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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 689 OF 2022 (F)

Mr. Abhinandan Patel, S/o
Harischandra Patel, Aged 37 years,
Male, Indian National, R/o c/o Maria
D'Souza, Naikawado, Calangute,
Bardez-Goa. Presently lodged at
Modern Central Jail, Colvale,
Bardez, Goa.

... APPELLANT

Versus

1. State (As represented by the
Officer in charge, Agacaim Police
Station), Agacaim, Goa.

2. The Public Prosecutor, High
Court of Bombay & Goa,
Porvorim-Goa.

... RESPONDENTS

Ms. Caroline Collasso with Mr. Kamalakant Poulekar,
Advocate for the Appellant.

Mr. Shailendra G. Bhobe, Public Prosecutor for the
Respondents.

WITH

CRIMINAL APPEAL NO. 702 OF 2022 (F)

Shri Anil Bhoe, S/o Maruti Bhoe, 34
years, Male, Indian, R/o Ramnagar, 3rd
Cross, Khangrali, Belgaum, Karnataka.
(Presently in Central Jail Colvale Goa).

... APPELLANT

Versus

State through,

1. Public Prosecutor, High Court of
Bombay at Goa, Porvorim Goa.

2. Police Inspector, Agacaim
Station, Agacaim, Goa. ... RESPONDENTS

Mr. Rohan P. Desai with Mr. Bhargav Samant, Ms. Avani Chodankar, Ms. Kshama Naik and Mr. Akshay Priolkar, Advocates for the Appellant.

Mr. Shailendra G. Bhole, Public Prosecutor for the Respondents.

CRIMINAL APPEAL NO. 1 OF 2023

Mr. Aniket Yallurkar, son of Deepak Yallurkar, Aged 29 years, Male, Indian National, R/o Jaffer, Gauliwada, Betim, Porvorim, Bardez, Goa. Native from Nahnath Galli, Khanggrali, Belgaum, Karnataka. Presently lodged in Judicial Custody Central Jail, Colvale, Bardez, Goa. ... APPELLANT

Versus

1. State through PP, High Court of Bombay at Goa, Porvorim-Goa.
2. Police Inspector, Agaciam Police Station, Agaciam, Goa. ... RESPONDENTS

Mr. Arun Bras De Sa with Mr. Kyle D'Souza, Mr. Alphy D'Souza and Mr. Sahil Sardesai, Advocates for the Appellant.

Mr. Shailendra G. Bhole, Public Prosecutor for the Respondents.

CRIMINAL APPEAL NO. 2 OF 2023

1. Mr. Ravi Patil, S/o Prabhu Patil, 35 years, Male, Indian, r/o Ramnagar, 2nd Cross, Khanggrali, Belgaum, Karnataka. Presently

lodged in Judicial Custody
Central Jail, Colvale, Bardez,
Goa.

2. Mr. Arun Patil, S/o Budaji Patil,
28 years, Male, Indian, r/o
Vishnu Galli, Khangrali,
Belgaum, Karnataka. Presently
lodged in Judicial Custody
Central Jail, Colvale, Bardez,
Goa. ... APPELLANTS

Versus

1. State through PP, High Court of
Bombay at Goa, Porvorim-Goa.
2. Police Inspector, Agaciam Police
Station, Agaciam, Goa. ... RESPONDENTS

Mr. Arun Bras De Sa with Mr. Kyle D'Souza, Mr. Alphy
D'Souza and Mr. Sahil Sardesai, Advocates for the
Appellants.

Mr. Shailendra G. Bhobe, Public Prosecutor for the
Respondents.

CORAM: **M. S. SONAK &
BHARAT P. DESHPANDE, JJ.**

RESERVED ON: **13th JUNE, 2023**

PRONOUNCED ON: **28th JUNE 2023**

JUDGMENT: (per Bharat P. Deshpande, J.)

1. All the above Appeals are taken up for disposal together as the Appellants/Accused persons are challenging the conviction and sentence awarded by the learned Trial Court in Sessions Case No. 42 of 2013.

2. Criminal Appeal No. 689 of 2022 (F) is filed by Abhinandan @ Raj Patel (Accused No. 2), Criminal Appeal No. 702 of 2022 (F) is filed by Anil Bhoje (Accused No. 3), Criminal Appeal No. 1 of 2023 is filed by Aniket Yallurkar (Accused No. 7) and Criminal Appeal No. 2 of 2023 is filed by Ravi Patil (Accused No. 4) and Arun Patil (Accused No. 5).

3. In Sessions Case No. 42 of 2013, in all, seven Accused persons were tried for the offence punishable under Sections 120B, 302, 397 and 201 of the Indian Penal Code, 1860 (for short, the IPC). By the impugned judgment dated 16.08.2022, the learned Sessions Judge, acquitted Accused No. 1 and Accused No. 6 of all the charges and convicted Accused Nos. 2 to 5 and 7 for the offence punishable under Sections 120B, 302, 397 and 201 of the IPC. Accordingly, the learned Sessions Judge sentenced all the said convicted Accused persons for the offence punishable under Sections 120B and 302 of the IPC, to suffer imprisonment for life and to pay a fine of ₹1 lakh and in default to undergo imprisonment for a period of three years. Similarly, all the said convicted Accused persons were sentenced to suffer ten years of rigorous imprisonment and to pay a fine of ₹50,000/- and in default to undergo further rigorous imprisonment of two years for the offence punishable under Section 397 of the IPC. As far as Section 201 of the IPC is concerned, all the convicted Accused persons were sentenced to suffer rigorous imprisonment for a period of seven years and to pay a fine of ₹25,000/- and in default to suffer further rigorous imprisonment for one a period of one year. Surprisingly, there is no mention about any set off against the period already undergone during the trial as provided under Section 428 of the Code of Criminal Procedure,

1973 (for short, the Cr.P.C.). There is also no mention as to whether all the sentences shall run concurrently. No reason is forthcoming on both of these aspects in the judgment.

4. As far as the acquittal of Accused Nos. 1 and 6 is concerned, the State preferred an Application for leave to appeal, which was also taken upon simultaneously along with the present Appeals. However, we propose to pass separate orders on that Application for leave to appeal since the parameters for grant of leave to appeal as compared to the aspect of the challenge raised to the conviction are totally different.

SUBMISSIONS ON BEHALF OF APPELLANTS/ACCUSED:

5. We have heard the learned Counsel appearing for the respective Accused persons at length. We have also heard the learned Public Prosecutor Mr. Bhobe appearing for the State in all these Appeals. With the assistance of the learned Counsel for the Accused persons and that of the learned Public Prosecutor, we have extensively gone through the paper book and more specifically, the evidence as well as the documents relied upon by the Prosecution and discussed by the learned Sessions Judge while convicting the respective Appellants.

6. The main contention as raised by the learned Counsel for the Appellants/Accused persons is that the entire case is based on circumstantial evidence. Since, the learned Trial Court acquitted Accused Nos. 1 and 6, the story of the Prosecution in connection with the hatching of a conspiracy by Accused No. 1 falls flat. The

learned Sessions Judge failed to consider the fact that the Prosecution has miserably failed to prove the conspiracy hatched by Accused Nos. 1 and 2 as alleged thereby acquitting Accused Nos. 1 and 6. Therefore, the entire evidence produced is only based on surmises and conjectures. It was further argued that the duty of the Prosecution is to prove each and every circumstance forming the chain of events with the hypothesis that only the Accused persons are perpetrators of such offence. In this case, as per the learned Counsel for the Accused persons, such chain is found broken at many places. The material brought on record by the Prosecution though creates some suspicion, however, it is well settled that such suspicion cannot take the place of proof as there is always doubt and two views are possible when there is only suspicion however serious it may be.

7. The learned Counsel for the Accused persons then pointed out that there are glaring discrepancies in the entire Prosecution case as the so called confessional statement of Accused No. 7 (Aniket) was not voluntarily given and therefore, the same ought to have been ignored. Secondly, it has been claimed that even if such a confession is considered, it is exculpatory in nature and therefore, the same could not have been used against the co-accused persons.

8. The learned Counsel for the Accused persons then pointed out that there are glaring defects with regard to the identification parade and the memorandum which the Magistrate prepared. It was submitted that there was an inordinate delay in conducting the test identification parade thereby creating the possibility of witnesses seeing the Accused persons in between. Secondly, it is claimed that

the Magistrate who conducted the test identification parade did not prepare the memorandum on the same day and was prepared almost after about a month, which completely negates such document as having any evidentiary value. Thirdly, it is claimed that the witnesses who claimed identification of the respective Accused persons in the test identification parade did not point out the role played by each Accused at the time of the alleged offence while identifying them before the learned Magistrate.

9. The learned Counsel for the Accused persons would then submit that the Prosecution heavily relied upon the call details of the mobile phones, however, admittedly, there are glaring defects with regard to the SIM cards and mobile handsets which are not matching with the record. It is claimed that the SIM cards were not found in the name of some of the Accused persons and hence, such call details could not have been relied upon.

10. The learned Counsel for the Accused persons would then submit that there is a clear violation of the rights of the Accused persons in connection with their arrest. It was submitted that Accused Nos. 3 to 6 were picked up/arrested from different places out of Goa and there is no record as to when they were actually arrested. The panchanama at the Agassaim Police Station was subsequently recorded showing formal arrest. It is claimed that the help of the local Police in Belgaum, Kolhapur etc. was not taken while arresting the said Accused persons. The Prosecution claimed that they were picked up from their respective cities and brought to Agassaim which creates suspicion and also an opportunity to plant mobile phones or SIM cards on their person.

11. Another submission advanced on behalf of the learned Counsel for the Accused persons is with regard to so called injuries found on their person and their so called admission/confession of such injuries to the Doctor who examined them at G.M.C. It is their contention that suddenly such injuries appeared on the person of the Accused persons only when they were produced before the Doctor and there is no such evidence of the Police Officer, who actually picked them from their respective places. Thus, such extra judicial confession to the Doctor is clearly unacceptable and the same has been planted only to implicate the Accused persons.

12. Lastly, it has been claimed that when the Prosecution has failed to prove the conspiracy qua Accused No. 1, there is no material to show that there was any enmity between Accused No. 2 and the deceased so as to commit such an offence.

13. The following decisions have been relied upon by the learned Counsel for the Accused persons:-

- i. *Pawan Kumar Chourasia v. State of Bihar*,
2023 SCC OnLine SC 259
- ii. *Subramanya v. State of Karnataka*,
2022 SCC OnLine SC 1400
- iii. *Sarvanand v. State of Goa*,
2006 SCC OnLine Bom 1678
- iv. *Naresh Parab v. State of Goa*,
2012 SCC OnLine Bom 1137
- v. *Gireesan Nair and Ors. v. State of Kerela*,
(2023) 1 SCC 180
- vi. *Khomu Kasar Bahadur Raul v. State and Anr.*,
2017 SCC OnLine Bom 8800
- vii. *Ravinder Singh v. State of Punjab*,
AIR 2022 SC 2726

- viii. *Rajender and Ors. v. State (NCT of Delhi), (2019) 10 SCC 623*
- ix. *Conceicao B. D'Souza v. State of Goa and Ors., WPCR No. 250 of 2022 (F) dt. 18.10.2022.*
- x. *Mani v. State of Tamil Nadu, (2009) 17 SCC 273*
- xi. *Mustkeem Alias Sirajudeen v. State of Rajasthan, (2011) 11 SCC 724*
- xii. *Vijay Thakur v. State of Himachal Pradesh, (2014) 14 SCC 609*
- xiii. *Shahaja alias Shahajan Ismail Mohd. Shaikh v. State of Maharashtra, 2022 SCC OnLine SC 883*
- xiv. *Shankar v. State of Maharashtra, 2023 SCC OnLine SC 268*
- xv. *Mansoorali Khan Ahmed Khan and Anr. v. State of Maharashtra, 2022 SCC OnLine Bom 308*

SUBMISSIONS ON BEHALF OF PROSECUTION/STATE:

14. The learned Public Prosecutor Mr. Bhobe claimed that there is a ring of truth that the Prosecution has brought on record while proving the charges against the Accused persons. He fairly submitted that though there are some loopholes, however, the same cannot be considered as affecting the findings of the learned Trial Court in holding the Accused persons guilty. He submitted that there is ample material to show that the deceased was developing a property in which Accused Nos. 1 and 2 were engaged to look after and help the deceased. He then submitted that since Accused No. 1 being a Government Servant was unable to conduct business in his own name, introduced the deceased to the land owner and thereafter, executed the contract for development between the land owner and

the deceased. There is material to show that Accused No. 1 was initially looking after the said project and he employed Accused No. 2. Differences arose between Accused No. 1 and the deceased with regard to some money transactions which resulted in the removal of Accused No. 1 from the said project by the deceased. Since Accused No. 1 was removed from the said project, ultimately, Accused No. 2 also lost his job and therefore, both of them conspired to eliminate the deceased. He further submitted that in such conspiracy, Accused No. 2 contacted Accused No. 7 and then arranged professional killers i.e. Accused Nos. 3 to 6. Accused Nos. 2 and 7 then made arrangements for such professional killers (Accused Nos. 3 to 6) in a Hotel at Miramar, who then contacted the deceased claiming that they want to purchase the old car of the deceased. On the date of the incident, Accused Nos. 3, 4 and 5 came to the garage of the deceased and after discussing with regard to the old car, they took the deceased along with them claiming that they want to take a test drive of the said car. On the same night, the deceased was found murdered in the same car, which was located near Bambolim Church.

