

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPEAL NO.237 OF 2019

Sandeep s/o Suresh Warokar,
Age - 25 years, occupation : labour,
R/o Wadali (Deshmukh), taluka Akot,
District Akola, (presently in Central
Jail, Akola).

..... **Appellant.**

:: VERSUS ::

The State of Maharashtra,
Through Police Station Officer,
Police Station Akot (City), taluka
Akot, district Akola.

..... **Respondent.**

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Shri A.J.Thakkar, Counsel for the Appellant.
Shri M.K.Pathan, Additional Public Prosecutor for the
Respondent/State.

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CORAM : ROHIT B.DEO & URMILA JOSHI-PHALKE, JJ.

CLOSED ON : 05/12/2022

PRONOUNCED ON : 10/02/2023

JUDGMENT (Per : Urmila Joshi-Phalke, J.)

1. By preferring this appeal, the appellant (accused) has challenged judgment and order of sentence dated 6.3.2018 passed by learned Additional Sessions Judge, Akot in Sessions Case No.56/2015 whereby the accused is convicted for offences punishable under Sections 302 and 201 of the Indian Penal Code. For offence under Section 302 of the Indian Penal Code, the accused is sentenced to suffer life imprisonment and to pay fine Rs.10,000/- and in default of payment of the fine amount to suffer further rigorous imprisonment for one year. For offence under Section 201 of the Indian Penal Code, the accused is sentenced to suffer

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rigorous imprisonment for three years and to pay fine Rs.5000/- and in default of payment of the fine amount to suffer further rigorous imprisonment for six months.

2. The case of the prosecution in a nutshell is as under:

Informant Riyasat Ali Taher Ali Deshmukh, who is brother of deceased, lodged report on 8.6.2015 at Akot City Police Station, district Akola that he is having five brothers including deceased Taj Ali. They are residing together. He sometimes resides at Wadali-Deshmukh and sometimes at Akot. On 18.5.2015, deceased Taj Ali left the house on the pretext that his two friends Anuj Maldhure and Sandeep Warokar (the accused) are coming from Nashik to meet him. On that day, deceased did not returned to the house and, therefore, the informant searched him, but he could not receive any information about his brother. After 2-3 days, he met the friend of the deceased namely Anuj Maldhure who informed him that deceased Taj Ali is with Sandeep Warokar and Sandeep Warokar is demanding Rs.8.00 lacs for releasing Taj Ali. He further alleged that as deceased Taj Ali, Sandeep Warokar and Anuj were friends he had not paid any attention to it. After 4-5 days, Sandeep met his brother Riyaj, but he did not disclose any information about Taj Ali. On 29.5.2015, he lodged the missing report at Akot City Police Station, district Akola as Taj Ali was not

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traceable. On 31.5.2015, accused Sandeep called him and demanded Rs.8.00 lacs and also disclosed that if Rs.8.00 lacs is not given, Taj Ali would be murdered. The search of Taj Ali was also carried out by Police, but he was not found. On 8.6.2015, they received an information that Sandeep was caught in bullock theft at Anjangaon and he disclosed that he has committed murder and, therefore, information immediately was given to him by Anjangaon Police Station. At Anjangaon Police Station, he came to know that accused Sandeep had murdered his brother Taj Ali and thrown him in the well within the limits of pathrot Police Station. Accused Sandeep has shown the well at Sindhi and dead body of Taj Ali was recovered from the said well. Thereafter, he lodged the report at Akot City Police Station against the accused. Shafakat Ali, the brother of the informant, had lodged report at Pathrot Police Station which was subsequently transferred to Akot Police Station. On the basis of the said report, police registered the offence vide Crime No.85/2015 against the accused under Sections 363, 364A, 302, and 201 of the Indian Penal Code.

3. After registration of the crime, wheels of investigating started rotating. Initially, Pathrot Police have received information telephonically from Anjangaon Police Station that a dead body is lying in the well in the field and, therefore, the Police Inspector from

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Pathrot Police Station visited the alleged spot of the incident where the dead body was found. At the relevant time, elder brother of Taher Ali and one Shafakat Ali were present. The Investigating Officer has visited alleged spot of incident and drawn spot panchanama. One Mukesh Gawande Police Officer from Pathrot Police Station drawn spot panchanama where dead body was found. The said dead body was taken out from well and inquest panchanama was drawn. As the body was decomposed, the Medical Officer was called and postmortem was conducted at the spot. During personal search of the said dead body, one knife was found in the pant pocket of the deceased which was seized by the police. The brother of the deceased namely Shafakat Ali was asked to lodge the report. Crime was registered by zero number and subsequently transferred to Akot Police Station. Further investigation was carried out by Assistant Police Inspector Pramanand Dadarao Katre attached to Akot Police Station. The said Investigator had also received the information that one dead body was found in the well. He immediately went at the spot. The spot panchanama where dead body was found was already drawn. He collected the said papers. He also obtained custody of the accused from Anjangaon Police and the accused was arrested. During the investigation, the accused made disclosure statement and shown the place near the bridge at Pathrot and produced one plastic bag containing blue

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colour jeans pant and one stone which were seized by drawing panchanama. Thereafter, the accused took him at Sindhi Shet Shivar and shown the place of incident. Accordingly, the panchanama was drawn. He had also recorded the statement of relevant witnesses including the statement of witnesses who had seen the accused and the deceased together. He collected CDR Reports and after completion of investigation submitted chargesheet against the accused.

