

(2016) 09 GUJ CK 0057
In the Gujarat High Court

Case No : Criminal Appeal No. 1022 of 2006 With Criminal Revision Application
No. 50 of 2006

State of Gujarat

APPELLANT

Vs

Shailendra Rajdev Pasvan

RESPONDENT

Date of Decision : 28-09-2016

Acts Referred:

Arms Act, 1959 — Section 21(1)(A)
Criminal Procedure Code, 1973 (CrPC) — Section 378(1)(3)
Explosives Act, 1884 — Section 3, Section 5
Penal Code, 1860 (IPC) — Section 120(B), Section 302, Section 363, Section 364,
Section 364(

Citation : (2017) 1 GujLH 409

Hon'ble Judges : Mr. Anant S. Dave and Mr. B.N. Karia, JJ.

Bench : Division Bench

Advocate : Criminal Appeal No. 1022 of 2006; Mr. Rutvij Oza, APP, for the Appellant No. 1; H.B. Shethna, Advocate, for the Opponent/Respondent Nos. 1 - 4; Mr. Hardik A. Dave and Mr. Harshadray A. Dave, Advocates, for the Opponent/Respondent No. 5; Criminal Revision

Final Decision : Allowed

Judgement

Mr. Anant S. Dave, J. (Oral)—This appeal is preferred by the State of Gujarat under Section 378 (1) (3) of the Code of Criminal Procedure, 1973 in view of judgment and order of acquittal dated 17.1.2006 passed by learned Presiding Officer, 7th Fast Track Court, Surat, in Sessions Case No.133 of 2001, whereby respondents came to be acquitted of offences under Sections 363, 364, 364 (A), 365 and 302 read with Section 120 (B) of the Indian Penal Code and under Section 21 (1) (A) of the Arms Act and under Sections 3 and 5 of the Indian Explosive Act, as the prosecution failed to prove its case beyond reasonable doubt.

2. Criminal Revision Application No. 50 of 2006 is preferred by the applicant/ original complainant challenging the very judgment.

3. Mr. Rutvij Oza, learned Additional Public Prosecutor appearing for the appellant-State of Gujarat has taken us to genesis of the prosecution case in the complaint lodged by one Paramhans Mangal Yadav residing at Bhaktinagar Society, Surat, who was working as a Supervisor in a private textile having two sons and two daughters and the youngest son, Arjun, who was studying in standard-2 was found missing. Though complaint was registered on 14.2.2001, the incident about missing of son, Arjun, was disclosed before police on 5.2.2001 and entry was made with Kapodara Police Station. According to complainant, on 4.2.2001 he left for his job around 8 a.m. and when returned home for taking meal, his son was not seen and he inquired whereabouts of his son with relatives and friends but till 5.2.2001, son of the complainant was not traceable. In efforts to trace out his son, opponent-accused no.1, Shailendra, also initially helped him but in view of suspicious conduct of accused no.1 and on further inquiry it was found that accused no.1 had kidnapped son of the complainant. After accompanying the complainant initially in his efforts to find out his son, accused no.1 suddenly disappeared and after four days the complainant received a telephone call from accused no.1 that he was at Vapi and upon further inquiry accused no.1 disclosed that he was not happy since Arjun, son of the complainant, was missing. Therefore, the complainant asked his brother-in-law Sadhusharan and other relatives to bring Shailendra back from Vapi and after taking Shailendra into confidence at Surat, it was disclosed that complainant had some animosity with accused no.5 and at his behest Shailendra, A-1, had kidnapped Arjun, son of the complainant. The investigation was carried out. The dead body of son of the complainant was found, was sent for postmortem and charge was framed at Exh.5 for the offences under Sections 363, 364, 364 (A), 365 and 302 read with Section 120 (B) of the Indian Penal Code and under Section 21 (1) (A) of the Arms Act and under Sections 3 and 5 of the Indian Explosive Act and the accused were tried, which resulted into acquittal of the respondents-accused.

4. Learned trial Judge upon examination and appreciation of evidence on record found that case of the prosecution was based on circumstantial evidence and theory of last seen together was unbelievable and extra-judicial confession of accused no.1 before complainant and other relatives was unsafe to be relied on to convict the accused. Panchas of various panchnamas were found to be known or relatives of complainant and though stood by the panchnamas were found to be unreliable. Medico-legal evidence was found lacking to prove the case of the prosecution. The analysis of samples drawn and sent for forensic science laboratory was also not connecting the accused with the crime and by assigning reasons, findings were arrived and conclusions were drawn which resulted into acquittal of respondents.

5. In the backdrop of case, as above, learned APP would contend that though case of the prosecution was based on circumstantial evidence, all circumstances came to be established by the prosecution and every circumstance stood proved on its own strength forming nexus with other circumstances and established and

a chain of events without any lacunae existed ruling out innocence of the accused or involvement of any person other than the accused in crime. According to learned APP, theory of last scene together was duly supported by two independent witnesses and extrajudicial confession of A-1 was free from blemish and medicolegal evidence, panchas of scene of offence, discovery, arrest for which they have supported the case of the prosecution and scientific evidence viz. FSL and serological report established and proved by prosecution collectively lead to inescapable conclusion about guilt of the accused. The trial Court has grossly erred in not believing such cogent, convincing and clinching evidence produced and established by the prosecution and, therefore, the appeal filed by the State of Gujarat, appellant herein, deserves to be allowed by quashing and setting aside the judgment of acquittal under challenge and further respondents be convicted and sentenced to maximum in accordance with law.

