



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 887 OF 2022

Samsheer S/o Sardar Pathan
Age: 46 years, Occu: Labour,
R/o: Punam Nagar, Shirdi,
Tq. Rahata, Dist. Ahmednagar

... Appellant

Versus

The State of Maharashtra

... Respondent

...
AND

CRIMINAL APPEAL NO.267 OF 2024

Durgaprasad S/o Omprakash Mishra,
Age: 38 Years, Occu- Labour/Now: Nil,
R/o: Newada, Varanasi (U.P.)/Kature Vasti, Shirdi,
Ta. Rahata, Dist. Anmednagar.
At present in Aurangabad Central Prison

... Appellant

Versus

The State of Maharashtra
Through Police Station Officer,
Shivoor Police Station, Ta. Vaijapur,
Dist. Aurangabad.

... Respondent

.....

Appearance :-

Mr. Narwade Narayan B., Advocate for the Appellant in
Criminal Appeal No.887/2022

Mr. Patil Indrale Anand Vinayakrao, Advocate for the Appellant
in Criminal Appeal No.267/2024

Mr. S. V. Hange, APP for Respondent – State in both Appeals

.....
**CORAM : R. G. AVACHAT &
NEERAJ P. DHOTE, JJ.**

**Reserved on : 11th July, 2024
Pronounced On : 14th August, 2024**

COMMON JUDGMENT : [PER NEERAJ P. DHOTE, J.]

1. These two Appeals, filed under 374 [2] of the Code of Criminal Procedure, 1973 [hereinafter referred to as 'Cr.PC'], challenges the Appellants conviction and sentence awarded by the learned Additional Sessions Judge, Vaijapur, Aurangabad, in Sessions Case No.78/2016, vide Judgment and Order dated 19/10/2022, as under:

(a) For the offence punishable under Section 302 r/w Section 120-B of the Indian Penal Code, 1860 [hereinafter referred to as 'IPC'], to suffer imprisonment for life and to pay fine of Rs.3000/-, in default, to suffer rigorous imprisonment for six [6] months.

(b) For the offence punishable under Section 364 r/w Section 120-B of IPC, to suffer rigorous imprisonment for ten [10] years and to pay fine of Rs.2000/-, in default, to suffer rigorous imprisonment for two [2] months.

(c) For the offence punishable under Section 3 read with Section 25 of the Arms Act, 1959 [hereinafter referred to as 'the Arms Act'], to suffer rigorous imprisonment for three [3] years and to pay fine of Rs.1000/-, in default, to suffer rigorous imprisonment for two [2] months.

2. Prosecution's case as revealed from the Police Report is as under :-

2.1 Deceased - Nishikant Pande [hereinafter referred to as 'Deceased'] and his entire family was in the business since last many years. They had their business at Shirdi and Shani-Shingnapur. On 16/07/2016 around 10.00 a.m., he proceeded

for Shani-Shingnapur from Shirdi. As he did not return home, his family members enquired about him. Around 7.00 p.m., he telephonically informed his wife that he would be returning home within 15 to 20 minutes. However, he did not return home. When his brother tried to call him, his mobile phone came switched off. On the next day i.e. 17/07/2016, his younger brother – Shashikant P. Pande along with his friends started for his search. From shopkeeper - Ramrao Hiware, it was revealed that Deceased had come to Shani-Singnapur and left in the evening for Shirdi on 16/07/2016. They viewed the footages from the CCTV's installed at the Temple premises. It was seen that Deceased went in the car with Accused No.1 [Durgaprasad Omprakash Mishra] and Accused No.2 [Iqbal Musa Shaikh] was on the driving seat. He lodged the missing report with the Loni Police Station. On 17/07/2016, the Police Patil - Ashok Eknath Jadhav of village Safiyabadwadi received a phone call from his son informing him of one dead body lying in Saiprasad Hotel. He passed over the said information to the Police. The Police Patil and the Police reached the said Hotel. The dead body was of male aged between 25 and 30 years having injuries, was lying at the Hotel. The FIR was lodged and the criminal law was set in motion. The Inquest was conducted. Spot Panchnama came to be drawn. The dead body was referred for postmortem. In the postmortem, the cause of death was revealed as '*firearm injury to head*'.

2.2 During investigation, the Police recorded the statement of witnesses and viewed the CCTV footages of the relevant spots. The relevant CCTV footages came to be secured. In all, five [5] Accused came to be arrested. The relevant Articles came to be seized, including the firearm pursuant to the discovery under Section 27 of the Indian Evidence Act, 1872 [hereinafter referred

to as 'the Evidence Act']. The call details of mobile phones of the Accused and Deceased came to be collected. Investigation revealed that the Accused kidnapped Deceased for ransom and as the Deceased could not meet their demand of money, he was killed. As sufficient proof of involvement of Accused was collected, the Police filed the Charge-sheet against the five [5] Accused persons for the offence punishable under Sections 302, 120-B, 364, 364-A of IPC and for the offence punishable under Section 3 r/w 25 of the Arms Act.

3. On committal, the learned Additional Sessions Judge framed the Charge against the Charge-sheeted Accused for the offence punishable under Sections 302 r/w 34, 120-B r/w 34, 364 r/w 34, 364-A r/w 34 of IPC and for the offence punishable under Sections 3 r/w 25 of the Arms Act, vide Exhibit - 23. The Accused denied the Charge and claimed to be tried. In support of the Charge, the Prosecution examined in all twenty two [22] witnesses and brought on record the relevant documents. On completion of Prosecution's evidence, the learned Trial Court recorded the statement of Accused under Section 313[1][b] of Cr.PC. The Accused denied the evidence and the case of Prosecution. After hearing both the sides and appreciating the evidence on record, the learned Trial Court passed the impugned Judgment and Order.

4. Heard the learned Advocates for the Appellants and learned APP for the Respondent - State.

5. It is submitted by the learned Advocates for the Appellants that the case is based on circumstantial evidence. It is necessary for the Prosecution to establish all the circumstances and rule out the possibility of involvement of any other person in the Crime, except the Accused persons. On the same set of evidence, the co-

accused are acquitted. The evidence brought on record is not sufficient to prove the involvement of the Appellants. The evidence in respect of identification of the Appellants was not credible. There is no credible evidence to show that finger ring seized during the course of investigation at the instance of one of the Appellant was that of the Deceased. The Prosecution failed to prove the Motive for commission of the Crime. The chemical analysis [CA] reports do not support the case of Prosecution. Considering the overall evidence on record, the Appellants are entitled for acquittal by setting aside the impugned Judgment and Order. The Judgments relied by them would be considered in the later part.

6. It is submitted by the learned APP that the evidence on record show that the Deceased was lastly seen in the company of the Accused. There is evidence in the nature of CCTV footages, discovery and incriminating Articles at the instance of the Appellants, ballistic reports, CDR / SDR of the mobile phones, which establishes the Crime against the Appellants. The circumstances are conclusive in nature and establishes involvement of Appellants in the Crime. No interference is called for in the impugned Judgment and Order and the Appeals are liable to be dismissed. The Judgments relied by him would be considered in later part.