4. As the offence punishable under Section 302 of the Indian Penal Code was exclusively triable by the Court of Sessions, learned Magistrate committed the case to the Court of Sessions. The charge was framed against the accused vide Exhibit-7. The accused pleaded not guilty and claimed to be tried.

5. To substantiate the charge levelled against the accused, the prosecution has examined as many as 14 witnesses. The accused has also examined defence witness Pramod Namdeorao Bhilpawar in support of his defence. The prosecution witnesses which are examined as mentioned as below:

(PW1)-Riyasat Ali Taher Ali Deshmukh- informant-Brother of the deceased	Ex. 26
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P.W.2-Mohd.Arif Ab.Samad pancha on memorandum statement and discovery panchanama	Exh.30
P.W.3-Pramod Shriramji Kalpande-panchaon panchanama of well where dead body was found, inquest panchanama and seizure memo regarding the clothes of the deceased	Exh.36
P.W.4-Gopal Shalikram Makode)	Exh.40
P.W.5-Manoj Bhlolenath Thorat	Exh.44
P.W.6-Chetan Prakashrao Ghogare-panchanama on memo- randum and discovery pan- chanama	Exh.45
P.W.7-Sk.Mushtaque Sk.Mukhtar	Exh.48
P.W.8-Sachin Rameshrao Tekam a witness on last seen	Exh.52
P.W.9-Shafakat Ali Taher Ali Deshmukh - brother of the deceased	Exh.53
P.W.10-Sachin Rameshrao Gole Medical Officer	Exh.60
P.W.11-Pyarsingh Harsingh Manlavi	Exh.65
P.W.12-Mukesh Wasudeorao Gawande	Exh.68
P.W.13- Pramanand Dadarao Katre Investigating Officer	Exh.77
P.W.14-Gajanan Laxmanrao Padghan - Police Officer.	Exh.109

6. Besides the oral evidence, the prosecution placed reliance on report Exhibit-28; First Information Report Exhibit-29;

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spot panchanama Exhibit-31; memorandum statement of the accused Exhibit-32; discovery panchanama Exhibit-33; spot panchanama where dead body was found Exhibit-34; panchanama of well Exhibit-36; inquest panchanama Exhibit-38; panchanama of seizure of knife Exhibit-39; verification panchanama Exhibit-46; seizure memo Exhibit-47; report lodged at Pathrot Police Station Exhibit-54; First Information Report Exhibit-55; Postmortem Report Exhibit-61; arrest panchanama Exhibit-79; requisitions to Chemical Analyzer Exhibits-82, 85, and 86; Map Exhibit-119; Chemical Analyzer's Reports Exhibits-17 to 19, and DNA Report Exhibit-11.

7. The defence of the accused is of total denial and of false implication.

8. To point out the shroudy investigation, defence witness Pramod Namdeorao Bhilpawar is examined by the defence to prove the distances between two places where two discovery panchanamas are drawn.

9. Learned counsel Shri A.J.Thakkar for the accused vehemently submitted that the entire prosecution case is based on surmises and conjectures. Though the prosecution is rested on circumstantial evidence, the prosecution failed to prove that it was the accused and only the accused had committed the crime. In

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fact, the chain of circumstances is not established. The various panchanamas, on which the prosecution relied upon, are not proved and not drawn as per legal provisions. He further submitted that except the circumstance of last seen, no other evidence is brought on record. Learned Trial Court had disbelieved the evidence regarding kidnapping and also disbelieved the evidence regarding the memorandum statements and discovery at the instance of the accused. The only circumstance, on the basis of which the accused is convicted, is the last seen. It is well settled that merely on the basis of last seen the accused cannot be convicted. He further submitted that the prosecution even failed to prove that the death of the deceased is homicidal one. Considering the nature of the evidence adduced by the prosecution, the prosecution miserably failed to prove charges and, therefore, the appeal deserves to be allowed.

10. *Per contra*, learned Additional Public Prosecutor Shri M.K.Pathan for the State vehemently submitted that the evidence of last seen is proved by the prosecution through the evidence of PW7 Sk.Mushtaque Sk.Mukhtar and PW8 Sachin Rameshrao Tekam. The circumstances, that the accused was last seen with the deceased, the deceased got missing and dead body of the deceased was found in the well at the instance of the accused, are sufficient

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circumstances to connect the present accused with the alleged offence. The motive suggested by the prosecution witnesses that the accused was demanding Rs.8.00 lacs from the brother of the deceased is also proved. For all these reasons recorded by learned Sessions Judge, the accused is convicted. Hence, no interference is called for in the judgment and order of conviction impugned in the appeal.

11. After hearing both sides and after considering the evidence on record, it has to be seen whether the prosecution has proved that the death of the deceased was homicidal one and the accused has committed the crime.

12. As regards the homicidal death of deceased Taj Ali is concerned, the material evidence on which the prosecution is relied upon is the evidence of PW10 Sachin Rameshrao Gole who conducted the postmortem at the spot itself. He testified vide Exhibit-60 that on 8.6.2015 he was attached to the Primary Health Centre at Pathrot. On that day, he received a request letter from police for conducting postmortem in the agriculture field. Accordingly, he went there. The dead body was partially decomposed. It was brought from the well. The skull was totally decomposed and both upper limbs bones are exposed. The skull is found in broken pieces. The head and neck is separated. There

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were no brain tissues found as the head is totally decomposed. Accordingly, he conducted postmortem. He opined that probable cause of death is due to fall from height and because of injury to the skull or head. He also collected viscera and clothes of the deceased. As there was no ear identification of the body, he collected a small piece of left femur bone for DNA Analysis. Accordingly, he prepared the Postmortem Notes Exhibit-61 and forwarded the viscera for analysis. He further deposed that the police sought his opinion by issuing him a query report. He answered the said query report by mentioning that the head is totally decomposed and there is no identification for injury over head. The cause of death is probably due to fall from height because no other injury over the body is identified as the body was decomposed. The exact time of the death cannot be said but after observing the body, the death may be before 3-4 days before the postmortem. The opinion about the fracture about the body is unable to identify due to decomposition condition of the body. The said opinion is at Exhibit-63.