6. Learned APP has taken us to evidence against accused no.1, Shailendra Pasvan, on the aspect of last seen together and PW-28, Kamlesh Bhagvanbhai Thakur, Exh.117 and PW-29, Kashiben Chhitubhai Patel, Exh.119, both above independent witnesses having no enmity with any of the accused persons deposed to have seen Arjun, son of the complainant, around 10.30-10.45 a.m. on 4.2.2001. According to PW-28, aged around 17 years at the time of recording his testimonies, was a friend of Arjun, son of the deceased, who narrates various incidents taken place during that period including that of A-1 taking Arjun on a bicycle. PW-29, Kashiben Patel, Exh.119, recollecting the instance around 10.30-10.45 a.m. on 4.2.2001 on Sunday where A-1 Shailendra asked her whereabouts of Arjun and thereafter key of bicycle was handed over to Arjun and Shailendra along with Arjun came down from terrace and went together. The above bicycle on which deceased Arjun was taken away by A-1 was recovered by discovery panchnama, Exh.26 on 16.2.2001 and Amrish Bahadursing Rajput one of the panchas at Exh.25 supported the above discovery in his testimonies. Next it is contended that conduct of the accused no.1 is relevant under Section 8 of the Evidence Act in view of initial support to complainant in tracing out his son, Arjun and after three days A-1 had left for Vapi and made telephone call to complainant to inquire as to whether Arjun was found out or not. Even A-1 had demanded Rs. 10,00,000/- from the complainant and it transpires from the testimony of the complainant. On 14.2.2001, A-1, Shailendra had shown the place from where the deceased was kidnapped on bicycle. Even on 14.2.2001 when A-1 Shailendra came to be arrested mud/earth which was stuck to the shoes of A-1 matches with mud/earth found from the field where the dead body of the deceased was recovered and sent for FSL and report submitted vide Exh.78 and also supported by panch witness Rajesh Mangru Yadav, PW-2, at Exh.13 of panchnama Exh.14.

6.1. On the point of extra-judicial confession by accused no.1, which was made before the complainant, who deposed at Exh.11, Sadhusharan Yadav, P.W.9, Exh.27 and Hiralal Parasnath Yadav, PW-22, Exh.64, in which A-1 told all the above three witnesses that Arjun was taken on bicycle and, thereafter, to railway

station and was handed over to A-2, Ramashish and A-3 Shivnath and all the above witnesses are consistent in this regard. That evidence remained unchallenged by defence in cross-examination of these witnesses. The confession of A-1 is free and voluntary and no threat was administered and, therefore, learned trial Judge ought to have believed these witnesses.

6.2. Learned APP has taken us to discovery panchnama, Exh.49, where bunch of hairs and two bones were recovered and is fully supported by panch witness Ashish Gadhiyali, again an independent witness, PW-3 at Exh.15. As per the FSL report, hairs were found to be human hairs and blood stains of the blood group of the deceased boy were found. Bones were also of human being and age opined in the FSL report, Exh.77 is of a person below 16 years. The discovery of human hair and bones is a new fact discovered and admissible in evidence.

6.3. So far as accused nos.2 and 3 are concerned, learned APP submitted that these accused were arrested by arrest panchnama Exh.18 on 15.1.2001 and the panch witness, Ram Prasad Hajarilal, Exh.17 has supported the prosecution case. When both these accused were arrested, their shoes were stuck with earth/mud and those shoes were attached under panchnama Exh.18, and the same mud/earth was found from the field where dead body of the deceased was lying and FSL report in this regard also supports the case of the prosecution. Blood stains found from the pant of A-3 and from the pant and shirt of A-2 were matching with the blood group of the deceased. Panchnama Exh.32 and 35 are relevant under the provisions of Section 7 and 8 of the Evidence Act so far as the place where the deceased was murdered.

6.4. Learned APP has also taken us through discovery panchnama, Exh.24, by which handkerchief stained with blood used in throttling the deceased was discovered by accused no.3 and in this regard panch witness, Chandrika Yadav, Exh.23 has supported the case of the prosecution. As per Exh.35, discovery panchnama, hairs were found at the place where accused no.3 had taken the panchas and police officers. Accused no.2 produced certain articles like top (bhamarda), clothes of the deceased, one knife, pillets, pieces of iron to prepare handmade bombs, two country made tamanchas, 13 pieces of live cartridges, one plastic injection, syringe, poisonous tablets, walkman tape, telephone diary, one camera, railway tickets etc. As per FSL report Exh.75, walkman was found in working condition and there was a talk regarding demand of money in it. So far as panchnama regarding the place where conspiracy was hatched is also supported by the panch witness Ganesh Yadav, Exh.28. He further submitted that since amount of ransom was demanded, it proves that there was a motive to commit the offence.

6.5. Therefore, according to learned APP, evidence galore on the record about guilt of the accused and, therefore, extensive appreciation of evidence by the appellate Court would establish that trial Court erred in ordering acquittal of respondents based on illogical reasonings and perverse findings which resulted into wrong conclusion about innocence of the accused.

