
(1979) 04 GUJ CK 0006
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Subamiya Dosmohmed and Another

RESPONDENT

Date of Decision : 12-04-1979

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Penal Code, 1860 (IPC) — Section 120B, 34, 34, 364, 404

Citation : (1980) 21 GLR 587

Hon'ble Judges : M.K. Shah, J;A.N. Surti, J

Bench : Division Bench

Judgement

A.N. Surti, J.—In the life of Gujarat, particularly in North Gujarat, a heinous offence was committed on August 27, 28, 1977 (which attracted considerable attention of the press and public as can be seen from the record of the case), Wherein a young innocent boy, untainted with worldly designs, and deliberately selected as incapable of giving any mental or physical resistance to the offenders, was kidnapped, and mercilessly done to death, the initial motive for the commission of the crime being, that as accused No. 2 had no son was craving for the human flesh of his son and he was anxious to get a son, and he could only get a son, if he offered "The tuft of hair of a young boy to Kalkamata...a deity" as advised by one Bava (or a so-called Sadhu or a Saint). But at this very stage, we may hasten to add that in course of the hearing of the appeal, we, times out of number, did administer to ourselves the necessary warning bell or the required caution to see, that the heinous nature of the crime, or the attraction of the press or the public should not at all affect our dispassionate and detached approach to the whole case with an anxious desire to find out the real truth. We were also conscious of the fact, that we should not be least led away by any sentimental or emotional considerations, as the unfortunate old father of the victim has living six daughters, and the seventh child, namely - a young son Tinu (aged about 4 years) was done to death without any fault of the family or the victim. With these words, we will briefly mention a few relevant facts giving rise to the present appeal.

2. The State of Gujarat was aggrieved by the impugned order of acquittal passed by the learned Sessions Judge, Sabarkantha at Himatnagar in Sessions Case No. 52 of 1977 wherein the learned Sessions Judge acquitted the respondents-accused for the alleged commission of the offences punishable under Sections 364 read with Section 120-B, 302 read with Section 120-B and/ or read with Section 34 of the Indian Penal Code and also Sections 404 and Section 507 of the Indian Penal Code.

3. It was the prosecution case that one Budhiprasad Shankerlal who was residing at Prantij, District Sabarkantha, had six daughters and the young son named Tinu. It was alleged by the prosecution, that on August, 27, 1977 the young boy Tinu was kidnapped and murdered. The dead body of Tinu was found on 29th August 1977. It was alleged by the prosecution that accused No. 2 Chandrakant Chimanlal Desai had no child, and, therefore, with a view to get a child, as advised by some Bava (the so called Sadhu or a Saint) a tuft of hair of a young boy was required to be offered to the deity of Kalkamata. It was the prosecution case, that with a view to achieve the said object, accused No. 2 secured the services of accused No. 1 Subamiya Dosmohmed. It was further the prosecution case that at the relevant time, accused No. 1 was already fondling Tinu, who was the son of Budhiprasad Shankerlal. It may be stated at this stage, that Budhiprasad was conducting a small Chavana or Sweet-meat shop, and accused No. 1 was coming at the said shop and was fondling Tinu for a considerable time. It was also alleged by the prosecution that accused No. 1 used to give Banana, sweet drops etc. to Tinu and used to fondle him. The prosecution alleged that Tinu, the victim of the incident was in the company of Budhiprasad Shankerlal till 4-00 or 4-30 p.m. on August 27, 1977. It was the prosecution case, that thereafter, Tinu was suddenly missing. On that very day, i.e. on 27th August 1977, accused No. 1 was last seen by witness Noorbibi Ibrahimhai, at about 7.00 p.m. It was the prosecution case that when Tinu was not seen on August 27, 1977 by 9-30 p.m. or 10-00 p.m. a crowd of people had collected and the crowd caught hold of accused No. 1 and brought him before Budhiprasad, the father of the victim. At that point of time, Budhiprasad the father of the victim did not entertain any doubt that accused No. 1, was responsible for the alleged crime. It may be mentioned at this stage, that accused No. 1 as a matter of fact, told Budhiprasad that if he had any doubt he was prepared to be arrested. But Budhiprasad told the crowd that he had no doubt about accused No. 1 as the person having any hand in the commission of the alleged crime.

4. It was the prosecution case that on 28th August 1977, accused No. 2 had shown one Jasachithi to Budhiprasad and it is stated in the Jasachithi Ex. 91 that Budhiprasad should put a sum of Rs. 700/- in a temple owned by Rabaris and that thereafter, he should not think of the said amount. It is also stated in the said Jasachithi that Budhiprasad should not inform the police about the said Jashachithi, and if he informed the police, the boy would be murdered. It is also stated in the Jasachithi, that Budhiprasad should not tell anything about the contents of the Jashachithi either to the Police or to anybody else. It was the

prosecution case, that after the dead body of Tinu was found out, accused No. 1 had removed certain silver anklets from the dead body of Tinu, and they were sold to prosecution witness Shankalchand for a sum of Rs. 8/-. The prosecution alleged that a sum of Rs. 7/- was retained by accused No. 1 whereas the sum of Re. 1/- was given to accused No. 2.

5. On August 30, 1977, at about 9-00 p.m. or 10-00 p.m. accused No. 1 was arrested whereas on the same night i.e. on August 31, 1977, at about 4-30 a.m. accused No. 2 was arrested.

6. Accused No. 1 was in police custody till September 6, 1977 and thereafter, accused No. 1 was in judicial custody. It is the prosecution case that on 9th of September 1977, accused No. 1 made a voluntary and truthful confession before the Magistrate.

7. Shortly stated on the aforesaid facts, it was alleged by the prosecution that the accused persons had committed the aforesaid offences.

8. The defence was one of total denial. Suffice it to state at this stage that when the circumstances appearing against the accused persons were put in Section 313 Cr. P. Code examination, both the accused persons either stated that they did not know anything about the facts or that they were not true or that they did not know anything about the circumstances. They also stated that they did not remember anything about the circumstances put by the learned trial Judge. In regard to the confession made by accused No. 1, he retracted the same for the first time when his statement u/s 313 of Cr. P. Code was recorded.

9. This was a case of circumstantial evidence. The learned Trial Judge was not impressed by the confession made by the accused No. 1 nor he was impressed by the several circumstances duly proved on the record of the case and acquitted the respondents accused. The State of Gujarat was aggrieved by the impugned order of acquittal and has filed the present appeal.

10. Before we proceeded to consider the evidence led by the prosecution, we were very much conscious of the fact, that the decision under challenge was one which had resulted in the acquittal of the accused persons. The guiding principles governing the exercise of the High Court's appellate jurisdiction are well settled. The appellate Court, while dealing with an appeal against the order of acquittal has full power to review at large the evidence on which the order of acquittal is founded, and to reach a conclusion that upon such evidence, the order of acquittal should be reversed. However, in exercising its powers the appellate Court should give proper weight and consideration to such matters as : (1) the views of the trial Court as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of the appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses which finding would not certainly be disturbed, if two reasonable

conclusions can be reached on the basis of the evidence on the record; (vide *Samson Hyam Kemkar Vs. State of Maharashtra*, *Bhim Singh Rup Singh Vs. State of Maharashtra*, , *Nirpal Singh and Others Vs. State of Haryana*, , *Satbir Singh and Another Vs. State of Punjab*, , and *K. Gopal Reddy Vs. State of Andhra Pradesh*, .

11. Mr. G.N. Desai, the learned Public Prosecutor being conscious of the aforesaid judgments, has argued the appeal very fairly. He also brought to our notice one very important fact that this being a case of circumstantial evidence, we should be very much conscious of the observations made in *Emperor v. Basangouda Yamanappa* 43 B.L.R. 144. The relevant observations are as under:

It is the duty of counsel in defending an accused to point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence. Where the accused is not represented, or not properly represented the Judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused, and if there is, he is not justified in convicting. A reasonable explanation of the evidence should not be rejected because not offered by the accused.

