

(2004) 09 GUJ CK 0067
In the Gujarat High Court

Case No : Criminal Confirmation Case No. 3 of 2003 with Criminal Appeal No's. 1122, 1157 and 1209 of 2003

State of Gujarat

APPELLANT

Vs

Vinubhai Laljibhai Patel

RESPONDENT

Date of Decision : 02-09-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Evidence Act, 1872 — Section 25, 26
Penal Code, 1860 (IPC) — Section 120B, 201, 302, 363, 364

Citation : (2004) 09 GUJ CK 0067

Hon'ble Judges : Kshitij R. Vyas, J; Akshay H. Mehta, J

Bench : Division Bench

Advocate : Harsha Devani, APP in Criminal Confirmation Case No. 3 of 2003 and K.G. Sheth in Criminal Appeal No. 1122 of 2003, for the Appellant; K.G. Sheth, for Petitioner No. 1 in Criminal Appeal No. 1122 of 2003, J.M. Panchal, in Criminal Confirmation Case No. 3 of 2003 and K.G. Sheth and 3 in Criminal Confirmation Case No. 3 of 2003, for the Appearing Parties

Judgement

Kshitij R. Vyas, J.—The appellants No. 1 to 3 were tried by the learned Addl. Sessions Judge, Ahmedabad in Sessions Case No. 255 of 2000 for offences punishable u/s 363 read with Section 120-B of IPC; Section 364 read with Section 120-B of IPC; Section 302 read with Section 120-B of IPC; Section 201 read with Section 120-B of IPC; and Section 384 read with Section 120 IPC. The learned Judge, at the end of the trial, by judgment and order dated 28th August 2003, convicted A1, A2 and A3 for the offences punishable u/s 302 of IPC. All the accused were also convicted for offences punishable under Sections, 363, 364, 384, 201 read with Section 120-B of IPC.

All the accused were ordered to suffer RI for seven years for the offence punishable u/s 363 of IPC and were also ordered to pay a fine of Rs.1,000/- each and in default of payment of fine, to undergo RI for one year.

All the accused were sentenced to RI for 10 years for the offence punishable u/s

364 of IPC and were ordered to pay a fine of Rs.3,000/- each and in default of payment of fine, they were ordered to undergo SI for two years. All the accused were sentenced to suffer RI for three years for the offence punishable u/s 384 of IPC and were directed to pay a fine of Rs.1,000/- each and in default of payment of fine, they were ordered to undergo further SI for six months. All the accused were also sentenced to suffer RI for seven years for the offence punishable u/s 201 of IPC and were ordered to pay a fine of Rs.1,000/- each and in default, to undergo further SI for one year. Further, all the accused were sentenced to suffer RI for ten years for the offence punishable u/s 120-B of IPC and were ordered to pay a fine of Rs.2,000/- each and in default of payment of fine, they were ordered to undergo further SI for two years.

A1 - Vinubhai Laljibhai Patel and A2 - Hasmukh Karshanbhai Patel were sentenced to death for the offence punishable u/s 302 of IPC and were ordered to be hanged by neck till they are dead, subject to the confirmation by this Court and were also ordered to pay a fine of Rs.5,000/- each and in default of payment of fine, to undergo SI for one year.

A3 - Dilip J. Patel was sentenced to undergo RI for offence punishable u/s 302 of IPC and was also ordered to pay a fine of Rs.5,000/- and in default of payment of fine, he was ordered to undergo SI for one year.

All the aforesaid sentences were ordered to run concurrently.

2. All the appellants have challenged the above judgment and order of conviction and sentence, by filing appeals. A1 has filed Criminal Appeal No. 1112 of 2003; A2 has filed Criminal Appeal No. 1157 of 2003 while A3 has filed Criminal Appeal No. 1209 of 2003. All the appeals are heard together with Confirmation Case No. 3 of 2003.

3. The facts giving rise to the prosecution case can be summarised as under:

Complainant Jivraj Tulshibhai is residing with his family at 16 "Shreeji" Apartment, in Bapunagar area of the city of Ahmedabad. His minor son, Mayur aged about 11 years, studying in 5th Std. was residing with him and his wife Manjulaben in "Shreeji" Apartment, Bapunagar, Ahmedabad. On the fateful day i.e. on 3.3.2000, in the morning at 9.15, Mayur was playing in the parking place of the complex. The complainant being doing the business of Diamonds had gone to Surat for purchasing raw materials. Manjulaben, for the purpose of sending her son Mayur to School, went to the place of parking, but she could not find him. After making futile attempts to find out the missing child, she and her husband's nephew, Ishwarbhai - PW-22 went to Bapunagar Police Station and informed that her son was missing while he was playing in the parking area of the complex, in the morning, at about 11.00 a.m. An entry to that effect was made in the diary of the Police Station. In the meantime, PW-1 was also informed at Surat, who returned to Ahmedabad in the evening. The entire family of the complainant made all efforts to search the missing child Mayur for two days. On 6.3.2000 at about 9.00 p.m., while PW 1 and PW 2 were sitting in the