7. Mr. Tolia, learned counsel appearing for the complainant-revisionist in Criminal Revision Application No.50 of 2006 has relied on submissions made by learned APP and contended that acquittal order by learned trial Judge has resulted into gross injustice to the complainant, a victim, who lost his son pursuant to conspiracy hatched and so meticulously executed, culminating into gruesome murder of his minor son. He reiterated and summarized character of circumstantial evidence and in addition to submissions made by learned APP submitted that when respondent no.2 immediately after his arrest on 14.2.2001 pointed out the place on 15.2.2001, where deceased was brought along with his friends and murdered son of the complainant in the field of sugarcane allowed to be eaten away by wild animals. According to Mr. Tolia, the case on hand is not only supported by independent witnesses and unblemished extra-judicial confession but panchas, who are independent, have also supported the case of the prosecution. The postmortem report reveal that Arjun, son of the complainant, was murdered by throttling. Even accused no.4, Ajay @ Pradip Hirala Gupta has shown his willingness to produce handkerchief which was used in throttling the deceased and which was also supported by panch witnesses, Chandrika Yadav, Exh.23 and FSL report reveal blood stained handkerchief having the blood group of deceased Arjun. Likewise, accused no.3, Shivnath Omprakash Gupta shown willingness to produce clothes of the deceased and one top (bhamardo) and some other articles including incriminating articles in one of the bag, viz. knife, pillets, pieces of iron to prepare hand made bombs, two country-made tamanchas, 13 pieces of live cartridges, one plastic injection syringe, poisonous tablets, telephone diary, one camera, railway tickets etc. including one cassette regarding the talk of conspiracy which took place between the accused. Panch witness, Chandubhai Kantilal Shah, Exh.30 supported the case of prosecution for all aspects. Even on the clothes of respondent no.3 and deceased found human blood having group-A, which is blood group of deceased, as per FSL report. Further, A-3 Shivnath Omprakash Gupta also shown place where conspiracy was hatched amongst accused persons on 27.1.2004 and panchnama to that effect was prepared and produced at Exh.29 and witness Ganesh Yadav, Exh.28 has supported the case of the prosecution.

7.1. Therefore, according to learned counsel for the complainant, all these circumstances are sufficient to prove the guilt of the accused beyond reasonable doubt and there is not a single missing link in the chain of the case of prosecution. All these circumstances indicate and establish that the accused and none-else committed the crime in question and, therefore, it is settled law that a man may tell lie but circumstances would never tell a lie and for that reason the order of the trial Court deserves to be quashed and set side. Learned counsel urged reversal of acquittal order and imposition of maximum sentence upon respondent by ordering conviction for the offences for which they were charged.

8. Mr. H.B. Shethna, learned counsel for the respondents-original accused has taken us to the judgment and order of acquittal and submitted that cogent and convincing reasons are assigned for not believing the theory of last seen together

and two witnesses to the above effect are not believed after considering their cross-examination. Kashiben Patel, PW-9 at Ex.119 in cross-examination admitted that her statement was recorded not after eight to ten days of the incidence but after three and a half months. Mr. Shethna relied on the decision reported in AIR 1934 Privy Council (PC) 227 in support of his arguments that the appellate Court jurisdiction and power of the appellate Court is circumscribed by well-settled principles or parameters and further relied on (2016) 1 SCC 501 in the case of State of Karnataka v. Chand Basha in the context of absence of close proximity of a live person seen together by witnesses and in the facts of this case even body was discovered after many days.

8.1. On extra-judicial confession, Mr. Shethna, learned counsel relied on para 12 of the judgment and submitted that confession of A-1 is obtained by threat and inducement and is not admissible under Section 24 of the Evidence Act, that complainant and his relatives threatened A-1 to hand over him to the police if correct facts about kidnapping of Arjun is not disclosed. Thus, when A-1 was threatened the confession is inadmissible in evidence. Learned counsel has also taken us to the judgment and submitted that Keshaben, who deposed at Exh.39, she is the mother of the deceased and was admittedly not present at Surat before and after the crime. About extrajudicial confession, reliance is placed on (2014) 6 SCC 745 in the case of Dhan Raj alias Dhand v. State of Haryana.

8.2. About circumstantial evidence, learned counsel relied on Ashok v. State of Maharashtra, (2015) 4 SCC 343 and submitted that absence of motive in the facts of this case, which is based on circumstantial evidence, view taken by the trial Court in favour of the accused need not be reversed even if this Court is inclined to take a different view and he has also contended on nature of evidence collected including presence of mud on shoes of A-1 recovered after ten days, absence of TI Parade, no evidence of accused demanding money viz. Rs. 10 Lacs, Arjun, son of the complainant wearing school uniform on a holiday i.e. Sunday which came to be recovered. That medical evidence about possibility of death before 36 to 48 hours falsify case of the prosecution including that of timings and day of kidnapping, presence of A-1 Shailendra with complainant and his relatives on 11.2.2001 and conclusively do not prove that body recovered was of a male or female and no determination about exact age of the deceased. Even fingerprints collected were not sent for FSL and finally on aspect of conspiracy if A-5 is not involved according to the complainant, then for what reason A-1 and other accused committed crime and there appear complete absence of motive. In view of these, he prayed that this appeal as well as revision application may be dismissed.

