1. P.W.6 had obliged. At about 7.30 to 7.45 pm the boys had boarded the jeep and an unknown boy had also accompanied them. P.W.6 had followed the jeep on his motorcycle. He could not contact accused no.1 and Sushant as their cell phones were switched off. Hence, he returned home when he received a call from Sushant asking him to come to the Petrol Pump at Vasai Phata. They all reached the Petrol Pump at Vasai Phata at about 11.00 to 11.15 pm. He met some of his colleagues including P.W.5. They waited at the Petrol Pump for almost two hours. When accused no.1 returned in the jeep they did not find the unknown boy but accused Anwar was driving the jeep. P.W.6 was summoned to the Police Station after more than 1 month. He was shown the photograph of a boy and was informed that the said boy has been killed. According to P.W.6, the person in the photograph was similar to the unknown boy who had travelled with accused no.1 upto Vasai Phata. In the cross-examination, the witness has admitted that he was acquainted with all persons who had occupied the jeep. It is further reiterated that the police had visited his house after about one and half to two months.

9. Another incriminating circumstance against the accused no.1 is the recovery of a razor at his instance from the scene of offence and the recovery of his clothes from his house. The memorandum for recovery of razor is at **Exh.33** and the recovery panchanama is at **Exh.34**. The said panchanama shows that the blade was rusted. To prove the discovery the prosecution has examined P.W.7 Chandrakant Gaidhane who is also a panch for the arrest panchanama dated 26.10.2009. According to P.W.7, on 2.11.2009, the accused had led the investigating agency to the highway at Kanher Phata. They stopped near a banyan tree which was close to a brick kiln. The accused had then handed over to the police one blade from the said place. It was of Topaz company. The accused no.1 had also led the police to his house for recovery of the clothes worn by him at the time of the incident. The memorandum is at **Exh.31** and the recovery of the clothes is at **Exh.32**. The arrest panchanama at **Exh.30** indicates that the accused nos.1 and 2 were arrested on 26.10.2009 along with three other persons who were juveniles in conflict with law.

10. P.W.8 - Dr. Swati Parab has performed autopsy on the body of deceased Melvin on 8.08.2009 between 1.30 pm to 2.30 pm. The post-mortem report is at **Exh.37**. She has proved the contents of

Exh.37 and has stated that initially the name of the deceased was not known, the police had intimated the name within 48 hours and hence, the name of the deceased was mentioned subsequently on 9.08.2009. On the basis of the fact that there was partly digested food material in the stomach, P.W.8 opined that the death was caused probably after two hours of the last meal and 12 to 14 hours prior to conducting autopsy on the dead body. The cause of death is “due to shock and hemorrhage due to cut throat”. The Doctor has opined that the injury must have been caused by a sharp weapon. The injury in column no.17 is incised wound over anterior part of neck 3 x 1 x 1 cm. The Doctor has further stated that the hands of the deceased were tied with a coir rope. The Doctor had not noticed any ligature marks on the hands of the deceased. Both carotids and jugular vein were cut.

11. On 9.09.2009, P.W.4 had handed over the empty box of the mobile handset of Nokia company and had informed the police that his deceased son Melvin was using the brown colour handset of Nokia 2600 classic, model no.002D327. The sim card was also purchased by P.W.4 and the cell phone number was 9987994373. The panchanama is at **Exh.41**. The IMEI number was 353521021020456. P.W.4 in his deposition has stated that he has purchased three handsets and three

sim cards which were all registered in his name. The mobile numbers of the sim cards are as under :-

9987994373, 7738784144 and 9987067432.

He has expressed his inability to give the IMEI numbers of all three mobile handsets but has given IMEI number of one handset.