house, A1 Vinubhai came there and told PW-1 that he wanted to tell him in secret that a serious act had been committed by him for which he was repenting. The complainant then told him that PW-2 was his nephew and whatever he wanted to tell, he may tell. A1 thereafter confessed before them that in greed of money, he sent the complainant's son Mayur on 3.3.2000 at about 11.00 a.m. to Agrawal Pan Shop to purchase a Pan. From there, he took Mayur in his Fiat Car and brought him at Thakkar Bapa Nagar approach road and as per the previous plan conspired by him and his friend A2 Hasmukh Karshanbhai, who was present at the approach road, all the three in his Fiat Car arrived at the Bansari Flat situated in Viratnagar, which was hired by him and in the room of the said Flat, A1 and A2 killed Mayur by throttling his neck and put his dead body in a gunny bag after having tied his hand and legs with Jute string and the dead body was tied with Saran (white stone) used for the purpose of polishing diamonds, after inserting iron chain in its hole and locked with iron chain and carried the said bag containing the dead body of the boy in the car and both A1 and A2 threw the same in the Kans (water canal) situated near the culvert of the said Canal on highway prior to Anand City. PW-1 and PW-2 thereafter went to Bapunagar Police Station. Devendra Bhatt, Sr. Police Inspector, PW-26 of Bapunagar Police Station recorded the complaint as stated by PW-1 and also made a report. PW-28-PSO, Bapunagar Police Station registered the offence at 10.00 p.m. being CR No. I-86/2000 and later on handed over the investigation to the Sr. Police Inspector Mr. Bhatt. A1 was arrested at 1.30 a.m. on 7.3.2000 and A2 was arrested on the same day at 1.30 a.m. Both were taken into police custody. The discovery panchanama was drawn at the place of incident (Bansari Apartment) at the instance of A2 in presence of panchas, and the clothes, a pair of leather chappals of the deceased and two keys of lock were recovered. PW1 identified the clothes and chappals to be of his deceased son. On 7.3.2000 at about 7.30 a.m., A1 made the disclosure statement before the panchas to show the dead body. PI Mr. Bhatt called the staff of fire brigade, Government photographer and panchas and they all went along with A1 at the site, i.e. Kans, where accused had thrown the gunny bag containing the dead body. The bag was tied with hump thread (Sutari). After removing the gunny bag from the water of Canal and opening the same naked dead body of the boy was there. The hands and legs of the deceased boy were tied with jute string and Saran was tied with iron chain and the lock was applied thereon. The body was identified by his relatives. The lock was opened by the key recovered from the room of the flat. The photographs of the dead body were taken, panchanama to that effect was drawn before panchas, muddamal articles recovered were seized under the panchanama, inquest panchanama of the decomposed dead body was also made. The dead body of the deceased boy was sent to Krishna Hospital at Pramukhswami Medical College, Karamsad, Dist. Anand where Dr. Satish Patel, PW-19 performed the post mortem of the dead body. The cause of the death was found to be mechanical Asphyxia (due to throttling of neck) of the boy. Viscera was preserved and was sent to Forensic Science Laboratory (FSL) and no poison was found. The gag was removed from the mouth of the dead body of the boy and one Kanthi of Tulsi

worn by the deceased were seized and sent to FSL.

4. The remand was obtained against both the accused. During the investigation, it was further disclosed that A1 had purchased Sutari (hump string), Saran, iron chain, lock etc. from different traders. The statement of all the witnesses were recorded. The statement of Rustamsinh Gambhirsinh Rajput, PW-13 was also recorded to prove that A1 had purchased petrol for filling in his fiat car on the date of incident. The Fiat car which was used for kidnapping the victim and after committing murder, carrying dead body up to canal was also seized under panchanama. A3 was arrested on 15.3.2000 at about 3.00 p.m. A3 disclosed the name of his office to be "Himalaya Gas Agency, and a search was carried out at his instance and a script of "Man Mauji" film and visiting card of A1 were seized under panchanama. The statements of Maheshbhai Chandubhai PW-24 working in the office of A3 and Rajubhai Bachubhai PW-18 were recorded on 19.3.2000 to establish that the deceased was last seen with accused before he was done to death. It appears that the Chief Metropolitan Magistrate also recorded statement of PW 24 u/s 164 of the Cr.PC.

5. The statement of one Maheshbhai Hiralal - PW-16, servant of Parshottamdas of New Deluxe Hair Cutting Saloon was recorded to establish the demand of ransom having been made by A1 through this witness on phone from Manjulaben, wife of complainant. 26.8.2004 5. According to the prosecution, demand for ransom was made by A1 himself as a part of criminal conspiracy for releasing the boy though he was already killed. Thus, it was under the pretext of showing that the boy was alive and he would be killed if the ransom amount was not paid when the demand for ransom was made.

6. After receiving report from the Serologist and collecting sufficient material against the accused persons, the Investigating Officer submitted chargesheet before the learned Metropolitan Magistrate. The case was thereafter committed to the City Sessions Court, Ahmedabad. The charge Ex. 1 was framed against the accused. The accused pleaded not guilty and claimed to be tried.

7. The prosecution has led oral as well as documentary evidence to establish the charge. In the further statement recorded u/s 313 of the Code of Criminal Procedure, the accused have come out with the case that they are innocent and they have been falsely implicated in the alleged offences.

8. The learned Trial Judge, after appreciating oral as well as documentary evidence, held that the prosecution has established the charge levelled against the accused beyond reasonable doubt and he accordingly passed the order of conviction and sentence as stated herein above.

9. We have heard Mr. K.G. Sheth, learned Advocate appointed for A1 and A3, Mr. J.M. Panchal, learned advocate for A2 and Ms. Harsha Devani, learned APP for the State.

10. We have also minutely examined the entire evidence on record. Learned

advocate Mr. Sheth submitted that the extra judicial confession alleged to have been made by A1 before PW 1 and PW 2 is not believable as the witnesses have given inconsistent versions. According to the learned advocate, the version given in the complaint does not tally with the version given in the evidence. Even the versions given by PW 1 and PW 2 in their respective evidence are not similar. The learned advocate further submitted that certain statements in the extra judicial confession alleged to have been made do not inspire confidence as PW 1 is the father of the deceased i.e. close relative of the deceased and that too, it was made after four days when Samir, friend of deceased was already interrogated by police. Learned advocate further submitted that there is no positive evidence regarding the arrest of A1 as panchas to the arrest panchanama of A1 are not examined. Not only that, but Constable Maniram and Constable Rajendrasinh who brought the A1 are also not examined. In the submission of learned advocate, in absence of any positive evidence regarding arrest of A1 and as per the suggestion put forward by defence, A1 was in fact arrested in the morning of 6.3.2000 itself and he was pressurized to make extra judicial confession. The learned advocate pointed out circumstances in order to show that A1 could not have made extra judicial confession. According to the learned advocate, even though A1 made alleged confession before PW 1 and PW 2, they allowed him to go without scolding or beating and PW 1 and PW 2 thereafter went to Police Station for the purpose of lodging complaint taking everything lightly and in routine matter, are the circumstances against human conduct. It was contended that as per the evidence of PW 1, he reached Police Station at 22.00 hours and it took him half-an-hour to give complaint while the offences were registered at 22.10 hours and the accused was arrested at 0.30 hours on 7.3.2000. According to the learned advocate, the timings suggested by the prosecution are not consistent with the prosecution case and a show is created to justify the extra judicial confession and arrest of A1. The learned advocate further submitted that the conduct of prosecution witnesses is highly unnatural and, therefore, they are not reliable. It was submitted that even though PW 1 who came to know from his wife about the phone call demanding ransom, instead of informing police, he kept quiet. Even Manjulaben, the mother of the deceased and Samir who had information about the missing of the deceased, are not examined. Likewise, PW 2 who was told by Manjulaben about the phone having been received demanding ransom did not inform police for three days. PW 16 Mahesh Hiralal, the servant of Purushottambhai, owner of Haircutting Saloon did not inform his employer or anybody about the phone call having been made by him at the instance of A1 demanding ransom. On the question of last seen together, the learned advocate submitted that no importance can be attached to the evidence of PW 18 Rajubhai Bachubhai and PW 24 Maheshbhai Chandubhai in view of their conduct of not informing anybody. Learned advocate finally submitted that in any case, even if it is established that A1 is involved, his involvement does not lead the case to the rarest of rare case and, therefore, the extreme penalty is not warranted. Our attention is invited to certain decisions on the point which we will refer to at an appropriate stage. Regarding involvement of A3, Mr. Sheth submitted that there is