15. The learned Public Prosecutor submitted that the call details of Accused Nos. 2 and 7 clearly show that they were in regular contact. Similarly, Accused Nos. 2 and 3 were also contacting each other. The mobile location of Accused Nos. 3, 4 and 5 are traced from Miramar to Taleigao and then to Bambolim, which is the path of travel of these Accused persons with the deceased.

16. He then submitted that Accused Nos. 3, 4 and 5 were last seen with the deceased by PW-1 and PW-2 i.e. brother and wife

respectively of the deceased. PW-1 and PW-2 identified Accused Nos. 3, 4 and 5 in the Court. The learned Public Prosecutor would then submit that even if the identification parade is not accepted, the identification of these Accused persons in the Court by the witnesses has not been shaken at all. He, therefore, would submit that the circumstances brought on record by the Prosecution show a ring of truth and when there is no explanation coming forward from the Accused persons, the Appeals deserve to be rejected.

17. The learned Public Prosecutor has placed reliance on the decision of the Apex Court in the case of **Balu Sudam Khalde & Another Vs. State of Maharashtra, 2023 SCC Online SC 355.**

18. After extensively hearing the learned Counsel for the Accused persons and the learned Public Prosecutor for the State and on going through the entire record, the following points fall for our determination:

POINTS FOR DETERMINATION

- (i) Whether the Prosecution succeeded in proving that a conspiracy was hatched to eliminate the deceased ?
- (ii) Whether the Prosecution succeeded in proving that in the said conspiracy Accused No. 2 contacted Accused No. 7 and arranged Accused Nos. 3 to 6 to eliminate the deceased ?
- (iii) Whether the Prosecution succeeded in proving that Accused Nos. 3 to 6 came to Goa and stayed in one Hotel at Miramar which was arranged by Accused No. 2 ?
- (iv) Whether the Prosecution succeeded in proving that Accused Nos. 3, 4 and 5 came to the garage of the

deceased on 21.03.2013 under the pretext of purchasing the car and then went away with the deceased in the said car for taking a test drive ?

(v) Whether the Prosecution succeeded in proving that the call details collected by the Prosecution connect the Accused persons showing their locations ?

19. The above points for determinations are only in connection with Accused persons who filed the present Appeal challenging their conviction i.e. Accused Nos. 2, 3, 4, 5 and 7. We make it clear that Accused No. 1 and Accused No. 6 who stand acquitted of all the charges are not before us in the present matters. The State filed a separate Application seeking leave to Appeal against acquitted Accused Nos. 1 and 6, which is decided separately though heard along with the present Appeals.

FACTUAL MATRIX:

20. A few facts that need to be considered for deciding the present Appeals are as under.

21. The investigation started by the P.I. Mr. Shivram Vaigankar (PW-37) upon receipt of telephonic information at Agassaim Police Station on 22.03.2013 at around 00:05 hours when one Rupesh informed him (P.I.) that his friend, who was missing, was found lying unconscious in a vehicle near Holy Cross, Bambolim. The Investigating Officer then visited the spot, however, by that time, the said injured person was shifted to G.M.C. On arrival at G.M.C. and on examination, the said injured was declared dead. In the

meantime, the family members of the deceased reached the Hospital and identified him as Hassan Khan. The brother of the deceased by the name Hyder Khan (PW-1) lodged a complaint against unknown persons. The inquest panchanama was conducted and the body was forwarded for post-mortem. In the meantime, a scene of offence panchanama was conducted near the Bambolim Church where the injured was found lying in the car and relevant material was collected.

22. Subsequently PW-1, Hyder Khan gave a supplementary statement in which he suspected the involvement of Accused Nos. 1 and 2 in the said offence due to the removal of Accused Nos. 1 and 2 from the development project by the deceased. Accordingly, the offence was registered under Sections 302 and 397 against Accused Nos. 1 and 2 initially. The investigating agency then arrested Accused Nos. 1 and 2 and during their interrogation, a lead was found with regard to the involvement of Accused No. 7 on the basis of call records, which further lead to the arrest of Accused Nos. 3 to 7 by the investigating agency. Confession of Accused No. 7 was then recorded by the learned Judicial Magistrate First Class, who according to the investigating agency, disclosed the conspiracy hatched by Accused Nos. 1 and 2 and they contacted Accused Nos. 3 to 6 to eliminate the deceased as against payment of cash of ₹7 lakhs.

23. After filing of the chargesheet, charges were framed against all the Accused persons and thereafter, the trial commenced. Basically, the charges at Exhibit-23 show that Accused Nos. 1 and 2 hatched a criminal conspiracy to kill the deceased as the deceased had removed

them from the construction project and that Accused No. 2 arranged the killers through Accused No. 7. During that conspiracy, Accused No. 2 gave a contract to Accused Nos. 3 to 6 to eliminate the deceased Hassan Khan and agreed to pay ₹7 lakhs and paid part of ₹2 lakhs to Accused No. 3. It is then found in the charge that in furtherance of such conspiracy and in the execution of it, Accused Nos. 3, 4 and 5 took Hassan Khan in his Honda City Car bearing No. GA-01/S-5679 on 21.03.2013 towards Bambolim and killed Hassan Khan between 20:30 to 23:30 hours in the said car by strangulating him with a nylon rope and stabbing Hassan Khan with a knife and robbed his gold chain, dual SIM Samsung mobile phone and wallet containing cash of ₹35,000/- from the deceased. During the said execution, Accused Nos. 2 and 6 followed the said car in a separate vehicle i.e. Maruti Wagon R bearing No. GA-06/D-3600 in order to give directions and to ensure the elimination of Hassan Khan and that Accused No. 1 being the mastermind was informed on the phone. In furtherance of the said conspiracy, Accused No. 7 was kept in readiness with a motorcycle No. GA-03/D-7603 from 20:00 hours on 21.03.2013 in order to join up a call from Accused No. 2 while monitoring the killing operations. After eliminating Hassan Khan, Accused Nos. 2 and 7 destroyed the blood stained clothes, shoes and chappals of Accused Nos. 3, 4 and 5 by putting them in an empty cement bag and dropping it into a rivulet from Nerul Bridge.

24. In order to prove such charges, the Prosecution has examined in all 37 witnesses. The statements of the Accused persons were recorded under Section 313 of the Cr.P.C. upon which they denied the entire case of the Prosecution.

25. The learned Sessions Judge in its impugned judgment and order more specifically in paragraph 81 observed the chain of circumstances pointing to the guilt of Accused Nos. 2, 3, 4, 5 and 7 as proved by the Prosecution. However, while doing so, the learned Trial Court relied upon the statement of Accused No. 7 claiming to be a confessional statement. The learned Trial Court also considered other material which include identification of Accused Nos. 3, 4 and 5 by the witnesses before the Magistrate, the call details and the last seen theory. Accordingly, the learned Sessions Court found that the Accused failed to explain the injuries and their admission to the Doctor prove the circumstances against them. The learned Sessions Judge further connected the Accused persons with regard to the call details on the basis of the mobile phones, SIM cards and more specifically, the IMEI number since it was found that some SIM cards were not in the name of some of the Accused persons. However, the learned Sessions Judge observed that there is no material to link Accused Nos. 1 and 6 and accordingly, acquitted the said Accused persons.

26. With this material and the fact that the case of the Prosecution is based on circumstantial evidence, the settled proposition of law with regard to circumstantial evidence needs to be considered.

CIRCUMSTANCES:

27. The circumstances which are relevant, and which the Prosecution was supposed to prove in order to prove the charges are as under:

- (i) Enmity between Accused No. 2 and the deceased so as to eliminate him ?
- (ii) Acquaintance between Accused No. 2 and Accused No. 7.
- (iii) Frequent calls between Accused No. 2 and Accused No. 3 just prior to the death of the deceased.
- (iv) Acquaintance and contacting of Accused Nos. 3 and 4 by Accused No. 7 for hiring them.
- (v) Registering room in Sunheads Hotel, Miramar by Accused No. 2 to accommodate Accused Nos. 3 to 6 on 18.03.2013.
- (vi) Hiring of Wagon-R car of PW-9 by Accused No. 2 from 16.03.2013.
- (vii) Accused Nos. 3 and 4 contacting the deceased under the pretext of purchase of his old car and meeting him in Green Park Hotel.
- (viii) Last seen together by Accused Nos. 3, 4 and 5 with the deceased on 21.03.2013 at around 8:30 p.m. while taking a test drive of the Honda City car.
- (ix) Locating the Honda City car with the deceased having fatal injuries.
- (x) Cause of death showing homicidal death according to the post mortem.
- (xi) Hiring of Innova car of PW-9 by Accused No. 2 on the night of 21.03.2013 to shift Accused Nos. 3 to 6 to Pune.
- (xii) Halt at K.L.E. Hospital by the said Accused persons while proceeding towards Pune in Innova car and Accused No. 3 meeting his mother in K.L.E.
- (xiii) Recovery of mobile phone from the possession of Accused Nos. 3 to 6.

- (xiv) CDR and SDR record of mobile phones of the deceased and the Accused persons.
- (xv) Extra judicial confession made by Accused Nos. 3, 4 and 5 to Dr. Patil explaining the injuries found on their bodies.
- (xvi) Recovery of the broken gold chain of the deceased at the instance of Accused No. 3.
- (xvii) Recovery of the knife at the instance of Accused No. 3.
- (xviii) Confession of Accused No. 7.

28. The question of enmity between Accused No. 2 and the deceased is found to be stretched too far and that too, on the ground that Accused No. 1 employed Accused No. 2 for the said housing project and since disputes arose between the deceased and Accused No. 1, deceased removed Accused No. 1 from the said project and ultimately, Accused No. 2 was also removed from the said project. Even for the sake of argument if it is accepted that the deceased removed Accused No. 1 from the said project due to some differences, at the most, it could be considered as a dispute between them, which, by no stretch of imagination is considered as enmity. For proving the enmity, something more must be necessary. After the removal of Accused Nos. 1 and 2, from the said project, no material has been produced on record to show that any threats were given to the deceased. No doubt, there is some evidence to show that Accused No. 1 and his wife approached the deceased and requested him to take Accused No. 1 back in the said project, however, in the absence of any material, the contention of the Prosecution that Accused No. 2 developed enmity against the

deceased and keeping in mind such enmity, he conspired to eliminate the deceased is too far fetched.