12. The accused no.2 was arrested on 26.10.2009. The panchanama at **Exh.42** dated 25.10.2009 shows that Nokia handset of 2600 classic model was seized from accused no.2 on 25.10.2009. The panchanama shows that the IMEI number of said handset is 353521021020456. The said panchanama was caused between 12.00 pm to 1.30 pm at Bandra East. The handset which was produced before the Court at the time of trial is having IMEI No.3535210210210456. The number 210210 is scored off. The said handset was having sim card number 9773276879. It is therefore, clear that the handset was seized from the accused no.2 one day prior to his arrest. At the time of arrest panchanama nothing was seized from accused no.2 except the clothes worn by him.

13. According to P.W.10 - Mohd. Shariff Khan, the police had seized one box of Nokia mobile at Virar Police Station on 9.9.2009 and

it is marked at **Exh.41** i.e. when PW.4 handed over the box to Virar Police. It is pertinent to note that the said mobile phone was charged with sim card of BPL company. PW.10 happens to be a stock panch.

14. PW.12 – Vasim Khan Habib is the brother of one Sameer who was running a garage at Juhu. Sameer was staying with PW.12 at Bandra. The accused no.2 was a good friend of Sameer. He used to visit the garage at Juhu quite often and therefore, PW.12 was acquainted with accused no.2. According to PW.12, sim card no.9967904907 was registered in his name. The service provider was Airtel and the said sim card was being used by his brother Sameer. He had learnt from Sameer that the said sim card was taken by accused no.2 and he used the same for sometime and returned back to him. That Sameer was staying in Saudi Arabia since 2012. The disclosure statement made by Sameer to PW.12 is in the nature of an omission which is brought on record in the cross-examination of PW.12. It is also elicited in the cross-examination that PW.12 was not aware as to who used to visit the garage of Sameer. The police had written his statement on their own and that he is not conversant with Marathi language. He has further candidly admitted that he had not seen

accused no.2 Anwar before the occurrence of the incident.

15. The prosecution has examined P.W.13 - Anil Sandbhor who had taken over investigation of Crime No.189 of 2009 from API Patil who was investigating the offence till 4.09.2009. The records in respect of the activation of the mobile phone of the deceased on a different sim card and the call detail record formed part of the papers of investigation which was handed over to him by API Patil. From the said record, it had transpired that the mobile phone of the deceased was activated for one day on the sim card of Sameer Khan, who happens to be the friend of accused no.2 Anwar and the role of Anwar had surfaced on the basis of the said record. The witness has admitted that the accused was arrested on 26.10.2009 as per arrest panchanama at **Exh.30**. According to P.W.13, the handset of the deceased was seized from accused Anwar on 25.10.2009. P.W.13 has proved the recovery panchanama of a razor at the behest of accused no.1. It is admitted that the accused was arrested on 26.10.2009 but according to P.W.13 he was taken in custody in the night of 25.10.2009. Exh.41 would show that the handset was recovered from accused no.2 on 25.10.2009 at Bandra (East) and not Santacruz. There is no panchanama which was prepared at Santacruz. The Investigating Officer has not placed on

record the lock-up register along with the charge sheet. According to P.W.13, the cell phone number of the deceased was 9821176435. He had called for the call details record of the said number. It is pertinent to note that the said number did not belong to P.W.4 and neither he has stated that the deceased was using sim card number 9821176435. Even according to P.W.12 - Vasim Habib, the number used by Sameer was 9967904907. P.W.13 has proved the letter addressed to Superintendent of Police Thane, Rural seeking the call detail record of 9821176435 and the same is at **Exh.62**. P.W.13 admits that he had not recorded the statements of the Nodal Officer. It is also admitted that the incident had occurred in rainy season but the suggestion that the blade would get rusted in this season is denied.

