



:: 1 ::

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.370 OF 2018

1. Parag s/o Machindra Pathare,
Age 24 years,
R/o Near Borawake College,
Ward No.1, Shrirampur,
Tq. Shrirampur, Dist. Ahmednagar

**(Appellant No.1 has filed separate Appeal
No.415/2019 as per order dt. 5/4/2019)**

2. Ajay s/o Dinkar More
Age 20 years,
R/o Prakashnagar, Near Thatte
Ground, Ward No.7, Shrirampur,
Tq. Shrirampur, Dist. Ahmednagar ... **APPELLANTS**
(Orig. Accused No.2 & 3)

VERSUS

1. The State of Maharashtra
(Copy to be served on
Public Prosecutor, High Court of
Bombay, Bench at Aurangabad)
2. Minakshi Gorakshnath Chandgude,
Age major,
R/o Chasnali, Tq. Kopergaon,
Dist. Ahmednagar ... **RESPONDENTS**

.....
Mr. Rajendra Deshmukh, Senior Counsel with
Mr. Devang Deshmukh with Mr. Vishal Chavan,
Ms K.M. Salve, Advocates for appellant
Mrs. S.N. Deshmukh, A.P.P. for respondent – State
Mr. R.R. Karpe, Advocate for respondent No.2.
.....

:: 2 ::

WITH

CRIMINAL APPEAL NO.348 OF 2018

Dhiraj s/o Shankar Shinde,
Age 23 years,
R/o Sanjay Nagar,
Near Water Tank, Shrirampur,
Tq. Shrirampur, Dist. Ahmednagar ... **APPELLANT**

VERSUS

1. The State of Maharashtra
through Police Inspector,
Police Station, Shrirampur
Dist. Ahmednagar
2. Minakshi Gorakshnath Chandgude,
Age major, Occ. Household,
R/o Chasnali, Tq. Kopargaon,
Dist. Ahmednagar ... **RESPONDENTS**

.....
Mr. G.K. Naik Thigale, Advocate for appellant
Mrs. S.N. Deshmukh, A.P.P. for respondent – State
Mr. R.R. Karpe, Advocate for respondent No.2.
.....

WITH

CRIMINAL APPEAL NO.415 OF 2019

Parag s/o Machindra Pathare,
Age 24 years, Occ. Student,
R/o Near Borawake College,
Ward No.1, Shrirampur,
Tq. Shrirampur, Dist. Ahmednagar ... **APPELLANT**
(Orig. Accused No.2)

VERSUS

1. The State of Maharashtra
Through Shrirampur City Police Station,
Tq. Shrirampur, Dist. Ahmednagar
(Copy to be served on
Public Prosecutor, High Court of
Bombay, Bench at Aurangabad)

2. Minakshi Gorakshnath Chandgude,
Age 42 years, Occ. Agri.
R/o Chasnali, Tq. Kopargaon,
Dist. Ahmednagar

... RESPONDENTS

.....
Mr. N.B. Narwade, Advocate for appellant
Mrs. S.N. Deshmukh, A.P.P. for respondent – State
Mr. R.R. Karpe, Advocate for respondent No.2.
.....

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

Date of reserving judgment : 8th July, 2024

Date of pronouncing judgment : 5th August, 2024

JUDGMENT (PER R.G. AVACHAT, J.) :

These three appeals are decided by this common judgment since challenge therein is to one and the same judgment and order of conviction and consequential sentence, dated 26/4/2018, passed by learned Additional Sessions Judge, Shrirampur, District Ahmednagar in Sessions Case, No.40/2015. The details of conviction and consequential sentence imposed against the appellants is given in a tabular form below :-

Sections	Sentence
302 r/w 34 IPC	Imprisonment for life with fine of Rs.5000/- each, in default R.I. for 6 months
364-A r/w 34 IPC	Imprisonment for life with fine of Rs.5000/- each, in default R.I. for 6 months
363 r/w 34 IPC	R.I. for one year with fine of Rs.1000/- each, in default R.I. for 1 month.
385 r/w 34 IPC	R.I. for 6 months with fine of Rs.500/- each, in default R.I. for 15 days
387 r/w 34 IPC	R.I. for 3 years with fine of Rs.2000/- each, in default R.I. for 1 month
120-B IPC	R.I. for 3 years with fine of Rs.2000/- each, in default R.I. for 1 month.
201 r/w 34 IPC	R.I. for 3 years with fine of Rs.3000/- each, in default R.I. for 3 months.
The substantive sentences have been directed to run concurrently.	

2. The facts giving rise to the present appeals are as follows :

Ganesh Chandgude (deceased) was a 12th Standard student of Science stream, in R.B.N.B. College, Shirampur. Smt. Minakshi (P.W.7) was his mother. Father of Ganesh had passed away in 2012. The family hailed from village Chasnali, Taluka Kopergaon, District Ahmednagar. Ganesh had two sisters, Tejaswini and Ruchira. Ruchira was married. Ganesh completed his 10th Standard education at

Kopargaon. He along with his sister Tejaswini thereafter started residing at the house of their maternal uncle, P.W.1 Sunil, at Matapur, Taluka Shrirampur.

3. Ganesh would shuttle between Matapur and Shrirampur for attending College. On 12/3/2015, he left the house, informing P.W.1 Sunil and other family members that he would return after 15 days. He had also informed that he would be staying in a room of his friend, Parag Pathare (appellant in Criminal Appeal No.415/2019). His (Ganesh) 12th Standard examination was underway. The last paper for the subject of Information Technology (I.T.) was on 25/3/2015. One Akash Adhav, friend of Ganesh informed P.W.1 Sunil on 13th March that Ganesh had asked him to inform him (Sunil) that he was going to Goa along with his friends. For next 2-3 days, P.W.1 Sunil tried to contact Ganesh on his cell phone. No contact could, however, be established.

4. It is also the case of the prosecution that, on the intervening night of 22 and 23 March 2015, a call was received on cell phone of Minakshi (P.W.7). The caller was unknown. The caller made a demand of Rs.1 Crore for release of Ganesh. He was speaking in Hindi. The caller told Minakshi

(P.W.7) that three others namely Rohan, Vishal and Pritesh were in their custody along with Ganesh. The caller also gave threats of dire consequences, if the matter was reported to police. A similar message too was received on the cell phone of Minakshi (P.W.7). Since Ganesh did not return post 25/3/2015, P.W.1 Sunil lodged First Information Report (Exh.17). It appears that, a crime vide C.R. No.I-72/2015 for offence punishable under Section 387 of the Indian Penal Code was registered at Shrirampur Police Station. Shri Vishal Vathore (P.W.19) was investigating the said crime.

5. A dead body of unknown person in half burnt condition with an injury on head was found under a bridge over Shivana river within the limits of Gangapur Police Station. The dead body was in decomposed condition. On the spot, inquest panchanama (Exh.60) and post mortem examination was conducted. The dead body was buried, but not before obtaining certain samples from the body for DNA analysis. F.I.R. (Exh.58) was lodged by Police Officer Ganesh Jamdar at Shrirampur Police Station, alleging therein murder of unknown person was committed for unknown reason. The cell phone of the deceased was under surveillance. It was realised during

the surveillance that the cell phone was possessed by Ajay More (appellant in Criminal Appeal No.370/2018). He was arrested. During his interrogation, involvement of the other appellants in commission of the crime was disclosed. The DNA report (Exh.232) (admitted by the defence in evidence before the Trial Court) indicates that Minakshi was biological mother of the deceased. As such, it was disclosed that the dead body found below the bridge over Shivana river was that of Ganesh. The papers of investigation made by Gangapur Police Station were transferred to Shrirampur Police Station.

6. On 9 September a news was flashed in the daily about the crime to have been cracked. It was disclosed during investigation that, the appellants kidnapped Ganesh for ransom. They took him to Hotel Rajyog and administered him liquor. Then they took him to the place whereat his dead body was found. He was further administered liquor. He became unconscious. The appellants then smashed his head with a small bolder and then set him on fire.

7. During the investigation, statements of persons acquainted with the facts and circumstances of the case were recorded. Cell phone of the deceased and that of his mother

were sent to Forensic Science Laboratory. The CDRs and SDRs of both the cell phones were obtained. It was revealed during investigation that, Kum. Punam (P.W.8), a cousin of Ganesh had seen the appellants in the company of Ganesh by little past 6.30 p.m. on 12/3/2015. A test identification parade was, therefore, conducted. She identified the appellants Ajay More and Dhiraj Shinde in the test identification parade. (Appellant Parag Pathare was known to her).