29. In the case of **Hanumant Govind Nargundkar & Another Vs. State of Madhya Pradesh**, AIR 1952 SC 343, the Hon'ble Apex Court observed in paragraph 10 as under:-

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused.”

30. In **Sharad Birdhichand Sarda Vs. State of Maharashtra**, (1984) 4 SCC 116, the Hon'ble Apex Court laid down the five golden principles while dealing with circumstantial evidence which are as under:-

“(1) The circumstances from which the conclusion of guilt is to be drawn “must” or “should be” and not merely “may be” fully established;

(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.”

31. The Apex Court in the case of **Shivaji Sahabrao Bobade & Another Vs. State of Maharashtra (1973) 2 SCC 793** observed as under:

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

(2) the facts so established should be consistent only 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. These principles are considered in a plethora of judgments by the Apex Court and accepted as settled proposition of law. There is no need to discuss all such judgments as the proposition laid down in the recent decisions is on the same principles. [See (**Ravindra**

Singh (supra), Rajendra & Others (supra) and Khomu Kasar Bahadur Raul (supra)].

CONFESSIONAL STATEMENT OF ACCUSED NO. 7:

33. Before considering the circumstances which the Prosecution has claimed to have been proved against the convicted Accused persons, it is important first of all to disclose about the so called confession of Accused No. 7, which according to the Prosecution unearth the entire conspiracy including the hiring of Accused Nos. 3 to 6 for the purpose of eliminating the deceased. The Trial Court has accepted such confession as voluntarily recorded and proved through the Magistrate. In this respect, the Prosecution examined PW-20, Judicial Magistrate First Class, 'C' Court, Panaji, who recorded the statement of Accused No. 7, Aniket under Section 164 of Cr.P.C. This confessional statement is marked as Exhibit-215 (page 680 of the paper book). A request to record the confession of Accused No. 7, Aniket was received by the learned Magistrate vide letter dated 12.04.2013. It is necessary to note here that Accused No. 7 was arrested on 26.03.2023. Therefore, the Application filed on 12.04.2013 shows that during interrogation on 23.03.2013, Accused No. 7, Aniket showed his willingness to give a statement about his confession and involvement in the offence. Accordingly, the learned Magistrate issued a letter to the Jailor to produce Accused No. 7, Aniket before her on 20.04.2013. The statement recorded under Section 164 of Cr.P.C. by the learned Magistrate (Exhibit-215) shows that Accused No. 7 was produced before the learned JMFC on the first occasion on 20.04.2013. After confirming that no Police Officer is present in the Court, she

questioned Accused No. 7, who understands Marathi language. Therefore, the Magistrate put questions to him in Marathi. The learned Magistrate then informed Accused No. 7 that he is no longer in Police custody and further, asked whether he is having any complaint against the Police towards illegal treatment to which he replied in the negative. The learned Magistrate then informed her designation and asked Accused No. 7 as to whether he wishes to make any statement. Accordingly, Accused No. 7 answered in the affirmative. Then the learned Magistrate told Accused No. 7, Aniket that he is not bound to make a statement and there is no compulsion that he has to make a statement and if he makes a statement then it will be used against him as evidence. Specific questions were asked to him at Serial Nos. 10 to 16 and the answers given by Accused No. 7, Aniket are recorded therein, which are clearly showing that he was given promise or allurement by the Police to make statements so that he will be released after making such statements or at the most, he would be made a witness. It is necessary to quote Questions 10 to 16 along with their answers as recorded by the Magistrate on the first date i.e. on 20.04.2013, which read thus:

“Question No. 10.-Have the police or any other person promised you that lesser punishment, will be awarded to you if you make a statement or that you will be acquitted ?

Answer: I say that the PI has told me that after my statement is recorded in the Court, I will be released.

Question No. 11.-Have the police or any other person given you any allurement to make statement ?

*Answer: No. However I say that the police have told me that after I give my statement, they will leave me.
(In case there are other co-accused).*

Question No. 12.-Have the police or any other person given you promise that if you make a statement then you will be made witness for the prosecution in the case ?

Answer: I say that the police have told me that I am a witness and that I will be released after my statement is recorded.

Question No. 13.-Do you still desire to make a statement ?

Answer: Yes

Question No.14.-When did it first occur to you that you should make a confession and why did it occur to you?

Answer: I say that about 15 days back when I was sent to Judicial Lock-up Mapusa, it first occurred to me that I should make a confession. I say that the same occurred to my mind as I had not done anything wrong but I was working for one Mr. Raj.

Question No.15.-Why are you making confession ?

Answer: I want to make confession as I will be released.

Question No.16.-Before you make any. statement you given more than 24 hours time for reflection. You are kept in Magisterial custody and you will not be kept in police custody. Have you understood all this ?

Answer: I say that I am ready to give the statement today.”

34. In spite of the above answers given by Accused No. 7, Aniket, the learned Magistrate gave him time for reflection till 24.04.2013, thereby remanding him in Magisterial custody and directed the Authority to produce him on 24.04.2013. The first part of the confessional statement of Accused No. 7, Aniket ends with the said

observation and Accused No. 7, Aniket was sent back to Magisterial custody.

35. It did not end there as Accused No. 7, Aniket was produced before the learned Magistrate on 24.04.2013 at 10:00 a.m. for recording his statement. The learned Magistrate after questioning Accused No. 7, Aniket, again, asked him questions which are recorded along with the specific answers given by Accused No. 7, Aniket. Apart from the regular questions, the learned Magistrate then asked specific questions from Questions 6 to 17, which are answered by Accused No. 7, Aniket. These questions are again required to be quoted for ready reference since the learned Magistrate after recording the answer to Question No. 17, recorded her satisfaction that Accused No. 7, Aniket is making a statement voluntarily and on his own free will and then proceeded to record the confessional statement which runs in six pages.

36. We found it very strange to accept that such statements were voluntarily given and that too of own free will by Accused No. 7, Aniket. First of all, we quote the following questions and answers from Questions 6 to 17 as under:-

“Question No. 6.-Do you wish to make a statement ?

Answer: Yes.

Question No. 7.-You were given more than 72 hours/more than three days time for reflection. Was it sufficient ?

Answer: I say that said time was sufficient.

Question No. 8.-You are not bound to make a statement and there is no compulsion that you should make a statement. Have you understood this ?

Answer: Yes.

Question No. 9.-If you make a statement then it will be recorded and the same is likely to be used as evidence against you. Have you understood ?

Answer: Yes

Question No.10.-Even if you refuse to make a statement you will not be kept in police custody. Have you understood this ?

Answer: Yes

Question No.11.-Have the police or any other person threatened you to make a statement ?

Answer: No. I am not threatened by any one.

Question No. 12.-Have the police or any other person promised you that lesser punishment will be awarded to you or you will be acquitted if you make a statement ?

Answer: Yes. The PI has told me that if, I give statement, lesser punishment will be awarded to me or I will be set free by the Court.

Question No. 13.-Have the police or any other person promised you that if you make a statement you will be made a witness for the prosecution ?

Answer: Yes. PI told me that I will be made a witness.

Question No. 14.-Have the police or any other person given you any allurement to make a statement ?

Answer: No.

Question No. 15.-Are you now willing to make a statement voluntarily and of your own free will ?

Answer: Yes. I am ready and willing to give the statement voluntarily and of my own free will.

Question No. 16.-You can tell me your complaints or difficulties, if any. Have you understood ?

Answer: I have understood but I have no complaints.

Question No. 17.-I am not here to record your statement by compulsion. I am here to record your statement if you are willing to make it voluntarily and of your own free will. Have you understood this ?

Answer: Yes. I want to give the statement voluntarily.

37. From a perusal of answers to Questions 12 and 13, as found recorded above, it is clear that Accused No. 7, Aniket was told by the P.I. that if he gives a statement to the Magistrate, lesser punishment will be awarded or he will be set free by the Court. Similarly, the P.I. also told him that he will be made a witness.

38. At this stage, it is necessary to refer to Section 24 of the Evidence Act, which reads thus:

“24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by

making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”

39. A careful reading of the above section shows that a confession made by the Accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the Accused person.

40. Similarly, Section 28 of the Evidence Act deals with the confession made after the removal of impression caused by inducement, threat or promise wherein it is provided that such confession as is referred to in Section 24 is made after the impression caused by any such inducement, threat or promise as in the opinion of the Court, been fully removed, becomes relevant.

41. Section 164 of the Cr.P.C. deals with the recording of confessions and statements made by the Magistrate. What is relevant is sub-section 2 which states that the duty of the Magistrate before recording any such confession thereby, explains to the person making it, that he is not bound to make a confession and if he does so, it may be used as evidence against him. No doubt this aspect has been fully complied with by the learned Magistrate (PW-20). However, the next part, which the Magistrate observed of voluntariness is difficult to digest. Section 164(2) mandates that the Magistrate shall not record any such confession, unless, upon questioning the person making it, has reason to believe that it is being made voluntarily.

42. First of all Accused No. 7, Aniket, on the first date itself i.e. on 20.04.2013 informed the Magistrate while answering questions put to him at Serial Nos. 10, 11 and 12 that he has been told by the P.I./Police that if he gives a statement, he will be released or at the most, he will be made a witness. This itself necessitated to be considered as an inducement/promise by the Police to Accused No. 7, Aniket to give the statements which the learned Magistrate ought to have been considered as inducement/ promise as found in Section 24 of the Evidence Act.

43. No efforts were made by the learned Magistrate to remove such inducement or impression from the mind of Accused No. 7, Aniket before granting him time to reflect as provided under Section 28 of the Evidence Act, so as to consider his statement as confession thereby removing such inducement. Therefore, to our mind, further procedure adopted by the learned Magistrate in giving time of reflection to Accused No. 7, Aniket without removing such impression or inducement from his mind as provided under Section 28 of the Evidence Act is of no consequence.

44. Accused No. 7, Aniket was simply sent to judicial lock-up without removal of such impression or inducement given to him by the Police. This means that Accused No. 7, Aniket carried the same impression/ inducement when he was brought back to the Magistrate and this is reflected in his answer given on the second occasion i.e. on 24.04.2013 when actually his so called confession is recorded by the learned Magistrate and while answering Question No. 12 onward as quoted earlier. Such answers given by Accused No. 7, Aniket conclusively show that he carried the same impression

and inducement/promise which he had expressed on 20.04.2013 to the Magistrate and when he was produced before her on the second occasion.

45. Only because the learned Magistrate told him that he is not bound to give statements and that he is ready and willing to give such statements voluntarily of his own free will, as found recorded in answer to Question No. 15, would not wipe out the earlier answers given by him to specific questions, showing that he was induced to give such statements by the Police.

46. Therefore, we are clearly of the opinion that so called confession given by Accused No. 7, Aniket and recorded by the Magistrate on 24.04.2013 vide Exhibit-215 was never voluntarily given, but, it was clearly marred by inducement given to him by the Police that he will be set free or at the most, he would be considered as a witness for the said offence. When such a promise is given by the Police Officer and expressed by the Accused before the Magistrate, it cannot be considered a voluntary statement of the Accused.

47. It was the duty of the Magistrate, when brought to her notice about such inducement or promise, to wipe out such inducement or promise from the mind of the Accused by informing him of the correct position, by taking to recourse to Section 28 of the Evidence Act and only then, if the Accused agreed to given statement voluntarily, the Magistrate could have recorded the confession.

48. With the above observations, we clearly come to the conclusion that by expressing his mind, Accused No. 7, Aniket clearly told the Magistrate about the inducement/promise given to him by the Police, which he carried on both occasions and that no efforts were made to remove such inducement/promise from the mind thereby making his statement as inadmissible. In view of Section 24 of the Evidence Act, it cannot be considered as voluntarily given and out of his own free will.