The said medical witness is cross-examined and it is elicited during cross-examination that he has not opined till date that the death could have occurred about 3 weeks before. He

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further admitted that if in road traffic accident the head gets dashed on a hard substance with force, such injury could be possible.

13. Besides the medical evidence, the prosecution also relied upon inquest panchanama. PW3 Pramod Kalpande who was serving as Village Development Officer acted as pancha on the said inquest panchanama. He testified that the dead body was in the well and the accused shown the said dead body in the well. The said dead body was in the well situated on Sindhi to Borala Road. The said well is of old structure of bricks. It is about 97 feet in depth. He saw the dead body. The dead body was in decomposed condition. The body was swollen from waist till neck and back portion was yellowish. The entire skin of the body was peeled of and there was no stench. Accordingly, panchanama was drawn at Exhibit-39.

The said witness is also cross-examined by the defence. So far as the condition of the dead body is concerned, nothing incriminating is brought on record to suggest that dead body was in a good condition.

14. After considering the evidence of PW10 Medical Officer Sachin Gole and PW3 Pramod Kalpande, pancha on inquest panchanama, it is not in dispute that the condition of the dead body

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was partially decomposed. So far as identification of the dead body is concerned, as per evidence of PW3 Pramod Kalpande, the brother of the deceased, who was present at the time of removing the dead body from the well, identified the said dead body is of his brother. Besides the said identification, evidence of PW10 Medical Officer Sachin Gole shows that to rule out doubts he collected the small pieces of femur bone for DNA Analysis. The DNA Report is at Exhibit-11 which shows that the DNA extracted from blood samples of Mehrunbee Taher Ali Deshmukh and Taher Ali Deshmukh and Exhibit-3 femur bone, it is concluded that they are biological parents of Exhibit-1 femur bone. Thus, identification of the dead body is very well established by the prosecution.

15. Now, the question remains whether the deceased died homicidal death or death of the deceased was accidental or suicidal. The evidence of PW10 Medical Officer Sachin Gole shows that the injuries on the other parts of the body could not be identified as the dead body was partially decomposed. He testified that skull is found in broken pieces. The head and neck were found separated. There were no brain tissues found as the head was totally decomposed and a probable cause of death is due to fall from height and because of injuries to the skull or head. Thus, only on the basis of medical evidence, it is difficult to ascertain that the

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death of the deceased is homicidal one. So far as injury narrated by the Medical Officer is concerned, it can be caused by accident as well as by suicide.

16. As already observed that merely on the basis of the medical evidence it is difficult to ascertain whether the death of the deceased is homicidal one. It not in dispute that the entire prosecution case is based on circumstantial evidence. The law regarding circumstantial evidence is well settled. In such cases, the prosecution is under obligation to establish chain of circumstances so complete, that it unerringly establishes the guilt of the accused and does not leave any scope for an interference consistent with the innocence of the accused. The circumstances relied upon by the prosecution must be incompatible with the hypothesis consistent with the innocence of the accused and should negate all possibilities of the innocence of the accused. The law regarding circumstantial evidence is well settled that :

"1. the circumstances from which an inference of the guilt is sought to be drawn must cogently and firmly establish;

2. though circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

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3. the circumstances taken cumulatively, should form a chain so complete that there is no escape that within all probabilities the crime was committed by the accused and none else; and

4. the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of a guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

17. Sir Alfred Wills in his admirable book "Wills Circumstantial Evidence" (Chapter VI) lays down following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."

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18. In the light of the above settled legal position, we have to see whether the prosecution succeeded in proving the chain of circumstances to prove the guilt of the accused. The circumstances on which the prosecution relied upon can be summed up as follows:

1. the evidence of PW1 Riyasat Ali Taher Ali Deshmukh and PW9 Shafakat Ali Taher Ali Deshmukh, the brothers of the deceased, shows that the deceased left the house on the pretext that his friends that is the accused Sandeep and one Anuj are coming to meet him;
2. PW7 Sk.Mushtaque Sk.Mukhtar and PW8 Sachin Tekam on the last seen;
3. evidence of PW5 Manoj Thorat on extra judicial confession;
4. recovery of dead body of the deceased at the instance of the accused;
5. motive;

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6. disclosure statement of the accused and discovery of blood stained stones and blood stained clothes at his instance, and

7. discovery of the place of the incidence at the instance of the accused.