9. Having heard Mr. Rutvij Oza, learned APP for the appellant-State of Gujarat, Mr. Tolia, learned advocate for the revisionist-original complainant and Mr. Shethna, learned counsel for respondent nos.1 to 4 and Mr. H.A. Dave, learned counsel for respondent no.5 and perusal of entire record of the case including judgment and order of acquittal under challenge, it is undisputed fact that case

of prosecution is based on circumstantial evidence, having basis in last seen together theory and extra-judicial confession of accused of committing crime, almost all panchas supporting the case of the prosecution and medico-legal opinion and scientific examination of evidence on record.

9.1. We have considered following oral as well as documentary evidence.

PW No.

Name/Particulars

Note

Exh.

Page No.

1

Charge

5

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Paramhans Mangal Yadav

Complainant

11

207A

Complaint

Dated 14.02.2001

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2

Rajesh Mangarubhai Yadav

Panch of Exh.14

13

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Arrest Panchanama

Arrest of Shailendra (A1)

14

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3

Ashish Sanmukh Ghadiyali

Panch of Exh.16

15

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Discovery Panchnama

Dated 15.02.2001 by A1

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4

Ramprasad Hajarilal Kashyap

Panch of Exh.18

17

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Arrest panchnama

Ramashish (A2) and Shivnath (A3)

18

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5

Sanjay Naginbhai Patel

Panch of Exh.20

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Panchnama for place of incident

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6 H

Jyantibhai Karshanbhai Patel

Panch of Exh.20

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Discovery by Ramashish

Dated 16.02.2001

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Chandrika Rambrij Yadav

Panch of Exh.24

23

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Discovery by Shivnath

Dated 16.02.2001

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8

Amrish Bahadursang Rajput

Panch of Exh.26

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Discovery of Cycle by Shailendra on which he had taken victim

PW-8 endorse that A-1 was residing at the given address since one and half years

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9

Sadhusharan Harinandan Yadav

Confession by A1 regarding the offence. A1 admitted that on instruction of A5, he had kidnapped victim

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10

Ganesh Satan Yadav

Panch of Exh.29

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Discovery Panchnama by Ramashish A2

On 27.01.2001 A1 to A4 have met at the place and decided the plan to kidnap victim and extort money from complainant. Photograph of the A1 to A4 was captured in camera of Ajay (A4)

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Chandubhai kantilal Shah Panch of Exh.31

30

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Discovery by Ramashish (A2)

2 Country made Tamanchas, 13 Cartoos, knife, material for preparing country made bomb, Injection, poisonous tablets, clothes of A2, cloth of victim, Top (Bhamardo) with string, cassette of conversation recorded, Camera, letter by Shailendra (A1)

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Sanjay Ramadhar Yadav

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13H

Prakashbhai Arjunbhai

Panch of Exh.35

33

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Discovery by Shivnath (A3)

Place of incident

35

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14

Shantilal Ramjibhai

Panch of Exh.37

36

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Discovery by Ajay (A4)

Place of incident

37

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15

Naginbhai Kalyanji Patel

Land Owner of agriculture field from where dead body of victim was found

38

300

16

Keshben Paramhans

Mother of victim

39

303

17

Ganeshbhai Chhotubhai

Panch of Exh.41

40

306

Inquest panchnama

Matching with the postmortem report

41

308

18H

Rajubhai Totaram

Panch of Exh.43

42

311

Recovery panchnama prepared by Police Officer of Pandesara Police Station

Recovered metal chain

43

313

19

Savjibhai Havarji Gameti

PSI, Kapodara Police Station on 05.02.2001 complainant had declared about his missing son

44

315

Missing complaint

Dated 05.02.2001

45

317

20

Mansangbhai Nagjibhai

PSI, Pandesara Police Station Gone to the place of incident as it was informed by the Sarpanch of Vadod Village that one dead body is lying in the agriculture field of PW15

46

319

21

Kishorsinh Bahadursinj Jadeja

PI, Kapodara Police Station

47

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Application

u/s. 319 of CRPC

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328

Order below Exh.50 joining A5 as an accused

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Charge

Ramkeval Mutur Yadav (A5)

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22

Hiralal Parasnath Yadav

Confession by A1 regarding the offence. A1 admitted that on instruction of A5, he had kidnapped victim

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23

Bismillahkhan Sahebkhani Pathan

PI, CID Crime, Surat City IO

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24

Munavarkhan Jamalkhan Pathan

PSI, Kapodara Police Station

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Discovery by Shailendra

About what he had done after reaching to the house of complainant Officer of the Forensic Science Laboratory

69

408

25

Dr. Mohhamad Iqbal Hussain Qureshi

? Opined regarding the bones found from the incident

71

412

Report by PW25

72

415

Serology Analysis

439

Biology Analysis

Opinion @ 446 It was found that control samples are matching with the clay found from the shoes of accused persons

78

442

Photography Analysis

Camera was found in a working condition

79

447

26

Vijaysing Gorsing Bhagora

PSO, Pandesara Police Station

83

456

27

Pravinbhai Kalidas Patel

PM Doctor

87

470

PM Report

Column No.7, 13, 14, 17, 20 and 27

88

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Certificate for cause of death

Asphyxia as a result of throttling associated with smothering

89

483

28

Kamleshkumar Bhagwanbhai Thakor

Neighbour of victim Last seen together

117

591

29

Kashiben Chhitubhai Patel

Neighbour of victim Last seen together

119

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Judgment

Dated 17.01.2006

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Barring PW-6, 13 and 18, all panchas have supported the case of the prosecution.