49. The learned Sessions Judge by accepting such confession of Accused No. 7, Aniket has committed serious error. The reasons given by the learned Sessions Court that a warning was given to Accused No. 7, Aniket that it will be used against him, is not sufficient enough for the simple reason that he carried the impression of inducement/promise given to him which reflected from his answers given on both occasions.

50. The aspect of the confessional statement does not end here as another glaring defect is pointed out which has been admitted by the learned Magistrate. At the beginning of the statement recorded under Section 164 of the Cr.P.C. (Exhibit-215), it is found recorded that Accused No. 7, Aniket understands Marathi language and therefore, all questions were put to him in Marathi. Admittedly, the Magistrate recorded the confession in English. There is no record in the entire confessional statement to show that what was recorded in English by the learned Magistrate, was read over and explained to Accused No. 7, Aniket in Marathi and found to be correctly recorded. During cross-examination, PW-20, the learned Magistrate though claims that after the recording of the statement, the contents

were read over and explained to Accused No. 7, Aniket, but no such statement is found in Exhibit-215. Thus, it is clear that though Accused No. 7, Aniket disclosed all the details in Marathi, it was recorded in English, but by translating it, such contents were not explained to him in Marathi and there is no statement or a contemporaneous record to show whatever is recorded by the Magistrate was even explained to him and found correctly recorded.

51. It does not stop here as the learned Counsel for the Accused persons pointed out that the statement of Accused No. 7, Aniket cannot be considered a confessional statement as it is clearly exculpatory and therefore, such statement should not be used against the co-accused persons.

52. The learned Public Prosecutor candidly accepted this argument. We have also gone through the statement and found that Accused No. 7, Aniket, nowhere claimed that he was involved in any such conspiracy as he clearly stated (though such statement is inadmissible) that when Accused No. 2, Raj asked him that four persons are required to give threats to Hassan and ask said Hassan to vacate the site, he (Accused No. 7, Aniket) thought that Accused No. 2, Raj is joking. Similarly, in the entire statement of Accused No. 7, Aniket, though, he talks about several phone calls, did not disclose his own mobile number or that of other Accused persons. This is important because the Prosecution claims that the SIM card in the name of Accused No. 2 was used by Accused No. 7, Aniket in his mobile phone. For the above reasons, we are unable to accept that the statement of Accused No. 7, Aniket was voluntarily given

and therefore, such statement (Exhibit-215) as recorded by PW-20, is clearly hit by Section 24 of the Evidence Act.

IDENTIFICATION PARADE AND LAST SEEN THEORY:

53. The second important aspect that the Trial Court has relied upon is the identification of the Accused persons by the witnesses during the identification parade and later on in the Court while deposing in the matter. The learned Sessions Court accepted the test identification parade report and observed that Accused Nos. 3, 4 and 5 were duly identified by PW-1, 2 and 3 when they last saw them with the deceased.

54. The learned Counsel for the Accused persons vehemently challenged such test identification parade report on various grounds including inordinate delay, failure to follow the procedure while considering the test identification parade and most importantly, the confusion that was made with the dates in memorandum of the test identification report. We have considered the deposition of PW-17, Veera Nayak, Joint Mamlatdar for Tiswadi Taluka, who deposed and produced the memorandum which is at Exhibit-199. We found substance in the submission of the learned Counsel for the Accused persons on all counts including delay of around one month, violation of the procedure and finally confusion about the date of the preparation of the memorandum.

55. While evaluating the evidence of PW-17, we observed that she received directions from the S.D.M. asking her to conduct the test identification parade in Crime No. 22/2013 of Agassaim Police

Station. Accordingly, she submitted a letter to the Investigating Officer, the Jailor and the witnesses to remain present before her on 25.04.2013. At this stage, it is necessary to note that the actual offence took place on 21.03.2013 and Accused No. 3 was apprehended on 25.03.2013 from Kolhapur, Maharashtra and Accused Nos. 4, 5 and 6 were also apprehended on 25.03.2013, but from Belgaum, Karnataka as deposed by PW-33, Dinesh Gadekar, P.S.I. as then he was attached to Agassaim Police Station. Admittedly, the names of Accused Nos. 3 to 6 were not mentioned in the F.I.R. as a supplementary statement given by PW-1, Hyder Khan shows suspicion only against Accused Nos. 1 and 2. The investigating agency through the Police Officer examined before Trial Court clearly admits that only after interrogation of Accused Nos. 1 and 2, they got the lead that a conspiracy was hatched involving other Accused persons and more specifically, Accused No. 7 who then arranged Accused Nos. 3 to 6 to eliminate the deceased Hassan Khan for Rs.7 lakhs. Therefore, the identification of Accused Nos. 3 to 6 was of prime importance. They were arrested on 25.03.2013 from Kolhapur and Belgaum. However, the test identification parade was conducted only on 25.04.2013 which is exactly after a period of one month.

56. PW-17, Veera Nayak deposed that on 17.04.2013 she received a memorandum from S.D.M. which she has produced at Exhibit-198. A perusal of this memorandum further shows that the S.D.M., Panaji received a letter from P.I. Agassaim Police Station on 17.04.2013 itself with a request to conduct a test identification parade. Thus, it is clear that P.I. Agassaim forwarded a letter on 17.04.2013 to the S.D.M. with a request to conduct the test identification parade. There is no explanation coming forward from

the investigating agency as to why the request to conduct the test identification parade was made so late i.e. after a period of 20 days approximately from the date of arrest of Accused Nos. 3 to 6. This shows that only after the said Accused persons were remanded to Magisterial Custody, such a request was forwarded.

57. In the case of **Gireesan Nair** (supra), the Hon'ble Apex Court greatly discussed the concept of test identification parade from paragraphs 29 to 34, which read thus:

“29. TIPs belong to the stage of investigation by the police. It assures that investigation is proceeding in the right direction. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant [Matru v. State of U.P., (1971) 2 SCC 75; Mulla v. State of U.P., (2010) 3 SCC 508 and C. Muniappan v. State of T.N., (2010) 9 SCC 567]. The evidence of a TIP is admissible under Section 9 of the Evidence Act. However, it is not a substantive piece of evidence. Instead, it is used to corroborate the evidence given by witnesses before a court of law at the time of trial. Therefore, TIPs, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of an accused can be sustained [State of H.P. v. Lekh Raj, (2000) 1 SCC 247 and C. Muniappan v. State of T.N., (2010) 9 SCC 567].

30. It is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that a TIP is held without avoidable and unreasonable delay after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses before the test identification parade. This is a very common plea of the accused, and therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution. But reasons should be given as to why there was a

delay [Mulla v. State of U.P., (2010) 3 SCC 508 and Suresh Chandra Bahri v. State of Bihar, 1995 Supp (1) SCC 80].

31. In cases where the witnesses have had ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial. It is the duty of the prosecution to establish before the court that right from the day of arrest, the accused was kept “baparda” to rule out the possibility of their face being seen while in police custody. If the witnesses had the opportunity to see the accused before the TIP, be it in any form i.e. physically, through photographs or via media (newspapers, television, etc.), the evidence of the TIP is not admissible as a valid piece of evidence [Lal Singh v. State of U.P., (2003) 12 SCC 554 and Suryamoorthi v. Govindaswamy, (1989) 3 SCC 24].

32. If identification in the TIP has taken place after the accused is shown to the witnesses, then not only is the evidence of TIP inadmissible, even an identification in a court during trial is meaningless [Sk. Umar Ahmed Shaikh v. State of Maharashtra, (1998) 5 SCC 103]. Even a TIP conducted in the presence of a police officer is inadmissible in light of Section 162 of the Code of Criminal Procedure, 1973 [Chunthuram v. State of Chhattisgarh, (2020) 10 SCC 733 and Ramkishan Mithanlal Sharma v. State of Bombay, (1955) 1 SCR 903].

33. It is significant to maintain a healthy ratio between suspects and non-suspects during a TIP. If rules to that effect are provided in Prison Manuals or if an appropriate authority has issued guidelines regarding the ratio to be maintained, then such rules/guidelines shall be followed. The officer conducting the TIP is under a compelling obligation to mandatorily maintain the prescribed ratio. While conducting a TIP, it is a sine qua non that the non-suspects should be of the same age-group and should also have similar physical features (size, weight, colour, beard, scars, marks, bodily injuries, etc.) to that of the suspects. The officer concerned overseeing the TIP should also record such physical features before commencing the TIP proceeding. This gives credibility to the TIP and

ensures that the TIP is not just an empty formality [Rajesh Govind Jagesha v. State of Maharashtra, (1999) 8 SCC 428 and Ravi v. State, (2007) 15 SCC 372].

34. It is for the prosecution to prove that a TIP was conducted in a fair manner and that all necessary measures and precautions were taken before conducting the TIP. Thus, the burden is not on the defence. Instead, it is on the prosecution [Rajesh Govind Jagesha v. State of Maharashtra, (1999) 8 SCC 428].”

58. Thus, it is clear that it is the duty of the Prosecution to prove that the test identification parade was conducted in a fair manner and that all necessary measures/precautions were taken.

59. We, in the light of the above observations of the Apex Court, would like to consider the submissions of the learned Counsel for the Accused persons, made on the following points, namely, (i) delay in conducting the test identification parade; (ii) the legality of the test identification parade and (iii) credibility of the eye witnesses who participated in a test identification parade and then claimed in evidence about identification of Accused persons, without disclosing the actual role played by such Accused during the alleged incident.

60. First of all, the delay of around one month to conduct the test identification parade seems to be fatal to the Prosecution in the present matter as during such period, Accused Nos. 3 to 6 were produced before the remand Magistrate and they were in Police custody for a substantial period. It is for the Prosecution to prove that there was no opportunity for the witnesses to see the suspects or the Accused persons from the date of the offence and more

particularly, from the date of arrest till they were identified in the test identification parade. We observe that such material is lacking.

61. As far as the legality of the test identification parade is concerned, as conducted by PW-17 and produced through memorandum at Exhibit-199, the first and foremost aspect is the date on which such test identification parade report was conducted and prepared. Exhibit-199 which is a memorandum of the test identification parade shows the date as 29.05.2013. Thus, the contemporaneous record that was prepared by PW-17, the Executive Magistrate, shows that though she called the Accused persons and the witnesses in her office on 25.04.2013, the memorandum was prepared on 29.05.2013. This further shows that only after preparation of such a memorandum on 29.05.2013, she signed it and then obtained the signatures of two respectable persons on it. However, during the deposition of PW-17, she tried to clarify this aspect about the date on which the memorandum was prepared and in that process, she made more confusion by deposing thus:

“I forwarded the said memorandum of TI parade vide my letter dated 29.05.2013 to P.I. Agassaim. I say that the date mentioned in the memorandum is in fact 22.05.2013 and there is a mistake in typing the date as 29.05.2013. I now say that below my name and signature inadvertently, it was mentioned as my designation as Joint Mamlatdar-III, Mapusa, Goa, however, it was in fact of Tiswadi Taluka and that the date of the letter is in fact 22.05.2013”.

62. The witness who conducted the test identification parade in her examination in chief stated (on internal page no. 19) and as quoted above, thereby proving that the memorandum is dated 22.05.2013. This statement is made on oath and the reason for

deposing it is the letter at Exhibit-200 which she forwarded to P.I. Agassaim Police Station has the date as 22.05.2013. However, though the date on the top of this letter is corrected from 29.05.2013 to 22.05.2013 by scribbling the figure 29 and by inserting figure 22 by pen, the learned Magistrate failed to explain as to how in the body of this letter, again, mentioned that she conducted the test identification parade on 25.04.2013, though she certified that the memorandum of test identification parade as 29.04.2013, which consist of pages 1 to 20. Thus, PW-17, the learned Magistrate disclosed three dates of the memorandum of the test identification parade i.e. 29.04.2013, 29.05.2013 and 22.05.2013. Such confusion clearly goes to show that even though it is claimed that the test identification parade was conducted on 25.04.2013, the memorandum of the test identification parade was prepared and signed subsequently and that too on 29.05.2013. This irregularity/illegality goes to the root of the matter. The Magistrate is duty bound to simultaneously prepare the memorandum of the test identification parade while conducting it and at the end, such memorandum has to be signed by the Magistrate along with two respectable persons in whose presence it was prepared. The matter in hand clearly goes to show that the Magistrate (PW-17) is not confirmed as to when she prepared the memorandum. It is worthwhile to note that only after preparing the memorandum, the same have to be signed by the Magistrate and respectable persons.