12. Having pointed out the aforesaid observations, Mr. G.N. Desai also urged before us that we should not be least led away by the heinous nature of the crime, and that the same should not affect in any manner whatsoever, our dispassionate and detached appreciation of the circumstances duly proved on the record of the case. In substance, Mr. Desai urged that simply because a young boy aged about 4 years died a homicidal death, we should not record an order of conviction any how, because the liberty of a citizen is equally precious. With this preliminary submission Mr. Desai, read out before us a confession which was made by accused No. 1 before the learned Magistrate. It may be once again emphasised at this stage, that accused no. 1 was in police custody till 6th September 1977. He was in judicial custody thereafter i.e. from 6th September 1977 and onwards. On 9th September 1977 the accused No. 1 made the confession before the learned Magistrate Mr. V.C. Shah, P.W. 40 Ex. 102.

13. Before we examined the contents of the confession made by accused No. 1, we were very much conscious of the fact, that the confession can only be used against the accused persons if the confession is proved to be voluntary and true. These two limitations are very vital for the protection of the liberty of any citizen. If the Court comes to a conclusion, that the confession which is made is involuntary, it is not at all necessary for the Court to take upon itself the task of examining the truthfulness of the contents of the confession. Therefore, in the instant case, we did our best to examine as to whether the confession which was made by the accused No. 1 was a voluntary one or not. Since we were dealing in appeal against the order of acquittal, with considerable anxiety, we have gone through the evidence of the Magistrate, the police officers and the statement u/s 313 of Cr. P. Code made by the accused No. 1, in order to correctly come to a conclusion as to whether the confession is a voluntary or not. At this stage

suffice it to state, that the evidence of the Magistrate is very clear, and we are satisfied beyond any shadow of doubt that in the instant case, the confession which was made by accused No. 1 before the Magistrate on 9th of September 1977 was a voluntary confession. In the instant case, the Magistrate has given all probable cautions, warnings and told the accused in so many terms, that if he made and confession, the same would be used against him as a piece of evidence, and on the basis of such a confession, the accused would be convicted. From this view point, we had an anxious look at the evidence of the Police Officers also, and the police testimony also does not reveal that the confession was snatched away by the police by adopting any of the police tactics, tortures, coercion or temptation. But Mr. Desai urged, that for the first time, accused No. 1 said while recording his statement u/s 313 Cr. P. Code, that the confession was not a voluntary one. On this point, Mr. Desai invited our attention to the reported decision of the Supreme Court, in *Shankaria v. State of Rajasthan* AIR 1978 S.C. 1248 and urged, that it is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. He further urged, that, therefore, when in a capital case, the prosecution demands a conviction of the accused primarily on the basis of his confession recorded u/s 164 Cr. P. Code, the Court must apply a double test.

(1) Whether the confession was perfectly voluntary?

(2) If so, whether it is true and trustworthy?

On this limited point, Mr. Desai also invited our attention to the reported decision of the Supreme Court in *Shankaria v. State of Rajasthan* AIR 1978 S.C. 1399. In paragraph 19 of the said judgment, it is observed as follows:

Another circumstance which militates to some extent against the contention canvassed on behalf of the appellant, is that the confession was not retracted at the earliest. It was made on 14-6-1974. The trial commenced on 10-1-1975 when the charge were framed and read over to the accused. This was the earliest opportunity at which he could retract the confession, particularly when he was defended by an experienced counsel. But he did not do so on this occasion, though he pleaded not guilty to the charges.

Mr. Desai urged, that in the instant case also it may be significantly noticed, that accused No. 1 did not make any statement at the time when the charge was framed against him that the confession was not voluntary. He did not retract from his own confession at that charge. In view of these facts, Mr. Desai urged, that in the instant case, and more particularly having regard to the evidence of the learned Magistrate, police testimony and the absence of any medical evidence to show that the accused No. 1 was physically injured, it will not be in accordance with law to warrant a conclusion that the confession was involuntary. Suffice it to mention at this stage, that we are convinced beyond any doubt that in the instant case, the confession which was made by accused No. 1 is a voluntary one. Of course, in course of the judgment we shall refer in detail the

evidence on this point. Once, the confession is held to be voluntary as held by the Supreme Court, in Shankaria's case (Supra) we should apply the second test, namely, if so whether it is true and trustworthy?

14. Reading the confession at Exs. 103 and 1C4 the accused No. 1 has stated before the Magistrate.

1. that there was a talk between him and accused No. 2 about 10 days before the occurrence and at that time, accused No. 2 had told him, that he wanted a tuft of hair, and for that purpose, he should secure a boy.

2. That in the confession, he further stated that he told accused No. 2 as to what he wanted to do with a boy, particularly when he was ready to secure a boy. Accused No. 2 told him that he wanted to cut some hair of the boy and that he - accused No. 2 wanted to tie a Nadachhadi (a thick red and white string), and that he wanted to offer rice seven times.

3. He also states in his confession, that for the said ceremony, he had secured a boy for accused No. 2 on the night of Saturday the 20th and the name of that boy was Tiou.

4. It is also stated in the confession, that he was knowing the boy for a period of 2? to 3 years, and that boy used to be with him and that he was giving to the boy Banana and sweet-drops and used to play with that boy.

5. It is also stated in the confession, that he was knowing the father of the boy and the other members of his family and that he was having homely relations with the family. He also states in his confession that he was going to the shop of the boy's father for the purpose of some break-fast, whenever he was hungry.

6. That he handed over the boy to accused No. 2 at 7-00 p.m. and that he removed (kidnapped) the boy near the shop at about 4-30 p.m. and thereafter, he took the boy near the valleys where he gave that boy one banana and sweet drops.

7. He also states in the confession that thereafter, the boy slept and in that condition as desired by accused No. 2, he reached the place near the house of Vagharis at about 7-00 p.m. and at that time wife of Ibrahimhai who is residing at Bhakharia had seen him and the boy, and that lady had informed the police that he had removed the boy named Tinu.

8. It is also stated in the confession, that thereafter, he and accused No. 2 put the boy in a gunny bag, and accused No. 2 tied that gunny bag. He also states in his confession, that accused No. 2 lifted the gunny bag and when the boy was shouting, the mouth of the boy was pressed in his arm-pit. The said place is situated near the cinema theatre, and thereafter the boy was removed to Mamaroli village road where there is a Kabrasthan i.e. a crema torium of Sumaras, and they took the boy in the crematorium. It is also stated in the confession that accused No. 2 gave a slap to the boy and thereafter the boy

started trembling (sic) and at that time, accused No. 2 took out a ribbon which was tied on some hair of the boy, and with that ribbon, the neck was tied, and he took up one end of the ribbon, and accused No. 1 took up second end of the ribbon, and the neck of the boy was pressed. It is stated in the confession, that, that had happened at about 7-45 p.m. on that day.

9. Thereafter, from the neck of the boy, the accused No. 2 removed the silver anklets, and at that point of time, accused No. 2 did not give to accused No. 1 his remuneration but gave to him some temptation in regard to his case, and thereafter both of them had separated.

10. He also states in his confession, that the dead body of the boy was put at that very spot, and accused No. 2 had told him that he should take care of the dead body, and thereafter, accused No. 2 had gone towards Bhakharia side.

11. He also states in his confession, that he went to the spot second time at about 2-30 a.m. and took the dead body of the boy at the Nalia of Lakroda village and that he removed the dead body along with the gunny bag.

12. He also states in the confession, that where the dead body was thrown, a small pit was dug out by him to put the dead body therein, and some dust, some grass etc. were also placed to cover the dead body.

13. He also states that when the dead body was taken out from the gunny bag, a chaddi (short pant) was taken out, and he threw the same in the field situated opposite to that place, and the gunny bag was thrown at a distance of 100 away from the place where the dead body was concealed. He also states that the gunny bag was used for the purpose of filling cement.

14. It is also stated in the confession that before the dead body of the boy was secreted, and when the search for the boy was made, he was sitting by the side of one Chandrakant who happened to be the brother of the boy's father, and he was searching for the boy and that he had sat with him for about 15 minutes.

15. It is also stated in the confession that on the night of the occurrence, he was playing the cards with his friends at about 10-00 p. m. and that accused No. 2 came there, and told him that he should go to the boy's father so that he might not have any suspicion on him, and hence, he had gone at the place of the boy's father.