7. Admittedly, the Prosecution's case is based on circumstantial evidence. The law in respect of circumstantial evidence is well settled by catena of decisions of Hon'ble Supreme Court of India from the decision in **Sharad Birdhichand Sarda Vs. State of Maharashtra; [1984] 4 SCC 116**, wherein, following principles are laid down:-

- “(1) The circumstances from which the conclusion of guilt is to be drawn should 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.”*

8. Admittedly, in the case in hand, in all, five [5] Accused persons were Charge-Sheeted and tried. By the impugned Judgment and Order, Accused Nos. 2, 3 and 4 came to be acquitted. Admittedly, there is no Appeal against acquittal. The Appellants, who were Accused Nos.1 and 5 came to be convicted. As per the learned Trial Court, the following circumstances were relied by the Prosecution in support of the Charge :-

- [I] Deceased Nishikant was missing from the evening of 16/07/2016, and on 17/07/2016 he was found died homicidal death ;
- [II] On 16/07/2016 in the evening, Deceased Nishikant was lastly seen in the company of Accused Nos.1 and 3 ;
- [III] Disclosure statement of Accused No.5 leading to recovery of pistol, live cartridges and golden finger rings, and the ballistic expert report ;
- [IV] Presence of accused in Shivoor area in between 9.00 p.m. to 9.30 p.m. as established by SIM detail record, call detail record and tower location ;
- [V] The disclosure statement of Accused No.1 leading to show the place where he threw the clothes, diary and mobile hand set of Deceased Nishikant ;

[VI] Presence of the Accused at the Hotel of Yogesh PW-13 at Vaijapur at 10.30 p.m. on 16/07/2016 ;

[VII] Absence of Accused No.3 from the noon of 15/07/2016 from his job from the Hotel ;

[VIII] Motive for the Accused to commit murder of Nishikant ;

[IX] Seizure of Indica Car and motorcycle used in the crime ;

[X] Seizure of clothes of Accused and forensic reports ;

9. The learned Trial Court held that the Prosecution succeeded in establishing the following five [5] circumstances against the Appellants which unerringly connect the Appellants with the Crime.

[1] Deceased Nishikant was missing from the evening of 16/07/2016, and on 17/07/2016 he was found died homicidal death.

[2] On 16/07/2016 in the evening, Deceased Nishikant was lastly seen in the company of Accused No.1

[3] There is no explanation by the Accused No.1 about the said circumstance.

[4] Disclosure statement of Accused No.5 leading to recovery of Pistol article T and live cartridges.

[5] Ballistic reports show that bullet found in the body of Deceased Nishikant was fired from Pistol article - T recovered from Accused No.5.

10. These being the Appeals against conviction, we are required to re-appreciate the evidence on record and record our findings. Thus, we proceed to deal with the circumstances and evidence available on record :-

[I] Deceased Nishikant was missing from the evening of 16/07/2016, and on 17/07/2016 he was found died homicidal death ;

11. PW - 3 [Shashikant Prabhunarayan Pande] is the brother of Deceased. They have family business since last many years at Shirdi and Shani-Shingnapur. On 16/07/2016, Deceased left for Shani-Shingnapur, however, did not return. In the evening around 7.00 p.m., Deceased called his wife over the mobile and informed that he will reach home within 15 to 20 minutes. However, Deceased did not return and so, he called on the cell phone of Deceased, which came switched off. On the next day i.e. 17/07/2016, he along with his friend - Pappu Agrawal went in search of Deceased. From PW - 6 [Ramrao Uttam Hiware], they learnt that at about 5.00 p.m on 16/07/2016, Deceased started for Shirdi from Shani-Shingnapur. They viewed the CCTV footages installed by the Temple Administration, wherein, Deceased was seen with Accused Nos.1 and 2. Thereafter, they went to Shani-Shingnapur Police Station from where, they were directed to Loni Police Station. He lodged the missing report at Exhibit - 77. The cross-examination show that the said evidence of this witness was not seriously challenged.

12. PW - 6 [Ramrao Uttam Hiware] was the resident of Shani-Shingnapur. He was having the cutlery and stationary shop. He was having business relation with Deceased. On 16/07/2016 between 12.00 p.m. and 1:00 p.m., Deceased visited his shop and after some time went for lunch and again came to his shop for taking articles and thereafter left his shop. On 17/07/2016 around 10.00 a.m., PW - 3 [Shashikant Prabhunarayan Pande] came to his shop and enquired about Deceased. He informed PW - 3 [Shashikant Prabhunarayan Pande] about the previous

day visit of Deceased to his shop. They viewed the CCTV footages of the Temple and noticed that Deceased boarded one car from the area of Shani Temple in the evening. Except that his statement was recorded by the Police on 7th day, nothing has come to doubt his testimony.

13. PW - 1 [Ashok Eknath Jadhav] was the Police Patil of village Safiyabadwadi since 1993. On 17/07/2016, when he was in the Police Station, he received the phone call from his son - Nitin informing that, one dead body was lying in the Hotel Saiprasad. The said Hotel was on the northern side of his field near the village Safiyabadwadi. He along with Police Constable - Shaikh reached the said Hotel around 11.00 a.m. and noticed the body of male person lying in the Hotel. The handkerchief was tied on the head, the sticky tape was put over the mouth and both the hands were tied with the sticky tape. Blood was seen near his head. One empty cartridge was found near the body. He lodged the Report at Exhibit - 46 with the Shivoor Police Station against unknown person. Nothing has come in his cross-examination to doubt his said testimony. His evidence show that the Report corroborate his evidence.

14. PW - 2 [Rajendra Narayan Pathade] acted as the Panch for the Spot Panchnama at Exhibit - 70 and Inquest at Exhibit - 72. His evidence show that the empty cartridge was found on the spot. He corroborate the evidence of PW - 1 [Ashok Eknath Jadhav] about the condition of dead body. The said Hotel belonged to his father. His evidence show that he was not the regular panch.

15. The evidence of PW - 18 [Ramhari Madhavrao Jadhav], who was the Assistant Police Inspector at Shivoor Police Station on 17/07/2016, show that he registered the Crime on the Report of PW - 1 [Ashok Eknath Jadhav] at Exhibit - 46 on 17/07/2016. He went to the Saiprasad Dhaba. The dead body of male person was lying, the mouth of which was tied with the handkerchief and sticky plastic tape was put over the handkerchief. There was bleeding injury near left ear, both hands were tied with the sticky tape and one empty cartridge was lying near the body. He prepared the Spot Panchnama and Inquest. He referred the dead body for postmortem vide Exhibit - 202.

16. The evidence of PW - 19 [Dhananjay Ramrao Farate], who was working as the Assistant Police Inspector at Shivoor Police Station on 17/07/2016, show that the investigation of the Crime was handed over to him. He circulated the photos of Deceased to different Police Stations to know the identity of Deceased. On that very day, he came to know about the missing report lodged with Loni Police Station in respect of Deceased. Identity of Deceased was ascertained. He called the brother and relatives of Deceased at Ghati Hospital, who identified the dead body as that of Nishikant Pande.