absolutely no evidence against him in respect to the offence for which he is charged and, therefore, appeal of A3 is required to be allowed.

11. Learned advocate Mr. Panchal appearing for A2 submitted that the case on hand being a case of circumstantial evidence, the prosecution has failed to establish chain of circumstances leading to involvement of A2 in commission of offence. The learned advocate further submitted that the confessional statement made by A1 cannot be used to prove other circumstances. In the submission of learned advocate, the confessional statement may be used as a last circumstance to corroborate other evidence. By inviting our attention to the evidence of PW 1- complainant, the learned advocate submitted that the alleged confession of A1 was recorded before lodging the complaint as the complainant in his evidence has stated that at the time of giving complaint, A1 was in police lock up. The learned advocate, therefore, submitted that the extra judicial confession given by A1 is not trustworthy and reliable.

12. On the question of last seen together, the learned advocate submitted that the evidence of prosecution witnesses is not consistent. According to P.W.1, A1 and A2 were together at the time of kidnapping the boy while the PW 1, in his complaint, has stated that A2 was on the approach road of Thakkar Bapa Nagar in the process of kidnapping while as per the evidence of PW 24 Mahesh Chandulal, A2 was in his office when A1 came with the boy in car. It was submitted by the learned advocate that the prosecution has not established involvement of A2 in the commission of offence. On the question of discovery of flat in Bansari Apartment, the learned advocate submitted that even the said discovery does not establish involvement of A2. According to the learned advocate, arrest panchanama of A2 was made at 1.30 a.m. on 7.3.2000 and nothing incriminating was recovered. If that was so, A2 can never have opened the lock of the door of flat by keys. Finally, the learned advocate submitted that there is no evidence worth the name of A2 having entered Bansari Apartment or having gone out of it when the crime was committed in the said flat. By criticising the evidence of PW 16 Mahesh Chandulal, it was submitted that he being merely a servant of A3, it was highly improbable on the part of A2 to make extra judicial confession of killing boy by A1 and A2. He, therefore, submitted that the appeal filed by A2 be allowed.

13. Ms. Harsha Devani, learned APP on the other hand, while supporting the reasonings of the trial court, has submitted that the prosecution has established the chain of circumstances, motive, kidnapping of the boy, last seen together, purchase of articles namely Saran, chain, lock, gunny bag, petrol, discovery of flat in Bansari Apartment at the instance of A2, discovery of dead body at the instance of A1 from Kans (subcanal), demand of ransom amount through PW 24, by cogent and reliable evidence. In her submission, the evidence produced by the prosecution is in conformity with the extra judicial confession made by A1 before PW 1 and PW2. She, however, frankly conceded that there is no sufficient evidence against the accused regarding hatching criminal conspiracy.

14. Having narrated the facts in detail, we do not think it necessary to re-narrate the entire evidence verbatim. We will, however, narrate the relevant portion of the evidence of prosecution witnesses while dealing the submissions advocated before us.

15. Before we deal with the submissions, we may deal with certain points which are not disputed and not seriously pressed.

It is not disputed before us that the boy Mayur died a homicidal death. As per confessional statement of A1, gunny bag drowned in the water canal was taken out with the help of Fire Brigade persons in presence of panchas and put up on the road side of canal. The gunny bag was thereafter opened and a dead body of naked boy was took out from the same. After preparing inquest panchanama of the dead body of the boy in presence of panchas, Investigating Officer PW 26 Devendrakumar B. Bhatt, after calling panch witness PW 6 Amul Ranchhodbhai Patel, prepared inquest panchanama of the body of the deceased boy. He has stated in his evidence that he saw naked body of a boy in decomposed condition. He has further stated that the two legs of dead body were bent towards his chest and with his legs, his hands were tied; eye balls of the dead body were protruded out and found decomposed; neck was found swelling; in the mouth of the dead body, there was a gag of cloth and there was one " Mala" of Tulsi as well as from the waist of the dead body, Saran was tied with iron chain having lock. According to this witness, one Ishwarbhai (PW 2) who identified the dead body of boy stated that the dead body was of his uncle's son, Mayur. He thereafter prepared panchanama Ex. 32 which was signed by another panch witness, namely Ramjibhai. PW 26 Mr. Bhatt has corroborated this witness. After the inquest report, Mr. Bhatt sent the dead body for autopsy at Shri Krishna Hospital and Pramukh Swami Medical College, Karamsad. PW 19 Dr. Satish Bhagabhai Patel, Ex. 63, in his evidence, has stated that he received the dead body of the boy Mayur aged 11 years for autopsy through Police Constable Sarfarajali Saiyed and on 7.3.2000, he started post-mortem of the dead body with a Panel Dr. Ritesh on the same day at about 12.15 p.m. and it was completed at 2.05 p.m. According to this doctor, there were no clothes on the dead body; the condition of the dead body was found decomposed, its skin was peeled off at some places and his face was found congested and decomposed and dark in colour; his eye ball was protruded out and decomposed and nostril was found dried blood stained and his mouth was gagged with a cloth and his anus had protruded out with faeces matter coming out. After removing gag from the mouth, tongue was seen being backward in mouth, decomposition was present and there was no mark of ligature on neck, but on dissection of neck, substaneous tissues and muscles around trachea were found congested and there was a fracture of right great in cornea of hyoid bone. After removing gag from mouth, two bluish black bruise of 1.3 cms x 1.2 cms and 1.1 cms x 1.0 cms of size on alveoli surface of lower lip were found; both upper limbs were tied at wrist joint with string, both lower limbs were tied at ankle joint with black string of clothes and one loose string and kanthi around the neck was found; skin of both palms and soles was