9.2. The learned trial Judge has accepted homicidal death based on evidence appreciated and discussed. For not believing testimonies of the complainant, Paramhans Mangaldas Yadav, PW-1, Exh.11, Sadhusharan Harinandan Yadav, PW-9, Exh.27 and Hiralal Parasnath Yadav, PW-22, Exh.64, learned trial Judge has found that testimonies of above witnesses do not inspire confidence and not trustworthy and, therefore, unreliable. All the above witnesses are relatives and known to each other and doubt is created for their conduct of not informing police about such confession in spite of the fact that information about missing

Arjun was given on 5.2.2001 to Kapodara Police Station. However, there is no evidence about demand of ransom of Rs. 10 Lacs and bringing Shailendra, A-1 from Vapi and his whereabouts, no material was produced including railway tickets by which PW-9 and another Premchand Yadav travelled from Surat to Vapi. Thus, confession made by A-6 before above witnesses create doubt if considered along with last seen together theory by two witnesses viz. Kamlesh Bhagvanbhai Thakur, PW-28, Exh.117 and Kashiben Chhitubhai Patel, PW-29, Exh.119, who in their cross-examination when confronted failed to support the case of prosecution. Even the presence of Kashiben is doubted by learned trial Judge on the ground that incidence of missing of Arjun had taken place on Sunday and being holiday ordinarily she was not leaving her house for sale of vegetables. Further, statement was recorded by police after eight to ten days and in cross-examination, she admitted to have made statement after three and a half months and before that she had not disclosed about the incidence. Immediately after the incidence she had left for attending a marriage ceremony and, therefore, she had no knowledge about what exactly transpired.

9.3. Thus, according to trial Court extra-judicial confession and theory of last seen together both were circumstances neither established nor proved by prosecution.

9.4. Further, confession made by A-1 was considered in light of Section 24 of the Indian Evidence Act and applying law it was held that witnesses of last seen together theory were set up by prosecution subsequently and the above doubt is created in the mind of the trial Court in view of belated complaint filed on 14.2.2001.

9.5. While considering Section 27 of the Evidence Act in the context of extra-judicial confession made by A-1 and articles which were recovered and discovered panch witnesses to some extent supported the case of prosecution but movement of accused and with motive for which no evidence was available. Initial theory about conspiracy hatched and executed at the behest of A-5, as per trial Court remained not proved, particularly, complainant visiting A-1 in jail in which it was disclosed that A-5 had no role to play and his name was wrongly mentioned in the complaint.

9.6. Even on scientific evidence including P.M. report would at the most reveal homicidal death but again as opined by doctor, they were not sure whether the dead body was of male or female. No detailed test was carried out of bone test to conclusively prove gender of dead body. Further incriminating material recovered viz. handkerchief, shoes put on by accused, mud found thereon, video tapes etc. would not connect accused with crime. Even dead body which was brought for postmortem possible time of death was prior to 36 to 48 hours which run contrary to case of the prosecution, particularly, accused no.1 was with complainant for about three days initially and was found missing for two days and inquiry was made on 9.2.2001 by A-1 about Arjun, who was then brought from Vapi to Surat on 10.2.2001 and on 11.2.2001 again A-1 remained with

complainant and his relatives. The dead body was found on 13.2.2001. Therefore, according to trial Court probable timings of death viz. 36 to 48 hours prior to dead body was brought for postmortem also do not get support from scientific evidence.

10. Having considered above line of reasonings on which findings and conclusion of no guilt of accused are arrived, we may profitably refer to postmortem report, Exh.88, which refers to a dead body of unknown male child aged about 10 years wearing no clothes and one golden metal chain present around neck. The body was swollen and in the stage of decomposition. Rigor mortis had already passed off with no marks of external injuries. However, column no.17 reveal following injuries.

(i) Laceration seen over inner Mucosal surface of lips.

(ii) Impression of the thumb and finger tips are found on either side of the windpipe. Thumb mark is higher and wider on Rt.side of the front of the neck. Finger marks are situated on its other side; obliquely downwards and outward; found clustered together and cannot be distinguished. Separately.

(iii) Hyoid tat C presence of hemorrhage in the tissues around the site. Extravasation of blood into the subcutaneous tissues under the finger mark and in the adjacent muscles of the neck cornua of thyroid cartilage. Ante mortem.

11. As per note made therein, radiological age has completed seven years but less than 12 years and cause of death was asphyxia as a result of throttling associated with smothering. Dr. Pravinbhai Kalidas Patel, PW-27 at Exh.87, Medical Officer, New Civil Hospital, Surat, confirmed fracture of hyoidbone and injuries were ante-mortem and the cause of death due to asphyxia by throttling. The above prosecution witness also confirms about report of FSL about age of body of the deceased as below 16 years. The above scientific evidence is a strong circumstance in light of evidence of two independent witnesses, viz. PW-28 and PW-29, who had seen A-1 with Arjun when he was alive. PW-28 was a close friend of Arjun, playing together at the day and time of incidence and categorically described how another boy-Dhaval, who left for repairing of video-game in nearby shop and what has happened around 10.30 to 11 O'clock on 4.2.2001. The above independent witness has identified A-1 in the Court room. Another PW-29, Kashiben categorically recollect the incidence and denies that in her police statement she had not stated that she had not gone for vending vegetables. According to her, while she was in her house and cutting vegetables, A-1 had come to her house and asked whereabouts of Arjun and, thereafter, A-1 had gone on the terrace of the complainant and had shown key of bicycle and both of them had gone together. By dis-believing above two independent witnesses, who have identified A-1 in the Court room, the trial Court has committed grave error.