8. On completion of the investigation, charge sheet was filed. The Trial Court framed the Charge (Exh.9). The appellants pleaded not guilty. Their defence was of false implication.

9. The prosecution examined 26 witnesses and produced in evidence certain documents. On appreciation of the evidence produced in the case, the Trial Court convicted and consequently sentenced the appellants as stated above.

10. Heard. Learned Advocates for the appellants made submissions in one voice. According to them, the case was based on circumstantial evidence. It was argued before us that, the dead body that was found under the bridge was

not that of Ganesh. Crime scene panchanama was, therefore, adverted to, to indicate that it was a dead body of a person of the age group between 25-30 years, while Ganesh was just 18. According to learned Advocates, mere admission of a document for giving no objection to exhibit the same does not relieve the prosecution of its obligation to prove the contents of the document so admitted. According to them, P.W.8 Punam was a planted witness. She would run a Medical Store attached to a psychiatric hospital of Dr. Unde. There used to be indoor patients. Closing the medical store for the day by little past 6.15 p.m. would be highly unnatural conduct. According to them, she was planted as a witness to make out a case of last seen theory. Her statement under Section 161 of the Criminal Procedure Code was recorded 17 days after she had seen the deceased in the company of the appellants. It was highly unnatural that no F.I.R. was lodged at the earliest. A missing person's report lodged by P.W.1 Sunil was not placed before the Trial Court. Both the cell phones allegedly used by the deceased and his mother and the respective SIM Cards issued in the names of some third persons. There was a difference between IMEI Number of the seized phone and the cell phone that was sent to Forensic Science Laboratory.

11. The learned Advocates for the appellants would further submit that, the Trial Court passed the judgment mostly on the material which was inadmissible in evidence. It was the material in the nature of confession-cum-demo given as to the manner in which the crime was committed, given by the appellant to the police.

12. Learned Senior Advocate appearing for appellant Ajay More took us through the evidence of the prosecution witnesses. According to learned Senior Advocate, following points be considered while deciding the appeal. The points which the learned Senior Counsel proposes to address are reproduced below :-

- “(i) Complainant did not produce any document to prove whether Nokia Lumia 625 mobile phone belonged to the deceased Ganesh.
- (ii) Prosecution failed to bring on record that Nokia Lumia 625 was in any way possessed/ handled/ used by deceased with the mobile number 7741935404.
- (iii) The Prosecution failed to prove beyond reasonable

doubt regarding why IMEI No.911421052576430 appears for mobile No.7741935404 which is totally contrary to entire evidence collected by the investigation authorities.

- (iv) The IMEI number digit dispute is not settled beyond the reasonable doubt.
- (v) No evidence of deceased along with accused persons visiting Rajyog Restaurant & Bar.
- (vi) No evidence of deceased along with accused persons crossing any of toll plazas between Ahmednagar and Aurangabad.
- (vii) Nothing seized from any of spots or places which would implicate any of accused with the said crime.
- (viii) As per Prosecution story, one motorcycle/ vehicle was pointed out by PW-8 (Punam), but the investigation authorities seized 2 motorcycles from accused and yet prosecution could not provide exactly which vehicle was used in commission of crime.
- (ix) CDR/ SDR reports of accused are not placed on record to prove any link between deceased

Ganesh and accused.

- (x) No documentary evidence proving beyond reasonable doubt to connect any of accused with the deceased.
- (xi) Entire prosecution machinery set into motion only after news flashes in multiple newspapers on 09/09/2015.
- (xii) Even though unknown dead body was found, inspected, performed post mortem in the jurisdiction of Gangapur Police Station on 16/3/2015 no independent and impartial investigation was carried out by investigation authorities till September 2025.
- (xiii) As per prosecution story, on 12/3/2015, deceased and accused consumed liquor and later deceased was put to death, then the viscera report of the deceased ought to have brought different result.”

13. Learned Advocate Mr. G.K. Naik Thigle representing the appellant Dhiraj Shinde relied on the judgment of the Apex Court in case of **Alamelu & ors. Vs. State, represented by Inspector of Police (Criminal Appeal**

No.1053/2019), decided on 18/1/2011 to submit that, mere admission of a document or marking it Exhibit does not dispense with the party relying on the same to prove probative value of the contents of the said document. This submission was advanced by the learned Advocate, to contend that, the remark “Admitted” would be of no avail for the prosecution. Such remark appears on the document namely F.I.R. (Exh.58), crime scene panchanama (Exh.59), DNA report (Exh.232), inquest panchanama (Exh.60) and the panchanama relating to burial of the dead body (Exh.61). According to the learned Advocate, the prosecution failed to prove the body that was found under the bridge was that of Ganesh. According to the learned Advocate, following were the vital aspects missed out from the case, which are reproduced below :-

- “(1) Age of the dead body,
- (2) Exchange of documents from police stations,
- (3) CCTV footage at Toll Plaza,
- (4) Mere admitting Exh.59 & 60 would not amount to admission of its contents,
- (5) Non examination of doctor, who performed P.M.,
- (6) Other panch witness is fatal,

- (7) the person who collected DNA samples i.e. doctor is not examined,
- (8) Where is the report of first P.M. conducted on the spot,
- (9) How second P.M. was conducted in mortuary if corpus was in decomposed condition.”

14. According to the learned Advocate, IMEI Number of cell phone seized and the one sent for analysis were different. The prosecution evidence is silent so far as regards explaining to whom the cell phone Number 9763899505 belonged. For example, he referred to the evidence of P.W.22 Nitin Pagar, who testified that, all the cell phones of the appellant were found to have been switched off under same mobile tower. He, however, admitted in his cross-examination that, there was no such evidence filed along with the charge sheet. The learned Advocate placed on record his written notes of submissions to ultimately urge for allowing the appeal.

15. Learned Advocate for appellant Parag Pathare took us through the evidence of each and every prosecution witness to submit that, the chain of circumstances to bring

home the charge has not been established. The owner of the room wherein appellant Parag would reside, took names of 4 persons namely Yuvraj Kale, Mahesh Mane, Abhijit Shete and Vruddheshwar as friends of Parag. According to him, the Executive Magistrate did not follow the mandatory provision as regards holding of test identification parade, given in Criminal Manual. According to learned Advocate, there is nothing to observe what was the base to come to the conclusion to publish a news item and as such, investigation which was started thereafter nearly about six months period was creating suspicion. Appellant Parag's role was not suspected in disappearance of the deceased immediately. Mere recovery of a motorbike pursuant to a disclosure statement under Section 27 of the Evidence Act at Parag's instance would be insignificant. Panch witness P.W.5 Subhash stated that, Parag did not disclose the motorbike number vide his memorandum statement was recorded. The witness was even unable to give details of the Society wherefrom the motorbike was seized. No explanation was forthcoming as to why the F.I.R. was lodged very late. According to learned Advocate, when the message allegedly received by the mother of deceased Ganesh contained three other names, such as Rohan, Vishal and

Pratesh, there was no further evidence about three others named in the message. According to learned Advocate, the appellant, therefore, deserved to be acquitted. He, therefore, urged for allowing the appeal.

16. The learned A.P.P. would, on the other hand, place on record his written notes of arguments. He referred and relied on the material evidence of each and every prosecution witness. We would be referring to the same a little later. He would further submit that, the C.A. report relating to viscera is silent about finding of alcohol. According to him, there ought to have been a certain quantity of liquor to have been consumed then only the same would have been reflected in the C.A. report. He would further submit that, the DNA report has been admitted by the defence. Since seizure of clothes of the appellants was made after a lapse of considerable time, it was just impossible to find blood stains on their clothes. According to the learned A.P.P., the appellants did not give any explanation as to their whereabouts during the period 12/3/2015 to 16/3/2015. They were identified in the test identification parade. Pursuant to their disclosure statement, very many things have been discovered. Independent

witnesses were supporting the prosecution case. According to learned A.P.P., the appellants have failed to make out a case for interference with the impugned judgment and order of conviction.