corrugated, teeth were movable in socket and there was no maggots, but foul smelling was present. He has further stated that on dissection, it was found that vertebrae was scalp hair carily pluckable and there was no fracture of skull bone and membranes were decomposed; brain was decomposed, semisolid and greenish in colour. There was no fracture of ribs, but there were signs of decomposition and pleurae was decomposed; there was mucus membrane of trachea and larynx was overt, black and marked congestion was cutting blood stained fluid comes out on prersive; lungs and pericardium were found decomposed; left side of heart was empty; right side was full with dark coloured blood fluid; large vessel was congested; walls of abdomen were pelling of skin and peritoneum, mouth, pharynx and oesophagus were decomposed; there was brownish coloured unidentified food present; small and large intestines were decomposed and liver was congested and decomposed; spleen and kidneys were decomposed and the bladder was empty; there was external genitalia, turgid and swollen; pancreas and supra renals were decomposed, limbs of dead body were found decomposed as dead body had remained in water. According to Dr. Patel, the cause of death was mechanical asphyxia by throttling i.e. compression of neck. Thus, from the medical evidence, the prosecution has established beyond any manner of doubt that the deceased Mayur died a homicidal death.

16. It is the prosecution case that the accused had hatched criminal conspiracy to extort a sum of Rs. 8 to 10 lacs from Jivrajbhai Tulsibhai, father of the deceased boy Mayur in order to meet with the expenses of making Gujarati film MANMOUJI by illegal means i.e. by kidnapping the minor child of 11 years and to fulfil the said criminal conspiracy, one Flat No. 10 in Bansari Apartment situated in Viratnagar area was hired to bring the boy there. The said boy was sent to Agrawal Pan Galla and from that place, he was taken in Fiat Car No. GJ1 AP 3414 to Himalaya Gas Agency of A3 situated at Thakkar Bapa Nagar and in furtherance of the said understanding between the accused persons for doing the said illegal act by illegal means, on or about 3.3.2000 between 11.00 a.m. and 11.30 a.m., A1, by kidnapping the boy without the consent of his parents or guardians, in furtherance of the intention to kidnap the child in order to extort a sum of Rs. 8 to 10 lacs for making Gujarati film MANMOUJI, made him to sit in Fiat Car of A1 in which A2 and A3 were already sitting and all the accused brought the said kidnapped boy in Flat No. 10 of Bansari Apartment in order to fulfil their intention of extortion and thereby committed offences punishable under sections 363, 364 read with section 120-B of the IPC.

17. For the purpose of proving criminal conspiracy, the prosecution has placed reliance on the following circumstances:

(1) Seizure of Script of film MANMOUJI Ex. 40 and Visiting Card Ex. 41 of A1 from the Office of Himalaya Gas Agency belonging to A3; The seizure panchanama at Ex. 39 is proved through Kamlesh Muljibhai Patel, PW 8.

(2) The presence of A3 with A1 at the time of taking Flat No. 10 in Bansari Apartment on rent.

(3) The information conveyed by A2 to PW 24 Mahesh to inform A3 that the work was over.

18. From the aforesaid circumstances, the prosecution has tried to prove conspiracy hatched by the accused persons to kidnap boy Mayur and to extort money. On going through the relevant evidence, we find that the prosecution has not only miserably failed to prove conspiracy hatched by the accused, but has also failed to prove the involvement of A3 in the offences for which he was charged. Mere finding of a Script and Visiting Card of A1 from the Office of A3 cannot lead to the conclusion that the accused had decided to produce a film and that too, by spending Rs. 8 to 10 lacs. In the evidence of Investigating Officer, he has stated that while recording the statement of Batuk Jairam, brother of A3, he produced a certificate of A3 showing that A3 has completed the course of film directing which is at Ex.113. The said certificate shows that A3 had undertaken the course of three years of film acting from Baroda Institute of Arts, Film Acting, Stage Programmes and Production. Thus, from the evidence on record, it appears that A3 had completed the course of film acting. Merely because a film Script is found from his office, by that fact itself, one cannot jump to the conclusion that all the accused hatched a criminal conspiracy to produce film. It is difficult for us to conceive the idea that a film can be produced in Rs. 8 to 10 lacs. Besides, one before making an attempt to kidnap for money would like to ascertain whether a person was capable of paying ransom amount or not. PW 1 Jivrajbhai Tulshibhai, Ex. 16, in his evidence, has stated that he was earning Rs.3000/- per month by doing labour work. Therefore, A1 being the neighbour would be the proper man to know the income, status and the capacity of PW 1 to pay the ransom amount. However, there is nothing on record to suggest that either of the accused made any attempt to ascertain that they were likely to succeed in getting the amount from PW 1. Surprisingly, in the present case, before demanding the amount of ransom, the kidnapped boy was done to death. Thus, the purpose for which the boy was kidnapped could not materialise. Thus, the entire exercise resulted into a flop show.

19. Reverting back to the circumstantial evidence, namely the presence of A1 and A3 while taking Flat No. 10 in Bansari Apartment on hire, PW 17 Babubhai Harjivanbhai, Ex.57, in his evidence, has stated that on 28.2.2000, his friend Jagdishbhai and his cousin Dilipbhai, (A3) and Vinubhai, (A1) met him for the purpose of taking flat on rent in Bansari Apartment. From the examination-in-chief, it appears that both the accused wanted to take a flat on rent and in fact, A1 had also told that they will take the flat on hire, but his further evidence reveals that the flat was taken on hire by A1 only. Para 4 of examination-in-chief clearly reveals that the A1 had told PW 17 Babubhai that he liked the flat and he would pay the amount of rent. In fact, on 1.3.2000, A1 had paid the amount of Rs. 5000/- by way of deposit and demanded rent receipt. PW 17 had issued rent receipt in the name of A1 which is produced at Ex. 58. The front portion of the said rent receipt is at Ex. 59. It may be noted that Ex. 58 was in fact recovered from the residence of A1 i.e. Shreeji Apartments. It was seized under

panchanama Ex. 36 proved by PW 7 Arvindbhai Laljibhai, Ex.35. Therefore, for all practical purposes, A1 had hired a flat in Bansari Apartments and A3 had merely accompanied him. Therefore, in absence of any positive evidence, merely by accompanying A1, involvement of A3 remains a matter of suspicion only.