17. PW - 14 [Dr. Vikas Madan Rathod], who was working as the Medical Officer at the Government Medical College and Hospital, Aurangabad, at the relevant time, deposed of receiving the dead body of Nishikant Pande. His evidence show that along with other Doctors, he performed the postmortem and found external and internal injuries, which were mentioned in Column Nos.17 and 19, respectively of the Postmortem

Report and opined that the external and internal injuries were antemortem and corresponding to each other and were sufficient to cause the death of person in ordinary course of nature. He opined the cause of death as '*firearm injury to head*'. The Postmortem Report is at Exhibit - 165, which corroborate his testimony. Though he was cross-examined, nothing has come so as to disbelieve his testimony.

18. With the above discussed overwhelming evidence on record, which remained unshaken in the cross-examination, the Prosecution has established the circumstance that Deceased - Nishikant Pande went missing on 16/07/2016, his dead body was found in an unusual condition at the Hotel on 17/07/2016 and his death was Homicidal.

[II] On 16/07/2016 in the evening, Deceased Nishikant was lastly seen in the company of Accused Nos.1 and 3

19. The evidence to prove the circumstance of last seen, the Prosecution has brought on record the electronic evidence. It is needless to state that Section 65 - B of the Evidence Act provides for the admissibility of electronic record.

20. The evidence of PW - 22 [Sachin Ashok Shete] show that since last eight [8] years, he was working as the CCTV In-charge at the Shani-Shingnapur Temple. He was looking after the CCTV services at the said Temple. The CCTV cameras were installed in the Temple premises, Bhakt Niwas and on road adjacent to the Temple. The CCTV footages were stored in the hard-disk of computer. Pursuant to the communication at Exhibit - 210, which was issued by Shivoor Police Station to the Trust for CCTV footages dated 16/07/2016 for the time between

17.00 to 17.30 hours from the Camera Nos.1, 2 and 3 which were installed at the square, he copied the CCTV footages of the said date and time in the CD at Exhibit - 251 from the hard-disk of computer and handed over the same to the Police. His evidence show that he brought the certificate under Section 65-B of the Evidence Act at Exhibit - 250, which was signed by him. Though the oral evidence of the contents of document is impermissible under the law, he deposed that it was mentioned in the said certificate that he copied the CCTV footage from the hard-disk of computer and there was no tampering with the said footages. His evidence show that he had knowledge about operating CCTV cameras, storing and copying the said data. His evidence establishes that the said electronic record had come from proper custody.

21. Merely because there was no permission or directions from the Trust to him to appear in the Court as the witness and non filing of any document about his knowledge regarding collection of CCTV footages, cannot be the reason to disbelieve him. Being the Prosecution witness, permission from the higher ups would be immaterial. It is tried to be brought on record in the cross-examination that the certificate under Section 65-B was not given to the Police at earlier point of time. That would not affect the admissibility of the said electronic evidence / record and certificate in view of the observation in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal; [2020] 7 SCC 1** that, Section 65-B does not speak of the stage at which such certificate must be furnished to the Court and so long as the hearing in a trial is not over, the requisite certificate can be directed to be produced by the learned Judge at any

stage, so that information contained in electronic record form can then be admitted and relied upon in evidence. What is seen from the observations of the learned Trial Court in the impugned Judgment, is that the said certificate was produced pursuant to the directions and summons issued by the learned Trial Court and it was produced at the time of tendering CCTV footage in evidence and the Appellants had cross-examined the witness on the certificate. Thus, the said electronic evidence satisfies the requirement of law and becomes admissible in evidence and can be relied.

22. The evidence of PW - 10 [Ramnath Eknath Jadhav] show that on 28/07/2016, he was called by Shivoor Police Station for Panchnama in respect of compact disk [CD]. The police sealed one compact disk in his presence, kept in an envelope under the Panchnama at Exhibit - 111. His evidence show that one person by name Dixit produced the said CD. Non examination of the said person - Dixit will not affect the evidence in respect of electronic evidence in view of the examination of PW - 22 [Sachin Ashok Shete], who was the In-charge of CCTV at the Temple, who deposed of copying the CCTV footage in the CD. Mentioning his profession as Sarpanch in the Panchnama and his evidence that the compact disk are easily available in the market, will not affect his testimony.

23. PW - 19 [Dhananjay Ramrao Farate], the Police Officer, who was entrusted with the investigation of the Crime, show that he gave letter on 23/07/2016 to the Lord Shani-Shingnapur Trust at Exhibit - 210 for getting CCTV footages. His cross-examination show that he collected the CCTV footages.

24. Not preparing the Panchnama in the premises of Temple in respect of collecting CCTV footages and preparing the Panchnama in respect of compact disk of CCTV footages in the Police Station, as seen from the evidence of PW - 21 [Harsh Vishwanath Potdar], who was assigned with the Investigation of this case from 19/07/2016, would not affect the Prosecution's electronic evidence due to the cogent evidence of PW - 22 [Sachin Ashok Shete], who was In-charge of CCTV at the said Temple.

25. The evidence of PW - 3 [Shashikant Prabhunarayan Pande] show that electronic record / evidence in the nature of aforesaid CCTV footage copied in the Exhibit - 251 CD were played and he viewed the same at the time of his testimony. For better appreciation, the relevant part from the evidence of PW - 3 [Shashikant Prabhunarayan Pande] is reproduced below :-

"13. Now, video clip No.1 in the CD started playing with the help of laptop on big monitor. The camera is named as Shani Thorat Parking chowk camera No.1. The first video clip is dated 16.07.2016 from 17.10.00 to 17.17.48. In the said video clip the persons and vehicle are seen going on the road. At 17.11.53 one white colour car is seen and coming and standing to the side of the road. At 17.12.06 one person wearing brick colour strips T-shirt (Horizontal) is seen sitting in the said car. The witness says that said person is accused Durgaprasad Mishra. At 17.13.04 the said person is seen getting down from the car. Until 17.15.32 the car was standing there. At 17.15.33 the car is seen going ahead. At 17.15.38, the registration number of said car is seen as MH-28-C-1791. At 17.17.01 the said car is seen coming again by another side of the road. At 17.17.01 the number of said (backside) car is seen as 1791. Thereafter said car went away. The said video clip is upto 17.17.48.

14. Now, the CCTV footage contained in second video clip is started. The camera is named as Shani Thorat parking chowk camera No.1. The said video clip is dated 16.07.2016 from 17.17.50 to 17.22.05. The said video clip started playing. At 17.18.01 one person wearing brick colour strips T-shirt and black colour pant is seen. The witness says that this person is accused Durgaprasad Mishra. At 17.18.08 the said person out of footage. At 17.20.51 one person with his face towards camera one person having black and white colour T-shirt is seen walking on the road. His face is towards camera. He is holding one white colour polythene bag. The witness says that said person is his brother Deceased Nshikant. At 17.20.50 the screenshot is taken. The print out of the said image. It is marked at **Exh.280**. At 17.21.00 the said person out of camera. At 17.21.21 the above number car MH-28-C-1791 is seen coming. The clip ended on 17.22.05.