12. If extra-judicial confession made by A-1 before three persons is looked into in the context of Section 24 what appears on record is that A-1 was told by

complainant and other persons that if he fails to disclose the correct facts about Arjun, he would be handed over to police but nothing appears on record about any kind of threat, inducement, allurements or promise and the above fact remains confirmed in testimonies of all three prosecution witnesses, viz. complainant, PW-1, Sadhusharan, PW-9 and Hiralal, PW-22, Exh.64.

13. Talk of above confirmation appears in testimonies of almost all witnesses including police witnesses. What is expected of the Court while appreciating the extra-judicial confession is whether it is voluntary, trustworthy and inspires confidence and, therefore, reliable. In the facts of this case, the police was informed about missing of Arjun on 4.2.2001 and finally when dead body was found on 13.2.2001, FIR came to be registered on 14.2.2001 but simply because complainant has not reported about conduct of A-1 and confession, itself would not be a ground to discard his testimony. In a case of kidnapping and ransom, tendency of victim and/or relatives of kidnapped is to find out missing person by making efforts on their own since taking help of police might result into endangering the life of kidnapped. In the facts of this case, A-1 was known to complainant and resided with him for two to three years prior to incidence and, therefore, such conduct of complainant to persuade A-1 to find out whereabouts of his missing son Arjun cannot be said to be a circumstance adversely affecting the case of the prosecution. As we have no doubt that two basic aspects about last seen together of alive Arjun and extra-judicial confession, for both sufficient evidence exists and well-established with support of all panchas along with scientific evidence.

14. As per the evidence available, appreciated, established by the prosecution, following circumstances were not only established but proved by the prosecution, viz.

(i) Evidence of last seen together (deceased Arjun and accused no.1) :- In this regard, as discussed earlier, two witnesses viz. Kamleshkumar, Exh.117 and Kashiben, Exh.119, who are independent witnesses with no enmity or any relationship with complainant, have supported the case of the prosecution.

(ii) The conduct of accused no.1 if judged in light of Section 8 of the Evidence Act, who initially accompanied the complainant for making inquiry about missing Arjun and, thereafter disappeared, made a call and was brought from Vapi by two other witnesses, who have deposed accordingly. Such conduct reflects mens rea and mala fide intention on the part of A-1. PW-9 and PW-10, who had gone to Vapi to bring back A-1, is dis-believed by the trial Court simply because they had not produced railway tickets. It is a matter of common prudence that passengers hardly keep or preserve railway tickets on completion of their travel. Otherwise both the above prosecution witnesses have supported the case of the prosecution.

(iii) Arrest panchnama of A-1 reveals shoes of accused no.1 stuck up with mud/earth, which tallies with mud/earth found from the scene of offence from where

dead-body was recovered as per FSL report and Rajesh, PW-2 supports the case of prosecution by confirming panchnama Exh.14.

(iv) A-1 came to Surat and made confessional statement before the complainant and other witnesses that he had kidnapped Arjun and thereafter Arjun was handed over to A-2 and A-3. A-1 also pointed out the place where the deceased was kidnapped on bicycle. The extra-judicial confession is not challenged in cross-examination.

(v) A-2 has also pointed out the place where the deceased was brought along with his friends and also had shown field in which the deceased was murdered and, thereafter, dead body was thrown in the open field. In panchnama new facts have been discovered viz. bunch of hairs and two bones viz. one thin and one thick with length of 26 cms. approximately along with other articles and panch witness Ashish Ghadiyali, PW-3 has supported the panchnama, Exh.16 in his testimony at Exh.15.

(vi) A-1 had also shown willingness to show place where bicycle on which deceased was kidnapped was left by him. Again panch witness Amrish Rajput, Exh.25, supported panchnama Exh.26.

(vii) After arrest A-2, Ramashish, had shown his willingness to show place where Arjun was murdered by throttling and panchnama was prepared Exh.22 again gets corroboration by the witness. A-2 had also shown willingness to produce clothes of the deceased, one top (a spinning toy which revolves with the help of a string and in vernacular called "bhamardo"), some other articles including knife, pillets, pieces of iron to prepare handmade bombs, two country-made tamanchas and cartridges, one plastic injection, syringe, poisonous tablets, tape recorder, telephone diary, camera, railway tickets and cassettes which gets fully established as per panchnama Exh.31 and confirmed by Chandubhai, PW-11. The complainant in his testimonies identified clothes of Arjun and categorically deposed that on Sunday and holidays, his son used to wear old school uniform. That clothes of A-2 and deceased, on which human blood of Group "A" was found, was matching with blood group of the deceased as per FSL report.

(viii) A-2, Ramashish, had also shown his willingness to point out the place where the conspiracy was hatched and panchnama, Exh.29, was produced and witness Ganesh Yadav, PW-10 has supported the case of the prosecution.