20. PW 24 Maheshbhai Chandubhai Patel, Ex.85 is serving as a Peon in Himalaya Gas Agency belonging to A3. He, in his evidence, has stated that in the Office, A1 and A2 used to come. According to him, on the day in question, he opened the office at 8.00 a.m. Thereafter A3 and later on A2 came in the office. On hearing the horn of a white car from the second floor of the office, he saw A1 sitting at the steering wheel. A2 thereafter informed A3 that A1 had come. He also saw a boy sitting on the rear seat. He saw A2 leaving the office and thereafter he went inside the office. According to this witness, when A2 returned to office, A3 was not there. When A2 inquired about A3, this witness told him as to for what purpose he was inquiring about A3 to which A2 told him to convey a message to A3 that the work was over. On this, PW 24 insisted to know as to which work was over to which A2 told him that A3 be informed that the boy was done to death. He told A2 that they had not done a good thing and, therefore, henceforth he should not come to the office. Thereafter A2 left the office. This witness thereafter went to his village after giving statement to the police. It appears that this witness was summoned by police after five to six days and accordingly he presented himself before the learned Magistrate before whom his statement was recorded.

21. Even from the evidence of PW 24 Mahesh, it appears that A3 did not play any role in the alleged conspiracy. Even if the evidence of PW 24 is believed, at the most, the involvement of A2 is established because it is A2 only who, on hearing the horn of the car driven by A1, after informing A3, left the office premises of A3 and thereafter informed PW 24 Mahesh that the work was over. In other words, A3 had never accompanied A1 and A2 in the car when the boy was alive as also he was not present when the boy was murdered. Otherwise, A2 had no reason to tell PW 24 Mahesh to give a message to A3 that the work was over.

22. The above discussion would lead us to the only possible conclusion that the criminal conspiracy hatched by all the accused to kidnap boy Mayur and to extort money from the father of the victim is not duly established. From the above discussion, it can also safely be concluded that the prosecution has failed to establish involvement of A3 in the offences punishable u/s 302 read with section 34 and sections 363, 364, 384, 201 read with section 120-B of the IPC.

23. On exoneration of the accused from the charge punishable u/s 120-B of IPC, we have to decide the case of involvement of A1 and A2 in the offence of kidnapping and destroying the evidence. The prosecution has relied upon extra judicial confession made by A1 before PW 1 and PW 2 and of A2 before PW 24.

24. As far as the alleged confessional statements of both the accused are concerned, since they have retracted in their statements u/s 313 of the Code of

Criminal Procedure, they cannot be made basis of conviction. The confessional statements of the accused, at the most, can be used in support of other evidence. The Apex Court, in the case of Chandrakant Chimanlal Desai Vs. State of Gujarat, after following Kashmira Singh Vs. State of Madhya Pradesh, in para 5, observed as under:

"The confession of accused 1 was retracted at the time when the accused was questioned u/s 313. In considering the reliability of this confessional statement, the High Court had not kept in view the observations of this Court in Kashmira Singh Vs. State of M.P. In this decision, the Supreme Court had observed:

"The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course, it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

25. The present case being a case of circumstantial evidence, the prosecution, over and above the confessional statements made by both the accused, placed reliance on the following circumstances:

- (1) The motive; demand of ransom through the servant of Haircutting Saloon;
- (2) Kidnapping the boy; xxxxxx Last seen together;
- (3) Purchase of articles saran, lock, gunny bag, petrol etc.
- (4) Discovery of Flat No. 10 of Bansari Apartment at the instance of A2; Recovery of clothes, chappals and key from the hook at the flat, lock applied on chain tied with saran on the dead body of the boy.
- (5) Discovery of dead body at the instance of A1;

26. The motive, in the instant case, as per the story put forward by the prosecution appears to be too weak. It is the prosecution case that with a view to extort money from complainant PW 1, the accused kidnapped the son of PW 1 at about 11.00 a.m. Except a phone call made by PW 16 Mahesh Hiralal at the instance of A1, at 6.00 p.m. on 3.3.2000, none of the accused made any attempt to demand ransom thereafter. PW 16 is the barber by profession and doing the said work as a servant at New Deluxe Hair Cutting Saloon. He, in his evidence, has stated that on 3.3.2000, at about 6.00 p.m., A1 had come to his Hair Cutting Saloon. He recognised A1 as his regular customer. He also recognised A1 in the

Court. A1 came in his white fiat. He asked Purshottambhai, the owner of Hair Cutting Saloon to send PW 16 with him for the purpose of taking gas cylinder from the house of his sister. As two to three customers were there in the shop, Purshottambhai was not inclined to send PW 16 with A1. However, after persuasion by A1, PW 16 was sent with A1. A1 took PW 16 to STD Booth of Viratnagar area, A1 thereafter told PW 16 to have a talk with Bhabhi (wife of A1), he asked PW 16 to repeat the sentence spoken by him in Hindi. A1 thereafter dialled the number and gave the receiver to PW 16. The phone was received by a lady. PW 16 thereafter talked to her in Hindi as told by A1. PW 16 inquired whether the master was there in the house. On getting reply, he again asked whether the wife of the master was there in the house. He further told that "your child is with them and send money". As the lady on the other side did not understand conversation in Hindi, she put down the receiver. Again A1 dialled the same number and gave the receiver to PW 16. PW 16 again started asking usual questions as aforesaid. The lady on the other side did not understand the conversation and gave the receiver to another lady. The other lady wanted to know the identity of PW 16 and also asked him to speak in the language understood by her. Since PW 16 felt suspicious about A1, he put down the receiver and came out from the STD Booth. A1 thereafter offered light drink to this witness. However, as PW 16 insisted to go back to the shop, A1 dropped him to the shop. Thus, a show was made by A1 by taking help of PW 16 by demanding money from the wife of complainant (PW1) misrepresenting PW 16 that the lady with whom he had conversation on phone was his Bhabhi (wife of A1).