16. It is also stated in the confession that the boy's father told him that he would not do such an act, as he was closely associated with the boy's father and at that time, there was a crowd of 50 to 60 persons, at the Police Station. Budhiprasad was also present in the police Station. It is also stated that he had declared at that point of time that he had no hand in the commission of the alleged crime and that people should not suspect him.

17. It is further stated in the confession, that at about 11-30 or 12-00 midnight he had gone to the hotel of one Badshahmal and at that point of time he had

written something on a note and that accused No. 2 had persuaded him to write such a note and that he had given him a paper and pen. It is also stated in the confession, that at that point of time, the accused No. 2 had given him certain intoxicants of Ganja and Charas, and at that point of time, one Maharaj - a Bava - so called Sadhu - had been also there, and he had also taken some Charas. It is stated that accused No. 2 made him to write such a note. It is further stated that accused No. 2 had taken away that note from him.

18. It is also stated in the confession that accused No. 2 had given him silver anklets on the next day, and he sold the same to one Soni whose shop is situated near Roopam Studio.

19. He also states that the Said Soni had given to him Rs. 8/- and he had given Re. 1/- to accused No. 2, whereas he retained with him Rs. 7/-.

20. It is also stated that accused No. 2 had told him that Rs. 700/- were to be received by him and then, the accused No. 2 would pay to him Rs. 350/- after a couple of days thereafter, and that accused No. 2 would retain with him a sum of Rs. 350/- as he wanted to go to Ambaji for Some prayers.

15. Applying the aforesaid double test, we have anxiously searched independent corroboratioa from evidence on the record on the contents of the aforesaid confessions.

1. The postmortem notes Ex. 19 clearly show that a young boy aged about 4 years died the homicidal death. It may be mentioned at this stage, that even in the confession it was the desire of accused No. 2, that accused No. 1 should secure a boy. It is not stated in the confession that accused No. 2 was anxious to secure one girl or accused No. 1 should secure any child. This part of the Medical testimony, namely, the evidence of Dr. Amratlal Ramabhai Patel P.W. 2, Ex. 17 and the contents of the post mortem notes clearly corroborate the first ingredient of the first plank of the confessional statement made by the accused No. 1.

2. The second point on which we are having independent evidence and which would corroborate the contents of the confession is that the boy must have some hair on his head at the relevant time, as accused No. 2 desired to have the tuft of hair to be offered to the deity of Kalka Mata. Now, on this limited point as to whether the young Boy Tinu had hair on his head or not, we are having the independent evidence of Dayasing Javansing, P.W. 12, Ex. 35, who deposes in his evidence, that at the relevant time, the boy had hair on his head. Witness Dayasing is a natural witness and he had actually seen accused No. 1 in the company of the boy near the theatre and he had actually seen the boy having a red chaddi on his person, and the boy had hair on the head. But on this very point, parents would be the best persons to know whether Tinu had the hair on the head or not. In the instant case, the evidence of Manjulaben, the mother of the victim who has been examined as P.W. 31, Ex. 74 states in clear terms that in para graph 4 of her deposition, that Tinu's hair were not cut at the relevant time. On this point, Budhiprasad the father of the boy when he gave information

to the police vide Ex. 83 in clearest terms states that the boy had hair on his head. Suffice it to state, that on the record of the case, we are having the evidence of three witnesses who prove that at the relevant time, the boy had hair on the head. Now this fact is also mentioned in the confessional statement (vide Ex. 103 and 104). Thus, the second important plank of the confessional statement made by the accused No. 1 is duly corroborated by firstly the independent evidence of Dayasing, P.W. 1 2, Ex. 35 and the evidence of the parents of the boy as stated, above.

3. The third plank of the confession is that the accused No. 2 desired to tie a red and white thick string known as "Nadachadi" on a boy and that is also duly proved by independent evidence from the record of the case. "Nadachhadi" is clearly mentioned in the post mortem note Ex. 18 at item No. 4 and the boy was seen by the doctor at the time of post-mortem examination.

Thus, the third important plank of the confessional statement is duly corroborated by independent evidence on the record of the case.

4. The fourth important point in the confession is that accused No. 2 desired to offer rice by taking seven rounds. In other words, accused No. 2 desired to scatter rice in a form of worship or punja or ceremony. Now, this part of the confession is also duly corroborated by the find of the rice in a scattered condition from the place where the body was tied or killed. From this view point, we had an anxious look at Ex. 38 which is the panchnama showing the place where the boy was murdered, and at that place, when the panchas saw accurately; they had seen the rice in the scattered condition and that the rice had stains of vermilion (kanku) powder. Thus the fourth plank of the confessional statement is duly corroborated by the evidence of the panchas who had actually seen rice in a scattered condition.

5. The next plank of the confession is, that he secured the boy for accused No. 2 on 27th, and there is voluminous evidence of the parents to prove that the boy was missing from 27th. The parents had given the complaint to the police accordingly. A crowd of people had gathered for the search of the boy expressing anxiety for the loss of the boy. Thus, this part of the confessional statement is also corroborated by the independent evidence on the record of the case.

6. It is also stated in the confession that accused No. 1 used to give to the boy Bananas and sweet-drops, and was fondling with the boy. Now, on this point, the prosecution has examined witness Bhavanji Chanduji, P.W. 20, Ex. 61 and his evidence discloses that at about 7 months before he gave the evidence, accused No. 1 had purchased one banana for the victim boy Tinu for 10 np. Even this part of the confessional statement is duly corroborated by the evidence of Bhavanji Chanduji P.W. 20, Ex. 61.

7. In the confession it is stated that he had good relations with the boy's father and the members of his family. Now, this part of the confessional statement is corroborated by the evidence of the father who deposes that when he saw

accused No. 1 in the whole crowd he never suspected that accused No. 1 had any guilty hand for the commission of the alleged crime. Even this part of the confession is corroborated by the testimony of the father. Suffice it to state that on every small plank of the confessional statement and on every small circumstance mentioned in the confessional statement we are having independent corroboration from evidence on record on all important points.

8. But in the confession, it is stated that accused No. 1 kidnapped or removed the boy Tinu either at about 4-30 p.m. on the date of the occurrence, and on that point also there is the evidence of the father.

9. The confession states that accused No. 1 and Tinu were seen by Noorbibi the wife of Ibrahimbai; and Noorbibi, P.W. 6, Ex. 28 in terms deposes that she had seen accused No. 1 and Tinu at the relevant time, namely, at about 7-00 p.m. on the date of the occurrence. At this stage, we may say that we have tested the sworn testimony of this witness on the touch stone of probabilities. On the day in question there was anxiety in the whole town about Tinu's whereabouts. The evidence of Noorbibi discloses, that on the next day, during early morning hours she contacted the parents of Tinu, and told the parents that she had seen Tinu in the company of accused No. 1. Noorbibi is further corroborated by the evidence of Manjula the mother of Tinu and Budhiprasad the father of Tinu and both of them say that Noorbibi had told them that she had seen accused No. 1 in the company of Tinu on the 27th at about 7-00 p.m. as alleged by the prosecution.

10. The confession also states the place or the scene of offence where the offence in question took place. It also states that with the ribbon the neck of the boy Tinu was tied and one end of the ribbon was in the possession of accused No. 2 whereas the another end of the ribbon was in the possession of accused No. 1, and in that fashion, the neck of Tinu was pressed. This part of the confession is again corroborated by the medical evidence on the record of the case, namely the evidence of Dr. A.B. Patel, Ex. 17 and the contents of P.M. notes Ex. 18. It may be significantly noticed that a ribbon was found on the dead body of Tinu when the dead body was examined by Dr. A.R. Patel, En. 17 and even in the post mortem notes, the ribbon is mentioned. It may be equally noticed that even in the inquest panch-nama Ex. 24 the ribbon is mentioned. It may be noticed at this stage that the inquest panch P.W. 4, Ex. 23 also refers to the ribbon. It may also be noticed that the inquest panchnama even mentions the colour of the ribbon. Thus, the medical testimony, the evidence of the inquest panch and the inquest panchnama refers to a ribbon. The Doctor's evidence discloses that the boy died a homicidal death because of strangulation. The panchnama Ex. 38 shows that at a place where the boy was murdered, rice in a scattered condition was found with Kanku powder thereon. Thus, the aforesaid portion of the confessional statement viz. that the boy was killed by tying his neck with a ribbon is duly proved from independent quarters of the record of the case as stated above and the said independent evidence is unimpeachable and must be acted upon.