15. Now, third video clip from the CD is started playing. The camera is named as Shani Fhorat parking chowk No.1. The CCTV footage in 3rd clip dated 16.07.2016. Said clip started from 17.10.35. From 17.10.35 to 17.19.42 the peoples and the vehicles are seen coming and going on the road. At 17.19.41 person wearing brick colour strips T-shirt is seen standing other road. The witness says that he is accused Durgaprasad Mishra. At 17.19.42 the screenshots is taken. The print out of the said image. It is marked at **Exh.281**. I am now shown the said print. The person standing on the road is the said scree shot is accused Durgaprasad Mishra. At Until 17.21.01 the said person is standing on the road. At 17.21.02 one person wearing white and black colours strips T-shirt having polythene white bag is seen going ahead with his back side towards camera. The witness says that said person wearing black and white strips T-shirt is his brother Deceased Nshikant. At 17.21.17 both persons are seen going ahead together. At 17.21.31 above numbered car (MH-28- C-1791) is seen going and stopping near the said two persons. At 17.21.31 the screenshot is taken. The print out of the said image is taken on printer. I am now shown the said image. In the said image my Deceased brother

Nshikant and accused Durgaprasad Mishra are seen together. It is marked at **Exh.282**. At 17.21.45 the person wearing black and white strips T-shirt is seen sitting on the back seat of the car and the person wearing brick colour strips T-shirt is seen sitting on the front seat of the car. At 17.21.45 the screenshot is taken. The print out of the said image is taken on printer. I am now shown the said image. In the said image my Deceased brother Nshikant and accused Durgaprasad Mishra are seen together. It is marked at **Exh.283**. At 17.21.52 the said car is seen going ahead. The witness says that said car is going towards Sonai. At 17.22.25 the said car goes out of camera. The video clip ends as 17.23.26.

16. Now, 6th clip from CD started playing. Camera is named as Shani Sonawane Hotel road camera No.1. At 17.17.33 the above numbered car is seen going from the road. It is seen halted at one point for some time. At 17.19.15 the person wearing black and white colour T-shirt is seen going ahead with his back towards camera. At 17.20.06 said person is seen is out of camera. At 17.24.32 said video clip ends.”

26. The evidence of PW - 3 [Shashikant Prabhunarayan Pande] show that Accused No.1 and Accused No.2 were known to him due to business. As seen earlier while discussing the Circumstance No.1, this witness had viewed the CCTV footages from CCTV installed at Shani-Shingnapur Temple and he saw Deceased - Nishikant Pande boarding the car along with Accused No.1. The above referred evidence of PW - 3 [Shashikant Prabhunarayan Pande] clearly established that in the said CCTV footages dated 16/07/2016 between 17.10.00 hours to 17.24.32 hours, Deceased and Accused No.1 were seen together. His evidence show that though he identified Accused No.2 as the one who was driving the car, in which, Accused No.1 and Deceased boarded, he further deposed that the driver's face

was not clearly visible, which was fortified from his cross-examination. Not providing the description of Accused No.1 to the Police while recording his statement is inconsequential for the reason that Accused No.1 was acquainted to this witness by name as is clearly seen from his evidence.

27. The evidence of PW - 3 [Shashikant Prabhunarayan Pande] show that after viewing the CCTV footages on 17/07/2016 at the Temple, he lodged the Missing Report. His evidence show that while recording his statement, he stated about the CCTV footages having timing 5.21 p.m. The omissions shown in Paragraph No.8 in the evidence of this witness does not affect the core of his evidence. Moreover the admissible electronic record / evidence brought on record, was shown to him. The further cross-examination of this witness in no way creates any dent in his evidence. The evidence of this witness gives the minute details from the CCTV footages. He being the brother of Deceased and Accused No.1 being of his acquaintance, his identification of them is well founded. There is nothing to show to disbelieve the testimony of PW - 3 [Shashikant Prabhunarayan Pande]. From the evidence of this witness, it is established by the Prosecution that Accused No.1 was seen in the company of Deceased in the evening of 16/07/2016 in between 17.10.00 hours and 17.24.32 hours and they boarded one four-wheeler and proceeded further. Undisputedly, this evidence of PW - 3 regarding Deceased seen in the company of Appellant No.1 is corroborated by his previous Missing Report. The evidence on record show that the Prosecution has conclusively established the last seen circumstance against Appellant No.1.

[III] Disclosure statement of Accused No.5 leading to recovery of pistol, live cartridges and golden finger rings, and the ballistic expert report

28. The evidence of PW – 21 [Harsh Vishwanath Potdar], who investigated the Crime from 19/07/2016 on-wards show that Appellant / Accused No.5 was arrested on 21/07/2016 under the arrest memorandum at Exhibit – 237. The Police custody of Appellant / Accused No.5 was taken on 22/07/2016. Appellant / Accused No.5 made disclosure statement to him before two panchas that he had concealed the country made pistol, two golden rings and three live cartridges near his house at Poonam Nagar, Shirdi. The memorandum of his statement was at Exhibit – 122. Thereafter, Appellant No.1 led him, panchas and policemen to his house at Poonam Nagar, Shirdi where he dug the soil near the bathroom and produced one country made pistol [Article - T], three live cartridges [Article - U] and two golden rings [Article - V], which came to be seized under the Panchnama at Exhibit-123. Except suggestion that no disclosure statement was made by Appellant / Accused No.5 and there was no discovery of the said articles, there is nothing which would render the said testimony in respect of discovery and seizure unworthy of acceptance.

29. There is evidence of PW – 11 [Vishnu Vankatrao Pillewar], who was the public servant, to show that on 22/07/2016, his superior received the communication from Shivoor Police Station and he was directed to act as the panch. Another public servant from his office by named Shaikh Riyaz was also directed by his superior to act as the panch. They both went to the office of Dy.S.P., Vaijapur where Appellant / Accused No.5 was present. Appellant / Accused No.5 showed his

willingness to produce the weapon of offence and other articles which were kept by him in his house at Shirdi. The memorandum to that effect was prepared at Exhibit - 122. Appellant / Accused No.5 led the panchas and the Police to Shirdi, where firstly they went to the Shirdi Police Station and thereafter, proceeded towards the house of Appellant / Accused No.5 and reached at Poonam Nagar, Shirdi. After parking the vehicle, they followed Appellant / Accused No.5 in one lane, where one house was pointed by Appellant / Accused No.5 and there was bathroom adjacent to the said house, wherein, black can of water was kept. Appellant / Accused No.5 kept aside the said can and removed one gun [Article - T], three bullets [Article - U] and two finger rings [Article - V]. The said articles were seized under the panchnama at Exhibit - 123.

30. Not knowing the full registration number of the vehicle by PW - 11 [Vishnu Vankatrao Pillewar], in which, he and other went to Shirdi, is not expected, however, he deposed that the vehicle number started as MH-20. Though it has come in his cross-examination that no one entered the house of Appellant / Accused No.5, would not create any dent to his evidence as there is consistency in the evidence of this panch witness and Police Officer that the said articles were seized at the instance of Appellant / Accused No. 5 from near the bathroom which was outside the house.