17. Learned Advocate Mr. Rahul Karpe representing the mother of deceased made oral submissions and placed on record bullet points of his arguments. He referred to the chronology of events leading to the incident. According to him, deceased Ganesh left the house by 9.00 in the morning on 12/3/2015. By 6.30 p.m. on the same day, he was seen in the company of the appellants by P.W.8 Punam. On the very day by 10.22 p.m., P.W.7 Minakshi (mother of the deceased) made a phone call to deceased Ganesh, who in turn informed her to have been with the appellant Parag Pathare. According to him, the family members were waiting for arrival of Ganesh since he was to appear for paper of I.T. Subject on 25/3/2015. Since he did not appear on the given day, the F.I.R. was immediately lodged by his maternal uncle P.W.1 Sunil. Learned Advocate has referred to the evidence of each and every witness. The same finds place in his written notes of arguments. According to him, the cell phone of the deceased

was recovered. It was under surveillance by officers of Local Crime Branch (LCB), Ahmednagar. Learned Advocate made some additional submissions as follows :

“1. As far as cell phone having SIM No.7741935404, it has been contended emphatically by the accused in present appeal that, the same does not belong to ‘D’ Ganesh.

Ans : The same SIM Number belongs to one Ashok Shinde (since this SIM was on this name) since 25/5/2013 till the disclosure of present offence.

Even this aspect has been minutely appreciated in the light of CDR information also by the learned Additional Sessions Judge, Shrirampur, particularly para No.50.

In short, though the said SIM having No.7741935404 belongs to the concerned Ashok Shinde being owner, but the same was being used/ possessing by ‘D’ Ganesh and this aspect has been corroborated in the teeth of documentary as well as oral evidence i.e. P.W.23 and P.W.26. In addition to this, it has also been observed in this very para No.50 as referred supra that, Exh.111 and Exh.112 CDR information indicate exchange of phone calls and SMS in between 9527425132 (belongs to mother) and

7741935404 possessing by 'D' Ganesh.

- II. As far as, emphasis has also been given with regards to Mobile No.9763899505, with this regard detailed analysis/ scrutiny has been done/ made by the learned Additional Sessions Judge, Shrirampur about this and this aspect can be crystalized from para No.55 onwards as well as para No.60 of the impugned order of conviction, wherein in this paragraph it has been observed that, during disputed period in between Mobile No.9763899505 and 9527425132, it also reveals that, there are several calls also have been made to another number and therefore in absence of contrary this isolated fact about this number i.e. Mobile No.9763899505 is not sufficient to disbelieve the case of prosecution.”

The learned Advocate ultimately urged for dismissal of the appeals.

18. Let us, now, advert to the evidence on record and appreciate the same.

P.W.1 Sunil was maternal uncle of Ganesh (deceased). P.W.6 Jyoti is wife of P.W.1 Sunil. They are residents of village Matapur, Tq. Shrirampur, Dist. Ahmednagar. It is in his evidence that since the father of

Ganesh (deceased) passed away in 2012, Ganesh, after completing his 10th standard education at Kopargaon, started residing with them at Matapur, for his further education. His sister Tejaswini was also residing along with them for the very purpose. Ganesh was a 12th standard student of Science faculty in R.B.N.B. College, at Shrirampur, in the year 2015. He would shuttle between Matapur and Shrirampur, for attending the college and classes. It is further in his evidence that on 12.03.2015, Ganesh left the house carrying a sack with him. He informed at home that he was going to stay at the room of his friend, Parag Pathare (appellant) for 15 days. It is further in his evidence that on the following day, i.e. on 13th March, Adesh Adhav, friend of Ganesh, told them to have been asked by Ganesh to tell him (Sunil) that he was going to Goa along with his friends. The evidence of P.W.1 Sunil further indicates that when he tried to contact Ganesh on his cellphone for 2-3 days, he could not establish contact. His evidence further indicates that Minakshi (mother of deceased Ganesh) had come to his residence. It was on the intervening night of 22 and 23 March. Minakshi received a call of an unknown person on her cellphone. The caller was speaking in Hindi. He made demand of Rs.1 Crore for release of Ganesh.

The caller told that Rohan, Vishal, Ganesh and Pratesh were in their custody. He asked them to arrange for money by 25 March. The caller even threatened her of dire consequences, if she tried to approach police or goes public. P.W.1 Sunil's evidence further indicates that on the same night, similar SMS was received on Minakshi's cellphone. According to him, on 25 March, there was paper (examination) of Ganesh for subject – I.T. He was to appear for the said examination. All of them were hopeful that Ganesh would return after appearing for the paper of I.T. subject. Since Ganesh did not return, he lodged the FIR (Exh.17) with Shrirampur City Police Station. It was alleged therein that some unknown person/s kidnapped Ganesh for ransom. A crime, therefore, came to be registered vide Crime No.72 of 2015 with Shrirampur Police Station for the offences punishable under Sections 363, 385, 387 of Indian Penal Code.

19. It is further in his evidence that on 09.09.2015, news was flashed in the daily. He learnt on reading of the news that the appellants had kidnapped Ganesh. They took him under a bridge over Shivana river in Taluka Gangapur and killed him with hitting his head with stone. A partially-burnt

body was found under the bridge over Shivana river. He along with his sister – Minakshi and wife Jyoti, therefore, went to the police station. They identified the clothes of Ganesh.

20. It is in the cross-examination of PW 1-Sunil that he did not knew any of the friends of Ganesh, except Adesh Adhav. According to him, Ganesh used to speak of Parag Pathare (appellant). He was, however, quick enough to respond to the question that he was so telling for the first time. So has not been stated by him in his F.I.R. (Exh.17). It is further in his evidence that Ganesh had left the house with his bag for college along with Adesh Adhav. It is further in his evidence that it was he, who would spend for education and maintenance of Ganesh and his sister – Tejaswini, since their father had passed away. His evidence further disclosed that before 22.03.2015, he had given an application to the police, informing Ganesh to have gone to Goa and if he would not return for his paper of I.T. subject, he would come and lodge a report. His evidence further disclosed that he has lodged a missing person's report with the concerned police station.

21. P.W.7 Minakshi, mother of Ganesh, testified more or less consistent with the evidence of P.W.1 Sunil and his wife

Jyoti. It is in her evidence that her husband passed away in 2012 and therefore, Ganesh and her daughter Tejaswini would reside at the house of her brother – Sunil (P.W.1) for further education. It is further in her evidence that on 12.03.2015, she talked to Tejaswini on phone. She learnt from her Ganesh to have left the house for 15 days to stay with Parag Pathare. Since Tejaswini has not been examined, this piece of evidence is hearsay. According to her, she, therefore, contacted Ganesh on his cellphone. He (Ganesh) informed to have been in the company of Parag Pathare. He further informed that he was at Parag's room. He informed her that he would be back on Sunday. A tiffin was sent for Ganesh on the following day with other boys. He, however, did not come to collect the same. So was informed to her by Tejaswini (hearsay). She, therefore, made phone call to Ganesh. She could not establish contact.

22. It is further in her evidence that on 22 March, she received a phone call from the cellphone of Ganesh. According to her, the cellphone number of Ganesh was 7741935404, while her cellphone number was 9527425132. She received a call of an unknown person on her cellphone. The caller was speaking in Hindi. He was making demand of

Rs.One Crore for release of Ganesh. The caller told that Rohan, Vishal, Ganesh and Pratesh were in their custody. He asked them to arrange for money by 25 March. The caller even threatened her of dire consequences, if she tried to approach police or make the incident public. According to her, similar SMS was received on her cellphone from the cellphone of Ganesh. It is further in her evidence that on 24 March, she received missed-call. According to her, no complaint with the police was lodged as they were hopeful of return of Ganesh immediately after his paper of I.T. subject was over on 25 March. Even, Ganesh did not return thereafter. Her brother Sunil (PW 1) lodged missing-person's report. It is further in her evidence that she again received missed-call and then, message from the cellphone of Ganesh. She was informed through the message that he (Ganesh) was to pay loan of his friends. He was, therefore, in need of money of Rs.9 Lakhs. He also made demand of Rs.35 Lakhs for opening a mobile shop at Kopargaon. It is further in her evidence that on 6 April, she was at her own residence. It was about 04.00 p.m., she received a threatening call on her cellphone. The caller was unknown person, speaking in Hindi. The caller made demand of Rs.1 Crore. She asked the caller to allow her to talk with

Ganesh; but he (caller) told her that Ganesh was not around. She even informed the caller that she was ready with the money to be paid to him. The caller, thereafter, told her that he would inform her after seven days. The call was then discontinued.

23. It is further in her evidence that since her mother was not keeping well, she came to Matapur on 09.09.2015. People had gathered at the house of her brother, PW 1 – Sunil. She learnt that a news was flashed in the daily disclosing Ganesh to have been killed by Parag Pathare, Ajay More and Dhiraj Shinde (appellants).