11. It is also stated is the confession that the silver anklets were re moved which were on the neck of the boy Tinu. Now, it may be significantly noticed that the said silver anklets were sold by accused No. 1 to Sakalchand, P.W. 10, Ex. 33 and his evidence is clear to say that he had purchased silver anklets from accused No. 1 for a sum of Rs. 8/-. Even this part of the evidence is duly corroborated by the independent evidence on the record of the case. The place from where the dead body is found is also mentioned in the confessional statement and is also duly corroborated by the contents of Ex. 25, the panchnama which was actually shown by the accused.

12. It is also stated that a Jasa Chithi or a note as a matter of fact was written by accused No. 1 which Jasa Chithi was read out by accused No. 2 to Budhiprasad the father of Tinu as discussed in the evidence of Budhiprasad. This part of the confessional statement is also proved by the evidence of the handwriting expert, who says that the Jasa Chithi Ex. 91 was written by accused No. 1. It may be significantly noticed that this part of the evidence is also corroborated by the evidence of the handwriting expert who says in the Court in so many terms that it was the handwriting of accused No. 1 who had written the contents of Jasa Chithi Ex. 91.

13. The other contents of the confessional statement are also corroborated viz. the find of the short pant just opposite the place of offence, payment of Re. II- to accused No. 2, and retaining a sum of Rs. 7/- with accused No. 1. All these facts which minor details are also duly proved by the independent evidence on the record of the case.

14. The last portion of the confessional statement states that the accused No. 2 was to receive Rs. 700/- and that very amount is mentioned in the Jasa Chithi Ex. 91 which was shown to Budhiprasad, father of the young boy Tiau, by accused No. 2.

16. Thus, on all the important points or on every material particulars as mentioned in the confession at Exs. 103 and 104 we are having independent corroboration from the record of the case. The independent corroboration is from:

1. Post mortem Note Ex. 18.

2. Panchnama showing the place from where the dead body was found, Ex. 23.

3. discovery and (sic) of silver anklets to prosecution witness Sakalchand (vide Ex. 27) and the evidence of Sakalchand Ex. 33 read with the incriminating statement made by the accused No. 1 that he had sold the silver anklets to Sankakhand, P.W. 10.

4. The find of a ribbon as mentioned in P.M notes, the evidence of inquest panch and inquest panchnama.

5. The find of Jasa Chithi Ex. 91.

6. The name of injuries of Tinu, namely, strangulation.

7. The vendor of Bananas, Bhavanji Chanduji, P. W. 20, Ex.61.

8. the existence of hair on the head of Tinu. Evidence of Dayasing, P.W. 12, Ex. 35 and the evidence of parents of Tinu, Manjulaben Budhiprasad, P.W. 31, Ex. 74, and Ex. 83 information given by the father of Tinu to the police.

9. The evidence of Noorbibi in regard to the association of accused No. 1 with Tinu vide P.W. 6 and the evidence of the parents of Tinu.

10. The find of Chaddi, vide the evidence of Rameshchandra Bhogilal Modi, P.W. 9, Ex. 31.

11. The find of rice in a scattered condition etc.

17. As we have come to the conclusion that the contents of the confession are duly corroborated by the independent evidence on the record of the case, we wanted to be doubly sure, particularly in a case of circumstantial evidence, that in the instant case the confession is a voluntary one; though we have at the very outset indicated in the earlier part of our judgment, that in the instant case, having regard to the evidence of the Magistrate, the police testimony and the statement of accused No. 1 recorded u/s 313 of the Cr. P. Code, we are convinced that the confession is a voluntary one. From this view point, now we propose to peruse in detail the evidence of Mr. V.C. Shah, the Magistrate, who recorded the confession of accused No. 1. His evidence is recorded at Ex. 102.

18. Vainkuthlal C. Shah, who recorded the confession was working as a Judicial Magistrate First Class, at Himatnagar from and on June 28, 1977. On September 8, 1977, accused No. 1 was produced before him with a police yadi. That yadi was dated 6th September, 1977. His evidence discloses that he had to record the confession of accused No. 1 and in this behalf, there was the necessary endorsement from the Judicial Magistrate First Class, Shri Savani, from Prantij. On 8th September 1977 at about 2-00 p.m. accused No. 1 was produced before him. The accused was handcuffed and he was freed as directed by him. Accused No. 1 was produced before him in his chamber, and at that time, there was no police-man in his chamber. There were other persons in the chamber, but, they were directed to leave the chamber. He also states in his evidence that no police-man or officer was present in the chamber; and only his senior clerk, one peon and one bailiff were present.

19. In paragraph 4 of his deposition, the Magistrate clearly states, that he asked the accused No. 1 as to whether the police had beaten him or that he had to make any complaint against the police, but accused No. 1 told him, that he did not desire to make any complaint against the police and that he had not to lodge any complaint against the police for any beating or torture. He also states in his evidence, that he told accused No. 1 that he was not under the police custody and that he had no reason to fear the police. He also states, that he told accused No. 1 that he should not be guided by any temptation, and that he was very much knowing that he was before the Magistrate. He also states in his evidence,

that he had given him the detailed instructions that he was not bound to make any confession in law, and he had also told the accused No. 1 that if any confession was made by him before him, the same would be used against him as evidence, and on the basis of the same, he would be convicted. He further states in his evidence that at that point of time, accused No. 1 was telling that he was willing to make the confession and that he was prepared to meet with all the consequences as a result of the confessional statement. He also states that he had given to accused No. 1 twenty four hours time for reflection and consideration. The Magistrate had made a note in the said statement and did obtain the signature of accused No. 1 thereon. His further evidence discloses, that the confession was kept in a sealed envelope and that when opened, he took out the confession from the sealed envelope and he also deposes about the signature of accused No. 1. His further evidence also discloses, that when he was produced on 9th September 1977 at about 3-45 p.m. i.e. after the lapse of 24 hours, he again brought to his notice whether he was beaten by the police or whether there was any police torture, but accused No. 1 had denied the same. He also states that he had examined even the body of accused No. 1, and he did not notice, any signs of physical violence on the person of accused No. 1. He also states in his evidence that accused No. 1 told him that he wanted to make confession voluntarily and that he was repenting for the same. The Magistrate had also asked accused No. 1 whether he was having any fear of the court clerk or a peon or a bailiff, but the accused No. 1 denied the same. His evidence clearly discloses that accused No. 1 wanted to make the confession voluntarily, and that accused No. 1 was not at all the victim of any temptation threat or violence. Moreover, the confession was recorded in the very language used by accused No. 1, ail (sic) pro lined and proved the contents of the confession at Exh. 103 and 104.

20. We have carefully seen the cross-examination of the learned Magistrate. Of course, in the cross-examination, the witness denied that he had not given any copy of the confession to anybody. From the entire cross-examination of the learned Magistrate, excepting some suggestions, namely, that accused No. 1 was under the influence of the police or that there were some signs of violence on his body, no facts are brought out in his cross-examination even to remotely suggest that accused No. 1 was a victim of police torture or violence or any temptation. At this stage, it may be significantly noticed that in paragraph 12 of his deposition, a suggestion was made in the cross-examination that accused No. 1 was not even physically conscious to speak a word, but, the learned Magistrate denied the same. We fail to appreciate as to how much a suggestion could have been ever made to a Magistrate. Why should the Magistrate be a party to concoct a document on the basis of which one can be convicted? Is it conceivable that accused No. 1 was not in a position to speak at all when he contacted the Magistrate? Why should the Magistrate tell a lie when he deposes that when he examined the body of accused No. 1, he did not see any signs of violence on the person of accused No. 1. The trend of the cross-examination is, that accused No.