31. The evidence of PW - 21, Investigating Officer, satisfies the requirement of 27 discovery as laid down by the Hon'ble Supreme Court of India in the case of **Babu Sahebagoada Rudragoudar Vs. State of Karnataka; AIR 2024 SC 2252**, wherein, the following observations are made ;

*“when the Investigating Officer steps into the witness box for proving such disclosure statement, he would be required to narrate what the Accused stated to him. The Investigating Officer essentially testifies about the conversation held between himself and the Accused which has been taken down into writing leading to the discovery of incriminating fact(s). It is further observed that, ‘Similar view was taken by the Hon’ble Apex Court in the case of **Ramanand @ Nandlal Bharti Vs. State of Pradesh**, wherein this Court held that mere exhibiting of Memorandum prepared by the Investigating Officer during investigation cannot tantamount to proof of its contents. While testifying on oath, the Investigating Officer would be required to narrate the sequence of events which transpired leading to the recording of the disclosure statement.”*

32. The cross-examination of these two [2] witnesses referred above, could not create any dent in their testimony. Their evidence is corroborated by the memorandum and seizure memo. From the above referred evidence of PW - 11 [Vishnu Vankatrao Pillewar] and PW - 21 [Harsh Vishwanath Potdar], the Prosecution has firmly established the discovery and seizure of the aforesaid articles i.e. firearm, bullets and finger rings at the instance of Appellant / Accused No.5.

33. The evidence of PW - 21 [Harsh Vishwanath Potdar] further show that on 28/07/2016, he referred the country made pistol [Article - T] to the Forensic Laboratory for examination vide letter at Exhibit - 238. The Prosecution has brought on record the examination report in respect of firearm, three cartridges and one empty cartridge and one deformed copper jacketed bullet at Exhibits - 20, 21 and 22. The said reports are admissible by virtue of Section 293 of Cr.PC. Being the scientific evidence, we propose to reproduce the relevant part from the said reports as under :-

“Exhibit – 20

6] Description of articles contained in the parcel:

Exhibit 1:- One countrymade pistol with magazine wrapped in plastic
Ex. No.A

Exhibit 2 :- Three intact KF 7.65 mm pistol cartridges wrapped in plastic marked Ex. No – A3

Exhibit 3 :- One KF 7.65 mm pistol empty without primer cap put in an envelope marked Ex. No – A1

Exhibit 1 to 3 also labelled Po. Station Shivur C.R. No.0101/16 U/S 302 IPC

Results of Analysis

Exhibit 1 is a countrymade pistol in working condition. It is capable of chambering and firing 7.65 mm pistol cartridges. Residue of fired ammunition-nitrite was detected in the barrel washings of the countrymade pistol in Exhibit 1, showing that Exhibit 1 was used for firing prior to its receipt in the laboratory.

Randomly selected two 7.65 mm pistol cartridges from Exhibit 2 were successfully test fired through the countrymade pistol in Exhibit 1.

Exhibit 3 is a fired 7.65 mm pistol cartridge case without primer cap. The characteristic breech face marks & chamber marks on the empty in Exhibit 3 tally with those on the cartridges test fired from the countrymade pistol in Exhibit 1, (examined under comparison microscope) Showing that the Empty in Exhibit 3 has been fired from countrymade pistol in Exhibit 1.

The deformed copper jacketed 7.65 mm pistol bullet in Exhibit 1 of BL – 562/16 (Received from Autopsy Surgeon, Department of Forensic Medicine, G.M.C. Aurangabad, PM No.1400/16, Dt. 18-Jul-16, Shivur Police Station, C.R. No. 0101/16), tally with the bullets test fired from countrymade pistol in Exhibit 1 in respect of superficial lengthwise brushing marks (examined under comparison microscope), Showing that the bullet in Exhibit 1 of BL – 562/16 has been fired from countrymade pistol in Exhibit 1 of present case.

Exhibit – 21

6] Description of articles contained in the parcel:

Exhibit 1:- One deformed copper jacketed bullet having brushing marks put in a cardboard box again put in a plastic container labelled PM. No.1400/16, Date: 18/7/16, Police Station:Shivur, Dt. Aurangabad, Name: Nishikant Prabhunaryan Pande, Age/Sex-65 Yrs/ male, Contents: Bullet for ballistic examination marked, Ex. No.A-2.

Results of Analysis

Exhibit 1 is a deformed fired copper jacketed 7.65 cm pistol bullet having brushing marks.

Exhibit – 22

6] Description of articles contained in the parcel:

Exhibit 1A & 1B:- Two cotton swab sucks put in a plastic container labelled contents – Two swabs from pals fro detection of gun powder marked Ex. No. B.

Exhibit 2A & 2B:- Two cotton swab sticks put in a plastic container labelled contents – Two swabs from firearm entry wound fro detection

of gun power marked Ex. No. C.

*Exhibit 1 and 2 also labelled P.M. No. 1400/16, Date – 18/7/2016,
Police Station – Shivur, Tal. Vijapur.*

Name – Nishikant Prabhunaryan Pande, Age/Sex-35 yr Male

Results of Analysis

*Nothing of note in relevance to the fired gunshot residues
(GSR) were detected on cotton swab sticks in Exhibit 1A and 1B.*

*Nothing of note in relevance to the fired gunshot residues
(GSR) were detected on cotton swab sticks in Exhibit 2A and 2B.”*

34. As discussed earlier while dealing with the circumstance of homicidal death, the evidence of PW – 2 [Rajendra Narayan Pathade] and PW – 18 [Ramhari Madhavrao Jadhav], the Prosecution established that one empty cartridge was seized from the spot of incident. Further, as discussed above the evidence of PW – 14 [Dr. Vikas Madan Rathod], show that the bullet was found in the left side of supra-tentorial region. His further evidence show that the said bullet was preserved for Forensic Analysis. The cross-examination could not create even slightest dent in the above discussed evidence.

35. The above discussed evidence available on record firmly established that the bullet found in the dead boy and empty cartridge seized from the spot of incident where body was lying were fired from the firearm [Article – T], which was in working condition, discovered and seized at the instance of Appellant / Accused No.5.

**[IV] Presence of Accused in Shivoor area in between
9.00 p.m. to 9.30 p.m. as established by SIM detail
record, call detail record and tower location**

36. Through the evidence of PW – 16 [Dattaram Shantaram Angre], the Prosecution has brought on record the call details of the mobile numbers of Accused No.4 [Bhaginath Vishwanath Shinde], Appellant / Accused No.5 [Samsher Sardar Pathan]

and Deceased. The evidence of this witness show that he was working as the Nodal Officer with the Vodafone – Idea Company at Pune. His company preserved all the data relating to calls from Vodafone – Idea SIM vide letter dated 05/10/2016. The office of Superintendent of Police, Aurangabad called the call detail records of the following SIM numbers :-

[1] 8806083620

[2] 9763298832

[3] 9850645160

Accordingly, the call details of the said three [3] numbers were provided to the office of Superintendent of Police, Aurangabad.