24. She was subjected to a searching cross-examination. She could not tell to whom cellphone No.9763899505 belonged. She did not bring her cellphone with her to the Court. She even claimed ignorance about the person by name, Ashok Lavande. She then clarified to have heard a person of the same name. According to her, he, i.e. Ashok Lavande was brother of husband of her sister. He was no more. She could not tell his cellphone number. The defence wanted to suggest that the cellphone number No.9763899505 (referred to above), belonged to Ashok

Lavande. She denied that message was received from said cellphone on her cellphone on 22 March. It is further in her evidence that she knew Adesh Adhav. She did not know Rushi Wable, Ajay Tagad and Parmi. She knew Kishor Daund. Adesh and Kishor were good friends of her son Ganesh. She, however, could not tell that there were number of phone calls from these friends on the cell phone of Ganesh on 12th March. According to her, only from Tejaswini she learnt that Ganesh did not collect his tiffin. She denied that behaviour of Ganesh was not good and therefore, after his 10th standard education, he was kept in hostel. She denied Ganesh was rusticated from the hostel and therefore, was staying with Sunil (P.W.1).

25. P.W.8 Punam was cousin of Ganesh (daughter of maternal aunt). She would run a medical shop attached to Dr. Unde's Psychiatric Hospital, at Shrirampur. It is in her evidence that on 12.03.2015, she closed the shop and was on her way home by 06.30 p.m. She was riding Scooty. According to her, near Morge Hospital, she saw Parag along with Ganesh and two other boys. Parag had black colour Activa Scooter with him, while those two unknown boys had red colour motorbike. She even inquired with Ganesh, as to

what he was doing there. Ganesh told her to have been in the accompanying Parag for purchasing of cellphone for him (Parag).

Her evidence indicates that she had shared the fact of having seen Ganesh in the company of those three (appellants), to her parents. It is further in her evidence that on the next day, Ganesh did not come to Matapur and therefore, his maternal uncle (P.W.1 Sunil) took search for him. Her father too made search for Ganesh. He (Ganesh) was, however, not found anywhere. According to her, police recorded her statement on 27.03.2015. She went to Tahsil Office, Shrirampur, for identification parade on 30.10.2015. She identified the appellants – Dhiraj Shinde and Ajay More in the test identification parade.

26. During her cross-examination, it was brought on record that the main gate of Unde Hospital opens towards East. There is water canal at one side and IDBI Bank on the other side of the hospital. Said water canal is onto southern side, while IDBI Bank is on northern. There is first turn to the road after crossing canal, on south side of Unde Hospital. On the given day, i.e. 12 March, she proceeded towards southern

side. There was no other medical shop attached to said hospital, except her's. She could not state how many persons were indoor patients in the hospital on the given day. It was her practice to inquire as to number of patients admitted to the hospital and whether they were in need of medicine in the night hours. No such inquiry did she make on the given day. On her Shop-Act licence, the shop timing is from 10.00 a.m. to 08.00 p.m. Dr. Unde would give service round-the-clock at his hospital. She could not describe the clothes on the person of Parag on the given day. Same is the case about other two in the company of Ganesh. It is further in her evidence that on 09.09.2015, a news had flashed in the daily, that Ganesh was killed by the appellants. She did feel to visit the police station to see the culprits. She could not tell age group of the persons made to stand in the row as dummies in the test identification parade. She further testified that there was Morge Hospital while going towards southern side from Unde Hospital. She denied to have deposed falsely since Ganesh was her cousin. Learned A.P.P. submitted that, there is no denial about the evidence of P.W.8 that she closed the medical shop by 6.00 p.m. for the day.

27. P.W.19 Vishal Vathore was Police Inspector, attached to Shrirampur Police Station. He was entrusted with the investigation of the crime (C.R. No.72 of 2015), registered pursuant to the FIR (Exh.17) lodged by P.W.1 Sunil. It is in his evidence that he paid visit to the premises of one Tushar Parkhe (P.W.18), in one of the rooms of his premises, appellant Parag Pathare would reside on rent. He drew crime-scene panchnama (Exh.19) of the said room since, according to him, Ganesh was kidnapped from the very room. P.W.18 Tushar Parkhe was the landlord of the said premises. His evidence indicates that he had let out one of his rooms to Parag Pathare. His friends used to visit the same. According to him, Yuvraj Kale, Mahesh Mane, Abhijit Shete and Vruddheshwar were friends of Parag Pathare (appellant). He informed police these four names. His police statement is silent to state that relations of Ganesh (deceased) had visited the premises to find whether Ganesh was there. Since nothing incriminating was found during the panchnama of the said room, we do not propose to refer to the evidence of the panch witness (PW 2 – Santosh) in that regard.

Gangapur Police Station :-

28. Exh.58 is the FIR lodged by one Ganesh Jagannath Jamdar, Assistant Police Inspector, Gangapur Police Station. He was not examined as witness. The defence, however, admitted the said document in evidence. Whether reading of the FIR in evidence on admission by the defence, would be a question of law. The defence has, however, admitted further documents in the nature of inquest panchnama (Exh.60). Same indicates that dead body of a person in partially burnt condition with injuries on its face was found below the bridge of Shivana river. The dead body was noticed on 16.03.2015 by evening. Since the darkness had descended by that time, the inquest was drawn on the following day. Since the dead body was in highly decomposed condition, the post mortem (p.m.) examination was stated to have been done on the spot. The post mortem report has not been produced in evidence. Considering the nature of the dead body, some samples therefrom were obtained for DNA profiling. The dead body was buried by the side whereat it was found. The dead body burial panchnama was drawn vide Exh.62. Learned counsel representing the appellants before

the Trial Court, gave endorsement thereon to the effect “may be admitted in evidence”.

29. PW 20 – Ashok had been to F.S.L., Kalina, Mumbai on 14.09.2015 and brought the DNA kit.

30. The evidence indicates that the blood samples of P.W. 7 Minakshi were obtained for DNA profiling. DNA report (Exh.232) was admitted by the defence in evidence. The report proves that P.W.7 Minakshi was biological mother of the deceased Ganesh. As such, although there was some variance as regards age of the dead body recorded in the inquest on its appearance and the actual age of the deceased Ganesh, the DNA report concluded that it was the dead body of Ganesh and none else.

31. P.W.24 Sanjaykumar, Police Sub-Inspector, was the official attached to the Local Crime Branch (LCB), Ahmednagar. It is in his evidence that the cellphone number 7741935404 was under surveillance. He obtained CDR/SDR of the said cellphone to know who was making use thereof. It is in his evidence that said mobile was registered in the name of Bhagirathi Thorat (PW 9). Rest of his evidence is hearsay

and therefore, not adverted to.

During his cross-examination, it has been brought on record that the IMEI number of the seized cellphone was – 356689056494320/1. He had given report as to what was transpired during the surveillance made by him. Said report is at Exh.127. According to him, it was a cellphone of Nokia make. Its IMEI number was 356689056494320/1, wherein SIM Card of number 9730845978 of Airtel Cellular Company, was being used.

32. Pursuant to the surveillance report, the investigating officials first reached out to P.W.9 Bhagirathibai. It is in her evidence that Sadhana Mande (P.W.10) was daughter of his brother. A SIM card (9730845978) was purchased in her name. She had given said SIM Card to Sadhana Mande for her use. P.W.10 Sadhana testified that said sim-card was given to her by her aunt (PW 9- Bhagirathibai) for her use. According to her, Sagar Pawar (P.W.11) was her friend. She had, therefore, given said sim-card to him. It is in her cross-examination that the mobile phone with SIM Card No.9730784866 was being used by her. She would talk to Sagar Pawar almost everyday.

33. P.W.11 Sagar Pawar's evidence indicates that he had received a sim-card of number 9730845978 from his friend Sadhana (PW 10). He was doing Diploma in Engineering (Polytechnic), in the year 2015. It is further in his evidence that about 5-6 days prior to the incident, he came to know of one Yadav in the shop of I-con Computer. He was Raju Ramjit Yadav. He (Sagar) purchased Nokia-Lumia 625 mobile handset from him for Rs.5,000/-. He identified the handset shown to him before the Court. According to him, he was using said handset for SIM Card No. 9730845978.

34. P.W.12 Raju Yadav testified that he had purchased the very Nokia - Lumia 625 handset for Rs.3,000/- from one Shubham Lokhande and sold it to Sagar (PW 11) for Rs.5,000/-.

35. PW 13 – Shubham Lokhande was another witness in the said chain. It is in his evidence that he would run a footwear shop at Main Road, Shrirampur. He knew Ajay More (appellant). Ajay had given him a mobile handset of Nokia make. He had purchased it from Ajay for Rs.2,500/- and sold it to Raju (P.W.12) for Rs.3,000/-. According to him, it was in

working condition.