1 was under police pressure, coercion and temptation and that he was so mercilessly beaten, that when he gave the confession, he was not able to speak even one word. These suggestions are suggestions, and were denied emphatically by the Magistrate and they are not at all evidence in law. They do not constitute any evidence in law. How can the Magistrate write down of his own the confessional statement of accused which contains all truthful facts duly corroborated by independent evidence on the record of the case? If we are to accept the mere suggestions of the defence as "Evidence" it only inevitably means that the Magistrate, Police, Senior Clerk, Peon, Bailiff and all concerned were intentional parties in concocting a false document against accused No. 1 which could be used as the sole basis of conviction. It is not possible for us to take such an extremely unreasonable view in the instant case.

21. That brings us to the consideration of the police testimony on this point to which our pointed attention was invited by Mr. Thakore, the learned Advocate for accused No. 1. He invited our attention to the evidence of police officer Shri N.M. Davada, P.W. 42 Ex. 167. Usual suggestions are made to the police officers to indicate that the accused No. 1 was under police pressure, threat or coercion, but the same were denied. On this point, our attention was not invited to any other evidence on the record of the case by the learned Advocates for the accused persons.

22. But as stated above, it was only for the first time, that accused No. 1 when his statement u/s 313 was recorded brought to the notice of the learned trial Judge that he was a victim of beating. He also states in his statement u/s 313 Cr.P. Code that even pins were pierced on his private parts by the police. This is really unacceptable to our minds, because if that was a situation, a complaint could have been filed against the police or at least accused No. 1 could have made the grievance about the conduct of the police when the charge was levelled against him as observed by the Supreme Court in Shankaria's case Vide AIR 1978 S.C. 1399 Supra. Thus having carefully seen the cross-examination of the learned Magistrate, the police testimony to which our pointed attention was invited by Mr. Thakore, the statement of accused No. 1 recorded u/s 313 of the Code of Cr.P. Code, we are convinced beyond any doubt, that in the instant case, the confession of accused No. 1 is voluntary. At this stage, we may indicate the submissions made by Mr. Thakore in this behalf. Mr. Thakore strongly urged, that having regard to the suggestions which were made to the police officer and the Magistrate, at least we should entertain a suspicion about the voluntary nature of the confession. We need hardly emphasise that the suggestions are suggestions, and they are not evidence in the court of law, and we regret to say, that, even the suggestion of an extreme nature put in the cross-examination of the Magistrate that the accused was not in a position to speak a single word, is a suggestion which is out of taste having regard to the facts and the circumstances of the present case. In view of the aforesaid discussed evidence, it is clear to us that the confession which was made by accused No. 1 (vide Exh. 103 and 104) is a voluntary confession. As mentioned in the earlier part of our judgment, on

about 18 to 19 points, we are having independent corroboration from the evidence on the record of the case. Under the circumstances, we are convinced that it is safe to act on the confessional statement made by accused No. 1 (vide Exs. 103 and 104) But as stated above, inspite of our sufficient caution to ourselves for dispassionate and detached appreciation of evidence having regard to the heinous nature of the crime; we are bound to act and accept the confession Exs 103 and 104 as voluntary and true. We have also cautioned ourselves that this is an appeal filed by the State against the impugned order of acquittal and hence, we were conscious of our limitations while deciding acquittal appeals. We have also cautioned ourselves that this is a case of circumstantial evidence and in such a case, prosecution evidence as to "the Motive" for the commission of a crime is an important factor as distinguished from cases of "Direct Evidence" in cases of capital punishment. In the instant case, as stated in the beginning of the judgment, the initial motive on the part of Accused No. 2 was "that as accused No. 2 had no son, he wanted to secure a boy with hair on his head so that he could offer a tuft of hair to a Hindu-deity Kalka-Mata", but subsequently for the accomplishment of the said motive, both the accused persons had to kill the young boy, realising that they would be not in a position to face public agitation, and their planned conspiracy would see the light of the day by a ferocious or of violent crowd. Having thus administered the necessary cautions to ourselves from various view-points, we have carefully examined the reasons assigned by the learned trial Judge for not acting upon the confessional statement made by accused No. 1, and we must say, that same did not impress us at all.

23. The learned trial Judge came to the conclusion that the confession in question is an involuntary one. His first reason for taking the confession as an involuntary one is, that the learned Magistrate recorded the confession in Chamber and not in open court. His second reason is that why the confession was recorded by a clerk and that there should be sufficient documentary evidence to come to a conclusion as to how and under what circumstances he took the services of the recording clerk particularly when the recording clerk was attached to the Court of other civil Judge. His third reason for rejecting the confession is that no adequate warnings were given by the Magistrate to accused No. 1. He also took the view that the accused was in police custody. We may once again emphasize the fact, that in the instant case, the accused was in police custody till 6th September 1977 and after that date, the accused was in judicial custody. On 8th September 1977 the learned Magistrate has given to him 24 hours cooling time and repeated warnings were given by the Magistrate telling the accused that he was not bound to make a confession and the if the accused chooses to make the confession, the same would be used against him as a piece of evidence. The learned trial Judge also says that the confession is a prepared document with the sole object of seeing that the accused persons are convicted. He also says that if the confession is in the sealed cover, how is it that the police could get the copy of the confession on the day on which the confession was

recorded. With great respect to the learned trial Judge, it is not possible for us to agree with his reasoning for treating the confession as involuntary; can it be said that if Magistrate records the confession in Chamber and not in the open Court, the voluntary nature of the confession is affected? Can it be said that the confession becomes involuntary simply because the clerk recorded the same? Can it be said that the confession is involuntary because no documentary evidence was produced to prove as to how the learned Magistrate secured the services of a clerk attached with some other Civil Judge? Can it be said that the accused was under police pressure or influence; particularly when he was in judicial custody right from 6-9-77 ? In the instant case, it may be emphasized that 24 hours cooling time was given to accused No. 1 and accused No. 1 gave out all truthful details in the confession as stated in the earlier part of our judgment. Can any concocter or forger ever give such minor details which stood the test of corroboration from independent quarters? Is it possible that the police might have obtained the copy of confession from the clerk of the Magistrate, but surely that cannot make any confession as involuntary one.

24. The last submission of Mr. Thakore on the confession was that it was very easy for the police to put the words in the mouth of the accused No. 1, in that way, the confession from accused No. 1 was snatched. In view of what has been stated above, the last submission of Mr. Thakore is a desperate submission. There is overwhelming voluminous evidence to warrant only one and one inevitable conclusion, that in the instant case, the confession is a voluntary one, and the contents thereof are true and trustworthy. If the double tests as observed by the Supreme Court (Vide; Shankaria's case Supra) are duly fulfilled in the instant case, we are bound to act on the basis of the confession and treat the confession as an acceptable reliable and unimpeachable piece of evidence. On this point, it may not be out of place to note that it was not even alleged by the defence, that the police had made any efforts to secure any confession from accused No. 2 by resorting to any popular or notorious police devices, though it was accused No. 2's mind which started functioning first for the commission of the alleged crime. This is a case where the police-testimony does not show even a ghost of stigma on the investigating agencies. We must say that the investigation, in the instant case, is fair, honest and admirable.

25. That takes us to the consideration of the other evidence on the record of the case.

26. The evidence of Dr. A.R. Patel Ex. 17 is clear to show that the young boy Tinu had the strangulation mark and the legature were present on the dead body of the deceased. He also deposed that the legature was present around the neck. The Doctor also found the fracture of the thyroid cartilage. The Doctor noticed the thyroid fracture and was of the opinion that the same was *antimortem*. In the opinion of the Doctor, the strangulation was *antimortem*. On internal examination, the Doctor found the brain to be congested. The trachea was closed just below the tongue due to strangulation. The Doctor deposes that the ribbon

was of sky blue colour. It may be noticed that even in the inquest panchnama, the colour of the ribbon is mentioned. Apart from the fact that the ribbon was used by the two accused persons as stated by accused No. 1 in his confession, we have seen the cross-examination of the Doctor, but there is nothing in cross-examination to warrant a conclusion that the doctor was making any false statement on any point. The doctor has produced and proved the contents of the P.M. notes Ex. 18 and the contents of the P.M. notes Ex. 18 read with the evidence of the doctor do corroborate the confession made by accused No. 1.

