



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 294 of 2020

Manishprasad Narsingh Gaud

(At Nagpur Central Prison)

Add. Ramrahi Chawl, Room No. 4

Galli No. 4, Old Link Road, Ekta Nagar,

Kandivali (West), Mumbai- 400067.

...APPELLANT

V/S.

The State of Maharashtra

(Kandivali Police Station, C.R. No. 06 of 2013)

...RESPONDENT

Adv. Prashant Pandey a/w Adv. Riddhima Mangaonkar, Adv. Neha Balani
and Adv. Dinesh Jadhvani i/b W3 Legal LLP for the Appellant.

Dr. Dhanlakshmi S. Krishnaiyer, APP for the Respondent-State.

CORAM : **MANISH PITALE &
SHREERAM V. SHIRSAT, JJ.**

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RESERVED ON: **30th JULY , 2026**
PRONOUNCED ON : **29th OCTOBER, 2026**

JUDGMENT: *(Per Shreeram Shirsat, J.)*

1. The present Appeal has been filed challenging the impugned judgment and order dated 05.05.2018 passed by the Sessions Court for the Greater Bombay at Dindoshi Mumbai in Sessions Case No. 06/2013, whereby the Sessions Court has been pleased to convict the Appellant for the offences punishable under Section 363 of the Indian Penal Code, 1860 (IPC) and has been sentenced to suffer 5 years Rigorous Imprisonment (R.I.) with a fine of

Vishal Parekar

Rs. 3,000/- and in default, to suffer Simple Imprisonment for further 3 months; under Section 302 of the IPC and has been sentenced to suffer Life Imprisonment with a fine of Rs. 3,000/- and in default, to suffer Simple Imprisonment for further 3 months; under Section 201 of the IPC and sentenced to suffer 2 years R.I. with a fine of Rs. 2,000/- and in default, to suffer Simple Imprisonment for further 2 months. All sentences were directed to run consecutively.

2. Brief facts of the prosecution case are as under:

a] It is the case of the prosecution that Shivchand Sharma (the Complainant), was residing at Ekta Nagar Welfare Society, Kandivali (W), Mumbai along with his wife and two sons. It is further the case of the prosecution that on 26.08.2012 at 3 p.m., when the Complainant returned from work and inquired with his wife about his younger son- Sagar, (aged 5 years, the victim), he was told by her that Sagar had gone out to play along with his elder brother but did not come back home. After searching for some time, when the whereabouts of his son could not be traced, a missing complaint came to be filed on 26.08.2012.

b] It is further the case that on 28.08.2012 at about 3:15 p.m., the Complainant received a call on his phone, bearing number 9594414632, from a person who identified himself as Raja from a phone, bearing number 9172060843, who claimed to have the victim child in his custody.

c] It is also the case of the prosecution that the Complainant again received a call from the above mentioned phone number (9172060843), asking him to pay a sum of Rs. 50,000/- to one Balli at 8:00 p.m. at Kandivali Railway Station if they wanted Sagar to be returned. Thereafter, as directed, the Complainant and said Balli went to Kandivali Railway Station and called on the aforementioned number (9172060843), who then asked the Complainant to handover the said ransom amount to Balli and to ask Balli to board a Churchgate bound local, however Balli refused to do so.

d] It is also the case of the prosecution that since the victim-child was not to be found even after two days, on 28.08.2012, an FIR was lodged by the father i.e. the Complainant at 10:15 p.m. against unknown person for the offence punishable under Section 363 of IPC being C.R. No. 210/2012.

e] It is further the case of the prosecution that on 29.08.2012 at about 4:30 p.m., the Complainant received a call from the same number i.e. 9172060843 and the caller abused him and asked him to come at Santacruz Railway Station and thus, the Complainant alongwith the police officers went to Santacruz Railway Station, however the caller did not come there.

f] It is further the case that on 30.08.2012, the Complainant received a call again and the caller informed him that his son i.e. the victim child was with one Pappu and that the child would return home by 4:30 p.m.

g] It is also the case that the investigation regarding the phone numbers

and SIM cards revealed that the Appellant had been using the said numbers and upon such information, the Appellant came to be arrested on 30.08.2012.

h] It is further the case of the prosecution that on 31.08.2012, the Appellant made a disclosure statement leading to discovery of the dead body of the victim child and further made disclosure statements regarding the clothes and mobile phone of the Appellant which was recovered from his residence at his instance.

It is further the case of the prosecution that, upon completion of the investigation in the present case, the officers of the Kandivali Police Station filed a chargesheet against the Appellant and the co-accused for the offences punishable under Section 363, 364-A, 302, 201 r/w 34 & 120 B of the IPC.

3. To bring home the guilt of the Accused-Appellant, the prosecution examined 8 witnesses (P.W. 1 to P.W. 8):

P.W	NAME	ROLE
1	Shivachand Sadhu Sharma	First Informant and Father of the deceased
2	Mukesh Amrutlal Mehta	Panch Witness The Disclosure and Seizure panchnama dated 31.08.2012 relating to the dead body of the victim
3	Jaysingh Ramavtar Chouhan	Panch Witness The Disclosure and Seizure panchnama dated 05.09.2012 relating to the clothes, mobile and sim card at the instance of the Appellant
4	Rohan Hemchandra Rane	Panch Witness The Arrest-cum-seizure panchnama dated 05.09.2012 at the instance of Samir Baig (A-2)
5	Chandrbhan Nandlal Chouhan	Witness who claims to have seen the victim child with the Appellant on 26.08.2012

6	Datta @ Kunal Mohan Ashthul	Acquaintance of the Appellant; Witness who claims to have seen the victim child with the Appellant on 26.08.2012
7	Deepak Dinanath Pandey	Acquaintance of the Appellant; Witness who deposed about the stolen sim card
8	Sumeet Harish Bakarania	Panch Witness The recording in the mobile of P.W. 1 was sent to the computer, which conversion was recorded in the C.D. dated 09.09.2012.
9	Dr. Sanjay Kiran Jadhav	Medical officer who conducted the Post-Mortem of the victim child on 01.09.2012
10	Rakesh Ramedhar Dubey	Panch Witness The recovery of a sim card at the instance of A-2
11	Raghunath Gopal Ghume	PSI at Kandivali Police Station who registered the offence in C.R. No. 210/12 dated 28.08.2012
12	Sudhakar Rajaram Shinde	Investigating Officer (I.O.)

4. Heard Ld. Counsel Prashant Pandey for the Appellant and Ld. APP Dr. Dhamlakshmi S. Krishnaiyer for the Respondent-State.