27. We are not at all impressed by the evidence of PW 16. Admittedly, his statement is recorded after five days from the arrest of A1. This witness is an ordinary servant of the Haircutting Saloon. He is not a friend of A1. He knows A1 as a customer. When the accused had undertaken risky mission of kidnapping the boy for the purpose of demanding ransom from the relatives of the boy, the normal conduct would be to talk directly or through someone who should be trustworthy and close to them. By calling a servant of the Haircutting Saloon and that too, for the purpose of demanding ransom, is totally against the normal human conduct. As per the evidence of PW 16, even though there were two or three customers waiting for their turn, he was permitted to go with A1. That fact also is not easily conceivable. Even though he demanded ransom at the instance of A1, he neither disclosed this fact to his employer nor his family members/friends, nor to the police. On careful examination of the evidence of this witness, we are of the opinion that his evidence is not reliable and trustworthy and no importance can be attached to prove motive. In absence of any other evidence, much less reliable evidence, the forgone conclusion is that the motive is not proved.

28. The circumstance of kidnapping the boy Mayur is duly established by the prosecution. It is the prosecution case that Mayur was kidnapped at about 11.00 a.m. while he was playing in the parking complex when A1 asked him to

purchase a pan from Agrawal Pan Shop on the date of the incident. According to the prosecution, Mayur was kidnapped from Agrawal Pan Shop from where he was taken in a fiat car to the office of A3 i.e. Himalaya Gas Agency situated at Thakkar Bapa Nagar and from there, he was taken to flat No. 10 of Bansari Apartment at Viratnagar where he was done to death.

29. Manjulaben, the mother of the boy gave information to Bapunagar Police Station and the police recorded the said information as Janvajog entry (missing report) at Ex.107. In the cross examination of PW 1 complainant, he has stated that on reaching Ahmedabad from Surat, he and his wife had inquired about their missing son from neighbours and residents of the area. They had also inquired from Natwarlal, owner of Agrawal Pan Shop as well as from boy Samir who was also staying in the same Apartment of the complainant with whom the deceased was playing before he was kidnapped. It is true that Manjulaben as well as Natwarlal and Samir are not examined though their statements were recorded by the Investigating Officer. By not examining those persons, the factum of kidnapping does not disappear especially when the prosecution has established that A1 kidnapped the boy from the lawful custody of the complainant. There is sufficient evidence on record about the deceased having been last seen with the accused. It is true that there is some inconsistency in the evidence of the prosecution about presence of both the accused with the deceased when he was kidnapped.

30. PW 1 Jivraj, in his evidence, has stated on the basis of confession made by A1 that when he sent Mayur for the purpose of purchasing pan, A2 was already there in the car and A3 who was to join them was waiting at the corner of approach road.

31. PW 2 Ishwar, the nephew of PW 1, in his evidence, has stated on the basis of confession made by A1 that A1, after sending Mayur for the purpose of purchasing pan, took him in his fiat car to approach road where A2 was waiting boarded the fiat car. Thus, there is some inconsistency in the evidence regarding presence of A2 and A3 in the car and/ or waiting at the approach road at the time of kidnapping the boy. One should not ignore the fact that the witnesses were deposing after a gap of ten months and, therefore, certain discrepancies in the evidence are bound to be there. Besides, these witnesses have deposed on the basis of information conveyed to them by way of confession by A1. In any case, both have remained consistent about A1 having kidnapped Mayur from Agrawal Pan Shop. At this stage, it is necessary to refer to the evidence of Rajubhai, PW 20 and Mahesh Chandulal, PW 24.

32. Rajubhai Bachubhai, PW 18, on the relevant day, at 11.50 a.m., was on his way on scooter to see his father. At that time, at Ambikanagar, on the turning of kutcha road, he saw one white fiat car. A1 was at the steering wheel and Mayur, the son of Jivrajbhai was sitting next to him. He felt that a man was also sitting on the rear side. The fiat car went towards Ambika Nagar kutcha road. After attending to his duties, in the evening, he had gone to village Umrli of Jetpur

Taluka for some social work. According to him, when he saw A1 driving a car with boy Mayur in Ambika Nagar, Jivrajbhai and A1 being neighbours, he did not feel anything unusual. After attending the marriage of his uncle's son, he returned Ahmedabad on 11.3.2000. On the next day, he came to know that A1, after kidnapping Mayur, killed him. He went to Jivrajbhai to console him. He saw lock on the door and came to know that Jivraj and his family had gone to Surat. After some days, he met Ishwarbhai, PW 2 and tried to know about deceased Mayur. Ishwar informed him that Jivraj and his family had gone to Surat for the purpose of performing last rites and will come thereafter. This witness has informed about he having seen the deceased with A1. On 19.3.2000, he had gone to Bapunagar Police Station and also informed police about the incident. According to him, because of business relationship, he used to go to the house of Jivrajbhai and, therefore, he was knowing him. He was also knowing his family and he also knew and identified A1 as a neighbour of Jivrajbhai.

33. Learned advocate appearing for A1 has challenged the evidence of this witness by contending that no reliance can be placed on the evidence of this witness as this witness is a chance witness. It was contended that there was no reason for this witness to come to Ambikanagar area on the day in question. It was further strongly contended that on the very day, he had gone to his native village and stayed there for about eight days. The police recorded his statement a week thereafter. In view of the aforesaid circumstances, it was contended that the evidence of this witness does not inspire confidence.

34. After considering the cross examination of this witness, we are of the view that nothing substantial has been brought out by the defence. There is no reason for us to doubt the testimony of this witness when he stated that he had gone to see his father serving at Gokulnagar Society, Odhav area. Considering the relationship between A1 and PW1 being that of neighbours, he did not feel unusual on seeing Mayur in the company of A1 in the car. He also saw the car being driven on kutchra road of Ambikanagar where the office of A3 named Himalaya Gas Agency was situated. Only after he returned from his native place on 11.3.2000, he came to know about the son of the complainant being kidnapped and murdered. He immediately thereafter went to the house of the complainant and came to know that the complainant and his family had gone to Surat. This is also established from the evidence of the complainant that they had in fact gone to Surat. After some days, when he met PW 2 Ishwarbhai, he informed him about he having seen the deceased in the company of A1 when the deceased boy was kidnapped.

35. PW 2 being the close relative of the deceased, it is quite natural for this witness to divulge this fact to him. The trial court in fact asked a question as to why he and Ishwarbhai had gone to police station to which he replied that since he had seen the deceased with A1, he had gone with Ishwarbhai to police station. Thus, from the evidence of PW 18 Rajubhai, it is clear that the deceased was last seen in the company of A1 though as per PW 18, another unknown

person was also sitting on the rear seat. No attempt is made by the prosecution to identify the said person. In any case, even if we try to connect presence of A2 in the car from the evidence of PW1, PW2 and PW 18, the identity of the said person is not established. From the evidence of PW 24 Mahesh Chandubhai Patel, Ex. 85, presence of A2 is not established in the car when PW 18 had seen the car at 11.15 a.m.