Shubham was subjected to a searching cross-examination. It is in his evidence that he was arrested in the very crime. He was in police custody for 14-15 days. The record indicates that he admitted that he was in jail for not less than three months. His arrest was effected after having been interrogated him. Prior to his arrest, he was unaware of the crime. He stated to have had met Ajay More only once relating to said mobile handset. He, however, denied to have had not bought the cellphone from Ajay.

36. It is P.W.14 Sonyabapu, who had carried DNA samples with DVR machine and adapter cable, seized in the crime, and delivered to F.S.L., Kalina, Mumbai. He placed on record the office-copy of letters (Exh.52 to Exh.54).

37. P.W.16 Laxman was a Police Patil of village Dhoregaon, Taluka Gangapur. His evidence is to the effect that, one dead body was found below the bridge over Shivana river. In a capacity of Police Patil, he paid visit to the spot. The person lying there was clad in a Jeans pant. Its one leg was burnt. A panchanama was drawn.

38. P.W.21 Vijaykumar was Police Station Incharge of Gangapur Police Station. It is in his evidence that, pursuant to the information received, he went to a place under a bridge over Shivana river. Dead body of a male was found there. The body was partially burnt. A stone was lying in the nearby of the dead body. The stone had blood stains. There was one oil can as well. As it was late in the evening and no electricity was there, he deputed Head Constable Avadhut and two Home Guards to guard the crime scene.

It is further in his evidence that, he went to the crime scene on the following day with two panchas and drew inquest panchanama (Exh.60). He seized certain articles from the crime scene. Since the dead body was in decomposed condition, the Medical Officer did post mortem examination on the spot. Since it was a dead body of an unknown person, the same was buried in the nearby in the presence of two panchas. He referred to the panchanama (Exh.62) in that regard. It is further in his evidence that, he sent the articles for DNA profiling through a Police Constable to Forensic Science Laboratory, Kalina, Mumbai. It is further in his evidence that, he sent other seized articles to the office of Forensic Science

Laboratory, Aurangabad for chemical analysis. He referred to his communications in that regard vide Exhs.80 to 83. It is further in his evidence that, he learnt that a missing person's report was registered at Shrirampur Police Station. He, therefore, contacted Police Station Officer of Shrirampur Police Station. A.P.I. Nitin Pagar (P.W.22) was investigating the said case.

39. During his cross-examination, it has come on record that, there were two Toll Plazas on the way from Shrirampur to the place whereat the dead body was found. He has made communication with the Heads of those two Toll Plazas for obtaining CCTV footage. According to him, the CCTV footage could not be collected since the same got deleted automatically after a period of three months.

40. The inquest panchanmama (Exh.60) indicates that, there was a wrist watch on the wrist of the deceased. P.W.22 Nitin was the A.P.I. serving with Shrirampur Police Station. It is in his evidence that, appellant Parag Pathare and Ajay More were arrested when he took over the investigation on 8/9/2015. He interrogated both of them. They confessed to the commission of the crime. What has been stated by the

appellants Parag Pathare and Ajay More to P.W.22 Nitin being inadmissible in evidence in view of Section 25 of the Evidence Act, the same is not referred to. His evidence indicates that, these two appellants shown various places whereat they had taken the deceased and the manner Ganesh was killed. It is further in his evidence that, he found that all the cell phones of the appellants were switched off under one mobile tower. He, however, in cross-examination, admitted to have not placed on record any evidence in that regard. His evidence also indicates that, he did not seize cell phones of the appellants. It was he who had sent the two cell phones to Forensic Science Laboratory and even obtained CDRs/ SDRs. According to him, IMEI Number of the cell phone of accused as was stated by the complainant was 911421052576430. The said IMEI Number was of the cell phone of the deceased. It was Nokia Lumia mobile. His attention was adverted to Exh.101 (CDR). With reference thereto he testified whether the message was received from Mobile Number 7741935404. According to him, a crime vide C.R. No.48/2014 was registered in Gangapur Police Station for offence punishable under Sections 302 and 201 of the Indian Penal Code.

41. P.W.3 to P.W.5 were the witnesses to the various panchanamas. Appellant Ajay More was arrested on 25/8/2015. Appellant Parag Pathare and Dhiraj Shinde were arrested on 1/9/2015 and 8/9/2015 respectively. Most of the evidence of these witnesses is inadmissible in evidence, being hit in view of Section 25 of the Evidence Act.

42. P.W.2 Santosh was witness first to a spot panchanama (Exh.19), dated 26/3/2015. The same has already been referred to above. He is then witness to the panchanama of a seizure of a cell phone from Sagar Pawar. The seizure is vide panchanama Exh.22. In the cross-examination, he admitted that, except panchanama Exhs.19 and 20, he did not remember any other thing. The cell phone seizure panchanama (Exh.20) contain IMEI Number of the seized cell phone as 356689056494321/0. It was Nokia make. Its colour was black. The cell phone contained SIM Card of the Number 9730845978. P.W.3 Sandip was a witness to the so called disclosure statement made by appellant Ajay. The said statement was in the nature of a confession to the police. The statement was to the effect indicating in what manner he and the other appellants kidnapped Ganesh, took him to hotel,

consumed alcohol, then took him to a place under a bridge, again administered him liquor and after having found him to be unconscious, committed his murder. P.W.3 Sandip is the witness to various panchanamas, such as Exhs.22 to 29. Somewhat relevant evidence in this case would be a disclosure statement by appellant Parag, pursuant to which a red colour motorbike came to be seized under panchanama (Exh.26). The panchanama (Exh.20) pertains to seizure of CPU, AC/DC Adapter of a CCTV Unit of Hotel Rajyog, under panchanama (Exh.27). Panchanama (Exh.29) pertains to the identification of clothes of the deceased by his mother at the Police Station. While panchanama of seizure of the said clothes is at Exh.28. Those clothes were produced by police officer Shri Sonawane in sealed condition. The seal was opened and the clothes were shown.

43. P.W.4 Ramesh is a witness to the seizure of cell phone (SIM Number 9527425132) of Smt. Minakshi (mother of the deceased Ganesh). It was seized under panchanama Exh.35.

44. P.W.5 Subhash was a witness to a statement made by appellant Parag Pathare that he would show the place

whereat he had broken and thrown the SIM Card (Exh.39). The statement and pointing out the place and memorandum thereof is at Exhs.37 and 38. The same being inadmissible in evidence, is not referred to in extenso. He is also a witness to a disclosure statement made by appellant Parag Pathare, pursuant to which a black colour Activa (two-wheeler) came to be seized from a parking slot of one of the Housing Societies at Sasane Nagar, nearby Pune. A panchanama to that effect is at Exh.38.

45. P.W.17 Sachin Mhaske was a Naib Tahsildar-cum-Executive Magistrate, who held the test identification parade on 3/12/2015. It is in his evidence that, witness Punam (P.W.8) identified appellant Ajay More and Dhiraj Shinde in test identification parade held by him in jail. According to him, two separate test identification parades were held. Services of 6 persons were availed as Dummies. The Dummies were different for both the test identification parades. The memorandum of test identification parade of appellant Dhiraj Shinde, is at Exhs.65 and 67 while that of appellant Ajay More is at Exhs.68 and 69. According to him, the police produced 6 persons as Dummies. The Dummies were of the same age

and height of that of the persons to be identified. While the memorandum of test identification parade indicates that the police officers were not asked to be present at the place of test identification parade.

46. P.W.23 Sachin Shinde was a Nodal Officer of Idea Cellular Company. He placed on record CDR and SDR for the period 12/3/2015 to 7/4/2015 of the cell phone numbers 7741935404 and 9527425132. He placed on record the same along with 65-B Certificate (Exh.110). It is in his evidence that, on 12/3/2015, there was a call from cell phone Number 9527425132 on the cell phone Number 7741935404. According to him, there were 5 outgoing calls on 13/3/2015 from cell phone Number 9527425132. Those calls were made to cell phone Number 7741935404. He testified that, on 12/3/2015, there is call from Mobile No.9527425132 to 7741935404 so also five outgoing calls on 13/3/2015 from Mobile No.9527425132 to 7741935404. On 18/3/2015, there is one SMS from said Mobile to 7741935404 and one incoming call on 22/3/2015 from Mobile No.7741935404 to 9527425132. Further, three SMS were received on the same mobile. Further, on 26/3/2015, message was received on

Mobile No.7741935404 from Mobile Number 9527425132. Further, on 29/3/2015, total eight messages have been received on Mobile Number 9527425132 from Mobile No.7741935404 whereas three incoming calls were received on 6/4/2015 on Mobile Number 9527425132 from Mobile No.7741935404.