16. P.W.13 has proved the omissions and contradictions of the witnesses. It is categorically stated that P.W.4 had not disclosed that he had lodged a missing complaint about his son which was registered as 66 of 2009. P.W.4 had also not stated in his previous statement that the sim card used by his son was registered in his name. P.W.4 has stated that he was acquainted with Ashishsingh Thakur and that he had stated before the police that after the death of Melvin a boy had given him the chit containing the name of Ashishsingh Thakur as the

assailant of Melvin. PW.13 had conducted investigation on the basis of the information given by PW.4 but no material could be gathered on the basis of the said chit. No person bearing the name of Ashishsingh Thakur was found in the course of investigation.

17. The prosecution has examined PW.14 - Milind Kolwalkar, who was working as a Nodal Officer with Bharti Airtel Limited. On 19.09.2009, he had received an email from S.P. Thane (Rural) requesting him to provide information of IMEI no. 353521020450. A specific information was being sought about the name and address of subscriber along with the CDR for the period 1.08.2009 to 19.09.2009. On 21.09.2009 the said information was given to the Superintendent of Police, Thane (Rural). The name of the subscriber was Vasim Habib Khan and the cell phone was 9967904907. The subscriber was resident of Sonawala Camp Tardev. The CBI record shows that the last call was made on 9.09.2009 at 13.59 hours and the said call was made on the IMEI number stated above. It is surprising to note that according to PW.14 the last digit of the IMEI number of the handset does not make any difference. PW.14 has admitted in the cross-examination that the CDR placed on record of the Court does not show any signature or seal of the company. It is the specific case of PW.14 that the IMEI number

consists of 15 digits but the number is only upto 14 digits and the last digit is the check digit. IMEI number stated by P.W.14 in his substantive evidence is of 12 digits only. P.W.14 has expressed his inability to show any rule or law or any provision to support the practice of considering “O” (zero) as the last digit which is termed as a check digit. It is further pertinent to note that it is admitted that his statement was not recorded by the police and that the company has not received any receipt from the Superintendent of Thane calling for the record.

18. The learned counsel for the Appellant in Criminal Appeal No.1234 of 2013 submits that the evidence of P.W.4 implicating the accused no.1 does not inspire confidence as the alleged incident of quarrel between P.W.4 and accused no.1 is of the year 1999 and for 10 years there was no untoward incident or any skirmish between the accused no.1 and P.W.4. Moreover, the accused no.1 could not have had any grudge or an axe to grind against the deceased who was hardly 8 years old at the time of the alleged incident and therefore, the motive for commission of offence is imaginary and has not been proved by the prosecution. P.W.13 has stated in the cross-examination that P.W.4 had not stated before him that the accused no.1 used to stare at him angrily after 1999. Hence, according to the learned counsel the motive

is not proved.

19. It is further submitted that the evidence of P.W.5 and P.W.6 is not cogent and convincing. The fact that accused no.1 had disclosed his intention to cause harm to Melvin and then asked the occupants of the jeep to alight from the jeep in the eventuality that they were scared would not appeal to a prudent man. In fact, at Dindoshi flyover, P.W.5 had started driving the jeep. It is not stated by him that he had started proceeding on Mumbai - Ahmedabad Highway on the instructions of accused no.1 and instead accused no.1 was purportedly telling the unknown boy that they had to go to the chowki. At one stage, P.W.5 has stated that he was acquainted only with Sushant and Aakash and Vikrant who was following the jeep and yet, he could identify Anwar as the driver of the jeep. The prelude to the incident has not been brought on record. P.W.5 has not stated before the Court as to when he had gained knowledge about the death of Melvin at the hands of accused no.1. It is further stated that P.W.6 Vikrant has controverted P.W.1. In fact, P.W.6 had not boarded the jeep and hence, he had no reason to know that an unknown person was sitting in the jeep. He has candidly admitted in the cross-examination that he was acquainted with all the persons who had boarded the jeep with accused no.1. It cannot be

ignored that he had learnt about the said incident almost after one and half month and therefore, according to the learned counsel for the accused no.1, P.W.5 and P.W.6 are got up witnesses.