27. Our attention was also drawn to the evidence of Jethalal Amratlal Joshi, P.W. 4, Ex. 23 and his evidence discloses, that he acted as a panch for the preparation of the inquest panchnama. This panch witness had actually seen the dead body of the young boy Tinu. He states that a ribbon was found round the neck. His evidence discloses that the neck was tied with the ribbon. His evidence further discloses that the silver anklets were very much there, and an artificial watch was also there on the person of the victim. The contents of the inquest panchnama Ex.24 also show that on the neck of the dead body, there was a sky blue coloured ribbon. Our attention was also drawn to the evidence of panch Hirabhai Madhabhai P. W. Ex. 26 and his evidence discloses that accused No. 1 had made an incriminating statement before this panch that he had sold the silver anklets to a goldsmith. This panch witness in his substantive evidence does depose that accused No. 1 had made the incriminating statement regarding the sale of silver anklets to a goldsmith, and the same is duly corroborated by the contents of the panchnama Ex.27 which also contains inter alia the incrimination statement made by accused No. 1 that he had sold silver anklets to a goldsmith.

28. But our attention was also invited by the learned Public Prosecutor to the evidence of Sankalchind a goldsmith P.W. 10 Ex.33 and his evidence also clearly discloses that he purchased silver anklets from accused No. 1 for a sum of Rs. 8/-.

29. The place of murder is shown by the panchnama Ex. 38 and it may be noticed that the scene of offence was pointed out by accused No. 2 who had made an incriminating statement before the panchas. It was at the instance of accused No. 2 that the scene of offence could be located. He did make the necessary or usual incriminating statement before the panch that he was prepared to show the scene of offence. In this behalf, the prosecution examined panch Rameshchandra Manilal Khamar, P.W. 13 Ex. 36 and his evidence is clear to show that accused No. 2 did tell the panchas that he was prepared to show the scene of offence. We also find from incriminating statement in the panchnama Ex. 38, that it was at the instance of accused No. 2 that the scene of offence was shown to the police. But what is more important to note is what was found at the scene of offence. The scene of offence is the same which is mentioned in the confession. At the scene of offence rice was found in a scattered condition with vermilion powder (Kanku) thereon. A careful perusal of the panchnama Ex. 38 completely satisfies the conscience of the court, that it was

accused No. 2 who had gone to the scene of offence to carry out his evil design.

30. The prosecution also led the evidence to prove Jasa Chithi Ex. 91 which was shown by the accused No. 2 to the father of Tinu the victim of the incident. That Jasa Chithi is at Ex. 91. That Jasa Chithi is proved to be in the handwriting of the accused No. 1. On this behalf there is the evidence of expert Jagdishbhai Jethalal, P.W. 37, Ex. 89. The evidence of this witness mentions various reasons as to why he came to the conclusion that accused No. 1 had written the Jasa Chithi Ex. 91, which Jasa Chithi is again referred to by accused No. 1 in the confession made by him before the Magistrate (Vide Ex. 103 and 104).

31. Our attention was also invited to the evidence of Bhavanji Chanduji, P.W. 20, Ex. 61, who deposes that he did sell one Banana for 10 np. to accused No. 1 who in turn had given the same to Tinu. As stated above, accused No. 1 was last seen in the company of Tinu by Noorbibi, P. W. 6, Ex. 28 and the evidence of Noorbibi is duly corroborated by the evidence of the parents of Tinu Mother of victim, namely, Bai Manjula, Ex. 74 and the evidence of Budhiprasad the father of Tinu Ex. 82 who deposed before the learned trial Judge that Noorbibi, P.W. 6, did intimate to both of them during the early morning of 28th September 1977 that she had seen accused No. 1 in the company of Tinu at about 7-00 p m. Thus, the evidence of last seen is cogent, convincing and acceptable to us. There was no oblique motive on the part of Noorbibi, P.W. 6, to falsely implicate the accused No. 1 for the commission of such a heinous crime. Why should Ncorbibi, P.W. 6, go out of the way and depose falsely against accused No. 1? No enmity is suggested or even proved against Noorbibi, P.W.6, which would inspire her to give fake evidence against accused No. 1. It may be significantly noticed that even in the confession Exs. 103 and 104, it is stated by the accused No. 1 that the wife of Ibrahimbhai (i.e. Noorbibi) had actually seen accused No. 1 with Tinu at about 7-00 p. m.

32. In this behalf, we are also having the evidence of Trikambhai Gumandas, P.W. 7, Ex. 29, who had seen accused No. 1 in the company of Tinu earlier than 7-00 p.m. on 27th August 1977. But that evidence need not detain us any longer in view of the acceptable evidence of Noorbibi, P.W. 6, Ex. 28.

33. The prosecution also examined Kameshchandra Bhogilal Modi, P.W. 9, Ex. 31 before whom accused No. 1 made an incriminating statement by saying that he had concealed a Chaddi-short pant - which was on the person of the victim. That Chaddi or a short pant was recovered as a result of the incriminating statement made by accused No. 1. It is that incriminating statement which led to the discovery of the Chaddi which ultimately connects accused No. 1 with the commission of the alleged crime. The contents of the panchnama Ex. 32 substantially corroborate the sworn testimony of the panch in this behalf.

34. It may be also noticed that the prosecution also led sufficient evidence to show the association of accused No. 1 with the accused No. 2 at the relevant time. In the context of the facts and the circumstances of the case, can it be said

by any stretch of imagination that the said association was innocent? Does that association not lead to an inevitable points that both of them had the guilty mind to commit the crime in question? In this behalf, there is sufficient unimpeachable evidence on the record of the case. At this stage, suffice it to state that there is acceptable evidence on the record of the case to show that accused No. 1 and accused No. 2 had sufficiently thick association at the relevant time which would be a clear pointer to indicate the (sic) on the part of the accused persons. As stated above, can it be said that the association was innocent? Let us emphasis once again that the very association of accused No. 1 with accused No. 2 at the relevant time viewed in the context of what has been stated above, clearly indicates that both the accused persons did entertain the requisite mens rea to commit the crime in question.

35. But the prosecution has also examined Chandanalal, P.W. 39 and his evidence clearly discloses that the rice which was found from the scene of offence and the rice which was found from the house of accused No. 2 were of the same quality. Chandanalal, P.W. 39, Ex. 96 states in his evidence that the rice were stained with pink colour and the same were contained in a white paper. He also deposes about the rice which were taken from the house of accused No. 2. This witness P.W. 39 states that he had made the test of both the samples morphologically and they resemble in most of the characters by morphological, and microscopically examination In the cross-examination, the usual suggestion is made that rice is a commodity which is easily available in open market. He also states in his cross examination that he did not consider the shape and size of the rice grains in both the samples, and excepting that aspect, the samples resembled in other characters.

36. We must frankly say that we are impressed by the evidence of Chandanalal Ex. 39. The rice which was found from the scene of offence and the rice which was attached from the house of accused no. 2 when examined morphologically and microscopically they are of the same time. This again leads us to one conclusion that accused No. 1's association with accused no. 2 or mutual association of both of them, at the relevant time, could never be innocent by any stretch of imagination. Criminology does recognise a principle, viz. "Those who wait, watch, move and see" also serve the cause of the crime.

37. It is significantly noticed that the rice which was found from the scene of offence was of the same quality as the rice found from the house of accused No. 2. It may be noticed that the rice found from the scene of offence were stained with pink colour as deposed to by witness Chandanalal P. W. 39. We have mentioned in the earlier part of our judgment while referring to the panchnama of the scene of offence, that the rice had stains of vermilion power (Kanku). This circumstance is again a pointer to the guilt of the accused persons and can never fit in with the innocence of the accused persons. We have considered circumstances after circumstance, and we also did our very best as observed in Emperor v. Busangarda 43 Bom. L.R. 144 (supra) to find out any reasonable

explanation which might fit in with the innocence of the accused. But it was impossible for us even after a judicial struggle to find out any rational explanation which would fit in with the innocence of the accused. With respect, it was also not possible for the defence counsel even to suggest the remote possible circumstance which would fit in with the innocence of the accused and in this behalf our imagination was exhausted, and reason was fatigued in that behalf and ultimately we could not get any rational explanation which may fit in with the innocence of the accused.