5. The Ld. Counsel for the Appellant, at the very outset, assertively submitted that the present case rests entirely on circumstantial evidence as there are no eye-witnesses to the kidnapping or murder of the victim. He further contended that the prosecution primarily relied upon four circumstances, namely (i) The Last Seen Evidence, (ii) The SIM card from which the ransom call was made in connection with the Appellant, (iii) The recovery of the dead body of the victim at the instance of the Appellant and (iv) The Medical and Forensic Evidence. However, the Ld. Counsel for the Appellant urged that none of the aforementioned circumstances, individually

or collectively, establishes the guilt of the Appellant beyond reasonable doubt, leaving the chain of circumstances incomplete. The Ld. Counsel for the Appellant argued that the motive of kidnapping for ransom, as identified by the prosecution, has been rejected by the Trial Court. It was argued that this absence of motive in a case of circumstantial evidence, weighs materially in favour of the accused.

6. The Ld. Counsel for the Appellant further submitted that the recovery of the body of the victim does not constitute a valid recovery under Section 27 of the Indian Evidence Act as the place of recovery was already within the knowledge of the police and therefore, the recovery of the dead body cannot be said to have resulted from the exclusive knowledge of the Appellant. On the circumstance of "Last Seen Together," the Ld. Counsel for the Appellant argued that the evidence of P.W. 5- Chandrabhan Nandlal Chouhan and P.W. 6- Datta @ Kunal Mohan Ashthul is unreliable. It was his contention that the testimony of P.W. 5 cannot be believed as his statement was recorded after a delay of nearly fifteen days and that such an unexplained delay vitiates his testimony and renders it susceptible to doubt. He also submitted that the prosecution failed to explain the five-day gap between the last-seen circumstance and the recovery of the body, opening a reasonable possibility of intervening acts and hence, the intervention of any third person cannot be ruled out. It was contended by the Ld. Counsel for the Appellant that the

voice-recording evidence which connects the Appellant to the ransom calls fares poorly.

7. It was further elaborated that the unproved SIM attribution, the fact that the CD technician was not examined during the Trial, in addition to the fact that the Complainant did not identify the voice of the caller and the voice-expert report was negative with respect to the Appellant, makes it a weak piece of evidence. It was then urged by the Ld. Counsel for the Appellant that the C.A. reports, in no manner link the Appellant to the commission of the offence. It was further the submission of the Ld. Counsel for the Appellant that while the DNA reports establish the identity of the Victim-child, it does not establish the involvement of the Appellant in the crime in question. The Ld. Counsel for the Appellant further submitted that the panch witnesses in the present case i.e. P.W. 2 and P.W.10 are habitual panchas and hence their testimony cannot be relied upon. The Ld. Counsel for the Appellant finally urged that the Trial Court has erred in awarding a consecutive punishment to the Appellant.

8. The Ld. Counsel for the Appellant has relied upon a plethora of judgments which are enlisted hereinbelow :

I. Hanumant vs. State of Madhya Pradesh¹

II. Shambu Nath Mehra vs. State of Ajmer²

¹ AIR 1952 SC 343

² AIR 1956 SC 404

- III. Tahsildar Singh vs. State of U.P.*³**
- IV. Jaffar Hussain Dastagir vs. State of Maharashtra*⁴**
- V. R.M. Malkani vs. State of Maharashtra*⁵**
- VI. Shivaji Sahabrao Bobade vs. State of Maharashtra*⁶**
- VII. Kali Ram vs. State of Himachal Pradesh*⁷**
- VIII. Mohmed Inayatullah vs. State of Maharashtra*⁸**
- IX. Ganesh Bhavan Patel vs. State of Maharashtra*⁹**
- X. Sharad Birdhichand Sarda vs. State of Maharashtra*¹⁰**
- XI. Ram Singh vs. Col. Ram Singh*¹¹**
- XII. Padala Veera Reddy vs. State of Andhra Pradesh*¹²**
- XIII. Arjun Marik vs. State of Bihar*¹³**
- XIV. C. Chenga Reddy vs. State of Andhra Pradesh*¹⁴**
- XV. Takhaji Hiraji vs. Thakore Kubersing Chamansing*¹⁵**
- XVI. Ashish Batham vs. State of Madhya Pradesh*¹⁶**
- XVII. Bodhraj vs. State of J&K*¹⁷**
- XVIII. State of U.P. vs. Satish*¹⁸**
- XIX. Pannayar vs. State of Tamil Nadu*¹⁹**
- XX. Mustkeem @ Sirajudeen vs. State of Rajasthan*²⁰**

3 AIR 1959 SC 1012

4 (1969) 2 SCC 872

5 (1973) 1 SCC 471

6 (1973) 2 SCC 793

7 (1973) 2 SCC 808

8 (1976) 1 SCC 828

9 (1978) 4 SCC 371

10 (1984) 4 SCC 116

11 1985 Supp SCC 611

12 1989 Supp (2) SCC 706

13 1994 Supp (2) SCC 372

14 (1996) 10 SCC 193

15 (2001) 6 SCC 145

16 (2002) 7 SCC 317

17 (2002) 8 SCC 45

18 (2005) 3 SCC 114

19 (2009) 9 SCC 152

20 (2011) 11 SCC 724

***XXI. Anvar P.V. vs. P.K. Basheer*²¹**

***XXII. Kanhaiya Lal vs. State of Rajasthan*²²**

***XXIII. O.M. Cherian vs. State of Kerala*²³**

***XXIV. Nizam vs. State of Rajasthan*²⁴**

***XXV. Muthuramalingam vs. State*²⁵**

***XXVI. Anwar Ali vs. State of Himachal Pradesh*²⁶**

***XXVII. Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantya*²⁷**

***XXVIII. Ravinder Singh @Kaku vs. State of Punjab*²⁸**

***XXIX. Pulukuri Kottaya vs. Emperor*²⁹**

9. Per contra, the Ld. APP for the Respondent-State submitted that the present case rests on circumstantial evidence and that each of the four circumstances relied upon by the prosecution has been proved by cogent and reliable evidence and taken together, they form a complete chain pointing only to the guilt of the Appellant. It was further submitted by the Ld. APP that the recovery of the dead body of the Victim-child is a valid recovery under Section 27 of the Indian Evidence Act, as it was pursuant to the information furnished by the Appellant that led to the discovery of the body. On the circumstance of 'Last Seen Together,' it was argued by the Ld. APP that the testimony of