19. To prove the first circumstance that the deceased left the house by informing that he is going to meet his friends Anuj and Sandeep, the prosecution mainly relied upon the evidence of PW1 Riyasat Ali Taher Ali Deshmukh and PW9 Shafakat Ali Taher Ali Deshmukh. The evidence of these witnesses shows that deceased Taj Ali is their brother and they were staying together. On 18.5.2015, deceased at about 10:00 am informed PW9 Shafakat that his two friends are coming from Nashik and he is going to meet them and, thereafter, their brother Taj Ali did not return back. The evidence of both these witnesses is only to the extent that it was their brother who informed that he is going to meet his friends i.e. Anuj and Sandeep. Their evidence further discloses that after 2-3 days, Shafakat met him and he disclosed that deceased Taj Ali is with Sandeep i.e. the accused. He further deposed that the accused is demanding Rs.8.00 lacs to release Taj Ali. It is pertinent to note that though this information was given by Anuj to Shafakat, Shafakat had not disclosed this fact to the police or had not lodged

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any report. The evidence of PW1 Riyasat Ali Taher Ali Deshmukh also shows that on 31.5.2015 he received a phone call of accused Sandeep and the accused informed him that his brother in his custody and he should pay Rs.8.00 lacs. He had also not disclosed the said fact to the police after receipt of the phone call. Thus, the evidence regarding source of information that the deceased was in the custody of the accused becomes doubtful as both brothers after receipt of the said information have not taken any action against the accused. These both witnesses are cross-examined by the defence and from their cross-examination it is clear that though they were searching the deceased, they have not lodged any report after receipt of the said information. The source of information was Anuj who was not examined by the prosecution to support the said fact. The Learned Judge below had acquitted the accused from charges under Sections 363 and 364A of the Indian Penal Code by assigning the reason that the evidence of these two witnesses shows that it was the deceased who left the house at his own and Anuj is not examined by the prosecution to support the contention that he was abducted by the accused. Thus, the evidence of these two witnesses, who though have information that the deceased was with the accused and they have not informed the police and not taken any action to release their brother, is not sufficient to hold

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that they received the information that the deceased was with the accused.

20. The another circumstance, on which the prosecution relies upon, is the evidence of PW7 Sk.Mushtaque Sk.Mukhtar who examined vide Exhibit-48 and PW8 Sachin Tekam who examined vide Exhibit-52 to prove that the deceased was lastly seen with the accused and, thereafter, the dead body of the deceased was found. Thus, these two witnesses are on the circumstances of last seen together.

21. The theory of "last seen together" is one where two persons are seen together alive and after an interval of time, one of them is found alive and the other dead. If the period between the two is so short, presumption as to person alive being the author of death of the other can be drawn. Time gap should be such as to rule out the possibility of somebody else committing the crime. Last seen together is one of principles which can be taken into consideration in establishing the guilt of the accused. The circumstances of "last seen together" not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime.

22. In the case of Jaswant Gir vs. State of Punjab, reported in 2005(12) SCC 438, the Honourable Apex Court observed that even assuming that the deceased had accompanied the accused in their vehicle, that circumstance by itself did not irresistible conclusion that the appellant and his companion had killed the deceased and thrown the dead body in the culvert. In Sk. Yusuf vs. State of West Bengal, reported in (2011) ALL MR (Cri) 2365, the Honourable Apex Court has reiterated its observation in State of U.P. vs. Satish, reported in (2005) 3 SCC 114 that the last seen theory comes into play where the time-gap between point of time when the accused and deceased were seen last alive and when the deceased dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It was held that where there is a long gap between the "last seen together" and the crime and there is the possibility of other persons enter there it is hazardous to rely on the theory of "last seen together". It is further held that even if time-gap is short there is no possibility of others intervening, it is safer to look for corroboration.

23. It is well settled that criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a

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weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Indian Evidence Act with regard to the circumstances under which death may have taken place.

24. Recently, the Honourable Apex Court, in Criminal Appeal No.972/2013 (**Jabir and others vs. The State of Uttarakhand**) decided on 17.1.2023, has dealt with the issue regarding the admissibility of the evidence regarding the last seen doctrine and held that it has been repeatedly emphasized by this court, that the "last seen" doctrine has limited application, where the time lag between the time the deceased was seen last with the accused, and the time of murder, is narrow; furthermore, the court should not convict an accused only on the basis of the "last seen" circumstance.

25. In the case of **Rambraksh @ Jalim vs State Of Chhattisgarh**, reported in **(2016)12 SCC 251** the Honourable Apex Court stated, as follows:

"10. It is trite law that a conviction cannot be recorded against the accused merely on the

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ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.

11. In a similar fact situation this Court in the case of *Krishnan v. State of Tamil* (2014) 12 SCC 279, held as follows:

21. The conviction cannot be based only on circumstance of last seen together with the deceased. In *Arjun Marik vs. State of Bihar* (1994) Supp (2) SCC 372) "31. Thus the evidence that the Appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the Appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded."

22. This Court in *Bodhraj vs. State* (2002) 8 SCC 45) held that: "31. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the

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deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible." It will be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together."

26. In the light of the above well settled legal position, now it has to be ascertained whether the prosecution is succeeded in proving the circumstance of last seen through PW7 Sk.Mushtaque Sk.Mukhtar and PW8 Sachin Rameshrao Tekam. PW7 Sk.Mushtaque is examined vide Exhibit-48. He testified that on 18.5.2015 he had seen Tillu (deceased) and Sandeep (accused) on motorcycle together. They were proceeding on motorcycle. At the relevant time, the accused was riding motorcycle and the deceased was pillion rider. They went towards Sindhi. Thereafter, he saw Sandeep returning and he was alone. He has seen him between 3:30 pm to 4:00 pm and he had informed this fact to the brother of Tillu namely Yunus after two days. He further deposed that he was doing work in school on Borala Road when he saw both of them proceeding. The evidence of PW8 Sachin Tekam shows that on 18.5.2015 he was working in Hotel Jai Jivdani at Anjangaon Surji. He was cleaning the hotel premises at about 10:30 am to 11:00 am. The accused came along with the deceased for lunch. They had a lunch and left the hotel. These both witnesses are cross-examined