63. At this stage, during cross examination of PW-17 when asked as to whether she recorded the features, height, and complexion of the Accused in the memorandum, she voluntarily stated that no such material was recorded in the memorandum, but she recorded it separately in her notes. This again goes to show the fact that the

memorandum was not prepared simultaneously while conducting the test identification parade and the learned Magistrate was busy in taking some notes. Admittedly, such notes are not part and parcel of the memorandum. However, as per the mandate as provided under the law and the Rules framed by the High Court for conducting the test identification parade, it is the duty of the Magistrate to record the memorandum simultaneously and at the end to sign the memorandum and hand it over to the P.I.

64. Apart from this illegality, the other aspects as to the features of the Accused persons and that of the dummies are not forthcoming in the memorandum. The procedure is that the dummies are required to be selected by the Magistrate considering the features, height, colour and other specific marks found on the person of each accused. In this matter, the test identification parade of four Accused persons was conducted on the same day. Though six dummies were used during each test identification parade, PW-17 admitted that three dummies are common in the entire test identification parade with regard to four Accused persons and six witnesses.

65. Another glaring defect that the witness accepted is the fact that during conducting a separate test identification parade, she did not ask the respective Accused person as to whether they wanted to change their clothes or their position. Similarly, all identifying witnesses who claimed to have identified Accused Nos. 3 to 6 did not specify the part played by each Accused person during the alleged offence.

66. Chapter I Rule 16 of the Criminal Manual as issued by the Bombay High Court describes the details as to how the parade has to be conducted and the procedure for holding it.

67. After the memorandum is complete, the Executive Magistrate should make an endorsement that it was conducted by him/her personally with the help of two respectable persons. Two signatures have been obtained in token of what was transcribed in their presence. Though such endorsement is found in Exhibit-199, surprisingly, the date is found as 29.05.2013, which PW-17 tried to correct during her deposition as 22.05.2013. Thus, the Magistrate herself is not sure though she firmly stated that the memorandum at Exhibit-199 is in fact dated 22.05.2013. Memorandum mentioned that test identification parade was conducted on 25.04.2013 whereas it was prepared and signed almost a month thereafter i.e. on 29.05.2013. This itself creates a serious suspicion about the memorandum as well as the deposition of PW-17 and on this ground, we are unable to accept such a memorandum as it is clearly found to be violative of the settled procedure as laid down in the Manual.

68. The third aspect is about the credibility of the eye witnesses who participated in the test identification parade to identify the Accused persons. In this respect, though PW-1, 2 and 3 firmly deposed that they were called, though PW-1, Hyder claimed that he was taken before the Magistrate to identify three persons, he identified three persons i.e. Accused Nos. 3, 4 and 5, which is found in his deposition at internal page no. 5. It is only one single statement without giving the details as to when he was called to

identify these Accused persons and what role they played during the alleged offence. No doubt, the learned Sessions Judge on page 8 of the deposition of PW-1 put a specific question to the witness and there is the answer given by PW-1 which reads thus:

“Question: You have stated in your examination in chief that on 21.03.2013 at around 8:00 p.m., persons came to your residence and started inquiring about Hassan. Can you tell which persons came to your residence and started inquiring about Hassan ?

Answer: I do not know the names of the said persons who came at my residence and started inquiring about Hassan, however, I remember them by face and they are Accused No. 3 and 4 who are sitting in the dock today.

(Court’s note: The Accused Nos. 3 and 4 are Anil Bhoe and Ravi Patil).”

69. PW-1, Hyder in his deposition claimed that on 21.03.2013 at around 8:00 p.m., he was at his residence and at that time, two persons came and started inquiring about Hassan. PW-2 Tabasum, the wife of the deceased Hassan, told them that Hassan had gone out. Both the said persons stated that they will wait for Hassan to return. Both persons told Tabasum (PW-2) that they wanted to see the Honda City car. Their Watchman (PW-4) Abdul Gafar showed them the said car bearing No. GA-01/S-5679 which they wanted to purchase. At that moment, Hassan came and both the said persons started verifying the documents while sitting in the garage office with Hassan. Both the persons then agreed to purchase the said car but prior to payment, they both stated that they would like to have a trial. PW-1, Hyder then claimed that a third person was found standing outside the garage and when the car was brought out of the garage, the third person also sat in the car and the said three persons along with the deceased Hassan went for trial.

70. During cross examination on page 9, PW-1 stated that when the said two persons came to the garage, he was at his residence which is nearby. PW-1, Hyder admitted that he is a resident of Flat No. C-16/780-5, Essar Building, Taleigao. He also admitted that this flat is at a distance of 5 minutes walk and is on the second floor. He then admitted that this flat is not facing the road but is located on the interior side of the building. It is clearly seen from this statement that when two persons came to the garage at 8:00 p.m. PW-1, Hyder was in his flat which is about 5 minutes walk from the garage and that too, not facing towards the roadside but towards the interior portion of the building. Therefore, there is clear doubt as to whether PW-1 was in fact present when Accused Nos. 3, 4 and 5 had allegedly visited the garage of Hassan at around 8:00 p.m. From the tenure of his chief examination, it is clear that the wife of Hassan i.e. Tabasum (PW-2) informed the said person that Hassan is not present and had gone out. The said person told Tabasum (PW-2) that they will wait and the Watchman showed them the vehicle. This again goes to show that there is clear doubt about the presence of PW-1, Hyder at that time and witnessing the said Accused persons and more particularly, about their presence.

71. PW-2, Tabasum claimed on page no. 3 of the deposition that prior to the death of her husband, two persons came in front of her house and she identified them as Accused Nos. 3 and 4. She then claimed that Accused Nos. 3 and 4 came there in respect of the purchase of a car and they talked with Hassan in front of their house and thereafter, her husband along with the said two persons went to the office and had a talk in the garage office. Thereafter, Accused Nos. 3 and 4 left the office. PW-2 Tabasum did not disclose the

date of such visit of Accused Nos. 3 and 4, however, she claimed that on the next day of their visit, Accused Nos. 3, 4 and 5 came to their garage at about 8:00 p.m. to purchase the car and to give money. She then deposed that her husband, Hassan told them about the price of the car as 2.5 lakhs, however, after bargaining he agreed to sell it for 2.3 lakhs. PW-2 then deposed that thereafter Accused Nos. 3, 4 and 5 took her husband in the said Honda City car towards Kalapur side and towards Bambolim for a test drive. At that time, the Watchman by the name Gafar Khan was there in the garage and the brother of the deceased, Hyder Khan was outside the gate of the garage. This deposition of Tabasum (PW-2) shows that on the earlier date, Accused Nos. 3, 4 and 5 visited the garage and had a discussion with Hassan. On the next day, Accused Nos. 3, 4 and 5 came again and had a discussion with the deceased Hassan. She only mentioned that when the said Accused persons left along with her husband for a test drive, the Watchman by the name Abdul Gafar (PW-4) and Hyder (PW-1) were present. This clearly goes to show that at the most, PW-1 Hyder came later on when the deceased along with the suspects had left the garage in the car for the test drive. It is surprising to note that PW-2, Tabasum claimed that the said Accused persons along with her deceased husband went in the said car towards Kalapur side and then to Bambolim for a test drive. Admittedly, the residence and the garage of the deceased are at Taleigao. One can understand the statement that the said persons went towards Kalapur side but it is difficult for PW-2 to state that the said persons went towards Bambolim side. This is clearly an improvement since the said car was found along with the body of the deceased at Bambolim.

72. As far as the test identification parade is concerned, PW-2, Tabasum clearly stated that she was called by the Mamlatdar in Panaji Court at around 4:00 p.m. to identify the Accused persons i.e. on 25.04.2013 but later on she stated that she did not remember the exact date. She claims to have identified Accused Nos. 3, 4 and 5 in the test identification parade. No further details were asked to PW-2 or as to what role was played by these Accused persons when she saw these persons last with her husband as alleged. However, it is a fact that the test identification parade memorandum is full of inconsistency including the date on which it was prepared. Identification of Accused Nos. 3, 4 and 5 in the Court by PW-2 without disclosing the role played by them specifically and that too after a gap of more than two years when her deposition was first recorded in July 2015, is difficult to accept. More specifically, when in her statement recorded by the investigating agency under Section 161 of the Cr.P.C. she did not describe the features and clothes of the said three persons, who visited the garage and went away with her deceased husband. No supplementary statement of PW-2, Tabasum was recorded by the investigating agency before she was asked to identify Accused Nos. 3, 4 and 5 during the identification parade so as to find out their features, height, age etc.

73. PW-4 Abdul Gafar claimed that he was working in the garage of Hassan at Taleigao. He claimed that around two years back somewhere in the month of March at 8:00 p.m., he was sitting near the gate of the garage and at that time, three persons came and asked him about the owner. He told that the owner, Hassan, has gone out and will come back after some time. Thereafter, Hassan came to the garage and went to the office along with the two persons, whereas

one person was standing outside near the office. After some time, the said three persons went along with Hassan in the car. Said Hassan was sitting at the back of the car and one person out of the three drove the car. He told the Police that the said three persons were of the age group of 20 to 25 years and two persons were tall and one was short, one person was black complexion and the short person was of fair complexion and was carrying a shoulder bag. Surprisingly, PW-4, Abdul Gafar did not speak of the presence of PW-1, Hyder or PW-2, Tabasum at the said time when the three persons came, had a discussion with deceased Hassan and thereafter, left in the car with Hassan.

74. Coming back to the memorandum of the test identification parade at Exhibit-199. On internal page 4 of the said memorandum, there is a clear and more specific disturbing feature recorded therein as under:

“I asked the witness no. 1 Shri Hyder Rehman Khan, to view the parade carefully, and to see whether he could identify the accused no. 1. Shri Anil Maruthi Bhoje. The identifying witness looked closely at the dummies standing in the identification parade within seconds positively identified the accused no.1. Shri Anil Maruthi Bhoje, who was standing in the identification parade between the dummies at Sr. No. 4 and 5. The witness no. 1. Shri Hyder Rehman Khan was then taken and made to seat in the vacant room used for census work, which is adjacent to the right side of the Courtroom of the joint Mamlatdar I of Tiswadi.”

75. This clearly goes to show that the learned Magistrate not only disclosed the name of the suspect, but his identity to the identifying witnesses. The same procedure is adopted by the learned Magistrate

in connection with identifying witness no. 2 Tabasum Khan (PW-2) identifying witness no. 3 Mr. Edney John Heredia (PW-3) and identifying witness no. 4 Abdul Gafar (PW-4), identifying witness no. 5 Ravichandra alias Ravi Acharya (CW-45), identifying witness no. 6 Babu Mallam (PW-32) and identifying witness no. 7 Pundalik Rathod (PW-5). To all these witnesses, the Magistrate disclosed the name of Accused Anil Bhoje and asked them to identify him. Accordingly, all these identifying witnesses were not asked by the Magistrate as to whether they had any opportunity to see the said Accused person/suspect before coming to the identification parade.