37. His further evidence show that as per the record of the company, the SIM number – 8806083620 was registered in the name of Bhaginath Vishwanath Shinde [Accused No.4], resident of Sant Nagar, Shirdi and the application of the registered owner was at Exhibit – 178.

The SIM number – 9763298832 was registered in the name of Samsher Sardar Pathan [Appellant / Accused No.5], resident of Islamnagar, Shirdi and the Application of the registered owner was at Exhibit – 179.

The SIM number – 9850645160 was registered in the name of Deceased – Babbu Prabhunarayan Pande and the Application of the registered owner was at Exhibit – 180.

38. The call details of the said three [3] numbers were brought on record in his evidence at Exhibit – 181. The lists issued by his company relating to tower location of the said three [3] SIM cards were brought on record at Exhibit – 183. His evidence show that the certificate under Section 65-B of the

Evidence Act in respect of the said three [3] SIM numbers was brought on record at Exhibit - 182.

39. His further evidence show that the call record dated 16/07/2016 for the SIM number - 8806083620 [Accused No.4] and SIM number - 9763298832 [Appellant / Accused No.5] for 09.36 p.m. was under the tower location of Gat No.1149, village Shivoor, Tq. Vaijapur, Dist. Aurangabad. His further evidence show that the call record dated 16/07/2016 for the SIM number - 9850645160 [Deceased] for 09.12.40 p.m. was under the tower location of Gat No.1149, village Shivoor, Tq. Vaijapur, Dist. Aurangabad. His further evidence show that the call record dated 16/07/2016 for the SIM numbers of Accused Nos.4 and 5 for 09.36.42 p.m. was under the tower location of open farm of Mr. Bodkhe, Shivoor Bungalow Corner, Shivoor village, Tq. Vaijapur, Dist. Aurangabad.

40. Though this witness was cross-examined, nothing material has come so as to create any dent in his above discussed evidence. The issuance of 65-B certificate by the then Nodal Officer Mr. Sachin Shinde will not affect his evidence, as the certificate is of the above referred service provider and the evidence of PW - 16 [Dattaram Shantaram Angre] show that he was in a position to identify the signature of the then Nodal Officer and the call detail records were taken from the computer of the office of the said service provider. Further, the merger of the Vodafone and Idea companies in August - 2018 will not affect the credibility of the evidence of this witness and the above discussed documentary evidence brought on record in his evidence. Though it has come in his cross-examination that in rural areas, the range of mobile tower can be upto 4 to 5 k.m.

surrounding the tower and from the tower location, the exact place of the mobile user cannot be ascertained, it is firmly established from his evidence that in the evening of 16/07/2017, the tower location of the SIM numbers registered in the name of Accused Nos.4 and 5 and Deceased were under the same tower location in between 09.12.40 to 09.36 p.m. It is nowhere the case of the Appellants that the said SIM numbers were not used by them or were not registered in their names.

41. Though the Prosecution has examined the Nodal Officer of Bharti Airtel Company as PW - 17 [Mandar Bhupendra Godambe] and brought on record the call details and tower location in respect of SIM numbers - 9970676280, 9175514592 and 7058207207, his evidence nowhere show that the applications and related documentary evidence were brought on record to establish as to who obtained or secured the said SIM numbers as is done in the evidence of PW - 16 [Dattaram Shantaram Angre]. Thus, the evidence of PW - 17 [Mandar Bhupendra Godambe] was of no assistance to the Prosecution.

[V] The disclosure statement of Accused No.1 leading to show the place where he threw the clothes, diary and mobile hand set of Deceased

42. On this point, the Prosecution has examined PW - 5 [Amol Sukhdeo Dehade] as the panch witness. In his evidence, he deposed that on 20/07/2016, he was called by the Police at Shivoor Police Station. Three Accused were in the lockup. Accused No.1 [Durgaprasad Omprakash Mishra] stated that the clothes, mobile and diary of Deceased will have to be searched in Godavari river. The memorandum of his statement was recorded vide Exhibit - 94. Thereafter, all the three Accused,

Police Officers and panchas left the Police Station in the police vehicle towards Godavari river. At the instance of Accused No.1 [Durgaprasad Omprakash Mishra], the vehicle was stopped at one place. All the Accused, Police Officers and panchas alighted the Jeep and proceeded towards the river at the instance of Accused No.1 [Durgaprasad Omprakash Mishra]. However, they could not find anything from the said place. The panchnama to that effect was drawn vide Exhibit - 95.

43. The evidence of PW - 21 [Harsh Vishwanath Potdar] show that Accused No.1 [Durgaprasad Omprakash Mishra] made disclosure statement to show the clothes and articles of Deceased, which were thrown in the Godavari river. The memorandum at Exhibit - 94 was prepared. Thereafter, Accused No.1 led them to the bank of river Godavari, where he pointed out a place, which was searched with the help of swimmers, however, no article was found and panchnama at Exhibit - 95 to that effect was prepared.

44. It is clear from the above discussed evidence that nothing was discovered at the instance of Accused No.1 [Durgaprasad Omprakash Mishra] and therefore, the said evidence will not be relevant under Section 27 of the Evidence Act.

**[VI] Presence of the Accused at the Hotel of PW - 13
[Yogesh Dnyaneshwar Teke] at Vaijapur at 10.30
p.m. on 16/07/2016**

45. The evidence of PW - 13 [Yogesh Dnyaneshwar Teke] show that he was having the Hotel at Yevla Road, Vaijapur. In between 10.15 p.m. and 10.30 p.m. on 16/07/2016, five [5] persons had come to his Hotel in one four-wheeler. They

ordered the food and while eating, they shouted, therefore, he went near them. After having food, those persons went away. His further evidence show that his evidence that he heard the shouts from the said five [5] persons was an omission. The said omission is proved in the evidence of PW - 21 [Harsh Vishwanath Potdar], who recorded his statement. This is the material omission. There is nothing in his evidence to show that he had any reason to keep in mind the features of the said five [5] persons so as to identify them at later point of time. It is nowhere his case that he was the only one in his Hotel to serve the customers. His evidence also do not show that at that point of time, there were no other customers except those five [5] persons so as to register in his mind their features for identification purpose at later point of time.

46. His further evidence show that he identified Accused Nos.1 and 5 in the TIP and thereafter in the Court while deposing. His further evidence show that the TIP was conducted on 06/10/2016. From the evidence of PW - 15 [Deepali Shankar Khedekar], who was the Nayab Tahsildar at the relevant point of time, show that the TIP was conducted on 06/10/2016. The evidence of Investigating Officer show that the Accused were arrested by 19/07/2016. This shows that the TIP was conducted after eighty [80] days from the date of arrest. This delayed TIP further affects the identification of the Accused persons by PW - 13 [Yogesh Dnyaneshwar Teke], as the possibility of Accused being seen by the said witness after their arrest cannot be ruled out.