²¹ (2014) 10 SCC 473

²² (2014) 4 SCC 715

²³ (2015) 2 SCC 501

²⁴ (2016) 1 SCC 550

²⁵ (2016) 8 SCC 313

²⁶ (2020) 10 SCC 166

²⁷ (2020) 7 SCC 1

²⁸ (2022) 7 SCC 581

²⁹ AIR 1947 PC 67

P.W. 5 and P.W. 6 is consistent and has remained unshaken in cross-examination. It was submitted that the delay in recording the statement of P.W. 5 is not fatal in the absence of any prejudice caused to the Appellant and merely the fact that he did not inform the Complainant earlier cannot, by itself, discredit his testimony. The Ld. APP further submitted that the CA and DNA reports establish the identity of the Victim-child and further submitted that the absence of blood stains on the clothes of the Appellant is of no consequence in view of the lapse of time before their seizure. It was further argued by the Ld. APP that P.W. 2 and P.W. 10 cannot be discarded merely because they have acted as panchas on earlier occasions, no bias or interest having been shown. Therefore, it was argued by the Ld. APP for the Respondent-State that in the totality of evidence brought on record, there can be no other reasonable hypothesis that points to the guilt of anyone else but the Appellant. The guilt of the Appellant is established beyond reasonable doubt and thus the order and judgment passed by the Trial Court, deserves to be sustained.

10. The Ld. APP for the Respondent- State has relied upon the following judgments to buttress her arguments:

I. ***Nagarajan vs. State of Tamil Nadu***³⁰

II. ***Rohit Jangde vs. State of Chhattisgarh***³¹

³⁰ 2025 (SC) 672

³¹ 2026 SCC OnLine SC 212

III. *Periyasamy vs. State of Madras*³²

IV. *Shyamal Ghosh vs State of West Bengal*³³

11. Recently this Court, while deciding a criminal appeal in the case of Prabhakar Kutty Shetty vs. State of Maharashtra³⁴, vide judgment dated 09.07.2026, had an occasion to refer to the recent judgement of the Hon'ble Apex Court in Anand Jakkappa Pujari @ Gaddadar vs. The State of Karnataka to analyze the legal approach towards the consideration of circumstantial evidence. The relevant observation is quoted herein below:

“Before advertng to the individual circumstances, it will be pertinent to refer to the latest judgment of the Hon'ble Apex Court in the case of Anand Jakkappa Pujari @ Gaddadar v/s The State of Karnataka decided on 27th April, 2026 in Criminal Appeal No. 1864 of 2024 wherein it is held as under:

“27. The logical process involved in the admission and consideration of circumstantial evidence has been explained by Wigmore on Evidence in paragraph 32 et seq. The test for the admissibility of evidence to prove a circumstantial fact was expressed in the following words:-

“The evidentiary fact will be considered when, and only when, the desired conclusion based upon it is a more probable or natural, or at least a probable or natural hypothesis, and when the other hypotheses or explanations of the fact, if any, are either less probable or natural, or at least not exceedingly more probable or natural” (paragraph 32, page 421).

“Where even the possibility of a single other hypothesis remains open, Proof fails, though it suffices for Admissibility if the desired conclusion is merely the more probable, or a probable one, even though other hypotheses, less probable or equally probable remain open. It is thus apparent that, by the very nature of this test or process, a specific course is suggested for the opponent. He may now properly show that one or another of these hypotheses, thus left open, is not merely possible and speculative, but is more probable and natural as the true explanation of the originally offered evidentiary fact” (paragraph 34, page 423).”

³² 1967 AIR 1027

³³ (2012) 7 SCC 646

³⁴ Criminal Appeal No 502 of 2021(BHC)

“28. In the aforesaid context, Kenny states that:-

“An amount of testimony which is not sufficient to rebut the presumption of innocence entirely (i.e., to shift the burden of proof so completely as to compel the prisoner to call legal evidence of circumstances pointing to his innocence), may yet suffice to throw upon him the necessity of offering, by at least an unsworn statement, some explanation. If he remain silent and leave this hostile testimony unexplained, his silence will corroborate it, and so justify his being convicted” (page 388).

“29. The principle that criminal courts should bear in mind is, in the words of C.B. Pollock:-

“To make a comparison between convicting the innocent man and acquitting the guilty is perfectly unwarranted. There is no comparison between them. Each of them is a great misfortune to the country and discreditable to the administration of justice. The only rule that can be laid down is that in a criminal trial you should exert your utmost vigilance and take care that if the man be innocent he should be acquitted, and if guilty that he should be convicted.” (quoted in Donough’s Principles of Circumstantial Evidence, 1918, 158).

“30. From the above, the following propositions emerge:-

- 1. Circumstantial evidence to justify conviction must be consistent with any reasonable or rational hypothesis of guilt of the accused.*
- 2. When the inference of guilt from the proved incriminating facts is a more natural and probable hypothesis than the other, the onus of offering an explanation for the incriminating facts lies upon the accused. If he does not offer any explanation, or falsely denies the very existence of the incriminating facts, it is itself a circumstantial fact against him, even if the court is in a position to imagine an explanation. The guilt is the legitimate inference from the incriminating facts and the added circumstantial fact of failure or refusal to offer an explanation for the incriminating facts because it is not reasonable or rational to say that the accused would fail or refuse to offer an explanation consistent with his innocence if he could. It is immaterial in such a case whether the Court can imagine an explanation or not.*
- 3. If the inference of guilt from the proved incriminating facts is a less natural or probable hypothesis than the other, the Court cannot draw it and the accused must be acquitted whether he offers any explanation or not.*
- 4. If the inference of guilt from the proved incriminating facts is as much a natural or probable hypothesis as any other, the accused may be called upon to explain and if he fails or refuses, the Court may treat it as an additional circumstantial fact and infer his guilt. Or it may take*

judicial notice of the other hypothesis even without any explanation by the accused and acquit him.

“31. In a catena of decisions, it has been consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the tests laid down by this Court in Sharad Birdhichand Sarda v. State of Maharashtra, reported in (1984) 4 SCC 116. The relevant observations read thus:-

“153. A close analysis of this 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 Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrLJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

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

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

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

12. We note that the present case rests on circumstantial evidence and the Ld. Counsel for the Appellant has relied upon several judgments on the issue of circumstantial evidence, viz; Shivaji Sahabrao Bobade vs. State of Maharashtra (supra), Padala Veera Reddy vs. State of Andhra Pradesh (supra), Arjun Marik vs. State of Bihar (supra), C. Chenga Reddy vs. State of

Andhra Pradesh (supra), Ashish Batham vs. State of Madhya Pradesh (supra) and Pannayar vs. State of Tamil Nadu (supra). However, upon reference to the aforementioned judgment we do not feel the need to deal with them individually as the principles of law laid down in these judgments are respectfully agreed upon and taken into consideration.