36. Mahesh Chandulal Patel, PW 24 Ex.85, at the relevant time, was serving as a Peon in the Office belonging to A3 and one Madhubhai Kavatiya (maternal uncle of this witness). According to him, he opened the office at 8.00 a.m.; A3 came first and thereafter A2 came in the office. On hearing horn of the car, he saw from second floor of the office, a white car wherein A1 was sitting at the steering wheel. A2 informed A3 that A1 had come. In the car, he also saw a boy sitting on the rear seat of the car. A2 had thereafter gone down. According to this witness, A2, after sometime, came in the office. At that time, A3 was not there in the office. When A2 inquired about A3, this witness asked as to for what purpose A3 was required. At that time, A2 told him to inform A3 that the work was over. In turn, this witness also asked as to which work was over, to which A2 replied that A3 be informed that the boy who was taken in the car was done to death. This witness thereafter told that they had not done a good thing and also told A2 not to come to office again.

37. If the evidence of this witness is accepted, it rules out presence of A2 in the car when the boy was kidnapped as he was in the office of A3. From his evidence, it appears that on hearing the horn, A2, after informing A3 about arrival of A1 had gone with A1 in the car.

38. The evidence of this witness PW 24 is criticised by the defence on many counts and in our opinion, rightly so. The evidence of PW 24 is required to be examined minutely especially when he being the servant of A3 was likely to change his version, his statement u/s 164 of the Code of Criminal Procedure was recorded before the learned Magistrate. Apart from that, in our opinion, the evidence of this witness is not trustworthy and does not inspire confidence.

39. The say of this witness that he saw the deceased sitting on the rear seat is inconsistent with the say of PW 18 Rajubhai and also for other number of reasons, the evidence of this witness is required to be condemned. He being an ordinary peon and had joined the services six months prior to the incident, it would be difficult for anybody to believe that within such a short span, he would become so close to A2 that A2 would divulge the fact that they killed the boy and would ask him to convey the said information to A3. If at all A2 wanted to divulge this secret of committing murder of Mayur, he would never divulge it to any person (much less PW 24) other than A3. Not only that, but PW 24 scolded A2 that he had committed heinous act and further asked him not to enter the office. This is contrary to human conduct and, therefore, difficult to digest. The prosecution wants us to believe the above extra judicial confession made by A2 before PW 24 to which our answer is that the same is not believable. According

to him, even though the police had recorded his statement on the same day, he had gone to his village. Further, as per the say of this witness in cross examination, in his village also, he did not inform about the incident to any member of his family. In reply to the question asked by the trial court whether he was asked by his family members as to why he had come from Ahmedabad, he replied that as there was no work in the office, he had come to the village. He also contradicted himself in the cross examination about the boy having been sitting on the rear seat. (contradiction with respect to rear). Thus, the sudden disappearance of PW 24 after the incident and keeping mum by not telling about the murder of kidnapped boy and to give evasive reply of leaving office raises serious doubt about the credibility of PW 24. After minutely considering the evidence of PW 24, we are clear beyond any manner of doubt that the extra judicial confession alleged to have been made by A2 is not natural and probable and raises doubt about the credibility of investigation. We, therefore, attach no importance to it. From the evidence of this witness, it is further clear that after coming out of the car, A2 had gone inside the office. Thus, there is no positive evidence that A2, in fact, had boarded the car and had gone with A1. Thus, from the evidence on record, on the point of last seen together, it is clear that there is no sufficient and reliable evidence of last seen together as far as A2 is concerned. The prosecution, in our opinion, has established the presence of A1 only, from the evidence which we have discussed on the point of last seen together.

40. The prosecution has heavily placed reliance on the circumstances of discovery of flat of Bansari Apartment at the instance of A2 and the discovery of dead body of deceased boy Mayur at the instance of A1. It is the prosecution case that the kidnapped boy was kept in the flat No. 10 of Bansari Apartment and was done to death in the said flat. From the evidence of PW 17 Babubhai Harjivan, Ex. 57, owner of flat No. 10 in Bansari Apartment, it is clear that the flat was hired by A1. It is also clear that for the purpose of hiring the flat, A1 and A3 had met him on 28.2.2000. However, from the rent receipts Ex.58 and 59, which are in the name of A1, it is clear that the flat No. 10 of Bansari Apartment was hired by A1 only.

41. Ex.24 is the discovery panchanama of Flat No. 10 of Bansari Apartment at the instance of A2. The prosecution has proved the discovery from the evidence of panch witness Valjibhai K. Patel, PW 4 Ex.23. By inviting our attention to the evidence of Valjibhai, learned advocate Mr. Panchal submitted that it was a joint discovery at the instance of both the accused and, therefore, the same is not permissible. He has placed reliance on the decision of this Court in the case of Hemat Ramji Vs. State of Gujarat, 16 GLR 782 and Mohd. Abdul Hafeez Vs. State of Andhra Pradesh, The principles laid down in both the decisions are established principles of law. There cannot be any dispute that when more than one accused make a joint statement, it is difficult to know which of the accused persons were responsible and in that event, such joint statement cannot be relied upon. In the instant case also, in the evidence of PW 4 Valjibhai K. Patel, he has stated that in

his presence, the police asked the names of A1 and A2. The police had also informed the witness that in his presence, whatever was disclosed by both the accused, he was to act as a panch to the same. He had also stated that the accused had desired to discover flat and thereafter preliminary panchanama was to be made. From the panchanama, it appears that the panchanama started at 5.00 a.m. on 7.3.2000 and was over at 5.15 a.m.

42. Even though both the accused were there at the time of discovery of flat, from the panchanama, it is clear that it was A2 who had shown the flat by telling that he and his friend A1 Vinubhai had taken the said flat on rent on 1.3.2000. The panchanama further reveals that A2 had taken out the key and opened the lock of Flat No. 10. After entering the flat, the complainant Jivraj identified pant, shirt and chappals belonging to his son Mayur put on by him on 3.3.2000. Under the panchanama, two keys of the lock applied to the chain on the waist of the dead body which was hanging on the northern wall were also recovered. The panchanama was completed at 6.50 a.m. Reading the panchanama Ex.24, it is clear that even though both the accused were present, discovery of flat was at the instance of A2. The panchanama being a corroborative piece of evidence, when substantial evidence i.e. evidence of PW 4 is otherwise, we are of the opinion that it was a joint discovery at the instance of both the accused which is not admissible in evidence and, therefore, the discovery of flat No. 10 of Bansari Apartment at the instance of A2 is not admissible in evidence. Consequently, the circumstance against A2 of discovery of flat No. 10 of Bansari Apartment cannot be used for the involvement of A2 in the offences in question.