47. In view of the above discussion, the identification of the Accused by PW - 13 [Yogesh Dnyaneshwar Teke] is required to be seen with doubt and is kept out of consideration.

[VII] Seizure of Indica Car and motorcycle used in the crime

48. PW - 8 [Bhausahab Sahebrao Jagtap] was examined as the panch witness by the Prosecution on the point of seizure of four-wheeler and motorcycle on 20/07/2016. However, the said witness did not support the case of Prosecution. True it is that, PW - 21 [Harsh Vishwanath Potdar] deposed of seizure of four-wheeler from the house of one Amol Borade. Firstly, the said person - Amol Borade is not examined by the Prosecution. Secondly, the Prosecution failed to establish as to how the seizure of the said four-wheeler would be incriminating against the Appellants.

49. Further, the evidence of PW - 21 [Harsh Vishwanath Potdar] show that on 20/07/201, he seized one motorcycle from the house of Accused No.2 [acquitted by the learned Trial Court]. The panch witness i.e. PW - 9 [Manoj Bhausahab Kulhal] examined to prove the said seizure did not support the case of Prosecution. There is no evidence to connect the Appellants with the seizure of the said motorcycle. Thus, it cannot become an incriminating circumstance against the Appellants.

[VIII] Seizure of clothes of the Accused and Forensic Reports

50. The evidence of Investigating Officers i.e. PW - 19 [Dhananjay Ramrao Farate] and PW - 21 [Harsh Vishwanath

Potdar] show that during the course of investigation, the clothes of the Accused persons came to be seized under the panchnama at Exhibits - 85, 86 and 87. The evidence of PW - 21 [Harsh Vishwanath Potdar] show that the clothes of Accused were referred to the Forensic Science Laboratory on 26/09/2016. The Prosecution has brought on record the Chemical Analysis Report in respect of the articles / clothes seized from the Accused persons at Exhibits - 31, 32 and 267. The aforesaid CA reports show that the blood group from Exhibit No.3 - blood stained gauze piece having the name of Deceased could not be determined as the results were inconclusive. True it is that the blood group of the blood stains found on the handkerchief, which was tied on the head of Deceased, was found to be of 'B' Group, that by itself would not be sufficient to hold that the blood group of Deceased was 'B', as it cannot be said with all certainty that the blood found on the said handkerchief was only and only that of Deceased.

51. The above referred report show that the hair found in the car were stained with blood group of 'B' and rexine piece was having human blood. As the blood group of Deceased was inconclusive, the said result of analysis in the CA report will be of no assistance for the Prosecution that the said blood was that of Deceased and none other.

52. The evidence on record go to show that the blood stains of blood group 'B' was found on the clothes seized from Accused Nos.3 and 4. The said Accused are acquitted by the learned Trial Court. The CA report show that no blood was detected on the clothes of the Appellants i.e. Accused Nos.1 and 5. Thus, this circumstance in respect of seizure of the clothes from the

Appellants would be of no assistance to the Prosecution.

[XI] Motive for the Accused to commit murder of Nishikant

53. Scrutiny of the evidence on record show that there is no consistency on the point of motive. According to PW - 3 [Shashikant Prabhunarayan Pande], who was the brother of Deceased, Accused No.3 [acquitted Accused] owed Rs. 65000/- from them and he was not paying the same. Except his bare words, there is nothing to corroborate his said testimony that there were financial transactions between Deceased and acquitted Accused No.3 [Rasul Ayub Shaikh].

54. According to PW - 21 [Harsh Vishwanath Potdar], Investigating Officer, the motive behind the Crime was ransom. Admittedly, there is no iota of evidence that the Appellants demanded any ransom from the family members of Deceased. Thus, the said bare version of Investigating Officer will not be sufficient.

55. As discussed earlier, two gold rings came to be seized at the instance of Appellant / Accused No.5 - Samsheer Sardar Pathan pursuant to his disclosure statement. There is no evidence to show that the said gold rings were that of Deceased. The evidence of PW - 3 [Shashikant Prabhunarayan Pande], who was the brother of Deceased, nowhere show that the said gold rings were confronted to him for identification. Thus, the said seizure will not help the Prosecution to establish that the motive was to rob Deceased.

56. The conspectus of the above discussion is that the Prosecution has firmly established the following circumstances which are conclusive in nature, against the Appellants, who were the original Accused Nos.1 and 5.

[1] Deceased Nishikant was missing from the evening of 16/07/2016, and on 17/07/2016 he was found died homicidal death.

[2] On 16/07/2016 in the evening, Deceased Nishikant was lastly seen in the company of Accused No.1

[3] Disclosure statement of Accused No.5 leading to discovery and seizure of Pistol article T and live cartridges.

[4] Ballistic reports show that bullet found in the body of Deceased Nishikant was fired from Pistol article - T seized at the instance of Accused No.5.

Judgments cited by the learned Advocates for the Appellants and learned APP

i] Judgments cited by the learned Advocates for the Appellants :-

(a) In **Shailendra Rajdev Pasvan and Ors. Vs. State of Gujarat ; 2019 DGLS (SC) 1631**, the following observations are made in Paragraph No.14 :-

*“14. Another important aspect to be considered in a case resting on circumstantial evidence is the lapse of time between the point when the Accused and deceased were seen together and when the deceased is found dead. It ought to be so minimal so as to exclude the possibility of any intervening event involving the death at the hands of some other person. In the case of **Bodh Raj Alias Bodha v. State of Jammu and Kashmir, (2002) 8 SCC 45, Rambraksh v. State of Chhattisgarh, (2016) 12 SCC 251, Anjan Kumar Sharma v. State of Assam, (2017) (6) SCALE 556** following principle of law, in this regard, has been enunciated:*

The last seen theory comes into play where the time gap between the point of time when the Accused and 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 author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the Accused when there is a long gap and possibility of other persons coming in between exists. In the

absence of any other positive evidence to conclude that Accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.”

(b) In **Laxman Prasad @ Laxman Vs. The State of Madhya Pradesh of the Supreme Court of India, in Criminal Appeal No(S).821/2012**, it is observed in Paragraph Nos.3 and 4 as follows:

“3. We do not find such conclusion of the High Court to be strictly in accordance with law. In a case of circumstantial evidence, the chain has to be complete in all respects so as to indicate the guilt of the accused and also exclude any other theory of the crime. The law is well settled on the above point. Reference may be had to the following cases:

(i) Sharad Birdhichand Sarda v. State of Maharashtra¹;

(ii) Sailendra Rajdev Pasvan v. State of Gujarat Etc.²

4. Thus, if the High Court found one of the links to be missing and not proved in view of the settled law on the point, the conviction ought to have been interfered with.”

ii] Judgments cited by the learned APP :-

(a) **Rohtash Kumar Vs. State of Haryana; (2013) 14 SCC 434**, wherein, the following observations are made in respect of motive and last seen together theory:-

“Motive

28. The evidence regarding the existence of a motive which operates in the mind of the accused is very often very limited, and may not be within the reach of others. The motive driving the accused to commit an offence may be known only to him and to no other. In a case of circumstantial evidence, motive may be a very relevant factor. However, it is the perpetrator of the crime alone who is aware of the circumstances that prompted him to adopt a certain course of action, leading to the commission of the crime. Therefore, if the evidence on record suggests adequately, the existence of the necessary motive required to commit a crime, it may be conceived that the accused has in fact, committed the same.