20. As against this, the learned APP submits that the accused no.1 in his statement under section 313 of Cr.P.C. has not given any plausible explanation as to when he departed from the company of Melvin and that he has only stated that he has been falsely implicated. It is further submitted by learned APP that the credence of P.W.5 and P.W.6 cannot be doubted as they have substantiated the evidence in respect of last seen together. Learned APP further submits that P.W. 5 and P.W. 6 have substantiated in their testimony that the deceased Melvin was in the company of accused Nos.1 and 2 when the Jeep was taken to Vasai Phata i.e. the scene of offence. That the recovery of the cell phone of the deceased at the behest of accused No.2 has also been substantiated by P.W.13 and P.W.14 and hence, the Judgment delivered by the learned Sessions Judge calls for no interference.

21. Upon meticulous scrutiny of the evidence adduced by the prosecution, the following points need consideration:-

- (i) According to P.W.4, the motive for causing homicidal death of

his son Melvin does not inspire confidence for the simple reason that the alleged incident is of the year 2009 and according to P.W.4 there was a quarrel with accused no.1 in the year 1999 and in the intervening period there was no untoward incident neither there was any altercation or skirmish between P.W.4 and accused no.1 or between Melvin and accused no.1 and the members of the family of P.W.4. In any case, the age of the deceased was 17 at the time of death and he was a minor in the year 1999. Neither it is the case of the prosecution that Melvin was taking tuitions from accused no.1 and there was some untoward incident between them. It is therefore, difficult to believe that the said incident of 1999 would be the cause for eliminating Melvin on 8.08.2009. In the case of *Ramesh Baburao Devaskar and Ors. Vs. State of Maharashtra*¹, the Apex Court, has held as follows:-

“Proof of motive by itself may not be a ground to hold the accused guilty. Enmity, as is well-known, is a double edged weapon, whereas existence of a motive on the part of the accused may be held to be a reason for committing crime, the same may also lead to false implication. Suspicion against the accused on the basis of their motive to commit the crime cannot by itself lead to a judgment of conviction.”

1 (2007) 13 SCC 501

In the present case, the motive as narrated by P.W.4 is a trifling motive (if any) and is not established by any specific circumstance.

(ii) According to P.W.5, he had seen one unknown person in the jeep. Accused no.1 had introduced the said unknown boy as Melvin. Moreover, the accused no.1 had divulged to the occupants of the jeep that he is intending to cause harm to Melvin and that they are at liberty to dissociate themselves for the time being does not inspire confidence, as P.W.5 has not stated about any reaction of the said person to the bold statement made by accused no.1. The hands of the said person were not tied in the jeep. It is pertinent to note that **the statement of P.W.5 is recorded on 3.11.2009 whereas both the accused are arrested on 26.10.2009** and therefore, it is clear that the foundation for arresting the accused is not established.

(iii) P.W.6 has categorically stated that he was acquainted with all persons who had occupied the jeep and he happens to be a good friend of P.W.5 and yet had not informed P.W.5 about the identity of Melvin. In any case, according to P.W.6, he had no

knowledge about the death of Melvin for almost two months.

The fact that the statement of P.W.5 is recorded on 3.11.2009, makes it clear that it could not have been the foundation for arrest of the accused. Till the recording of the statement of P.W.5 and P.W.6 there was no material to arrest the accused. In the case of *Nizam and Anr. Vs. State of Rajasthan*², the Apex Court has held as follows :-

“Undoubtedly, “last seen theory” is an important link in the chain of circumstance that would point towards the guilt of the accused with some certainty. The “last seen theory” holds the Courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of the death of the deceased. It is well settled by this Court that it is not prudent to base the conviction on “last seen theory”. “Last seen theory” should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.”

In the present case, the prosecution has failed to establish the evidence in respect of “last seen theory” beyond reasonable doubt as there is no circumstance on record to show the prelude or the postlude of the incident and therefore, the onus would not shift upon the accused to offer any explanation for the same.