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at length. It is elicited from the cross-examination of PW7 Sk.Mushtaque that brother of the deceased namely Yunus used to work with him. On 18.5.2015, he was working with two masons and two labours in Borala school from 9:30 pm to 5:00 pm. At the relevant time, he was working on the ground floor on the western portion. He was constructing wall on north-south. He met Yunus near Urdu School and, thereafter, he never met him. He admitted that Yunus did not come to Borala school for any enquiry. He also admitted that he did not disclose this fact to anybody except Yunus. Also, the cross-examination shows that he did not enquire names and addresses of the deceased and the accused as he did not enquired about the names and addresses of the customers. The fact that the accused had come with the deceased has not stated by him in his statement before the police. Thus, the fact that he had seen the deceased with the accused appears to be improvement in his evidence.

27. Thus, after going through the evidence, even if it is accepted they both have seen the deceased with the accused on 18.5.2015, the dead body of the deceased was found on 8.6.2015. As per the medical evidence, the dead body was partially decomposed. Exhibit-63, opinion given by the Medical Officer, shows that the exact time of death cannot be said, but after

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observing the body the death may be before 3-4 days before postmortem. In the light of the above said fact, if the evidence of PW7 Sk.Mushtaque Sk.Mukhtar and PW8 Sachin Ramesh Rao Tekam is appreciated, it shows that they have seen the accused and the deceased on 18.5.2015. The evidence of PW7 Sk.Mushtaque further shows that on the same day he had seen the accused returning back alone. If the medical evidence is considered, the death of the deceased may be before 3-4 days before postmortem. The postmortem was conducted on 8.6.2015. It means that when PW7 Sk.Mushtaque has seen the accused returning alone, the deceased was alive on that day. Subsequently, no one has seen the deceased and the accused together. The time gap between these two dates is so large and, therefore, the entry of any third person between the said period cannot be ruled out. When there is a time gap and possibility of others intervening, the circumstances of last seen is to be corroborated by other evidence. Thus, looking to the circumstance of last seen by PW7 Sk.Mushtaque and PW8 Sachin Tekam and the death of the deceased time gap is so long. The entry of any third person could be possible. In such circumstances, it is hazardous to rely on theory of last seen together.

28. The next circumstance, on which the prosecution, relies upon is the evidence regarding extra judicial confession. To prove

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the extra judicial confession, the prosecution has placed its reliance on evidence of PW5 Manoj Thorat who testified vide Exhibit-44 that he was working in R.P.Engineering wherein accused Sandeep, the deceased, Aman, and Anuj were working for three months. On 22.5.2015, the accused called him at Patharodi phata and disclosed that he had committed the murder of Aman that is deceased and the vehicle which is in possession of the accused at the relevant time is of deceased Aman. During his cross-examination, it is elicited that he disclosed this information to the police and he had not disclosed the incident to anybody. He had disclosed the said incident on 22.5.2015. Thus, as per his evidence, the accused disclosed him about the fact that he had committed murder of Aman and, thereafter, after 4-5 days, he disclosed the said information to the police. It is pertinent to note that as per the prosecution case the accused was taken into custody by Anjangaon Police Station on 8.6.2015 and till then the police did not have any information about the murder of the deceased. As per the Investigating Officer, when the accused was arrested in bullock theft case, he disclosed the said fact and, therefore, the police came to know that the accused had committed murder. Whereas, evidence of PW5 Manoj Thorat shows that on 22.5.2015 the accused made an extra-judicial confession to him and disclosed that he committed the murder of deceased. He informed to the police after 4-5 days.

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29. The law regarding acceptability of extra-judicial confession is that it is a weak type of evidence. The Honourable Apex Court, in the case of State of U.P. vs. M.K. Anthony, reported in 1985 SC 48, observed that the law does not require that evidence of an extra-judicial confession should in all cases be corroborated. It thus appears that extra-judicial confession appears to have been treated as a weak piece of evidence but there is no rule of law nor rule of prudence that it cannot be acted upon unless corroborated. If the evidence about extra-judicial confession comes from the mouth of witness/witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused; the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction. The same view is reiterated in the case of Chattar Singh & Anr vs State of Haryana reported in 2009 ALL MR (Cri) 936 (S.C.).

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30. In the light of the above principle, if the evidence of PW5 Manoj Thorat is re-appreciated, nothing is on record to show that the accused was having faith in the witness and, therefore, with that faith and trust he disclosed the said fact to PW5 Manoj Thorat. From the evidence, it appears that PW5 Manoj Thorat is resident of Malegaon, district Nashik. Whereas, the accused is resident of Wadali (Deshmukh), taluka Akot, district Akola. They worked together only for three months. It is not the case that they are having friendship and out of that trust and belief upon PW5 Manoj Thorat the accused had disclosed that he committed the murder. Moreover, words spoken by the accused are not narrated by this witness. No reason came forward why the accused would again meet this witness and would make extra-judicial confession to him. The evidence of this witness appears to be shaky one for the reason that he, as per the evidence, disclosed the fact to the police within 4-5 days of 22.5.2015. Whereas, his statement was recorded on 16.6.2015. Neither Investigating Officer from Akot Police Station nor Investigating Officer from Pathrot Police Station shows that they have received any information from this witness regarding the extra-judicial confession made by the accused to the witness. Thus, the evidence of PW5 Manoj Thorat is not cogent and is not reliable and his evidence is liable to be discarded.