13. Therefore, where the evidence is of a circumstantial nature or where the case is based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn, should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. It will therefore have to be seen from the evidence that has come on record, whether the circumstances from which the conclusion of guilt is to be drawn, are fully established and all the facts so established are consistent only with the hypothesis of the guilt of the accused.

14. As stated above, in this case, there is no direct evidence and the entire

case hinges on circumstantial evidence. According to the prosecution and as also considered by the Trial Court, the circumstances viz the last seen together, the SIM card through which ransom calls were made in connection with the Appellant, the recovery of the dead body of the victim at the instance of the Appellant and the Medical and Forensic Evidence form a chain of evidence excluding every possible hypothesis except the guilt of the Appellant.

15. We find that all the circumstances have not been properly spelt out by the trial court and therefore taking cue from the circumstances referred herein, in addition to the above, we deem it appropriate to further classify the circumstances and deal with them based on the evidence that has come on record.

A. LAST-SEEN TOGETHER

16. In order to establish the circumstance of "last seen together", the prosecution has examined two witnesses, i.e. P.W. 5 and P.W.6. P.W.5- Chandrabhan Chouhan, deposed that on 26.08.2012, while he was returning, he saw two persons along with a child alighting from an autorickshaw and proceeding towards the Khadi (creek). He further deposed that those two persons were Manish and Baliram and he knew them as they all were residing in the same area. He further deposed that after four to five days, he came to

know that the body of that boy was found there. He further deposed that the small child was the son of Shivcharan Sharma. He further deposed that he can identify Manish Prasad and Baliram, and he pointed towards the accused who was sitting in the dock as Manish Prasad (the Appellant). In the cross-examination, he admitted that since the boy was missing, it was known in the area and also to him that the boy was missing. He answered that he also assisted them to search for the missing son. He also admitted that he had knowledge that a complaint had been filed in the police station with respect to the missing son. He further admitted that he visited the police station after four to five days, after the dead body was found, and thereafter he has not visited the police station at any time. He further answered that he used to enquire with others whether the boy was found or not.

17. In the cross examination, it has come by way of omission that he did not state to the police that he had seen two persons who have been named above with the child. He further admitted that his statement was recorded after 4-5 days. It has also come, by way of omission, that he had stated before the police that two persons with the boy were proceeding towards the Khadi and he cannot assign any reason why said fact is not mentioned in his statement. We are of the opinion that the testimony of this witness does not inspire confidence for the reason that his statement came to be recorded after

fifteen days i.e on 15/9/2012. In this context, it would be apposite to refer to the judgment of the Hon'ble Supreme Court in the case of Ganesh Bhavan Patel vs. The State of Maharashtra (supra) on which the Ld. Counsel has also placed reliance:

“15. As noted by the trial court, one unusual feature which projects its shadow on the evidence of PWs Welji, Pramila and Kuvarbai and casts a serious doubt about their being eyewitnesses of the occurrence, is the undue delay on the part of the investigating officer in recording their statements. Although these witnesses were or could be available for examination when the investigating officer visited the scene of occurrence or soon thereafter, their statements under Section 161 of the CrPC were recorded on the following day. Welji (PW 3) was examined at 8 a.m., Pramila at 9.15 or 9.30 a.m., and Kuvarbai at 1 p.m. Delay of a few hours, simpliciter, in recording the statements of eyewitnesses may not, be itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to investigator was deliberately marking time with a view to suggest that the decide about the shape to be given to the case and the eyewitnesses to be introduced. A catena of circumstances which lend such significance to this delay, exists in the instant case. It was also held similarly in the case of Ganpat Kondiba Chavan vs. State of Maharashtra³⁵:

“ The Apex Court in number of cases has concluded that the conduct of a witness in not disclosing the incident to persons whom he must have met after the incident, is indicative of the fact that he had not seen the incident..... ”

18. Although P.W. 5 says that on 26.08.2012, he had seen two persons with the child, and he knew that the boy was missing, a missing complaint was also filed with the police station and he did visit the police station four to five days after the body was found, but he does not inform the police that he had seen those two persons with the child. Surprisingly, he even does not disclose

35 1997(2) Crimes 38

this fact of having seen the two accused with that boy to his brother or any other person who were present there, or even to P.W. 1, whom he claims to have been acquainted with. In our opinion, P.W. 5 appears to be a got up witness. Taking into consideration the evidence of P.W. 5 we are not inclined to accept his evidence to prove the circumstance of last seen.

19. The other witness, according to the prosecution, who establishes the theory of "last seen" is P.W. 6, Datta @ Kunal Mohanlal Ashtul. He deposed that he is acquainted with one lady called Deepa, who had introduced him to Manish (Appellant) and others, as Manish was her lover. He deposed that on 25.08.2012, at about 12:30 p.m., he received a phone call from Deepa, who told him that Manish Prasad wanted to talk to him and made a phone call on conference. He further deposed that Manish Prasad stated that there was one boy with him and that he should keep that boy with him. He further deposed that when he asked him as to who the boy was, Manish replied that the boy was known to him. However, Manish did not tell him why he wanted to keep the boy with him. He further deposed that he, along with Sachin and Vishal, were going for work on 26.08.2012. He further deposed that at about 2:00 p.m. he received a phone call from Manish Prasad, and he asked this witness about his whereabouts, to which he replied that he was at Charkop. He further deposed that Manish told him that he should stop near Machhi Market at

Charkop and accordingly they stopped there. He further deposed that after some time Manish, Balli with a five-year-old boy came by autorickshaw at that place and Manish asked him whether he can keep that boy with him, to which he replied that he was residing at the house of his uncle and therefore, it will not be possible. He further deposed that Manish, Balli and the five year old boy left that place by another autorickshaw and he, Sachin and Vishal returned to their respective houses.