76. The same procedure was adopted by the Magistrate (PW-17) with respect to Accused, Arun Patil (Accused No. 5), Ravi Prabhu Patil (Accused No. 4) and Shivraj Raju Patil (Accused No. 6) by disclosing their names to the identifying witnesses before they could identify such suspects. Such procedure is clearly unheard of and not in accordance with the settled procedure as described in the Criminal Manual. Disclosing the names of the Accused persons, clearly shows the intention of the learned Magistrate to give some input to the identifying witnesses. Therefore, not only the identification parade stands vitiated for the above reasons, but the identification of such Accused persons in the Court by the said witnesses is also seriously affected. No efforts were made by the investigating agency and the procedure to show that the test identification parade was conducted in a fair manner. In fact, the record produced before this Court shows otherwise, and therefore, no credence could be placed even on the test identification parade as well as the deposition of PW-17, the learned Magistrate and identification of Accused Nos. 3, 4 and 5 by the witnesses in the Court.

77. This identification parade is therefore linked to the last seen theory, which the Prosecution has heavily relied upon. PW-1, PW-2 and PW-4 claimed that they saw Accused Nos. 3, 4 and 5 lastly with the deceased at around 08:00 to 08:30 p.m. whereas the body of the deceased was recovered at midnight by one Rupesh, who called the Police Officer from Agassaim Police Station and also intimated PW-1, Hyder on phone. Surprisingly, said Rupesh is not examined either by the investigating agency or even by the Prosecution during the trial.

78. In the case of **Nizam and Another Vs. State of Rajasthan, 2016 1 SCC 550**, the Hon'ble Apex Court, relying on the earlier decision in **State of Rajasthan Vs. Kashi Ram, 2006 12 SCC 254**, observed that the provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in the discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not

throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. In the case of circumstantial evidence, the Court has to examine the entire evidence in its entirety and ensure that the only inference that can be drawn from the evidence is the guilt of the accused. The gap between last seen together and the recovery of the body of the deceased, if found linked, it would be dangerous to come to the conclusion that the Accused is responsible for such an offence and it is safer to look for corroboration from other circumstances.

79. Thus, it shows that only on the basis of last seen together, when the time gap is more, cannot be safely relied upon without any further corroboration or circumstantial evidence. Similarly is the view in **State of Goa Vs. Pandurang Mohite, (2008) 16 SCC 714.**

80. In the present case, the identification of Accused Nos. 3 to 5 during the identification parade is found to be doubtful for the reason of delay in conducting such parade, non-disclosure of the role played by the Accused persons by the identifying witnesses and more specifically, the confusion of the dates on which the memorandum of the test identification parade was prepared. Thus, when such identification is directly connected with the last seen theory, it is not safe to rely on it solely as tried to be claimed by the Prosecution.

CDR/SDR RECORDS OF SIM CARDS OF MOBILE PHONES:

81. Another circumstance on which the learned Sessions Court has placed reliance is the mobile phones along with the CDR and SDR of the Accused persons and the deceased. In this respect and for the purpose of convenience the following chart is disclosed to show the names of the Accused persons and their mobile phones.

	Name	Phone No.
1.	Robert Gonsalves (Accused No. 1)	Mobile – 9421555593 9422062809 (Registered in the Name of Valencia O. Pereira)
2.	Abhinandan @ Raj Patil (Accused No. 2)	Airtel SIM Card Number – 7387558141 Idea SIM Card – 9049291220 8600941510
3.	Anil Bhoe (Accused No. 3)	8884702923 (Possession) (Registered in the name of Kudanarkar Sudha)
4.	Ravi Patil (Accused No. 4)	Nokia C-5 mobile along with Vodafone SIM Card No- 7795581682 (Registered in the name of Kallappa Katambale)
5.	Arun Patil (Accused No. 5)	NIL
6.	Shivaji Patil (Accused No. 6)	NIL
7.	Aniket Yallurkar (Accused No. 7)	Mobile-SIM card registered in the name of Accused No. 2

82. As far as Accused No. 1, Robert Gonsalves is concerned, he was arrested and his mobile phones were recovered from his person. His call details including CDR and SDR were also obtained.

83. As far as Accused No. 2, Abhinandan @ Raj Patel is concerned, in his name, three SIM cards are found registered. It is the contention of the Prosecution that Mobile No. 8600941510, is registered in the name of Accused No. 2, Abhinandan. However, the confession of Accused No. 7 is already found to be inadmissible in evidence as the same was not voluntarily given. Accused No. 7 was placed under arrest vide arrest cum attachment panchanama on 26.03.2013 and at that time, in his pants pocket, a black phone of make Nokia touch screen with two SIM cards of Airtel and Idea respectively were found. PW-8, Vinay Kerkar, panch witness, identified the said mobile phone when he was shown in the Court as Exhibit-F1 (M.O. No. 34).

84. The arrest of Accused Nos. 3, 4 and 5 is shown on 25.03.2013. However, PW-33, Dinesh Gadekar deposed that he was attached to Agassaim Police Station as P.S.I. and P.I. S.M. Vaigankar obtained permission from S.P. (North) to form a team consisting of P.I. Rajendra Prabhudessai, P.S.I., Dinesh Gadekar, H.C., Amonkar and P.C. Tirthraj along with other staff from Agassaim Police Station to proceed to Pune, Kolhapur and Belgaum in search of suspects/non-Goans on 24.03.2013. He deposed that P.I. Vaigankar received some reliable information in respect of some non-Goan suspects. Accordingly, the team was formed and PW-33, Dinesh Gadekar along with P.I., Rajendra Prabhudessai and others left Goa for Pune on 24.03.2013. He then deposed that on 25.03.2013 at 05:35 hours, he along with other team members returned to Agassaim Police Station after apprehending Accused No. 3, Anil Bhoe at Kolhapur at about 20:00 hours and on 25.03.2013, with help of Accused No. 3, Anil Bhoe, they apprehended Arun Patil

(Accused No. 5), Ravi Patil (Accused No. 4) and Shivaji Patil (Accused No. 6), all residents of Belgaum, Karnataka, from their residence, at around 2:00 hours of 25.03.2013 and all of them were handed over to P.I. Vaigankar.

85. Surprisingly, PW-33, Dinesh Gadekar conveniently avoided to disclose the place in Kolhapur from where Accused No. 3, Anil Bhoje was apprehended at around 20:00 hours so also, the locality and the house numbers of Accused Nos. 4, 5 and 6 from Belgaum. There is no contemporaneous record to show that PW-33, Gadekar even contacted the local Police at Kolhapur and Belgaum in order to take their help in locating the said Accused persons.

86. During cross examination and more specifically, on page 10, PW-33, Gadekar deposed that P.I. Vaigankar did not give any description or ID proof of such non-Goan suspects, to him so as to arrest such suspects. He further admitted that he did not report to any Police Station in Pune with regard to the arrest of the suspects. He then claimed that he was aware of the location of the suspects at Kolhapur. He then claimed that P.I., Prabhudessai, who is not examined in the present trial, took assistance from Kolhapur Police. However, conveniently, he failed to disclose the names of the Police Stations on the precise ground that he does not recollect such names. He then admitted that arrest panchanama at Kolhapur and Belgaum was not recorded where suspects were apprehended. Similarly, no documents were prepared at Kolhapur and Belgaum at the time of apprehending the suspects. The said suspects were not produced before any Magistrate at Kolhapur and Belgaum. This

itself create suspicion about date, time and places from where, Accused Nos. 3, 4 and 5 were apprehended.

87. In **Conceicao B. D'Souza** (supra), we have considered the question of Police Authorities of one State entering another State and effecting arrest without intimating the local Police. In this respect, the Delhi High Court in the case of **Sandeep Kumar Vs. State, 2019 SCC Online Delhi 11901** while deciding the Petition of habeas corpus found that the Police Officers from Uttar Pradesh entered the premises of Jawaharlal Nehru University without informing the local Police and picked up the petitioner and his wife from their residence and took them to Uttar Pradesh. While deciding such Petitioner, some steps/guidelines were framed which are in consonance with the settled proposition of law as laid down in the case of **Arnesh Kumar Vs. State of Bihar and Another, (2014) 8 SCC 273**. Accordingly, this Court requested the State of Goa and Goa Police to formulate standing orders. We have been informed that such standing orders have been already formulated. We refer to the above decision only for the purpose that the Officers of Goa Police visited Pune, Kolhapur and Belgaum, picked up some suspects and that too without contacting the local Police, came back to Goa and only thereafter the arrest panchanama in the Police Station was recorded wherein it is claimed that some articles including mobile phones were found on their person.

88. It has been mainly argued on behalf of the Accused person that such articles were planted on their person while conducting the panchanama in the Police Station. Admittedly, Accused Nos. 3 to 6 are not having any SIM cards issued in their names. The Prosecution

claimed that Accused No. 3, Anil Bhoe was using Mobile No. 8884702923. However, the said SIM card is registered in the name of Kudanarkar Sudha (PW-29). PW-29 when examined before the Trial Court claimed that somewhere nine years back, Goa Police came and asked for the details of her documents including an Aadhar card copy, and one form with her photo, which she identified. However, she flatly refused that on those documents, the said mobile number (8884702923) was issued in her name. She claimed that about three years prior to 2013, she had submitted those documents for a mobile phone SIM card with a shop by the name 'Om Communication', which is at Kangrali and one SIM was allotted to her, which she started using. Such documents remained in the shop. She categorically stated that the SIM card having Mobile No. 8884702923 was never allotted to her. Thus, there is no link between the said mobile phone with that of Accused No. 3.

89. As far as the IMEI of the Nokia phone is concerned, which was found with Accused No. 3 as alleged, since the arrest was not effected in Kolhapur itself, from where Accused No. 3 was picked up by PW-33, Gadekar, finding a mobile phone on his person when his arrest panchanama was conducted at Agassaim Police Station on 25.03.2013 appears to be doubtful. The possibility of planting such mobile phones cannot be ruled out.

90. Accused No. 4, Ravi Patil was also arrested on 25.03.2013 and it is claimed that Nokia mobile phone with Vodafone SIM card no. 7795581682 was found in his person. The said SIM card is in fact registered in the name of Kappalla Katambale.

91. There is no record with regard to any mobile phone or SIM card found in possession of Accused No. 5, Arun Patil and Accused No. 6, Shivaji Patil.

92. The learned Sessions Judge has heavily relied upon the CDR and SDR of the mobile phones of the Accused persons and that of the deceased along with IMEI numbers and the SIM card numbers. The Prosecution has examined the Nodal Officers i.e. PW-22, Francis Pereira, Nodal Officer of Vodafone Company, PW-24, Milind Kolwalkar, Nodal Officer of Bharti Airtel and PW-25, Vinay Londhe, Nodal Officer for BSNL. PW-22, Francis Pereira deposed that his Company received a letter dated 16.05.2013 from the S.P. (North) to provide CDR/SDR of Mobile Nos. 9049291220 (claimed to be used by Accused No. 2) and 8884702923 (claimed to be used by Accused No. 7). He, thereafter, generated CDR/SDR of the above mobile numbers for the period from 01.03.2013 to 24.03.2013, extracted such details and printed it and forwarded it to S.P.(North) vide his letter dated 29.05.2013 along with certificate under Section 65B of the Evidence Act. Such CDR/SDR are produced at Exhibit-228 colly. He then stated that Mobile No. 8884702923 was registered in the name of Kudanarakar Sudha, resident of Ramnagar, Kangarali, Belgaum, whereas Mobile No. 9049291220 was registered in the name of Accused No. 2, Abhinandan Patel, resident of Calangute, Bardez, Goa. He then deposed that the CDR at Exhibit-228 colly disclosed the details, such as time of the call, date of the call, duration of the call and cell ID in coded numerical format. He then claimed that the Company is having a practice of sending a list of cell ID along with the addresses of the said circle to SP's office through which it is possible

to identify the location of the particular mobile phone. Such a list is provided to the SP's office every month so as to decode the location of a particular mobile phone. During cross examination and more specifically, on page 5, he stated thus:

"I say that the Cell ID of the tower are already fed in the system and the name and location of the tower are separately are manually fed in the system and therefore it is not possible to give name and tower location in CDR at that time which only contained the Cell ID. The tower location and the name is available with our Company and such information is shared with the Police Department on monthly basis. Such information of tower name and location is not available with the receiver Company."