During his cross-examination, he testified that, SIM Card of Number 7741935404 was issued in the name of one Ashok Shinde. As per record, he was resident of Bhalgaon, Taluka Vaijapur, District Aurangabad. He had applied for obtaining SIM Card on 25/5/2013. He tendered in evidence application submitted by person named Ashok Shinde along with document in proof of his identity. Those were at Exhs.114 and 114-A. According to him, cell phone Number 9527425132 also stood in the name of some other person and not Minakshi. According to him, IMEI Number of cell phone Number 7741935404 was 911421052576430. According to him, during the period from 12/3/2015 to 7/4/2015, cell phones of two different IMEI Numbers were used for making calls from cell phone Number 7741935404. The other IMEI Number was 356689056494620. He was shown the cell phone of Nokia

Make. Its model number was 625. Its IMEI Number was 356689056494321. The cell phone was of black colour. According to him, all the three IMEI Numbers were different. It is further in his evidence that, there were calls between cell phone numbers 9527425132 and 9763899505 vide Exh.112. He could not state the tower location of those phone numbers when the calls between these two cell phone numbers took place.

47. P.W.25 Shivaji Palde was the Police Officer attached to Shrirampur City Police Station during relevant time. It was he who filed report under Section 169 of the Cr.P.C. against then accused – Shubham Lokhande (P.W.13).

48. P.W.26 Arjun Gaikwad was a Scientific Officer serving with Regional Forensic Science Laboratory, Kalina, Mumbai. The report (Exh.101) was prepared by him. According to him, it was pertaining to IMEI Number 356689056494321. He too tendered in evidence Section 65-B Certificate. It is in his evidence that, in Mobile phone on Contact No.9763899505 one message was sent on 23/3/2015 at 14:04:12 o'clock. The said message was, "*Rohan, Vishal, Ganesh, Pratesh, Charo hamare pass hai. Agar aapko aapke*

ladke ki khairiyat chahte ho to ek crore ready rakho 25 March tak. Aap ko wapas se ek call aayega. Police complaint bilkul nahi, koi hoshiyari nahi warna un charo ki lash aapko milegi aur wah sab Allah ko pyare ho jayege. Hamari najar aap par rahegi ye 4 din. Gud luck". It is further in his evidence that, if the said CD is played on then messages, contacts and call logs will be seen.

49. It is further in his evidence that, from the server of the DVD, nothing could be retrieved like CCTV footage etc. According to him, in his report (Exh.101), there is no mention of Mobile Number 7741935404. He was candid enough to state that, his report is silent regarding what procedure he adopted for giving his opinion and finding the SMS sent from one cell phone to the other.

50. The aforestated is the entire evidence in the case. Before turning to the appreciation of the aforesaid evidence, it needs no mention that, the case is based on circumstantial evidence and mainly on the last seen theory and cell phone record.

51. In case of in case of **Sharad Birdichand Sarda Vs.**

State of Maharashtra (1984 CJ (SC) 262), the Apex Court observed :-

“152. A close analysis of the decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned must or should and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in (Shivaji Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC 793, where the following observations were made :

“certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of 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.”

52. The following are the circumstances sought to be proved by the prosecution on the basis of the evidence referred to hereinabove:-

- (1) Homicidal death of Ganesh,
- (2) The deceased Ganesh having been lastly seen in the company of the appellants.
- (3) CDRs and SDRs of the cell phones belonging to the deceased and his mother Minakshi.

53. Admittedly, Ganesh was a 12th Standard student of Science stream of R.B.N.B. College, Shrirampur in the year 2015. He hailed from Kopargaon. His father had passed away in 2012. He had two sisters, Tejaswini and Ruchira. Ruchira was married. Ganesh completed his education up to 10th Standard at Kopargaon. For further education, Ganesh and

his sister Tejaswini started residing at the house of their maternal uncle P.W.1 Sunil at Matapur. Ganesh would shuttle between Matapur and Shrirampur for attending college. The evidence of P.W.1 Sunil and his wife Jyoti (P.W.6) would indicate that Ganesh left the house for college as usual on 12/3/2015. He carried with him a black colour sack bag. Their evidence further indicate that, he informed them that he would be back after 15 days. Ganesh also reportedly said them that he would be staying along with appellant Parag Pathare in his room. His examination of 12th Standard was underway. The last paper of I.T. was on 25 March. There is also evidence to indicate that, Adesh Adhav, friend of Ganesh had told P.W.1 Sunil on the following day that Ganesh had asked him to inform at his maternal uncle's residence that he would be going to Goa along with his friends.

54. In the cross-examination, P.W.1 Sunil testified that, Ganesh had left the house along with Adesh Adhav on 12/3/2015. Adesh Adhav has not been examined as a witness nor was he suspected to have been involved in the case.

55. Admittedly, Ganesh did not return post he left the house on 12/3/2015. It was tried to be argued by learned

Advocate Mr. Thigale that, the dead body that was found under the bridge over Shivana river was not that of Ganesh. We do not subscribe to his submissions. Admittedly, dead body of a male person was found on 16 March below the bridge over Shivana river. It was in highly decomposed condition. On the spot post mortem examination was said to have been done. For the reasons best known to the prosecution, the post mortem examination report has not been placed on record. Admittedly, viscera was preserved. The same was sent for chemical analysis. Blood sample of Minakshi was obtained. The DNA report (Exh.323) indicates the dead body found at the concerned place was that of a biological son of P.W.7 Minakshi. The DNA report (Exh.232), inquest panchanama (Exh.60) and the dead body burial panchanama have been expressly allowed to be admitted in evidence by the concerned Advocate representing the appellants before the Trial Court. On all these documents, we find an endorsement "May be admitted in evidence". Learned Advocate Mr. Thigale, therefore, could not now be heard to say that the dead body was not that of Ganesh, son of Minakshi.

56. His reliance on the judgment of the Apex Court in

case of Alamelu & ors. (supra) would be of little assistance for him since it pertains to proof of date of birth. True, it has been observed therein that mere admission of a document does not dispense with the obligation of the prosecution to prove probative value of the contents of the document. There can be no two views over the same. In the peculiar facts and circumstances of the present case, however, since the appellant admitted the DNA report (Exh.232), we have no hesitation to hold the dead body found was that of Ganesh and none else.

57. The inquest panchanama (Exh.60) indicate the dead body was in decomposed condition. It was partially burnt. Head was smashed with a stone. A stone was lying in the nearby. There were blood stains on the stone. An oil can was also found at the scene. It, therefore, cannot be said to be a case of an accident or suicide. From appreciation of this evidence, we reach the conclusion that deceased Ganesh met with homicidal death, though the post mortem report was not placed on record.

58. The question is, whether the appellants were the authors of the crime. Appellant Parag Pathare was stated to

be a close friend of deceased Ganesh. 12th Standard examination of Ganesh was underway. He had left the house of his maternal uncle (P.W.1 Sunil) in the morning of 12/3/2015 as usual. He had informed P.W.1 Sunil that he would be staying with appellant Parag for study for 15 days. The evidence in examination-in-chief of P.W.1 Sunil and his wife Jyoti (P.W.6) would suggest that it was Ganesh who alone left the house in the morning of 12 March. P.W.1 Sunil, however, in his cross-examination, admitted that, Ganesh left in the company of Adesh Adhav.

59. The F.I.R. (Exh.17) was lodged by P.W.1 Sunil on 25/3/2015 i.e. 13 days after Ganesh left the house. As per the prosecution case itself, (P.W.1 Sunil and his wife P.W.6 Jyoti), Ganesh had left the house to stay with his friend – appellant Parag Pathare. According to the prosecution, on the following day i.e. on 13 March, Adesh Adhav had informed P.W.1 Sunil and his wife Jyoti (P.W.6) that Ganesh had asked him to tell them that he was leaving for Goa along with his friends. The evidence of P.W.1 Sunil further indicates that, he tried to contact Ganesh for two consecutive days i.e. on 13 and 14 March 2015. He, however, could not establish contact.