(ix) A-3, Shivnath had shown his willingness to produce handkerchief which was used in throttling Arjun while he was murdered and blood stained handkerchief was produced by him for which panchnama Exh.24 was prepared and supported by panch witness Chandrika Yadav, Exh.23, and FSL report confirmed blood group of deceased on the blood stained handkerchief. Accused no.2 and accused no.3 have not explained blood and mud on their clothes and shoes.

(x) Even possibility of A-1 misguiding complainant and others by implicating A-5 is not ruled out.

15. Reliance placed on the decision in the case of Sheo Swarup and Others v. King Emperor, AIR 1934 Privy Council 227 (2) in which an appeal was preferred before Privy Council from order of Allahabad High Court under Section 417 of the Criminal Procedure Code, 1898, in which well-known principles were discussed and it was held that when order of acquittal by lower Court suffers from thorough incompetence, stupidity or perversity by distorting conclusion so as to produce positive miscarriage of justice and the lower Court has obstinately blundered, the High Court can well interfere with such order, otherwise, view taken by the lower Court ordinarily need not be reversed. The Privy Council also taken into consideration Section 423 of earlier Code of Criminal Procedure about powers of Appellate Court. The above declaration of law of powers of Appellate Court against order of acquittal by lower Courts by and large was followed even by the Apex court and various High Courts but at the same time, in the case of Sanwal Singh v. State of Rajasthan in 1961 (3) Supreme Court Reports 120, it was held that there is no phraseology like "strong compelling", "cogent" "substantial reasons" etc. as per Justice Subba Rao (as His Lordship then was) appear in the provisions and no different treatment is to be given to appeal against acquittal. Such phraseology according to learned Judge was not borne out from any of the conclusion.

16. Another decision in the case of Ashok v. State of Maharashtra (supra) about last seen together, we are in respectful agreement with the law laid down in the above case that accused himself would have special knowledge of incident and thus would have burden of proof as per Section 106 of the Evidence Act but last seen together itself is not conclusive proof and that prosecution is supposed to establish clinching evidence in support of last seen together theory so as to shift burden of proof on to the appellant-accused. The facts in this case, as discussed earlier, convincingly and conclusively establish and prove its case about last seen together theory with plenty of materials recovered and discovered and in the testimonies of prosecution witnesses.

17. Another decision in the case of State of Karnataka v. Chand Basha (supra) again about last seen together theory and necessity of close proximity about last seen evidence and death to be clearly established, for which we have already discussed the evidence as to manner in which both the witnesses of last seen together theory recollected the incidence of A-1 searching about Arjun and went away with him on a bicycle.

18. Another decision of Nizam and Another v. State of Rajasthan (2016) 1 SCC 550 (supra) will be of no use to learned advocate for the defence inasmuch as the very principles laid down in the case of Ashok (supra) are reiterated.

19. However, the Apex Court in the case of State of Karnataka v. Suvarnamma and Another reported in 2015 (1) SCC 323 considered Section 155, 165 of the Evidence Act, 1872 in the context of offences under Section 304 and 498-A and dying declaration under Section 32 (1) of the Evidence Act and powers of appellate Court against acquittal order by the trial Court and after scanning law

in this regard laid down by the Apex Court in various cases including in Shivaji Sahabrao Bobade v. State of Maharashtra reported in 1973 (2) SCC 793 and other such decisions found that there is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Relying on the decision in the case of Main Pal v. State of Haryana reported in 2004 (10) SCC 692 in which in paragraph 12, the Apex Court held as under :-

"12. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. As a matter of fact, in an appeal against acquittal, the High Court as the court of first appeal is obligated to go into greater detail of the evidence to see whether any miscarriage has resulted from the order of acquittal, though it has to act with great circumspection and utmost care before ordering the reversal of an acquittal. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See Bhagwan Singh v. State of M.P. ((2002) 4 SCC 85) : (AIR 2002 SC 1621 : 2002 AIR SCW 1532) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference."

20. What emerges from various case laws of the Apex Court with regard to powers of the Appellate Court, in appeal against order of acquittal ordered by the lower Court, principles to be followed can be summarized as under:-

20.1. That in an appeal against acquittal filed under Section 378 read with Section 386 of the Code, 1973, as such there is no limitation upon the Appellate Court to review the evidence. But at the same time, if on fact as well as on law, conclusion drawn by the trial Court based on appreciation of evidence unless compelling, cogent and substantial reasons appear for interference and when findings and reasonings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable, acquittal is not to be reversed or disturbed. When acquittal is based on the surmises and conjectures and not substantiated by law and evidence on record, an Appellate Court may re-appreciate and review the entire evidence to see that undue benefit is not given

to the accused. Now, it is well settled that even if two views are possible, the Appellate Court shall not ordinarily interfere with the judgment of acquittal in a routine manner unless the judgment of the trial court is per se wrong on facts and on law or perverse, substituting its own views by the High Court is not permissible. Further, it is well settled that even if two views are possible in an appeal against acquittal, the view taken by the trial Court is one of the possible view, then the view which favours the acquittal is not to be disturbed or interfered with. That in case of acquittal, it is to be born in mind by the Appellate Court that there is double presumption in favour of the accused that firstly, presumption of innocence on the premise that every person should be presumed to be innocent unless he is proved to be guilty by the Court of Law, and secondly, when accused secures an acquittal, such presumption of innocence is reinforced and reaffirmed by the trial Court. However, as such there is no straight jacket formula while considering appeal against acquittal and each case is to be dealt with on its facts and circumstances.