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31. As per the prosecution case, the dead body of the deceased was recovered at the instance of the accused. The evidence of PW12 Mukesh Gawande, who was attached to the Pathrot Police Station, testified that on 8.6.2015 he received the information telephonically from Anjangaon Police Station that dead body is lying in a well in field which came into their jurisdiction and, therefore, he went to the place where the dead body was found. The Police Officer namely Shri Padghan from Anjangaon Police Station was present there. The elder brother of the deceased namely Shafakat Ali was present there. The accused was in the custody of Anjangaon Police. He called two panchas and the dead body was taken out from the well. He drawn inquest panchanama of the dead body in the presence of panchas. Thereafter, the Medical Officer was called and postmortem was conducted. To prove the said circumstances, that the dead body was removed from the well, the prosecution has examined PW3 Pramod Kalpande vide Exhibit-36. As per his evidence, he was called by Pathrot Police Station. He is working as a Village Development Officer. He was called in the field of Shri Sawarkar. In his presence, the dead body was taken out. The brother of the deceased identified the body. The said well is situated on Sindhi to Borala Road and is of old structure of bricks. Accordingly, inquest panchanama of well was drawn. He further testified that the accused was also present there

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who pointed out towards the well. During his cross-examination, it is elicited that village Sindhi can be approached from Anjangaon or via Borala or via Pathrot. It is further brought on record that Ganesh Temple is situated after railway gate of Anjangaon. The said temple is adjacent to the road which turns towards Borala. Thus, the entire cross-examination is regarding topography of the said place. It is not in dispute that the dead body is recovered from the said well which is in a partially decomposed condition. The only fact to be ascertained is whether it was the accused who only pointed out the place and on the basis of his memorandum statement the said place was discovered by the police. The evidence of PW3 Pramod Kalpande shows that he was called by the police to act as a pancha. Another pancha was also present. The police made enquiry with the accused and the police took them at pan stall at Anjangaon and panchanama was drawn. Thereafter, they again came to the police station and, thereafter, the statement of the accused was recorded. He stated that his pant and stones are kept hidden under the shrub near the bridge and he will show the said place. Thereafter, said statement was signed by him as well as other pancha and the accused. The admissible portion is at Exhibit-32. Thereafter, the accused led them to Anjangaon Pathrot Road. The accused asked to stop the vehicle and, thereafter, he got down from the vehicle and took out the plastic bags wherein blue

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colour pant having blood stains and one stone were recovered. Accordingly, panchanama Exhibit-33 was drawn. Again, they returned to the Akot Police Station. Thereafter, again he was called to the police station and the accused disclosed that he will show both the places. Thereafter, he went to Sindhi Borala Road. There was one field adjacent to road as well as one well. The police drawn the panchanama there.

32. The evidence of PW13 Investigating Officer Pramanand Katre is also led vide Exhibit-77 to prove both panchanamas. As per evidence of Investigating Officer Pramanand Katre, the accused was arrested, thereafter, the accused made a disclosure statement which was recorded in presence of panchas. Thereafter, they proceeded towards Pathrot from Anjangaon Road along with the accused and just before the first bridge the accused got down from the vehicle. It was the bridge between Anjangaon Pathrot. He produced one plastic bag having blue colour jeans and one stone having blood stains which are seized by him by drawing panchanama Exhibit-33. Thereafter, they went to Sindhi Shivar and carried out panchanama of the said place which is at Exhibit-34. Both these witnesses have cross-examined by the defence. The evidence of PW2 Mohd.Arif Ab.Samad shows that after drawing the initial panchanama that is seizure of clothes and stones they again

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came to Akot Police Station. Whereas, as per evidence of the Investigating Officer, after drawing panchanama of seizure of clothes and stones, directly they went to Sindhi Shet Shivar. To falsify the version of the Investigating Officer, in support of the defence, defence witness Pramod Bhilpawar was examined. He produced one map on record which shows that on Pathrot Paratwada Road Walmikpur is shown at a distance of 2 kilometers. As per the contention of the defence, roads to approach Pathrot and Sindhi are two different roads. Therefore, contention of the Investigating Officer that from the bridge, which was near the Pathrot, they directly went at Sindhi, is not possible. To that effect, the cross-examination of PW13 Investigating Officer Pramanand Katre is material. During cross-examination, he admitted that village Sindhi can be approached either from Anjangaon via Borala or via Pathrot. He further admitted that the market at Pathrot is at Anjangaon Paratwada Road. He has also admitted that first panchanama commenced at 12:45 pm and ended at 13:10 hours and, thereafter, the accused made statement at 13:20 and they left police station at 13:35 hours. They reached after about 25 minutes. The distance between Akot and Pathrot is 40 kilometers. So far as the evidence, regarding recovery of articles is concerned, it appears that the statement of disclosure of the accused relating to these articles is at 13:20 p.m.. The timing mentioned in the

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memorandum statement is 11.6.2015 about 13:30 and the timing mentioned on discovery panchanama is 13:35. It is highly unacceptable that within five minutes they reached at the said place. According to panchanama Exhibit-33, entire staff and the accused went from Akot Police Station and they went beyond Pathrot to Walmikpur. The contents of the spot panchanama shows that while proceeding from Pathrot to Walmikpur, near one bridge, the accused asked to stop the vehicle. During cross-examination, this part was confronted to PW13 Investigating Officer Pramanand Katre and he stated that instead of Pathrot it should have been mentioned Anjangaon in the panchanama. He has not denied the fact of mentioning the name of Walmikpur appearing in the panchanama. The defence witness who is a Government Official produced the map showing the location of the said villages. The map is not reflected place Akot. The highlighted road shows that it is Anjangaon Pathrot and, thereafter, Walmikpur. Thus, Walmikpur is ahead of Pathrot. Thus, the discrepancy regarding the place of articles recovered came on record.