2 (2016) 1 SCC 550

- (iv) The razor was recovered at the behest of accused no.1 on 2.11.2009 i.e. practically, after three months of the alleged incident. The incident had occurred in the rainy season and the blade was found in a rusted condition. In the case of **Abdulwahab Abdulmajid Baloch vs State Of Gujarat**³, the Apex

Court has held as follows :-

“Conviction under section 302 of IPC cannot be recorded on the sole premise that recovery of weapon was made and the expert opined that the bullet found in the body of the deceased was fired from one of the weapon seized. The trial Judge himself opined that the recovery having made after nine months the weapon might have changed hands. In absence of any other evidence connecting the accused with commission of murder it is not possible to hold the appellant guilty for commission of offence under section 302 of IPC on the basis of such slender evidence.”

- (v) P.W.13 has admitted that there was an investigation on the basis of the chit given by P.W.4 which according to P.W.4 had shown the name of one Ashishsingh Thakur as the perpetrator of the crime. But no person with the name Ashishsingh Thakur was found during investigation.
- (vi) Even according to the prosecution, although P.W.5, Sushant and Ankit had alighted from the jeep, there were other boys besides the accused and Melvin in the jeep. This fact is

3 (2009) 11 SCC 625

corroborated by **Exh.30** which shows that along with accused nos.1 and 2 Prabhat Sharma, Kunal Dawale (the juveniles in conflict with law) were arrested on 26.10.2009. In fact, according to P.W.6, accused no.1 had requested P.W.6 to come on the motorcycle as there were too many boys in the jeep. Therefore, it cannot be said that the deceased was in the exclusive company of the accused nos.1 and 2 soon before the death.

- (vii) The recovery of the mobile handset at the behest of accused no.2 is one day prior to his arrest. Moreover, P.W.4 has not stated the cell phone number which was being used by the deceased. The theory propounded by the prosecution that the accused no.2 had used the sim card of one Sameer in the handset of the deceased is falsified by the evidence of P.W.11 as the sim card used by Sameer was 9967904907 whereas, **Exh.62** shows that the phone number used by the deceased was 9821176435 and it was kept on surveillance. The IMEI number also does not match with the IMEI number given by P.W.4 and the theory put forward by P.W.14 to the effect that the last digit is the check digit, moreover, the IMEI number

mentioned in the substantive evidence of P.W.14 is of 12 digits only whereas, even according to P.W.14, the IMEI number consists of 15 digits and the number is only upto 14 digits and the last digit is the check digit, is not substantiated by any rule, circular, notification, etc. The variance in the IMEI number and cell phone number leads to an inference that the recovery of handset at the instance of accused no.2 is not established beyond reasonable doubt. It is not the case of the prosecution that the calls were either received or made by the deceased on the said cell phone number to the accused persons. The fact that there is variance in the cell phone numbers which was put under surveillance and the number allegedly used by the accused would go to the root of the matter. The said circumstance is not established beyond reasonable doubt as there is no nexus between the cell phone recovered and the cell phone of the deceased which was missing. It does not complete the chain of circumstances to prove the guilt of the accused.

22. In the absence of any cogent and convincing evidence and in view of the above discussion, the appellants deserve to be acquitted

of all the charges levelled against them. Hence, we pass the following order :-

ORDER

- (i) The appeals are allowed;
- (ii) The judgment and order passed by the Additional Sessions Judge, Vasai in Sessions Case No.13 of 2010 in Crime No.189 of 2009 convicting the accused under section 302 and 201 of IPC is hereby quashed and set aside;
- (iii) The appellants be released forthwith, if not required in any other case;
- (iv) The fine amount, if paid, be refunded;
- (v) The appeals are disposed of on above terms.

(N.J. JAMADAR)

(SMT. SADHANA S. JADHAV, J)

Pallavi M.
Wargaonkar
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by Pallavi M.
Wargaonkar
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