20.2. When acquittal is based on the surmises and conjectures and not substantiated by law and evidence on record, an Appellate Court may re-appreciate and review the entire evidence to see that undue benefit is not given to the accused. Now, it is well settled that even if two views are possible, the Appellate Court shall not ordinarily interfere with the judgment of acquittal in a routine manner unless the judgment of the trial Court is per se wrong on facts and on law or perverse, substituting its own views by the High Court is not permissible.

20.3. That in case of acquittal, it is to be borne into mind by the Appellate Court that there is double presumption in favour of the accused that firstly, presumption of innocence in favour of a guilty on the premise that every person should be presumed to be innocent unless he is proved to be guilty by the Court of Law, and secondly, when accused secures an acquittal, such presumption of innocence is reinforced and reaffirmed by the trial Court. That it is further well settled that even if two views are possible in an appeal against acquittal, the views taken by the trial Court if one of the possible views, then the view which favours the acquittal is to be not disturbed for interfering with.

21. Reasons assigned by trial Court about no guilt of accused are not germane to the record and contrary to evidence. On appreciation of entire evidence if the appellate Court find reasons assigned for arriving at findings and drawing conclusions by the trial Court are perverse and minor discrepancies, even omissions and contradictions, not touching to the core of prosecution are pressed into not believing the case of prosecution can be set right by the appellate Court. In the facts of this case, all circumstances are not only established but proved beyond reasonable doubt forming nexus with each other and chain of events is such which lead to inescapable conclusion about guilt of the accused ruling out any of the possibility of involvement of any other person.

22. Therefore, the case based on circumstantial evidence for which

circumstances stand proved and even evaluation of proved circumstances cumulatively appreciated leave no room of doubt about the guilt of the accused and rule out involvement of any other person and, accordingly, we find that judgment and order of acquittal warrant interference in exercise of powers under Section 378 read with Section 386 of Cr.P.C. 1973. We find no substance in the arguments of learned counsel for the defence about failure on the part of the prosecution to prove its case beyond reasonable doubt.

23. Thus, accepting submissions made by learned APP and learned advocate for the complainant in revision application, we allow this appeal as well as revision application and accordingly acquittal order passed by learned trial Judge, except under the Arms Act and Indian Explosives Act, is quashed and set aside so far as accused nos.1 to 4 are concerned and they are hereby convicted for the offences punishable under Section 363, 364, 364 (A), 365, 302 and 120- B of the Indian Penal Code. For awarding sentence, these matters are adjourned to 13th October, 2016.

Further Order

24. Heard Shri Rutvij Oza, learned APP for the appellant-State of Gujarat, Shri Tolia, learned advocate for the revisionist-original complainant and Mr. H.B. Shethna, learned counsel for respondent nos.1 to 4.

25. According to learned APP, in view of conviction recorded by this Court under Sections 363, 364, 364-A, 365 and 302 read with Section 120-B of the Indian Penal Code, the case may not fall in the category of the rarest of rare for awarding death punishment but no less than life imprisonment is required to be imposed and no leniency be shown by this Court. Learned counsel for the complainant has also supported the submissions made by learned APP, as above. However, according to Shri H.B. Shethna, learned advocate for respondent nos. 1 to 4, case of the prosecution is based on circumstantial evidence and the trial Court has ordered acquittal by dis-believing the case of prosecution and considering individual role of accused nos.1 to 4, in view of absence of conspiracy at the behest of respondent no.5, sentence is to be imposed by taking a lenient view and under no circumstance death sentence be awarded. Learned advocate for respondent nos.1 to 4 requested for granting reasonable time to respondent nos.1 to 4 to surrender as they are inclined to approach the Apex Court.

26. Having regard to the facts and circumstances and considering evidence on record and reasons assigned on the basis of which findings and conclusions are arrived in this judgment, while reversing the judgment and order of acquittal under challenge in this appeal, we deem it just and proper to impose punishment upon respondent nos.1 to 4 as follows :-

Offence under Section

Sentence Imposed

Default Sentence

302 of IPC

Life imprisonment + fine of Rs. 10,000/- each

Two months" simple imprisonment.

363 of IPC

Seven Years rigorous imprisonment + fine of Rs. 5,000/- each

One month"s simple imprisonment.

364 of IPC

Ten Years rigorous imprisonment + fine of Rs. 5,000/- each

One month"s simple imprisonment.

364-A of IPC

Life imprisonment + fine of Rs. 10,000/- each

One month"s simple imprisonment.

365 of IPC

Seven Years rigorous imprisonment + fine of Rs. 5,000/- each

One month"s simple imprisonment.

27. All the above sentences shall run concurrently. Ten weeks time is granted to accused nos.1 to 4 to surrender before the jail authorities for undergoing the above sentence. Acquittal of accused no.5 is upheld. Remaining part of the impugned judgment shall remain unaltered. Bail bond of the accused stands cancelled. Record and Proceedings, if lying here, be sent back to the concerned trial Court forthwith.