Last seen together theory

32. In cases where the accused was last seen with the deceased victim (last seen together theory) just before the incident, it becomes the duty of the accused to explain the circumstances under which the death of the victim occurred.

33. In **Trimukh Maroti Kirkan v. State of Maharashtra**³⁰ this Court held as under:

“22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.”

34. Thus, the doctrine of “last seen together” shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.”

(b) State of Rajasthan Vs. Kashi Ram; (2006) 12 SCC 254, wherein, the following observations are made in Paragraph Nos.19, 23 and 24:-

“19. Before advertng to the decisions relied upon by the counsel for the State, we may observe that whether an inference ought to be drawn under Section 106 IPC is a question which must be determined by reference to proved. It is ultimately a matter of appreciation of evidence and, therefore, each case must rest on its own facts.

23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric 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 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. The principle has been succinctly stated in Naina Mohd., Re.⁵

24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.

(c) State of Rajasthan Vs. Thakur Singh; (2014) 12 SCC 211, wherein, following observations are made in Paragraph No.22:

“22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.”

57. Coming to the case in hand, as regards the proximity of time between the last seen together and death is concerned, the evidence of PW – 14 [Dr. Vikas Madan Rathod], who performed the postmortem show that on 26/09/2016, the Shivoor Police Station sought his opinion relating to the firearm and probable time of death of Nishikant Pande. He responded to the said communication vide Exhibit – 166 and opined that opinion of ballistic expert be taken in respect of query pertaining to the firearm and opined that death of Nishikant Pande might have caused within 36 to 40 hours before the postmortem examination. Non mentioning of the probable time of death in the postmortem would not lead to discrediting his evidence in view of the previous communications at Exhibit - 166. His evidence show that the postmortem was performed on 18/07/2016 between 11.15 a.m. to 01.05 p.m.

58. The evidence of PW – 21 [Harsh Vishwanath Potdar], the Assistant Superintendent of Police posted at Vaijapur at the

relevant time, show that he corroborate the above version of PW - 14 [Dr. Vikas Madan Rathod] in respect of queries / opinion issued vide Exhibit - 166. From this evidence available on record, the Prosecution has established that Nishikant Pande died homicidal death within 36 to 40 hours before the postmortem.

59. The evidence of PW - 3 [Shashikant Prabhunarayan Pande], as discussed above, show that in the CCTV footages Deceased was seen in the company of Appellant No.1 between 17.10 to 17.21 on 16/07/2016. It is further clear from his evidence that Appellant No.1 and Deceased boarded the car and the car went ahead. Further, the evidence of PW - 22 [Sachin Ashok Shete], CCTV In-charge, who viewed the said CCTV footages, though could not identify Appellant No.1 and Deceased, which he had no reason to identify, show that after the two persons boarded the car, the car proceeded further. From this evidence on record, it is clearly established by the Prosecution that Deceased and Appellant No.1 were together and both left in the four-wheeler from Shani-Shingnapur at 17.21.53 hrs. on 16/07/2016.

60. As seen from the evidence discussed while dealing with the circumstance of homicidal death, the dead body of Nishikant Pande was found in the said Saiprasad Dhaba / Hotel around 10.00 a.m on the very next day i.e. 17/07/2016. This can be seen from the cross-examination of PW - 1 [Ashok Eknath Jadhav], Police Patil, wherein, it has come that he received the phone call of his son at about 10.00 a.m. informing of dead body at the Dhaba / Hotel and thereafter, he and Police left for the said spot at about 11.00 a.m.

61. There is no evidence, even slightest, to show that after Deceased left with the Appellant No.1 as discussed above in the car, Deceased was seen in the company of any other person. The Appellant No.1 [Durgaprasad Omprakash Mishra] offered no explanation that he had parted company with the Deceased at any stage. He simply denied the incriminating circumstances put to him. This becomes additional incriminating circumstance against him.

62. As regards the conclusive circumstance established against the Appellant – Samsher Sardar Pathan i.e. Accused No.5, he denied the incriminating circumstances put to him.

63. As seen from the answers given by the Appellants to the incriminating circumstances put to them under Section 313 of Cr.PC show that except denying the Prosecution's case, no explanation is offered by them.

64. From the above discussed conclusive circumstances, we see no merit in the submission of the learned Advocate for the Appellants that on the basis of same evidence, co-accused have been acquitted.

65. In the cases based on circumstantial evidence, motive assumes importance. However, it is not always possible for the Prosecution to establish the motive. The motive is always in the mind of the Accused persons. In the light of settled legal position, failure to establish the Motive behind the Crime by itself will not be fatal for the Prosecution, if other circumstances are cogently established. The failure to prove the motive of the offence does not signify the non-existence of the Crime. Failure to establish the motive for the Appellants to commit the Crime

will not be fatal in the light of the conclusive nature of circumstances proved by the Prosecution against the Appellants. The proved circumstances unerringly connect the Appellants with the commission of the Crime, leaving no room for reasonable doubt. The proved circumstances are clear and unambiguous.

66. However, the evidence on record does not show the necessary ingredient for the offence punishable under Sections 120-B and 364 of IPC. There is also no evidence to show that the prior Sanction as mandated under Section 39 of the Arms Act was obtained for Prosecution under the provisions of Arms Act. Thus, the conviction recorded by the learned Trial Court with the aid of and for the offence punishable under Section 120-B and for the offence punishable under Section 364 of IPC and for the offence punishable under Section 3 r/w 25 of the Arms Act and sentence imposed in that regard would be unsustainable.

67. The proved circumstances discussed above are complete and consistent with the only conclusion that the Appellants have committed the offence punishable under Section 302 of IPC. The proved circumstances are completely inconsistent with the innocence, but consistent with the hypothesis that the Appellants have committed the murder of Deceased. The conclusive circumstances as discussed above clearly establish that the Appellants were *Participis Criminis*. Thus, the conviction of the Appellants is accordingly modified/alterd to one under Section 302 r/w 34 of IPC. Hence, the following order:

ORDER

- [i] The Criminal Appeals are partly allowed.
- [ii] The conviction of the Appellants for the offence punishable under Sections 364 and 120-B of IPC and for the offence punishable under Section 3 r/w 25 of the Arms Act, is quashed and set aside.
- [iii] The Appellants are acquitted for the offence punishable under Sections 364 and 120-B of IPC and for the offence punishable under Section 3 r/w 25 of the Arms Act.
- [iv] The conviction of the Appellants for the offence punishable under Section 302 of IPC is confirmed with the aid of Section 34 of IPC and sentence imposed on the Appellants by the learned Trial Court for life imprisonment with fine of Rs.3000/-, in default, to suffer rigorous imprisonment for six [6] months is maintained.

68. Criminal Appeals are accordingly disposed of.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)