20. He further deposed that in the evening he received a call from Deepa, to whom he told that Manish and Balli came with a five-year-old boy to him, upon which she asked him as to what he had done, to which he replied that he had told that he was residing with his uncle and, therefore, it was not possible for him to keep the child. He further deposed that he was called to the police station by giving information that police had caught Manish and Balli. He further deposed that police recorded his statement and the police had shown a photograph of the five-year-old boy to him. During the deposition, the photograph was shown to him, and he identified the photograph of the said boy as the boy whom he had seen when Manish and Balli brought him to the Machhi Market. However, he further answered that a photograph of the dead body of the boy as well as the dead body was not shown to him. Further, the later part of the cross examination reveals that this witness himself was a

suspect and was in the police station for 4 to 5 days. He also answered in the cross examination that he came to know the name of the proposed accused from the police. Although P.W. 6 refers to the calls made by the Appellant to him on 25.08.2012 and on 26.08.2012, there are no call detail records to prove the said fact. P.W. 6 also stated that when he met the Appellant at Macchi market at Charkop, two persons by name Vishal and Sachin were also with him. Although the police have recorded the statements of Vishal, Sachin, for reasons best known, the police have chosen not to examine them. Even the lady by name Deepa, with whom the Appellant claims to have had a conversation on that day, has not been examined by the prosecution although her statement has been recorded. We are therefore of the opinion that it will be hazardous to rely upon the uncorroborated testimony of this witness on the point of last seen theory.

21. Further even the time gap between the Appellant having been last seen with the deceased on 26.08.2012, as deposed by P.W. 5 and 6, and the time the body was recovered on 31.08.2012, is also wide enough, which does not negate the intervention of any third person. P.W. 9, the doctor has also not stated the time of death of the deceased and therefore from the overall evidence on record, we are of the opinion that the prosecution has failed to conclusively prove that the theory of last seen. At this stage it will be pertinent to refer to

the judgment of Bodhraj vs. State of J & K (supra) as rightly relied upon by the Ld. Counsel for the Appellant

“31. 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.”

22. At this stage, it would be relevant to make a reference to the judgment in the case of Nizam vs. State of Rajasthan (supra), relied upon by the Ld. Counsel for the Appellant. The relevant portion reads as follows:

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

It would also be relevant to refer to the judgment of **Kanhaiya Lal v. State of Rajasthan** (supra) relied upon by the Ld. Counsel for the Appellant:

“12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.”

23. Therefore, in the light of the judgments referred to hereinabove, this Court is of the opinion that the conviction cannot solely be based on the theory of last seen. In the present case, we are of the opinion that the circumstance of last seen together, has not been established beyond reasonable doubt. It will therefore be necessary to examine other circumstances in order to arrive at a conclusion about the involvement of the present Appellant.

B. MOTIVE

24. The prosecution primarily examined P.W. 1 in order to establish the circumstance of motive. It is the case of the prosecution that the victim child was kidnapped for the purpose of ransom. PW 1 has given details about telephonic calls made to him by one Raja demanding Rupees 50,000/- failing which it was threatened that the child would be killed. The said witness has further deposed about the ransom calls made to him between 28/8/2012 to 31/8/2012. However, the narration given by this witness about calls being made on 29/8/2012 to 31/8/2012 has come by way of omission. This witness also refers to receiving of ransom call on 28.08.2012 in the afternoon at about 3:15p.m. to 3:30 p.m., however surprisingly , does not inform the police at the time of filing of lodging of FIR on the same day i.e 28.08.2012 at 10:15 p.m. This conduct goes against the credibility of this witness. The non-disclosure of such relevant information by this witness in spite of available opportunity

raises doubts regarding the genuineness of this contention.

25. Further, the voice samples which were recorded on the seized mobile phone of P.W. 1, were sent to the expert after a delay of about a month. Additionally, no panch witness has been examined or panchnama was prepared regarding the seizure of the phone and the transfer of the same to the Chemical Analyser for examination. We also take note of the fact that the expert report has not been brought on record and further, the Trial Court records in the judgment that the expert report was negative as far as the involvement of the Appellant is concerned. Thus, the motive for committing the offence of kidnapping for ransom and further the offence of committing murder of the victim-child is not met with cogent evidence on record to suggest the involvement of the Appellant.

26. It is to be taken into consideration that the inability of the prosecution to prove motive would weigh in favour of the accused, especially in a case like this, which rests on circumstantial evidence. The Ld. Counsel for the Appellant rightly relied upon the judgment in the case of **Anwar Ali v. State of Himachal Pradesh** (supra). The relevant paras are stated hereunder:

“24. Now so far as the submission on behalf of the accused that in the present case the prosecution has failed to establish and prove the motive and therefore the accused deserves acquittal is concerned, it is true that the absence of proving the motive cannot be a ground to reject the prosecution case. It is also true and as held by this Court in Suresh Chandra Bahri v. State of Bihar that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. However, at the same

time, as observed by this Court in Babu, absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. In paras 25 and 26, it is observed and held as under: (Babu case, SCC pp.200-01)

“25. In State of U.P. v. Kishanpal, this Court examined the importance of motive in cases of circumstantial evidence and observed: (SCC pp. 87-88, paras 38-39)

‘38.the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.

39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.’

26. This Court has also held that the absence of motive in a case of depending on circumstantial evidence is a factor that weighs in favour of the accused. (Vide Pannayar v. State of T.N.)”

C. HOMICIDAL DEATH

27. The prosecution has relied upon the evidence of P.W. 9- Dr. Sanjay to establish this circumstance. He deposed that on 01.09.2026 he received a body from Kandivali Police station of one Sagar. He deposed that he conducted an autopsy, however, he could not see any identifiable injuries due to advanced decomposition. He further deposed that he found a fractured left temporal, right temporal, left parietal and frontal bones. He further stated that the bones were displaced and he gave final opinion to the cause of death as head injuries

in the form of fractured skull bones. Nothing has been elicited in the cross-examination. We have perused the post mortem exhibited as Exhibit 208 and taking into consideration the injuries mentioned, the decomposed condition of the body, we are of the opinion that this a case of homicidal death.

D. RECOVERY OF DEAD BODY

28. Before adverting to the relevant prosecution witnesses with respect to the recovery of the dead body, we make a useful reference to the judgment relied upon by the Ld. Counsel for the Appellant in the case of Jaffar Hussain Dastagir vs. State of Maharashtra (supra) which states as under:

“5.The essential ingredient of the section is that the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence. The embargo on statements of the accused before the police will not apply if all the above conditions are fulfilled.....”

29. As far as the recovery of the dead body is considered, the prosecution has examined P.W. 1 and P.W. 2.

30. P.W. 1 deposed that the Appellant led the police as well as P.W. 1 near the gate of MHADA Housing Society where a body was lying in the bushes. He deposed that there was cover on the body in the bushes and that the dead body was of his son- Sagar. He stated that on the body there was a blue colour

shirt, red colour pant and a black colour string was tied around his neck. He further deposed that from the clothes, he recognized the dead body was of his son. He further deposed that the face of his son was crushed. He further deposed that the place where the body was found was at a walkable distance of 5 minutes from the residential area. In the cross-examination, the defence had put a suggestion that due to the cloth on the dead body, it was unidentifiable which suggestion was denied. He further stated that the dead body was not in a condition to identify. Nothing was brought out in the cross-examination to discredit the witness with respect to the identification of the body of his child was concerned.