Admittedly, P.W.1 Sunil had lodged a missing person's report. The same has not been placed on record. According to P.W.1, he was hopeful of return of Ganesh immediately after his paper of I.T. subject was over on 25 March. The report (Exh.17) was lodged stating therein that some unknown person kidnapped Ganesh for ransom. It is just surprising that when Ganesh had left the house to join appellant Parag Pathare, there is nothing to indicate the family members to have ever suspected Parag Pathare's role. It was just unnatural conduct on their part. There is nothing to indicate that P.W.1 Sunil or anyone else had really paid visit to the room wherein appellant Parag Pathare was staying on rent. The landlord Tushar (P.W.18), whose room was taken on rent by appellant Parag Pathare, testified that, family members of Ganesh had come to his premises and enquired whether he was residing. That time only he came to know that Ganesh was not in the room. In his cross-examination, P.W.18 Tushar testified that, one Yuvraj Kale, Mahesh Mane, Abhijit Shete and Vruddheshwar were the friends of Parag. His police statement is also silent to state that family members of Ganesh had been to him to make enquiry as to whether Ganesh was there along with Parag Pathare in a room taken on rent from him (P.W.18). As such, it

appears that, P.W.18 Tushar was even not knowing deceased Ganesh. His police statement being silent (material omission) to state that Ganesh was staying with appellant Parag in the room, his evidence before the Court is an improvement over his police statement.

60. When P.W.1 Sunil lodged the F.I.R. (Exh.17), and based on which the crime was registered, there is nothing to indicate that the then investigating officer of the said crime (Shri Vathore) made any efforts to locate Ganesh or any of his friends, mainly appellant Parag Pathare. There is no any shred of evidence that, from 13 March until next 4-5 days any of the appellants were absconding. Although P.W.22 Nitin Pagar, testified that he found all the cell phones of the appellants were switched off under one tower location, he was candid enough to admit that no such evidence was placed before the Court.

61. Evidence of P.W.8 Punam, cousin of the deceased Ganesh (daughter of maternal aunt) indicate that, on the given day i.e. on 12 March, she had seen Ganesh (deceased) along with appellant Parag Pathare and two others (Ajay More and Dhiraj Shinde) near Morge Hospital while she was on her way

home little past 6.30 p.m. The question is, whether her evidence inspires confidence. The appellants have every reason to contend her to be a planted witness. Admittedly, Punam would run a medical shop/ store. The licence issued to her indicates timing of the shop being from 10.00 in the morning to 8.00 in the evening. Her medical shop was attached to a Psychiatric Hospital of Dr. Unde. According to her, she would close the shop for the day after having verified that, OPD patients were no longer there. Her evidence in examination-in-chief indicates that she closed the shop by 6.00 p.m. and was on her way home on a Scooty. She met Ganesh along with the appellants near Morge Hospital. She even enquired with Ganesh to learn from him that he was accompanying Parag Pathare for buying a cell phone of him (Parag Pathare). She then went her home. On the following day, she went to her maternal uncle's house (P.W.1 Sunil) at Matapur. Since deceased Ganesh did not return on that day, her maternal uncle took search for him. This piece of evidence does not sound reasonable since according to P.W.1 Sunil himself Ganesh had left the house for staying with appellant Parag Pathare for 15 days. Therefore, there was no question for him to make search for Ganesh on account of his non

return to his residence late evening on 12 March itself. During cross-examination of Punam (P.W.8), it has been brought on record that there was a water canal on southern side of the Unde Hospital while IDBI Bank was on the northern. According to her, there was first turn to the road after crossing canal on south side of Unde Hospital. Then there is first turn on north side of Unde Hospital near IDBI Bank. Up to these turns, road in front of Unde Hospital was straight. She testified that, she proceeded towards southern side. While the place whereat she had met Ganesh near Morge Hospital, was towards northern side. Her evidence further indicates that, there was only one shop attached to Dr. Unde's Hospital. On the given day i.e. 12/3/2015, she did not make any enquiry while closing of the medical shop as to whether there were outdoor patients. This conduct of Punam (P.W.8) was unusual. More so when her evidence indicates that, there used to be indoor patients as well and Dr. Unde would give medical service round the clock. Her evidence would further indicate that, on the next day itself she had visited the house of her maternal uncle Sunil (P.W.1). The evidence of P.W.6 Jyoti indicates that, Punam (P.W.8) used to visit her residence at least once a week. Keeping quiet for a long time, expecting

return of Ganesh appears to be unusual. True, they (P.W.1 and P.W.6) were somewhat distant relations of the deceased. P.W.8 Punam even could not describe clothes on the person of Ganesh and the appellants while she had seen them near Morge Hospital. Admittedly, her evidence indicates that, Morge Hospital was not located on the way which leads to her home. There is nothing in her evidence as to why she took the route/ road that would lead towards Murge Hospital. Moreover, her statement was recorded by investigating officer on 27 March i.e. 15 days after Ganesh left the house and two days after registration of the F.I.R.

62. A test identification parade was held by P.W.17 Sachin Mhaske, Naib Tahsildar-cum-Executive Magistrate on 3/12/2015. The investigating officer had given him a letter on 2/11/2015 itself to hold test identification parade. He held the test identification parade one month after receipt of the requisition and about three months after arrest of the appellants. Admittedly, names of the appellants had been flashed in the daily on 9 November itself. P.W.8 Punam had not given the description of appellants Parag Pathare and Ajay More in her statement to the police. Since evidence of P.W.8

Punam that she closed her medical shop by 6.30 p.m. and while on way home she met Ganesh along with the appellants is found to be unbelievable, being unnatural on the part of owner of a medical shop, services of which were required in fact round the clock or at least up to 9.00 p.m. everyday. Her evidence that on the given day, she even did not enquire or satisfy herself that there were no patients in the OPD and as such, there would be no inconvenience to Dr. Unde or any of his patients if she closed the medical shop for the day, appears to be unreasonable and unnatural as well. We, therefore, do not propose to rely on her evidence. The same does not inspire confidence. For these reasons, her evidence of having identified the appellants Dhiraj Shinde and Ajay More in test identification parade loses its efficacy. More so, when the test identification parade was held about three months after arrest of these appellants. Admittedly, their names were flashed in the daily on 9 November itself.

63. Conviction solely based on last seen theory may only be based when the time gap between the two is so narrow so as to eliminate possibility of intervention of some third person in between. In the case in hand, even we accept (for

the sake of assumption) that P.W.8 Punam had seen Ganesh (deceased) in the company of appellants on the evening of 12 March, dead body of Ganesh was found somewhat late in the evening of 16 March. The Medical Officer who conducted the post mortem was not examined. Post mortem report has not been placed on record. As such, the prosecution produced no evidence as regards exact time by which Ganesh met with homicidal death. The so called last seen theory would, therefore, be of little consequence to connect the appellants with the crime in question.

64. As per the prosecution case itself, the appellants had taken the deceased to Hotel Rajyog. They took wine and dined there. Thereafter they took Ganesh to a place whereas his dead body was found. Then they killed him there. Admittedly, the investigating machinery had collected the CCTV Unit and even the hard disc thereof and sent to Forensic Science Laboratory to retrieve recording therein. It was P.W.26 Arjun, Scientific Officer with Forensic Science Laboratory, Kalina did this exercise. His report indicates nothing could be recovered from the hard disc of the CCTV Unit. As such, there is no evidence to indicate that the

appellants and deceased had been to Hotel Rajyog, they took wine and even dined there.

65. As per the case of the prosecution itself, the appellants, after having left Hotel Rajyog administered wine to Ganesh soon before he was murdered at the place whereat his dead body was found. The C.A. report relating to viscera (Exh.23) is also silent to indicate it to have contained alcohol residues. The same too runs counter to the prosecution case.

66. The case of the prosecution that Ganesh was kidnapped for ransom appears to have been improbable since kidnapper did not make any call to mother of Ganesh or anyone of his close relations before dead body of Ganesh was found on 16. It is only on 22 March a first call and message to that effect was received on cell phone of Smt. Minakshi (P.W.7), mother of Ganesh. The inquest panchanama (Exh.60) indicating wrist watch of Ganesh on his wrist indicates that the killers had no motive to rob him.