93. Thus, it is clear that according to PW-22, the Cell IDs of the tower are already fed in the system, whereas the name and location of such tower are separately and manually fed to the system and hence, it is not possible to give the name and location of the tower in the CDR.

94. PW-31, Vidhyanand Pawar deposed that he is working as P.I. in Anti Terrorist Squad (ATS) at Altinho. He claimed that at the relevant time, ATS was having software for the purpose of decoding the data on the basis of tower location, and mobile number as provided by the service provider. He claimed that such software was installed in the office of ATS only in Goa and thereafter, he was given one week of training along with other staff of ATS as to how to operate the said software and decode the data. In this matter, he claimed that somewhere in the month of March 2013, P.I. Vaigankar of Agassaim Police Station as also S.P. (North) requested him to decode the information received in Crime No. 22/2013 in

order to locate the tower and the mobile number. Accordingly, he visited the office of S.P.(North) and collected the data with the Cell ID along with the location address on the pen drive for carrying out decoding. He carried out the decoding of the said data brought on a pen drive on 13.06.2013 and extracted the said data by decoding it in tabular form. He then printed the said information, decoded it and handed it over to P.I. Vaigankar along with Certificate 65B of the Evidence Act. He, thereafter, disclosed the relevant decoded data in connection with all the mobile phones including location.

95. However, this witness is totally silent about the monthly data of the tower location provided by the service provider to the office of the S.P. as claimed by PW-22 Francis Pereira. Such monthly data is neither relied upon nor produced by the investigating agency so as to consider that such data was furnished by the service provider to the office of S.P., which was used for the purpose of decoding. In the absence of such data, it is difficult to accept the evidence of PW-31, Vidhyanand Pawar about location of the mobile phone, which he claimed to be decoded.

96. In the case of **The State of Maharashtra Vs. Ramesh Vishwanath Darandale**, AIR Online 2019 BOM 1224, this Court considered the provisions of Section 65B of the Evidence Act. It is observed that the applicability of the procedural requirement under Section 65B(4) of the Evidence Act, requires furnishing of the certificate has to be applied only when such electronic evidence is produced by a person, who is in a position to produce such a certificate being in control of said device. While relying on the case of **Anvar P.V. Vs. P.K. Basheer**, (2014)10 SCC 473, it was observed

that the requirement of producing the certificate arises when an electronic record is sought to be used as evidence. Such a certificate must accompany electronic records like computer printouts, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence when the same is produced in evidence. All these safeguards are only to ensure the source and authenticity, which are the two hallmarks pertaining to electronic records sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

97. In this case, serious objections have been raised on behalf of the Accused persons regarding the CDR and SDR details and more specifically, the emails forwarded by the Nodal Officer to the office of the S.P.(North) and thereafter, taken on pen drive by the Officer of the ATS (PW-31-Vidyanand). The said witness Vidyanand claimed that he took the data for CDR on a pen drive from the office of S.P.(North). Admittedly, the Officer who was incharge of the Computer in the office of the S.P.(North) while transferring such data into the pen drive, did not submit a certificate under Section 65B of the Evidence Act. When the data is transferred from the computer to the pen drive, such data is susceptible to tampering. There was a need for certificate under Section 65B of the Evidence Act from the incharge of the computer in the office of the S.P. (North) who is allowed to transfer such data into a pen drive to be given to PW-31. The certificate issued by PW-31 after decoding and taking the printout is of no use. He admittedly transferred the data from the computer available in the office of the S.P.(North), took it to his own office and claimed to have been decoded. Thus,

in the absence of a certificate under Section 65B from the concerned officer, who allegedly transferred such data into a pen drive, the decoding exercise carried by PW-31 and the pen drive produced by him are not admissible in evidence.

EXTRA JUDICIAL CONFESSION:

98. The learned Sessions Judge also heavily relied upon so called by Accused Nos. 3 to 6 given to Doctor Ankush Patil (PW-13).

99. The arrest panchanama (Exhibit-109) in connection with the arrest of Accused, Anil Bhoje (Accused No. 3), Arun Patil (Accused No. 5), Ravi Patil (Accused No. 4) and Shivaji Patil (Accused No. 6) was conducted at Agassaim Police Station on 25.03.2013 at 05:50 hours and concluded at 06:40 hours. This means that the arrest cum attachment panchanama was conducted during the early morning hours between 5:50 a.m. to 6:40 a.m. All these Accused persons were then taken to G.M.C. for medical examination. The panchanama, which was conducted in the presence of two panch witnesses, specifically records that injuries were found on all four Accused persons and surprisingly, the panchanama shows that the Accused told the panchas that such injuries were caused to them during the scuffle with the deceased Hassan in the Honda City car. Such statement of Accused persons in arrest panchanama is inadmissible in evidence.

100. A perusal of the evidence of PW-13, Dr. Ankush Patil shows that all these Accused persons were brought at G.M.C. during the day time on 25.03.2013. On examination, he noticed six injuries on

Anil Bhoe (Accused No. 2), 3 injuries on Arun Patil (Accused No. 5), two injuries on Ravi Patil (Accused No. 4) and six injuries on Shivaji Patil (Accused No. 6). PW-13, Dr. Patil claimed that when he asked all the Accused persons as to how they sustained the above injuries, to which, all of them voluntarily disclosed that they sustained injuries during a scuffle with the deceased while assaulting him. First of all, it is very difficult to digest that so called statements of Accused persons given to Doctor could be termed as voluntary admission. In fact, it clearly amounts to a confession. The Accused did not state that they sustained injuries either due to any weapon or due to bite, without disclosing anything further. However, in the statement of PW-13, Dr. Patil clearly goes to show that all the Accused persons clearly confessed that such injuries were sustained by them while having a scuffle with the deceased.

101. Deposition of PW-33, Gadekar, who along with other Police Officers, picked up all four Accused persons from Kolhapur and Belgaum on 24.03.2013, is completely silent about any injuries found on the person of Accused Nos. 3 to 6. It is hard to believe that a Police Officer of the rank of P.I., accompanied by PW-33, namely, P.I., Rajendra Prabhudessai as well as PW-33 himself being the P.S.I. did not notice a single injury on Accused Nos. 3 to 6 when they were apprehended at Kolhapur and Belgaum.

102. As noticed earlier, PW-33, Gadekar is completely silent on contacting the local Police as well as the place in Kolhapur and Belgaum from where these Accused persons were apprehended, which creates serious doubt about the so called injuries found on the person of the Accused persons suddenly appearing when they were

shown as arrested during the early hours on 25.03.2013 at Agassaim Police Station. Be that as it may, the so called confession given by these Accused persons to Dr. Patil (PW-13) cannot be considered for the simple reason that at the relevant time, all these Accused persons were in Police custody, though produced before a Medical Officer for the purpose of medical examination.

103. In **Naresh Parab** (supra) the co-ordinate Bench of this Court while dealing with such aspect found that what is recorded by the Doctor, as history given by the Accused, is nothing but wholesale confession. In **Sarvanand** (supra) this Court observed that extra judicial confession made by the Accused before the Doctor is not reliable. In the present case, we clearly observe that it cannot be termed as admission given by the Accused as history, but it is a wholesale confession recorded by the Doctor and that too when the Accused were in Police custody though brought for medical examination. Thus we are not inclined to accept such wholesale confession given by the Accused persons to the Doctor. Even otherwise, such extra judicial confession is a weak piece of evidence. The parameters to accept the extra judicial confession are not at all established by the Prosecution as all the Accused persons were picked from Kolhapur and Belgaum and had no connection or any contact with PW-13, Dr. Patil so as to repose confidence to give such extra judicial confession to him.

**HOTEL ACCOMMODATION OF ACCUSED NOS. 3 TO 6 BY
ACCUSED NO. 2:**

104. It is the specific case of the Prosecution that Accused No. 2 registered the room at Sunheads Hotel Miramar for Accused Nos. 3 to 6. It is their case that the Accused persons came to Goa on 18.03.2013 and left during the night time on 21.03.2019. In this respect, the Prosecution examined PW-34, Nellikunnil Mohammad Nizar, who deposed that he started operating the Hotel known as Sunheads Miramar from Mr. Hyder Ali Damani and he engaged a Manager by the name Anil, who was looking after outdoor works and one Babu who used to look after the reception counter and one Ravi was working as Manager during the night time together with one Hassan and Abdulla as room boys. He disclosed that on 17.03.2013, he left Goa to visit Kerala as his father was sick and he returned on 21.03.2013. When he went to the Hotel on 21.03.2013, Ravi handed over to him cash of Rs.6,000/- and told him that he (Ravi) deposited cash of Rs.7,000/- in IDBI Bank. During that evening, when he was in the Hotel, one person by the name of Raj came to the Hotel and paid Rs.1500/- as the balance amount of room rent for Room No. 105. He was shown M.O. No. 37 i.e. the register and copy of the driving license. We perused the said register and the copy of the driving license i.e. M.O. No. 37. On perusal of the said register, it is clear that though there is an entry at Exhibit-260, it is in the name of Raj. In the column of persons occupying the room, it is shown as 5. Room No. 105 is not exactly against the entry of the name of Raj, but it is above in the respective column. During cross examination, PW-34 claimed that such a register was obtained from the Tourism Department. The said register shows the printed name of the Hotel as Sunheads Hotel Miramar. However, PW-34 admits that the name of the person occupying the room is required to be mentioned in the register. Thus, it is clear that only by mentioning the name Raj in

the said register, such a register will not help the Prosecution to prove that five Accused persons stayed in the said room.

105. PW-32 Babu Mallam claimed that he was working at Sunheads at Miramar as a Receptionist and in the absence of the owner, he used to look after the entire business of the Hotel. He further deposed that he used to look after the needs of the guests including the arrangement of room, room service and even taking their identity card, which is used to record the details of the customers in the Hotel register. He specifically deposed that on 18.03.2013, he was present at the Hotel counter when one boy came to ask for one room having four beds. The said boy told this witness that he requires the said room for his relatives (male persons) and that the said four persons will check in during the evening on 14.03.2013 and will be staying for two days. Accordingly, he recorded the name of the said boy as Raj from Calangute along with his mobile phone. Said Raj paid the entire amount of two days' room charges at the rate of Rs.1,500/- per day and accordingly, he issued the receipt. Room No. 105 was allotted to them. Said Raj showed his driving licence as identity proof, a copy of which was retained by him in his record.

106. First of all, PW-32 claimed that in his presence on 18.03.2013, one boy Raj came to ask room for four persons and paid the entire charges for two days and accordingly, a receipt was issued. Thus, the entry against the name of Raj made in the register ought to have shown that only four persons were required to be occupied. However, the register shows the entry as five persons. PW-32, Babu Mallam claimed that the entire payment was made by

Raj for two days at the rate of Rs.1,500/- per day and he issued a receipt to said Raj.

107. No doubt, PW-32, Babu Mallam identified said Raj as Accused Nos. 2 and four persons, who stayed in the said room as Accused Nos. 3 to 6, the fact remains that the register did not show the names of the occupants. The said register and the specific entry showing the name of Raj along with his signature, allegedly made by Raj himself was not forwarded to the handwriting expert to conclude that the said entry was made by Accused No. 2 himself.

108. Be that as it may, PW-34, the owner of the said Hotel had claimed that on 21.03.2013 said Raj had come to the Hotel and paid the balance amount of Rs.1,500/-, however, no receipt was issued.