31. P.W. 2, Mukesh Amrutlal Mehta deposed that on 31.08.2012, he was called at Kandivali Police Station, where he was informed that one arrested accused was in their custody and that the accused is giving statement before the police and requested him to act as a panch witness, to which he consented. He further deposed that the accused stated his name as Manish Prasad Narsingh Gaud. He further deposed that the accused thereafter stated that he is ready to show the place where he killed the boy and hid the dead body of the boy and accordingly, a memorandum panchanama was prepared and signature of the accused was taken. He further deposed that the Police Inspector, police staff, both the panchas and the arrested accused came out of the police station and sat in the police vehicle. He deposed that the driver drove the vehicle as

directed by the accused and that the accused took them to Ganesh Nagar, in front of MHADA Colony, Building No. 50, by name Prathamesh Building. He further deposed that the accused then took them into the forest in front of the said building and after walking for about 50 feet, he had shown the dead body of boy Sagar Sharma, aged 5 years. He deposed that he saw the body, which was around 3 feet, his legs were bent. He further deposed that police removed the clothes from the body as the body was decomposed and had worms. He further deposed that the accused had also shown a stone which was lying near the body. He further deposed that police seized the stone and sealed it by pasting labels having signatures of Police Inspector and panch witnesses. He further deposed that the father of the boy, namely Shivchand Sharma, was there and he identified the dead body as of his son Sagar. He deposed that the police took the clothes of the deceased in their custody which were removed from the body. He further deposed that on the next day he was called to the Kandivali Police Station to seize the clothes of the deceased, which was a blue colour T-shirt.

32. In the cross-examination, it has come on record that this witness worked as a panch witness in as many as 13 cases of Kandivali Police Station. It has also come in the cross-examination that he had read the panchanama dated 31.08.2012 at home before he came to court to give evidence about the said panchanama and the police had given a copy of said panchanama to him

one or two months prior. He also deposed that this has been his pattern and even in other cases in which he has given evidence, the police had given him the copy of panchanama beforehand. Earlier in the cross-examination he answered that the accused was not in handcuffed condition, however, subsequently he deposed that he did not see minutely whether the accused was in handcuffed condition when taken out of the police station and also on the spot.

33. We find the evidence of this witness not to be free from doubts. This witness seems to be a regular stock panch of the police. We may not be misunderstood to say that a panch having acted in other cases can never act as panch in another case, however in this case the nexus of this witness with the police is to such an extent that the copy of the panchnama was given to this witness prior in point of time before the date of deposition in the court and that it is a regular pattern for him.

34. It will also be pertinent to note that PW 12, the IO has admitted in the cross examination that, by way of statement dated 31.8.2012, the complainant had disclosed particular place and they found dead body on same place/address and that upto 16.00 pm on 31/8/2012, the accused had not shown/disclosed particular place where they found the dead body. The statement of the Appellant before the police, though has led to the recovery of the dead body of the deceased, creates a reasonable doubt whether the

recovery of the dead body is at the instance of the Appellant or otherwise. Further PW 1 has also deposed that he had seen that the Appellant was handcuffed in the police station and therefore, to our judicial conscience, this circumstance so far as the Appellant is concerned cannot be said to be proved beyond reasonable doubt.

D. ELECTRONIC EVIDENCE

35. The evidence as regards voice sample of the person who made the phone call has not been clearly established. P.W. 1 in his deposition made reference to the calls received on his mobile phone where the caller uttered the words “Tumhara ladka mere kabje mein hai” and “Tera ladka Mira Road pe hein aur me Kurla mein hu”. He further deposed that after some time he called again and said “Baccha chahiye to pachas hajar balli ke hat mein Kandivali Railway Station mein rat ko aath baje dena”.

36. P.W. 1 deposed regarding the events that occurred on 30.08.2012 and 31.08.2012. However, the incidents of 29.08.2012, 30.08.2012 and 31.08.2012 which have been narrated, have come by way of omission. Further, as discussed above, it is also a mystery as to why the conversation which was recorded in the mobile phone on 29.08.2012 was not brought to the notice of the I.O, when the F.I.R was registered on the same day. As per P.W. 12, the

I.O., it was only 7 to 8 days later that P.W. 1 disclosed that he had recorded the conversation in his mobile. P.W. 12 deposed that there was no system in the mobile to show particular time, date and calls. P.W. 1 stated in his examination in chief that Accused No. 1 Manishprasad resided near his house earlier and he had heard his voice and he guessed that the voice in the mobile clipping is his voice, however, even this has come by way of omission. P.W. 12 very categorically stated that P.W. 1 had not identified the voice of the caller.

37. The Supreme Court in the judgment of Tahsildar Singh vs. State of U.P. (supra) settles the law while explicitly stating that material omissions in police statements amounting to contradictions may discredit the witness.

38. Further, the prosecution has not brought on record the expert report regarding the voice samples to prove that the person who had made the phone call to P.W. 1 was the Appellant only and no other person. However, the Trial Court makes an observation regarding the same while stating that the expert report is negative in relation to the Appellant.

39. At this stage it will be pertinent to refer to the authorities relied upon by the Ld. Counsel for the Appellant on this aspect.

40. The judgment in the case of Ram Singh vs. Col. Ram Singh (supra) states thus:

“Thus, so far as this Court is concerned the conditions for admissibility of a tape-recorded statement may be stated as follows:

- (1) *The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition that the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.*
- (2) *The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence—direct or circumstantial.*
- (3) *Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.*
- (4) *The statement must be relevant according to the rules of Evidence Act.*
- (5) *The recorded cassette must be carefully sealed and kept in safe or official custody.*
- (6) *The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.”*

41. The Ld. Counsel for the Appellant has also referred to the judgment in the case of Ram Malkani vs. State of Maharashtra (supra) to further substantiate on the admissibility of tape recorded conversation:

“23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice ; and, thirdly, the accuracy of the tape recorded conversation is provided by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Indian Evidence Act. The conversation between Dr. Motwani and the appellant in the present case is relevant to the matter in issue. There is no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The appellant was given full opportunity to test the genuineness of the tape recorded conversation. The tape recorded conversation is admissible in evidence.”