33. As per the evidence of PW2 Mohd.Arif Ab.Samad, after drawing the discovery panchanama, they again came to Akot Police Station and, thereafter, proceeded to village Sindhi. Whereas, as per evidence of PW13 Investigating Officer Pramanand Katre,

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directly from the bridge where the articles are recovered they proceeded towards Sindhi. Thus, the evidence regarding memorandum statement and visit of the panchas is not consistent. The panchanama, which was drawn at Anjangaon Naka at about 12:45, completed at about 13:10. Thereafter, they went to Akot Police Station. As per the evidence of PW2 Mohd.Arif Ab.Samad and PW13 Investigating Officer Pramanand Katre, the accused made a memorandum statement and the statement was started at about 13:20 and completed at about 13:30. Thereafter, they proceeded towards the place of discovery and the discovery panchanama started at 13:35 to 15:00. It is highly unacceptable that after first panchanama at Anjangaon Naka, immediately the accused had made a statement within ten minutes. The route taken subsequently is also of material importance. The panchanama regarding discovery is shown to be carried out at about 15:35 that is within 35 minutes. The distance between two places is about 40 kilometers. Thus, the aspect of recovery of incriminating articles at the instance of the accused is doubtful. It is pertinent to note that travelling to Pathrot and coming back and then again going to Sindhi within 35 minutes appears to be improbable. The request to Pathrot Police Station for carrying out spot panchanama by the said witness is given at 15:05. Thus, within 5 minutes of completing the panchanama at Walmikpur a letter is given to Pathrot Police Station

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and within 35 minutes they returned back to Akot and reached at Sindhi that is the distance at about 50 kilometers also appears to be improbable. Thus, the entire evidence regarding the discovery of articles as well as verification and panchanama regarding spot of incident at Sindhi is improbable.

34. Before giving finding, whether the evidence adduced by PW2 Mohd.Arif Ab.Samad and PW13 Investigating Officer Pramanand Katre regarding recovery is admissible or not and can be accepted or not, it is necessary to see legal position regarding ingredients of Section 27 of the Indian Evidence Act.

35. The Privy Council in the case of Pulukuri Kottaya and others vs. King Emperor, reported in AIR (34) 1947 has observed as under:

“Section 27 which is not artistically worded, provides an exception to the prohibition imposed by the preceding section and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. Thus, the section seems to be based on the view that if a fact is actually discovered in consequence of the information given, some guarantee is afforded thereby that the information was true, and

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accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate."

Thus, the doctrine, therefore, is founded on the principle that if any act is discovered after the search is carried out on the search of any information obtained from the prisoner, such a discovery is guarantee that the information supplied by the prisoner is true.

36. The Hon'ble Apex Court in the case of Shahaja @ Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra, reported in 2022 LiveLaw (SC) 596, wherein it is held that - Conditions necessary for the applicability of Section 27 of the Act are broadly as under -

"(1) Discovery of fact in consequence of an information received from accused;

(2) Discovery of such fact to be deposed to;

(3) The accused must be in police custody when he gave informations and ;

(4) So much of information as relates distinctly to the fact thereby discovered is admissible."

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37. In another judgment Subramanya vs. State of Karnataka, reported in 2022 LiveLaw (SC) 887. The Honourable Apex Court considered the aspect that how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 and held that mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. In para Nos.78 to 87 the Honourable Apex Court has discussed the legal position regarding Section 27 of the Indian Evidence Act and held that mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given. But, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to discovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from

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a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true.

38. In the light of the well settled legal position, if evidence of PW2 Mohd.Arif Ab.Samad and PW13 Investigating Officer Pramanand Katre is scrutinized, admittedly the evidence of these witnesses nowhere shows that the accused made voluntary statement. The evidence of the Investigating Officer is completely silent regarding the aspect of what statement is made by the accused. His evidence nowhere discloses that the accused made a voluntary statement that he will show the place where he concealed the articles. Thus, admittedly ingredients of Section 27 of the Indian Evidence Act are not proved by the prosecution which is requirement of Section 27 of the Indian Evidence Act. The information in the nature of discovery of fact regarding concealment of the weapon by the accused is not apparent. So far as the place of the incident is concerned, also the statement of the accused is not recorded under Section 27 of the Indian Evidence Act.

39. If the evidence of PW2 Mohd.Arif Ab.Samad is scrutinized, which was adduced regarding the panchanama, he stated that the accused made a memorandum statement and at his instance the blood stains clothes are recovered. The said memorandum was drawn at 1:30 and discovery panchanama was

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drawn from 1:35 to 3:00 pm. As per this witness, the spot panchanama, regarding the place i.e. the well was drawn on 11.6.2015 at about 15:35 to 16.5. The earlier discovery panchanama was drawn at Pathrot to Paratwada Road near the bridge near Walmikpur. Whereas, the well was situated in village Sindhi. The distance between two places as per evidence is 40 kilometers. As per evidence of PW2 Mohd.Arif Ab.Samad, after discovery panchanama, they again came to the police station at about 2:00 pm which is at the distance of 40 kilometers and immediately they started for village Sindhi at about 15:35. The distance between Akot to Sindhi is again 50 kilometers. Thus, if the evidence of PW2 Mohd.Arif Ab.Samad and PW13 Investigating Officer Pramanand Katre along with panchanama Exhibits-33 and 34 are considered, the aspect of recovery of blood stained clothes and stones does not inspire confidence. Moreover, the evidence of PW2 Mohd.Arif Ab.Samad nowhere shows that the accused has made voluntary statement in their presence as well as PW13 Investigating Officer Pramanand Katre has also not stated that as the accused has shown willingness to make statement, he called panchas. The evidence of the Investigating Officer is completely silent regarding aspect of concealment of articles by the accused.