109. PW-32, Babu Mallam claimed on page no. 4 that on 20.03.2013 when he reached the Hotel at around 9:30 a.m. or so, he found all the Accused persons present in the Hotel and that a bill was prepared by Ravi for 20.03.2013 in respect of Room No. 105. He informed the said guests that they have to pay the room charges for 20.03.2013 as the room was taken only for two days. The said guests informed him that Raj will come and pay such rent. Accordingly, he contacted Raj on his mobile phone from the landline available in the Hotel. Raj told him that he will pay the amount. After some time, Raj came to the Hotel and paid Rs.1,500/- as room charges on 20.03.2015 then he left on his motorcycle. He then claimed that on 21.03.2013, he noticed that

the said four guests checked out from the Hotel during morning hours.

110. Thus, according to PW-32 Babu Mallam, room rent for the third day i.e. 20.03.2013 was deposited by Raj on the same day whereas PW-34, the owner claimed that Raj came to the Hotel on 21.03.2013 and paid the balance amount of Rs.1,500/-. Thus, both these witnesses deposed contrary in connection with the payment of room charges for 20.03.2013.

111. On perusal of the Hotel register and more specifically, the entry at Exhibit 260, it is found that the check-out date of five persons against Room No. 105 is noted as 20.03.2013. Therefore, the statement of PW-32, Babu Mallam that the said guests remained in the said Hotel even on 20.03.2013 and they left the Hotel on 21.03.2013 during morning hours is not supported by the entries. As far as payment charges of room rent for the third day is concerned, it is also doubtful as there is a contradiction between PW-33 and PW-34, the owner of the Hotel, which discrepancy goes to the root of the matter as the name of the occupants of such room is not found in the register. There is also a discrepancy in the number of occupants of Room No. 105 in the said Hotel.

112. The attachment panchanama for the attachment of Hotel register is at Exhibit-285 which is produced through PW-37, P.I. Vaigankar. The said panchanama was conducted on 27.03.2013 in the presence of two eye witnesses by names Suresh Ramesh Naik and Anil Devraj Radudia. Both of these witnesses were not examined by the Prosecution. Admittedly, Accused No. 2 was arrested by P.I.

Vaigankar on 24.03.2013. During the arrest panchanama of Accused No. 2, Abhinandan @ Raj Patel, P.I. Vaigankar found several items including the mobile phone, SIM cards, wallet containing cash and driving licence issued by the State of Goa. Thus, the driving licence of Accused No. 2 was with P.I. Vaigankar from 24.03.2013 and certainly, it was available with him.

113. This fact he has admitted during the cross examination. It is required to note here that the copy of the driving licence which is allegedly attached along with the register of the Hotel, is in the name of Abhinandan Patel and not in the name of Raj. Thus, the contention of PW-32, Babu Mallam claiming that one boy by the name Raj came to the Hotel on 18.03.2013 and requested a room for four boys as his relatives and paid charges of two days, made an entry in the register and at that time, said Raj showed his driving licence as identity proof and accordingly, he retained a copy of the said licence for his record is not acceptable. No question was put by PW-32 Babu Mallam as to why the said boy recorded his name as Raj when the driving licence was in the name of Abhinandan Patel. This itself shows that the copy of the driving licence was not shown by said Raj at the time of allegedly booking the Hotel room. The contention of P.I. Vaigankar that he was having the original licence of Accused No. 2 in his possession from the date of his arrest clearly shows that the possibility of planting a copy of such licence on 27.03.2013 as the identity proof against the name of Raj cannot be ruled out. Thus, no credence could be given to the evidence of the Hotel Manager or the driving licence copy.

114. As far as the identification of Accused Nos. 3 to 6 by PW-32 Babu Mallam is already disclosed earlier and such identification is clearly doubtful.

RECOVERY UNDER SECTION 27 OF EVIDENCE ACT:

115. In the case of **Shahaja alias Shahajan Ismail Mohd. Shaikh** (supra), the Hon'ble Apex Court while discussing the aspect of Section 27 of the Evidence Act, clearly observed that what is substantive evidence is what has been stated by the pancha or by the person concerned in the witness box and not what is mentioned in the panchanama, unless such a portion of the panchanama is read over to the witness and found correctly recorded. While relying on the landmark decision of the Apex Court in the case of **Phulukuri Kottaya Vs. Emperor, AIR 1947 Privy Council 67**, the Hon'ble Apex Court has observed the fact that the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. The information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant.

116. But in the present case, the so called recovery of the gold chain of the deceased at the instance of Accused No. 3, Anil Bhoe from his mother's place at Belgaum is not established as the said

witness/mother of Accused No. 3 did not state about the recovery of any gold chain from her house. Similarly, the so called disclosure made by Accused No. 3 in the presence of panch witness, Ravindra Pednekar (PW-14) shows that Accused No. 3 disclosed that one gold chain and one mobile phone were handed over by him to his mother at Belgaum at his residence and he is ready to show the said mobile phone and the chain, if taken there. This witness nowhere disclosed that the chain belongs to the deceased, which he removed from the person of the deceased. The mother of Accused No. 3, Mallava (PW-27) did not refer to any gold chain handed over to her by the Accused. No doubt, PW-27 was confronted with the portion marked A to A1, it was only recorded that Accused No. 3 after handing over the mobile phone and the broken gold chain left at the said place. Thus, substantive evidence is not brought on record to connect Accused No. 3 with the so called gold chain allegedly belonging to the deceased.

117. The Prosecution has claimed that at the instance of Accused No. 3, they recovered three knives which were allegedly used by the Accused persons while committing the said offence. In this respect PW-36, Roque Pereira, the panch witness deposed that on 27.03.2013, he acted as a panch witness and at that time, one Accused by the name Anil was brought before him with his face covered. After the removal of the cloth from the face, the said person disclosed his name as Anil and voluntarily stated that he concealed three knives near Calangute Church and is ready to show the said place if taken there. PW-36, Roque Pereira, failed to identify Accused No. 3 firmly in the Court but claimed that the said person sitting in the dock looks like Anil and at that time, the said person was thin. He then deposed that the said Accused, Anil led

them towards Calangute and after reaching the Dolphin circle, Accused No. 3 instructed the Driver to stop the jeep. He then took across the road where there is a garage named as Alex Workshop.

118. PW-36 then claimed that Accused No. 3 entered the said garage, opened the inside door of the room, went inside the room, lifted one thin sheet lying on the floor and removed one coffee colour bag with a chain. Accused No. 3 then removed three knives from the bag and showed them.

119. First of all, PW-36, in the deposition nowhere disclosed that Accused No. 3 told them the place where he concealed the knives i.e. in the room inside the garage by the name Alex Workshop at Calangute. He only disclosed about the concealment of three knives near Calangute Church.

120. Further, no inquiry was made with the owner of the said garage as to why and when Accused No. 3 entered into the said garage and inside the room in order to conceal a bag containing knives. The statement of the garage owner is also not recorded. It is difficult to digest that the garage owner will allow any person to enter into his garage and then inside the room in order to conceal the crime weapon. It was expected from the investigating agency atleast to record the statement of the garage owner as to how and when the Accused was permitted to enter the garage. In the absence of any connection of Accused No. 3 with the said garage owner, such a story put up by the Prosecution regarding the recovery of three knives at the instance of Accused No. 3 appears to be highly doubtful specifically when no person from the said garage had seen

the Accused entering or leaving the garage either on 21.03.2013 or at any time.

121. Admittedly, the C.A. report with regard to the said knives is inconclusive. Thus, connecting the Accused with the said knives or the recovery is again unacceptable.

122. Since the entire case is based on circumstantial evidence, the burden lies on the Prosecution to prove each and every circumstance beyond reasonable doubt thereby linking it to the Accused persons with the hypothesis that it is only the Accused and no other person is the perpetrator of such offence.

123. In the present case, the circumstance with regard to hatching of conspiracy by Accused No. 2, is not established. No material is brought on record to show that there was any enmity between the deceased and Accused No. 2. No doubt, Prosecution succeeded in showing some dispute when Accused Nos. 1 and 2 were removed from the project. However, such a dispute cannot be termed as enmity for want of any other material.

124. The circumstance regarding acquaintance between Accused No. 2 and 7 would not in any manner prove the contention of the Prosecution that Accused No. 2 engaged Accused No. 7 to hire Accused Nos. 3 to 6 for eliminating the deceased. Such evidence is lacking. It is well settled that on the basis of some suspicion, the Prosecution cannot claim to have proved the guilt as such circumstance is required to be proved beyond all reasonable doubts.

125. The CDRs and SDRs, as disclosed earlier, throw some suspicion but not proof. The SIM cards and the mobile phones as allegedly recovered from the Accused persons, have not been clearly established. The tower location and more particularly, the decoding carried out by PW-31 are inadmissible for the reason that the monthly data, which the service provider forwarded to the office of S.P.(North), is not attached and secondly, the certificate under Section 65B of the Evidence Act is not forthcoming from whom PW-31 collected the data on his pen drive from the computer available in the office of the S.P.(North).

126. The circumstance with regard to the last seen theory is again not established clearly as there are several doubts with regard to the identification parade of Accused Nos. 3 to 6 and the memorandum of such parade and therefore, their identification directly in the Court by the witnesses cannot be considered as reliable for the reasons disclosed earlier.

127. The admission/confession of Accused Nos. 3 to 6 to Dr. Patil is inadmissible as it amounts to a wholesale confession that too during Police custody. Even otherwise, such extra judicial confession is a very weak piece of evidence.

128. The confession of Accused No. 7 is not found evidentiary value and thus, the circumstance though, show some suspicion, is not clearly established.

129. The impugned judgment failed to consider the mandate under Section 428 of the Cr.P.C. and there is no reason forthcoming as to

why set off for the period already undergone by the Accused persons in custody during the trial was not considered. Secondly, while awarding sentences for different offences, the learned Sessions Judge again, did not disclose that all the sentences shall run concurrently. No reasons are given again for not considering this aspect and whether all sentences should run consecutively. It was expected that the learned Sessions Judge ought to have given reasons for not granting the set off under Section 428 of the Cr.P.C. and for not considering the sentences to run concurrently.

130. Accordingly, we answer Point Nos. 1 to 5 framed in paragraph 18 in negative.

131. Having said so, all the Appeals must succeed. The judgment and the conviction awarded by the Trial Court is required to be quashed and set aside. Hence the following order:

O R D E R

- (a) Appeal Nos. 689 of 2022 (F), 702 of 2022 (F), 1 of 2023 and 2 of 2023 stand allowed.
- (b) The conviction and sentence passed by the Trial Court in Sessions Case No. 42 of 2013 against Accused Nos. 2, 3, 4, 5 and 7 for the offences punishable under Sections 120B, 302, 397 and 201 of the IPC is hereby quashed and set aside.
- (c) Accused Nos. 2, 3, 4, 5 and 7 are therefore acquitted from the offence punishable under Sections 120B, 302, 397 and 201 of the IPC by giving the benefit of the doubt.
- (d) All the Appellants/Accused persons are in custody and therefore, we direct that all the

Accused persons i.e. Abhinandan @ Raj Patel (Accused No. 2), Anil Bhoje (Accused No. 3), Ravi Patil (Accused No. 4), Arun Patil (Accused No. 5) and Aniket Yallurkar (Accused No. 7), shall be released forthwith, if not required in any other offence.

- (e) The said Accused persons i.e. Abhinandan @ Raj Patel (Accused No. 2), Anil Bhoje (Accused No. 3), Ravi Patil (Accused No. 4), Arun Patil (Accused No. 5) and Aniket Yallurkar (Accused No. 7), shall execute a personal bond for an amount of Rs.25,000/- each with one surety in the like amount to the satisfaction of the learned Sessions Court as provided under Section 437-A of the Cr.P.C. with an undertaking that they shall appear before the higher Court as and when notice to that effect is issued.
- (f) The order of the learned Sessions Judge in connection with the disposal of the muddemal property is maintained.
- (g) Fine, if any, paid by the Accused persons as directed by the impugned judgment, shall be refunded.

132. All the Appeals stand disposed of in the above terms.

BHARAT P. DESHPANDE, J.

M. S. SONAK, J.