42. We are therefore of the opinion that the above cited judgments can come to the aid of the Appellant even though the voice/conversation is recorded in a mobile phone which is also an electronic device. The prosecution has failed to prove the conversation as is required to be proved, as

mandated in law. The identity of the caller also remains unidentified. Especially in view of the fact that there is no report establishing conclusively, whether the voice of the caller in the ransom calls recorded by the P.W. 1 is that of the Appellant.

E. RECOVERY OF ARTICLES UNDER SECTION 27:

43. The prosecution examined P.W. 3 in order to establish the recovery of the clothes worn by the Appellant on the day of the incident and a mobile and SIM card. P.W.3 in his deposition states that on 05.09.2012, he was called to the police station and told that murder of a boy was committed and a panchnama was to be prepared. He further deposed that the accused Manishprasad Gaud stated that he was ready to show the place where he kept clothes worn by him on the day of the incident and a mobile phone and a sim card. He also deposed that they sat in a police jeep and went to the house of the said accused. He stated that the mother of the accused was present in the house. He deposed that clothes were hanging and Manishprasad took one black colour half pant having elastic and a full sleeves shirt and gave it. He also deposed that the mother of the accused opened the cupboard and handed over a mobile of Nokia Company. He stated that the mobile was red on the back side and black from the front side. P.W.3 deposed that the clothes and mobile were sealed in brown colour paper and taken to Kandivali police station and

signature was taken. This witness identified all the articles shown to him in the Court. He identified the accused Manishprasad in the court. Nothing could be elicited from the cross-examination to disbelieve this witness. Upon perusal of the Recovery panchnama at Exhibit 189, we find that the IMEI Number of the Mobile device was 35903404837022/1 and 35903404837023/9.

44. The prosecution has also relied upon P.W. 10 who is a panch witness to the recovery of the sim card made at the instance of Samir Baig (A-2). P.W. 10 stated that on 08.09.2012, he was called to Kandivali Police Station. He further stated that upon being asked his name, he disclosed his name as Sameer Baig. He deposed that in their presence, he disclosed that the sim card was kept in his house, in connection with a mobile call made by him. The witness also deposed that they rushed to Ekta residence at the instance of the accused. He further stated that Sameer showed his room and they followed him. It was also deposed that he took out sim card from his almirah and handed this sim card to the police officer. It has come in the cross-examination that the witness had acted as a panch witness in other matters. Apart from the fact that this witness is a habitual panch, nothing has been brought on record to discredit his testimony. A perusal of the recovery panchnama exhibited at Exhibit 212 points out that the mobile phone was of a Unicorn company and the sim card was bearing number 9172060843. It is important to note that the ransom calls were received by the Complainant from the above mentioned

number, which was recovered from Sameer Baig (A-2).

45. The judgment in the case of Mustkeem @ Sirajudeen vs. State of Rajasthan (supra), as rightly relied upon by the Ld. Counsel for the Appellant, reiterates the settled law that a recovery under Section 27 does not imminently point towards the guilt of the accused. It states thus:

“25. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.

26. If the recovery memos were prepared at the police station itself then the same would lose their sanctity as held by this Court in Varun Chaudhary v. State of Rajasthan.

27. The scope and ambit of Section 27 were also illuminatingly stated in Pulukuri Kotayya v. King Emperor reproduced herein below: (IA p. 77)

“.....it is fallacious to treat the ‘fact discovered’ within the section as equivalent to the object produced; the facts discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ‘I will produce a knife concealed in the roof of my house’ does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added ‘with which I stabbed A’, these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.”

The same were thereafter restated in another judgment of this Court in Anter Singh v. State of Rajasthan.”

46. It is further to be taken into consideration that although this sim card

recovered at the instance of Accused No 2 and the mobile device recovered at the instance of the Appellant were in use to make ransom calls to the First Informant (P.W. 1), the same has not been proved with the help of documentary evidence. Neither the CDRs, nor the report of the concerned nodal officers have been exhibited to establish the use of the SIM card in the mobile phone of the Appellant. The relevant 65 B certificates have not been brought on record to establish the same. Even if we are to believe the above mentioned recoveries, in the light of the above records and certification not being exhibited and brought on record, we refrain from taking into consideration the above recoveries to be pointing to the guilt of the Appellant. Thus, in the facts of the present case, the recovery of these articles under Section 27 cannot be viewed as a circumstance leading to the culpability of the accused.

47. It is important to note the judgment of the Supreme Court in the case of Pooranmal vs. The State of Rajasthan³⁶. The judgment reiterates the principle that the 65B certificate is necessary to sanctify the electronic evidence and the absence thereof raises questions about the genuineness of the same. The relevant para are extracted hereunder:

“50. This position of law was cemented by this Court in the case of Anvar P.V. v. P.K. Basheer¹⁴, wherein it was held as follows: -

“14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in

³⁶ 2026 INSC 217

accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B(2). Following are the specified conditions under Section 65-B(2) of the Evidence Act:

- (i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;*
- (ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;*
- (iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and*
- (iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.*

15. Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

- (a) There must be a certificate which identifies the electronic record containing the statement;*
- (b) The certificate must describe the manner in which the electronic record was produced;*
- (c) The certificate must furnish the particulars of the device involved in the production of that record;*
- (d) The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act; and (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.*

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer

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

17. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A—opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.”

(Emphasis Supplied)

F. CHEMICAL ANALYSER REPORTS

48. The evidence with respect to the Chemical Analyser report is also not of much help to the prosecution to connect the present Appellant to the death of the victim child. The prosecution has established through the CA report at Exhibit 222 (collectively) that the blood group of the Appellant is 'B'. Further, from the CA report at Exhibit 222 it can be seen that 8 articles were sent for the analysis viz the piece of cloth (Exhibit 1), stone in polythene bag wrapped in paper labelled (Exhibit 2), cover (Exhibit 3), hair found on cover (Exhibit 3), earth in a plastic container labelled (Exhibit 4), earth in a plastic container (Exhibit 5), full Shirt (Exhibit B1), three fourth pant (Exhibit B2). Although Exhibit 1 to 5 were found to be stained/mixed with blood and the grouping result for Exhibit 2 and 3 were found to be 'Human', the results are inconclusive. Therefore, it cannot be conclusively established that the

Applicant is connected with the death of the victim child.