38. The next evidence is the evidence of Balubhai Ranchhodbhai, P.W. 17, Ex. 58. His evidence discloses that at the relevant time, he was working as a Press reporter and that he too went in search of Tinu. He deposes that when they visited Kalkamata temple, they saw one Bavaji and at that time he had seen accused no. 2 sitting in a temple of Kalkamata. It may (sic) stated that this witness had seen accused No. 2 on that day on which Tinu was kidnapped by accused No. 1. Efforts were made to secure the presence of that Bava who could have given the evidence before the learned trial Judge. But Bavaji's presence could not be secured, and hence his evidence could not be led before the learned trial Judge. In the facts and circumstances of the case, the absconding of the Bavaji at the relevant time particularly when he was in the association of accused No. 2 is also a circumstance which caused considerable anxiety to us. If the presence of accused No. 2 was innocent in the temple, on the night of the 27th August 1977, Bavaji would not have absconded. That also leads us to one reasonable inference that accused No. 2 might have hand in seeing that Bavaji runs away or absconds and that he was not available to the prosecution so that the prosecution could have led his evidence.

39. The prosecution has also led the evidence of Hasmukhbhai Babubhai Parikh, P.W. 30, Ex. 71, who was serving as a Clerk in the Prantij Court and his evidence is that at the relevant time accused No. 2 was making efforts to see that accused No. 1 is away from the court during the relevant period, namely, 27th, 28th, 29th, and 30th September 1977.

40. The prosecution also examined Buchiprasad Shankerlal, the unfortunate father of the victim. His evidence is recorded at Ex. 82 and he states in his evidence that he had six daughters and that the victim was his seventh child--a son. His evidence also discloses about the circumstances under which Tinu was removed, and the time at which he was removed. His evidence also shows that Tinu had hair on his head on the day on which he was kidnapped. He also identified the ribbon which was used by the accused persons to tie the neck of Tinu as stated above, His further evidence is about the Jasachithi Ex. 91 which was shown by accused No. 2 to him and the contents whereof were read out by accused No. 2 to him. Even the contents of Ex.91 the said Jasachithi (sic) indicate that the accused No. 2 was very much interested in getting a sum of Rs. 700/- from Budhiprasad even after the unfortunate murder of Tinu. It may be recalled at this stage that in the confessional statement made by accused No. 1,

it is stated that accused No. 2 had told accused No. 1 that he was to (sic) a sum of Rs. 700/- within a couple of days and that on receipt of the same, accused No. 2 would pay a sum of Rs. 350/- to accused No. 1 and that accused No. 2 would retain with him a sum of Rs. 350/- as he had to go to Ambaji for the purpose of performing some Puja. The father of the victim has also identified that artificial watch which was on the person of the victim.

41. The aforesaid discussed evidence leaves no doubt in our minds that accused No. 1 did make the aforesaid confessional statement (vide Exs. 103 and 104) which was voluntary and true. As stated above, we are also convinced that on every small details or on any vital plank of the prosecution case or any material particulars, we are having independent corroboration from the record of the case; and that leaves no doubt in our minds, that accused No. 1 was also guilty of committing the alleged crime. We are also convinced that in the instant case the association of accused No. 1 with accused No. 2 was not innocent and honest but the association of accused No. 1 with accused No. 2 was sufficiently dishonest and criminal to carry out the aforesaid evil design as alleged by the prosecution. In this view of the matter, we are convinced that accused No. 1 is guilty of the commission of the alleged crime.

42. That brings us to the consideration of the evidence against accused No. 2. We wish to make it absolutely clear that we do not propose to act on the confessional statement made by accused no. 1 so as to convict accused No. 2; but, we shall carefully scrutinise the prosecution evidence against accused No. 2 (except the confession of accused No. 1) and shall reach to the necessary conclusion, and then only, we shall have a look at the confessional statement made by accused No. 1, which would lend corroboration or support to our ultimate determination of the prosecution accusation against accused No. 2. This principle is laid down by the Supreme Court in its reported decision in 1971 (3) S.C.C 432 (Baburao Bajirao Patil v. State of Maharashtra). We are very much conscious of the fact that the confessional statements are many a time made by the co-accused-involving others. We are conscious of the fact, that cases are not out to remember, wherein an accused person does involve his co-accused for the commission of the alleged crime. Having thus administered a proper caution to ourselves from this point of view, we have perused the prosecution evidence against accused No. 2. Accused No. 1 and accused No. 2 were actually last seen on the night of the 27th September 1977. In this behalf, there is the acceptable evidence of association of accused No. 1 with accused No. 2. In this behalf, we may refer to the evidence of Budhidhan Raghavji, R.W. 11, Ex. 34. His evidence is that he was a radio repairer. He further states that on 27th August 1977 at about 9-00 or 9-30 p. m. he was out to search Tinu and when he was in the company of one Ratilal Somalal Modi, he had seen accused no. 1 in the company of accused No. 2. He also saw both of them coming from Mamaroli road. This witness in the cross-examination states that he had stated before the police that they had gone in the cinema compound and at that point of time they had made inquiries.

43. From the aforesaid contradiction which is duly proved on the record of the case, can it be said that the witness tells a lie when he says that on 27th August 1977 the day of the occurrence when he had seen accused No. 1 in the company of accused No. 2 at about 9-00 or 9-30 p.m. the witness was telling the falsehood? Why should this witness tell a lie? He says that on the day of the occurrence accused No. 1 was in the company of accused No. 2. Can it be said that the association of accused No. 2 with accused No. 1 on 27th August 1977 at a very significant place near the cinema (we say that the place is significant in the context of the evidence discussed against accused No 1). But Mr. M.M. Desai, the learned Advocate for accused No. 2 made a strong grievance about the testimony of this witness that his police statement was recorded on 3rd September 1977. Can it be said that the delay in the instant case is so fatal to the prosecution case or to the evidence of this witness? What could be the oblique motive on the part of this witness to falsely involve accused Nos. 1 and 2 for the commission of the alleged crime? It may be significantly noticed at this stage that accused No. 2 was found in Kalkamata temple during the night hours at about 11-00 p.m. in the company of Bavaji as deposed to by Balubhai, P.W. 17, Ex. 58. It may be also significantly noticed that the aforesaid discussed evidence clearly shows that it was accused No. 2 who pointed out the scene of offence, where rice stained with vermilion powder (Kanku) were seen by the independent and responsible panchas. It may be significantly noticed that from the house of accused No. 2 same quality of rice as found from the scene of offence, was seized by the Investigating officer and the rice found at both the places was of the same quality as deposed to by the expert witness Chandanlal P.W. 39 Ex. 96, who had carried out morphological and mycrosopical test. In the context of these facts, can we say by any stretch of imagination that the association of accused No. 2 with accused No. 1 was innocent? To reach such a conclusion would amount to nothing but to patent perversity of justice. But in the instant case, there the matter does not rest. Accused No. 2 had actually shown the Jasachithi Ex. 91 to Budhiprasad the father of Tinu Ex. 82. How is it that the accused No. 2 was in possession of Jasachithi Ex. 91 which is proved to be in the handwriting of accused No. 1? As stated above, the handwriting expert says in his evidence that the Jasachithi Ex.91 was written in the handwriting of accused No. 1. The handwriting of accused of No. 1 in Ex 91 Jasachithi was duly proved in the handwriting of accused No. 1 by the handwriting expert. How is it that accused No. 2 was in possession of such a Jasachithi? What was the necessity for accused No. 7. to show such a Jasachithi to Budhiprasad Ex. 82 the father of Tinu; but for the evil design on the part of the accused to take out also a sum of Rs. 700/- from Budhiprasad even after the murder of Tinu so that he could give Rs. 350/- being the amount of remuneration to accused No. 1. In the context of the aforesaid discussed evidence against accused No. 2, we had again a very anxious look at several answers given by accused No. 2 in his Section 313 statement. We may say that when one reads to the answers given by accused No. 2 in his statement u/s 313 of Cr.R Code, accused No. 2 has stated that it is not true. Accused No. 2 has stated that the circumstances appearing against him

are either not true or false or he was not knowing about the circumstances. Thus, it is clear that even on patent and vital facts duly proved by the prosecution, accused No. 2 was giving patently false answers. We are conscious of the fact that this is a case of circumstantial evidence, and the falsity of his answers supply the missing links to the prosecution. In this behalf, we may usefully refer to the case in *Deonandan Mishra Vs. The State of Bihar*, . In that case the Supreme Court has observed as under:

It is true that in a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in a case where the various links have been satisfactorily made out and the circumstances point to the accused as the probable assailant, with reasonable definitions and in proximity to the deceased as regards time and situation, and he offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion of the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain.