67. Then what remains is the evidence in the nature of CDRs and SDRs. Both the cell phones said to have been used by deceased and his mother were issued in the names of

some other persons, but those were the days when the person in whose name SIM Card issued stop making use thereof for certain time, the concerned cellular company would issue SIM Card of very number to someone else. True, there is no such evidence in this case. Admittedly, the SIM Card used by the deceased was issued in the name of Ashok Shinde. Ashok Shinde has not been examined. We cannot be oblivious of the fact that the case is based on circumstantial evidence. True, the Trial Court has found that CDR record indicates that there were many calls between the deceased and his mother and their relations as well. There is also no serious dispute that the deceased would use a mobile phone of SIM Number 7741935404. While the cell phone number of his mother was 9527425132. According to the prosecution, the cell phone of the deceased was under surveillance. It was P.W.24 Sanjaykumar who did the said exercise. He found the SIM Card of the deceased was active in a particular cell phone. He did the investigation in that regard. As per the case of the prosecution itself, one Bhagirathibai (P.W.9) had purchased the cell phone with a SIM Number 9730845978. She had given the said SIM Card to Sadhana (P.W.10), daughter of her sister. Sadhana testified that, the said SIM Card was given by her to

her friend Sagar (P.W.11). Sagar testified to have received the very SIM Card from Sadhana. It appears that, Sadhana and Sagar were close friends and would converse with each other on cell phone everyday.

68. P.W.11 Sagar's evidence indicates that, he was making use of the said SIM Card in a mobile handset Nokia Lumia Make 625. According to him, he had purchased the said cell phone for Rs.5000/- from one Raju Yadav (P.W.12). Raju Yadav in turn testified that he had purchased the said cell phone (allegedly of the deceased) from Shubham Lokhande for Rs.3000/- and sold it to Sagar for Rs.5000/-. The prosecution then examined Shubham (P.W.13) who testified to have had purchased the said cell phone (handset) allegedly of the deceased, from Ajay More (one of the appellants). He had sold the said cell phone to his friend Raju Yadav for Rs.3000/-. According to him, he had purchased for Rs.2500/- from Ajay.

69. The aforesaid evidence of P.W.9 to P.W.12 indicates that, the handset with the SIM of the deceased therein had changed many hands. It is, however just difficult to believe that the person purchasing a used handset (second hand), sells it for a price more than the purchase price. There

is no evidence to indicate what was the cost of a new brand Nokia Lumia 625 model cell phone so that one may believe the handset in question to have changed hands for the price more than market price.

70. Admittedly, P.W.13 Shubham was arrested in the crime. He was in police custody for 15 days. He was behind the bars for about 90 days in connection with the crime in question. The investigating officer ultimately filed report under Section 169 of the Cr.P.C. The same suggests that, during investigation, the prosecution did not find any evidence against Shubham. What material was there so as to file report under Section 169 Cr.P.C. against P.W.13 Shubham is not on record. Shubham being one of the suspects in the crime and was even arrested and was behind the bars for about 90 days, his evidence that he purchased the cell phone from appellant Ajay More, that ultimately turned out to have belonged to the deceased, needs to be taken with pinch of salt. Even for the sake of assumption we accept the evidence of P.W.9 to P.W.13 that Bhagirathibai's SIM Card changed hands and the cell phone of the deceased changed hands from Ajay More to Shubham and from Shubham to Raju Yadav and from Raju

Yadav to Sagar Pawar is accepted, there is no evidence to indicate the day, date and time on which the mobile handset and SIM Card of Bhagirathibai in fact changed hands. Therefore, even we accept the evidence of CDRs and SDRs as it is, it is just difficult to observe the prosecution to have clinching evidence to indicate any of the appellants had in fact made a call and sent SMS on the cell phone of mother of the deceased to make a demand of ransom of Rs.1 Crore. In short, there is no evidence on record to indicate that on the given day i.e. on 22 March, the day on which a call was made, with a demand of Rs.1 Crore for release of Ganesh, the handset was in possession of any of the appellants and it were they or one of them who made such call and/or sent message in furtherance of their common intention.

71. Exh.101 is the examination report of the cell phone sent to Forensic Science Laboratory. The report indicates that, IMEI Number of the cell phone sent for examination was 356689056494321. While the seizure panchanama of the cell phone indicates its IMEI Number being **356689056494321/0**. P.W.22 Pagar did not testify to have scored '0' appearing in the panchanama of the seizure of cell phone. True, the report

indicates that, excess '0' (zero) appearing in the panchanama of seizure of cell phone to have been scored out, but for want of explanation on behalf of P.W.22 Nitin Pagar, who drew the said panchanama. True, the report indicates that a message was retrieved, which was found in Mobile number 9527425132 belonging to mother of the deceased, sent to cell phone Number 9763899505. There is no evidence to indicate to whom this cell phone number belonged. It was stated to have belonged to one Gorakshnath Chandgude (her husband). The retrieved message was to the following effect :

Sr. No.	Party	Date	Time	Folder	Status	Source	Message	Deleted
1	To: 9763899505	23/03/2015	23-03-2015 14:04:12	Sent	Sent	SIM 1	Rohan, Vishal, Ganesh, Pratesh ye charo humare pas hai, Agar apko apke ladko ki khairiyat chahate ho to 1 carod ready rakho 25 march tak. Apko vapas se ek call ayega. Police complaint bilkul nahi, koi hoshiyari nahi warna unn charo ki lashh apko milegi or who sub Allah ko pyare ho jayenge. Humari nazar ap-par rahegi ye char din. Gud luck.	Intact

72. There is no investigation on the line to find who were those persons by name Rohan, Vishal and Pritesh besides deceased Ganesh in relation to whom the caller who

made demand of ransom was talking of. Clause 7 and 8 of the report (101) reads thus :

7. SMS-Text messages were not found dated between “12/03/2015” to “15/04/2015” mobile phone in Ex-1 and SIM Card in Ex-1-1.
- 8 SMS-Text messages were not found dated “29/03/2015” mobile phone in Ex-2 and SIM card in Ex-2-1.

73. Moreover, there is evidence to indicate that the SIM Card belonging to the deceased was used with different cell phone numbers, meaning thereby different IMEI Numbers. There is no investigation on that line. P.W.23 Sachin was categorical to admit that during the period 12/3/2015 to 7/4/2015 two IMEI numbers were used for Mobile No. 7741935404. Those were 911421052776420 and 911421052576430. The witness was shown cell phone of Nokia Make Model No.625. It was of black colour. According to him, its IMEI Number was 356689056494321.

74. We have also perused the CDRs and the calls between two numbers and other numbers as well as have

been relied on by the prosecution.

75. Serious is the offence stricter shall be the proof. The case is based on circumstantial evidence. Each and every circumstance needs to be proved conclusively. Even the CDRs and SDRs are accepted as it is, there is nothing to show that on 22 and 25 March, whatever call or SMS were sent from cell phone of deceased Ganesh, were sent by the appellants or any one of them in furtherance of their common intention. The prosecution has utterly failed to show that on the given day the cell phone was possessed by the particular appellant. More so when its case is that the cell phone and even the SIM Card had changed many hands. No details thereof have come in the evidence. One of the witnesses thereto, whom the handset was said to have changed hands, was suspect in the crime. He was arrested and was behind bars for 90 days. Then report under Section 169 Cr.P.C. was filed against him. Means, the prosecution did not get any evidence to send him to stand trial. In the circumstances, testimony of P.W.9 to P.W.13 that the SIM Card and the handset changed hands as they have stated in their examination-in-chief do not lead us to conclusively hold that the call was made and/ or SMS was sent

by any of or all the appellants in furtherance of their common intention.

76. We have perused the judgment of the Trial Court. The Trial Court has relied on the evidence of the appellants disclosing the police the manner and way in which they had kidnapped the deceased and committed his murder. The same was inadmissible in law. We have also perused the relevant paragraph Nos.56, 58 and 59 of the impugned judgment, relied on by learned counsel for the informant. These were the reasons of the Trial Court. This being the appellate Court, dealing with Criminal Appeals against conviction, could reappraise the evidence and come to its independent conclusion. On appreciation of the entire evidence on record and the reasons, stated hereinabove, we reach the conclusion that the prosecution has failed to establish each and every circumstance beyond reasonable doubt. The appellants are, therefore, entitled for benefit of doubt. In the result, interference with the impugned judgment and order of conviction and sentence is warranted.

77. In the sequel, the appeals succeed. Hence the order :-

ORDER

- (i) All the Criminal Appeals are allowed.
- (ii) The order of conviction and consequential sentence, dated 26/4/2018, passed by learned Additional Sessions Judge, Shrirampur, District Ahmednagar in Sessions Case No.40/2015 is hereby set aside.
- (iii) The appellants are acquitted of the offences punishable under Sections 302, 364-A, 363, 385, 387, 120-B and 201 read with Section 34 of the Indian Penal Code. Fine amount, if any, be refunded to them.
- (iv) The appellant Parag s/o Machindra Pathare and Ajay s/o Dinkar More are in jail. They be set at liberty forthwith if not required in any other case.
- (v) Bail bonds of appellant Dhiraj s/o Shankar Shinde are cancelled.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-