FINDINGS :

49. We have perused the entire evidence on record, however there is no material on record to hold the Appellant guilty of murder of the deceased. No doubt it is a case of homicidal death, but whether the Appellant is the author of the crime has not been cogently established. Just because there is recovery of the dead body at the instance of the Appellant, which also cannot be said to be cogent and convincing, it cannot be said that the Appellant is connected with the murder of the deceased.

50. A reference can be made to the judgment of Kali Ram vs. The State of Himachal Pradesh (supra) which states as under:

“25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused. It is also an accepted rule that in case the Court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of doubt. Of course, the doubt regarding the guilt of the accused should be reasonable ; it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations. As mentioned by us recently in the case of State of Punjab v. Jagir Singh, a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is

guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.”

51. Thus, we hold that the prosecution has utterly failed to prove the chain of circumstances which would unerringly point out towards the guilt of the accused. There is no material brought on record which can connect the Appellant with the death of the child victim.

52. As far as the conviction under Section 363 of the IPC is concerned, it is important to refer to Section 361 of the IPC is concerned, the same reads as under:

“361. Kidnapping from lawful guardianship. —

Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation. — The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

(Exception)

— This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.”

53. We find it appropriate to refer to the judgment of the Hon’ble Apex

Court in the case of Anversinh @ Kiransinh Fatesinh Zala vs. The State of Gujarat³⁷. The three-judge bench of the Supreme Court laid down the elaborated upon the key ingredients of Section 361 as follows:

“12. A perusal of Section 361 of IPC shows that it is necessary that there be an act of enticing or taking, in addition to establishing the child’s minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian. Such ‘enticement’ need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl. However, mere recovery of a missing minor from the custody of a stranger would not ipsofacto establish the offence of kidnapping. Thus, where the prosecution fails to prove that the incident of removal was committed by or at the instigation of the accused, it would be nearly impossible to bring the guilt home as happened in the cases of King Emperor v. Gokaran and Emperor v. Abdur Rahman.”

The Hon’ble Supreme Court clarifies that in a case where prosecution is unable to prove that the incident of removal of the minor was at the instance of the accused, it would not be possible to point to the guilt of the accused.

54. Taking into consideration the view taken by the Hon’ble Supreme Court in the aforementioned judgment, we find that in the present case, there is no circumstantial evidence brought on record to establish that the Appellant was responsible for enticing or taking out the deceased from the lawful custody of his parents. No doubt P.W. 6 deposed that on 26.08.2026, he had seen the child (deceased) with the Appellant and Balli, followed by the conversation between them, however we have already held that the testimony of this witness does not inspire confidence and also as held by the Hon’ble

³⁷ 2021 INSC 16

Supreme Court that mere recovery of a missing minor from the custody of a stranger would not ipso facto establish the offence of kidnapping. In our opinion, it raises a suspicion with respect to the involvement of the Appellant, but suspicion however strong cannot take place of proof. Thus the offence of kidnapping, punishable under Section 363 of the IPC, is also not proved against the Appellant.

55. Consequently, we hold that there is no material to sustain the charge under Section 201 of the IPC against the Appellant.

56. Thus, after perusing the entirety of the records and taking into consideration the overall conspectus of the matter, we hold that the prosecution has failed to prove any of the offences against the Appellant.

57. The trial court erred in convicting the Appellant. We may also note that the trial court while returning a finding of conviction against the Appellant has held that all sentences to run consecutively. In the present case we have come to the conclusion that circumstances are not proved, however we would like to mention that the trial court could not have directed the sentences to run consecutively. The trial court could not have directed the life sentence to run consecutively with a fixed term sentence, which is against the settled principle of law. The Ld. Counsel for the Appellant has relied upon the judgment of **O.M. Cherian v. State of Kerala** wherein it has been held as under:

“13. Section 31(1) CrPC enjoins a further direction by the court to specify the order in which one particular sentence shall commence after the expiration of the other. Difficulties arise when the courts impose sentence of imprisonment for life and also sentences of imprisonment for fixed term. In such cases, if the court does not direct that the sentences shall run concurrently, then the sentences will run consecutively by operation of Section 31(1) CrPC. There is no question of the convict first undergoing the sentence of imprisonment for life and thereafter undergoing the rest of the sentences of imprisonment of fixed term and any such direction would be unworkable. Since sentence of imprisonment for life means jail till the end of normal life of the convict, the sentence of imprisonment of fixed term has to necessarily run concurrently with life imprisonment. In such case, it will be in order if the Sessions Judges exercise their discretion in issuing direction for concurrent running of sentences. Likewise if two life sentences are imposed on the convict, necessarily, the court has to direct those sentences to run concurrently.

58. The said position of law is reiterated the Hon'ble Apex Court in the latest judgment in the case of **Gopi @ Sahaya Puruna v The State, Rep by The Inspector of Police** wherein it is observed as under :

“21. It is thus clear that the law on this point is settled. The proposition that flows directly from this Court's interpretation of Section 31 of CrPC is that a sentence of life imprisonment cannot be directed to run consecutively, either with another life sentence or with a fixed-term sentence. In the Appellant's case, the Trial Court awarded the sentence of life imprisonment under five counts. One under Section 449 of IPC, thrice under Section 302 of IPC for the murder of Dr. A. Malik Mohammed, his wife Katheeja Bibi and Gnanaprakasam and lastly under Section 364 of IPC. He was also awarded a fixed-term sentence of Rigorous Imprisonment for 7 years under Section 201 of IPC. Both the Trial Court and the High Court directed the sentences to run consecutively. This goes against the settled position of law that in cases where the convict is awarded multiple sentences for multiple offences and one of the sentences awarded is life imprisonment, the sentences must only run concurrently and not consecutively.”

As a result, we pass the following order:

ORDER

i] The Appeal is allowed.

ii] The conviction and sentence of the Appellant under Section 302, 363 and 201 of the IPC recorded vide judgment and order passed by Ld. Sessions Court for Greater Bombay at Dindoshi, Mumbai dated 05.05.2018 in Sessions Case No. 06/13 is quashed and set aside. The Appellant is acquitted of all the charges he is charged with.

iii] Consequently, the Appellant who is in custody shall be released forthwith after complying the procedural formalities, unless required in any other case.

iv] Before being released, the Appellant shall execute P. R. Bond in the sum of Rs. 50,000/- (Rupees Fifty thousand only) under Section 481 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (Corresponding to Section 437A of the Cr.P.C.) for his appearance, in the event an appeal is preferred against the acquittal.

v] The Appeal is disposed of in the above terms.

vi] Pending Applications, if any, also stand disposed of.

(SHREERAM V. SHIRSAT, J)

(MANISH PITALE, J.)