Thus apart from the confessional statement made by accused No. 1, we are convinced that the prosecution has proved it beyond any doubt against accused No. 2 also on the basis of the other evidence on the record of the case and the falsity of the answers given by accused No. 2 in his 313 Cr. P. Code statement. Having reached the said conclusion, as laid down by the Supreme Court in *Baburao Bajirao Patil Vs. State of Maharashtra*, (*Baburao Boji Rao Patil v. State of Maharashtra*) we perused the confession of accused No. 1 and we are completely satisfied that accused No. 2 is also guilty of the alleged crime. At the relevant time, accused No. 2 had no son, he was aged 55 and hence, to satisfy the worldly passion he submitted himself to a criminal modus-operandi which resulted in the death of a young boy aged 4. In view of what has been stated above, we are convinced that in the instant case, accused Nos. 1 and 2 did entertain the common intention on the spot, and they did enter into a criminal conspiracy to take the life of this young unfortunate victim aged about 4 years under circumstances mentioned above. As observed earlier, this is a case, where in the life of Gujarat, particularly in North Gujarat, a heinous offence was committed and the victim was deliberately selected as incapable of giving any mental or physical resistance to the offenders, and that a young innocent boy untainted with any wordly evil designs was kidnapped and ercilessly done to death, the initial motive for the commission of the crime being, that as accused No. 2 had no son--was craving for the human flesh of his son and he was anxious to get a son of which motive was ultimately culminated in the murder of Tinu for reasons mentioned earlier.

44. Having regard to the nature of the offence, the circumstances under which the young victim lost his life, we seriously called upon the advocates at the bar as to whether this is a fit case wherein extreme penalty of death should be

imposed on the offenders or not. In this behalf, our attention was invited by the learned Public Prosecutor to the reported decision of the Supreme Court in *Francis v. State of Kerala* 1974 SC 2281. The principles on which the extreme penalty of death should be levied or should not be levied are set out in the said reported decision of the Supreme Court. In paragraph 5 and 10 of the Said judgment, it is observed as follows:

It is not possible for Courts to attempt on the slender evidence to explore the murky depths of a warped and twisted mind so as to discover whether an offender is, capable of reformation or redemption, and, if so, in what way. That is a subject on which only experts in that line, after a thorough study of an individual's case history, could hazard an opinion with any degree of confidence. Judicial psychotherapy has its obvious and inherent limitations. Courts are generally concerned only with the nature and extent of punishment called for, once the accused's guilt is established. In considering the question of appropriate sentence to be awarded, while the common frailties and failings of ordinary human beings, to which the offender gives vent, may, without affecting the criminality of the acts, punished, be enough to show that a lesser sentence will meet the ends of justice, abnormal twists of the mind or indications of a conduct obdurate and unrelenting viciousness of mind and offender may show the need for a severe sentence.

Thus, in deciding whether the case merits the less severe of the two penalties prescribed for murder a history of relations between the parties concerned, the background, the context, or the factual setting of the crime, and the strength and nature of the motives operating on the mind of the offender, are relevant considerations. The state of feelings and mind produced by these, while insufficient to bring in an exception, may suffice to make the less severe sentence more appropriate. Death sentence reduced.

45. In the light of the aforesaid observations, the learned Public Prosecutor requested us to impose the extreme penalty of the death on the accused persons.

46. But Mr. H.K. Thakore and Mr. M.M. Desai, for the accused Nos. 1 and 2 respectively, urged before us that in the instant case, accused No. 1 is young boy aged about 21 years. He also urged that he was and is unemployed. He also urged that the society is responsible for the unemployment of the young offender. He also urged that by imposing the extreme penalty on such among boy no useful purpose will be served. He also urged that there was no motive on the part of accused No. 1 to commit the crime in question and if the motive evidence is accepted, the crime in question was committed by accused No. 1 was only for a negligible remuneration.

47. While considering the case of accused No. 1, we must frankly say that though he had associated himself with a heinous crime which may be remembered for a decade to come yet the young age of accused No. 1 has caused considerable anxiety to our minds. The legislature has shown some mercy

to young offenders even by enacting the Probation of Offenders Act. The new Code of Criminal Procedure also contemplates some mercy to be shown to young offenders. Accused No. 1 was motivated to commit the crime for some remuneration. Under the circumstances, we are not inclined to impose the extreme penalty of death on accused No. 1.

48. That brings us to the consideration whether the extreme penalty of death should be imposed on accused No. 2 M.M. Desai, the learned advocate For the accused No. 2 strongly urged before us that in the instant case accused No. 2 is aged about 55 years. He also urged that in the instant case, for the commission of the same offence, one accused is not given any capital punishment, and that factor itself should weigh with us and that accordingly, we should not impose extreme penalty of death on accused No. 2.

49. Having heard the submissions at the bar on the question of sentence to be imposed on both the aforesaid persons, we are haltingly Satisfied that this is not a fit case where extreme penalty of death should be imposed.

50. That brings us to the consideration as to whether we should issue any notice on the appellants giving to them an opportunity of making their submissions on the question of sentence.

51. In the instant case, we do not think it necessary to issue any notice to the accused persons giving to them an opportunity to make their submissions on the question of sentence as we propose to pass the minimum sentence on the accused persons as provided in Section 302 of the I.P. Code. In this behalf, we may usefully refer to the decision of the Supreme Court reported in *Narpal Singh v. State of Haryana* AIR 1977 SC 1966. In paragraph 31, it is observed as follows:

So far as the case of Divinder Singh and Maha Singh are concerned, as they have already been given sentence of life imprisonment and this is the minimum sentence that could be passed u/s 302, Indian Penal Code, it is not necessary to remit their case to the Sessions Judge.

Following the aforesaid Supreme Court judgment, we do not think it necessary to issue any notice on the accused persons giving to them an opportunity of making their submissions on the question of sentence.

52. As a result of the aforesaid discussion, we are convinced that in the instant case the impugned order of acquittal passed by the learned Sessions Judge is patently perverse and the same has resulted into gross miscarriage of justice. The reasons assigned by the learned trial Judge have not impressed us at all. His reasons for coming to the conclusion that the confession in question was involuntary cannot be countenanced at all. His reasoning viz. that the statements by the police were recorded late has not at all impressed us. His reasoning either on the conduct of the father of the victim or on the evidence of Noorbibi or on the production and the (sic) of the Jasnachithi have not at all impressed us.

53. In view of what has been stated above, we set aside the impugned order of

acquittal passed by the learned trial Judge and we do hold that both the accused persons are guilty of committing an offence punishable u/s 302 read with Section 34 and also u/s 302 read with Section 120-B of the Indian Penal Code. We also take the view that both the respondents are also guilty of committing other offences as mentioned in the charge, but we do not propose to award any separate sentence for the commission of the offences mentioned in the charge.

54. In view of the aforesaid discussions, the appeal is allowed. The order of acquittal passed by the learned Sessions Judge in Sessions Case No. 52 of 1977 is set aside and we direct both the respondents-accused to suffer Rigorous Imprisonment for life for committing both the offences. The sentences are ordered to run concurrently for the commission of both the offences as stated above. The accused No. 1 is already in jail. Accused No. 2 is directed to surrender to custody within a period of four weeks from today on his furnishing fresh bonds in the trial Court within a period of three days from today.