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40. In the light of the well settled legal position, if the evidence of PW2 Mohd.Arif Ab.Samad and PW13 Investigating Officer Pramanand Katre is considered, it nowhere shows that the accused made a voluntary statement and in the light of said voluntary statement articles are recovered. As already observed, the evidence regarding discovery and recovery of the articles is not inspiring the confidence.

41. The prosecution has also placed reliance on Chemical Analyzer's Report Exhibit-18 and as per the said report article pant of accused has shown some blood stains and the blood stains found on pant are of Blood Group "B". But, the Blood Groups of the deceased and the accused are not on record. Though blood samples of the accused are obtained during investigation, the Chemical Analyzer's Report regarding Blood Group of the accused is not filed on record.

42. Thus, after appreciating of the evidence, especially the circumstances on which the prosecution relied upon, except the last seen, no other evidence is on record to prove the guilt of the accused.

43. Learned Additional Public Prosecutor Shri M.K.Pathan for the State placed reliance on the decision of the Honourable Apex

Court in the case of State of Rajasthan vs. Kashi Ram, reported in (2006)12 scc 254. Paragraph No.17 of the said decision is in respect of the custodial death when the death of the deceased was caused due to strangulation when the deceased was in the custody of the accused. The Honourable Apex Court held that burden is on the accused to prove circumstances in which alleged incident has occurred. For attracting Section 106 of the Evidence Act, the prosecution has to prove that the deceased was in the custody of the accused and death was caused when the deceased was in the custody of the accused. Merely because the death was caused, is not sufficient to attract Section 106 of the Evidence Act, but the circumstances on which the prosecution relies upon are to be proved. When prosecution proves the circumstances to show that the death of the deceased was caused when the deceased was in the custody of the accused, the accused can offer explanation and, therefore, the cited facts of the case relied upon and facts of the present case are not identical. He also placed reliance on the decision of the Honourable Apex Court in the case of The State of Maharashtra vs. Suresh, reported in (2001) 1 SCC 471 wherein it is held that it is not possible that there is "an inherent incredibility in the evidence" on the premise that a culprit kidnapping a minor girl with sinister design would normally take the precaution not to be seen by any other person on the way, but in this case the culprit

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along with the girl had moved from place to place in the town. We are unable to appreciate such a reasoning as proposition of human conduct. For considering that reasoning it must be remembered that girl would certainly have been abducted by some body and that person had taken the abducted girl from her house up to the farm. Unless it is suggested that there was another alternative and safer route for the culprit to take the girl unnoticed by any shopkeeper or even a pedestrian there is no rationale in the reasoning that there is "inherent incredibility" in the version that respondent would have taken the girl through this route. It is further held that recovery of dead body from a place pointed out by the accused – possibilities also exist that the accused would have seen someone else concealing the dead body at that place or he would have been told by somebody else that the dead body was concealed there. But if the accused does not tell the Court about the happening of any of the two possibilities, then the Court can presume that the accused had himself concealed the dead body.

44. Here, in the present case, there is a long gap between the deceased and the accused lastly seen together and finding of dead body. Even, assuming that the deceased was in the company of the accused, that circumstance by itself is not sufficient to infer the conclusion that it is the accused who had killed the deceased and thrown away the

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dead body. Admittedly, as per evidence of PW7 Sk.Mushtaque Sk.Mukhtar, he had seen the accused along with the deceased and immediately on the same day he had seen the accused returning alone that is on 18.5.2015, whereas, the dead body was found on 8.6.2015. As per the medical evidence, probable time of death was 3-4 days prior to the postmortem. So, irresistible conclusion cannot be drawn that the murder was committed by the accused by taking along with him immediately on 18.5.2015.

45. Thus, in the present case, except the last seen theory, there is no other circumstance or evidence. Importantly, the time gap is so long between the deceased was seen in the company of the accused on 18.5.2015 and the probably time of his death based on postmortem report was prior to 3-4 days of the postmortem note. In view of above circumstances and in the light of the doubtful evidence regarding the discovery panchanama and other panchanamas and the fact that though brothers of the deceased PW1 Riyasat Ali Taher Ali Deshmukh and PW9 Shafakat Ali Taher Ali Deshmukh were informed by one Anuj that the deceased was with the accused, no action was taken by them and creates a doubt about the entire genesis of the events and, therefore, the sole reliance on last seen circumstance to convict the accused is not justified.

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46. For the above reasons, the conviction and the sentence imposed upon the accused cannot be sustained. Hence, we pass following order:

ORDER

(1) The criminal appeal is **allowed**.

(2) The judgment and order of sentence dated 6.3.2018 passed by learned Additional Sessions Judge, Akot in Sessions Case No.56/2015 is hereby quashed and set aside.

(3) The accused is acquitted of offences punishable under Sections 302 and 201 of the Indian Penal Code.

(4) The accused be released forthwith, if he is not required in any other case.

With this, the criminal appeal stands **disposed** of.

(URMILA JOSHI-PHALKE, J.)

(ROHIT B.DEO, J.)

!! BrWankhede !!