43. Apart from that, before the alleged discovery of Flat No. 10, arrest panchanama of A2 at Ex.107-B was drawn at 1.30 a.m. on 7.3.2000 which is proved by the evidence of Investigating Officer as the panchas are not examined. From the said panchanama, it is clear that A2 was arrested at 1.30 a.m. on 7.3.2000. It is clearly stated in the said panchanama that no incriminating article was recovered from his possession. A2 had remained in the custody of police right from that time. If that was so, he could not have taken out the key of Flat No. 10 from his pocket and opened the lock of the flat. As stated above, the flat was taken on rent by A1 and the rent receipts were also issued in the name of A1. Therefore, in ordinary circumstances, the key of the flat should remain with A1 only. Therefore, the story put forward by the prosecution that A2 took out the key from his pocket and opened the lock of the flat also appears to be a concocted and doubtful version. Thus, the circumstance of discovery of flat at the instance of A2 also cannot be used against A2. The manner in which the discovery of flat at the instance of A2 was made, raises a doubt about the said discovery and even on that count, the benefit must go to A2. 2.9.2004 44. The prosecution has not led any evidence to show that A2 entered Bansari Apartment or went out of it even though statements of Watchman Amrutlal and one Umesh were recorded by the Investigating Officer. The Investigating Officer Mr. Bhatt, in his evidence, has admitted that he had recorded statements of those persons. Besides, as per the evidence of Investigating Officer Mr. Bhatt¹, statement of

Samir with whom deceased played last and Natwarlal of Agrawal Pan Shop have been recorded. However, they have not been examined for the reasons best known to the prosecution. In absence of the same, the presence of A2 with A1 at the time of kidnapping Mayur is not established. The prosecution wants us to accept extra judicial confession of A1 wherein he has involved A2 in all stages i.e. kidnapping, murdering and destroying dead body of deceased. The said confession being statement of co-accused, it is not safe to rely in absence of any corroboration from other evidence.

45. Rustamsinh Rajput, PW 13, serving at Ajay Petrol Pump is examined by the prosecution to show that he had filled in petrol in fiat car driven by A1 on 3.3.2000 and a bill was also issued. Even this witness did not refer to the presence of A2 in the car on the day in question. Thus, the prosecution has not established presence of A2 while going to Anand and coming back from Anand.

46. In view of the above discussion, we are clearly of the opinion that the prosecution has failed to establish beyond reasonable doubt the circumstances/motive behind kidnapping and killing and for that A2 having been last seen together with the deceased boy as well as A1 and discovery at the instance of A2 of flat No. 10 of Bansari Apartment. The alleged extra judicial confession made by A2 before PW 24 is not believable. There are of course, strong circumstances against A2 regarding his frequent visits to the office of Himalaya Gas Agency and meeting the other accused. Even on the day in question, he was found present at the said office with A3. No sooner did he hear the horn of the car driven by A1, he immediately informed A3 that A1 had come. This would create suspicion about his involvement in the offence. But suspicion remains only suspicion, it does not become evidence. Thus, considering the entire evidence against A2, we are of the view that in absence of cogent and sufficient evidence, no conviction can be based against A2. In any case, he deserves benefit of doubt.

47. In absence of any positive evidence against A2 and A3, we are inclined to give benefit of doubt to them. However, the same does not necessarily apply to A1. Even keeping aside his extra judicial confession before PW1 and PW2 for the time being, the prosecution has established chain of circumstances leading to his involvement in the offence of kidnapping, viz. last seen together with the deceased boy, purchase of articles i.e. Saran, chain, lock, jute bags, petrol, hiring of flat and possession thereof at the time of incident, discovery of dead body of the boy Mayur at his instance with cogent evidence. The above circumstances, in our opinion, are sufficient to establish the charge of kidnapping as well as committing murder of boy Mayur even though motive is not established by the prosecution.

48. As discussed above, the prosecution has established the charge of kidnapping from the evidence of PW 18 as well as PW 24. PW 18 Rajubhai had seen the deceased with A1 in fiat car at about 11.15 a.m. near Ambikanagar Kutcha Road, PW 24 Mahesh had also seen A1 sitting in the fiat car and driven it away immediately from the office of Himalaya Gas Agency. The boy was in fact

kidnapped around 11.00 a.m. as per the extra judicial confession made by A1 himself before PW 1 and PW 2. Therefore, the timings given in the confessional statement also tally with the other evidence on record. The kidnapped boy was thereafter taken to Bansari Apartment where he was done to death. It was contended on behalf of A1 that the prosecution has failed to establish motive and when there is practically no evidence regarding the demand of ransom, there was no reason for the accused to commit murder of the kidnapped boy. It is difficult to accept the contention raised on behalf of A1. Whatever answer that may be given would be nothing but conjecture and surmise. However, a reasonable inference in such a case is always permissible. From the evidence on record, it is clear that A1 and PW1 were staying in the same Apartment. A1, with a view to extort money, kidnapped boy Mayur, the son of PW1. Even though in the extra judicial confession, he has stated that after kidnapping the boy, he was done to death by throttling his neck in Bansari Apartment on the same day, even though it has come in the evidence that various articles like Saran, iron chain, lock, jute bags were purchased on the same day i.e. on 3.3.2000, we feel that the boy might not have been killed on the same day. An attempt was made to extort money through PW 16 Mahesh Hiralal, by dialling the phone of the house of the complainant at 6.00 p.m. That was an unsuccessful attempt. Thus, probably up to 6.00 o'clock, the boy might have been alive. However, A1 thereafter might have found it difficult to save his skin and to handle the child and, therefore, according to him, to make the boy quiet for ever was the only way out. Hence, A1 would never have liked to take a risk of his name being disclosed by the child and consequently he appears to have taken such an extreme step. This, in our opinion, is the only inference that can safely be drawn regarding murder of the deceased boy.

49. It is the prosecution case that A1 purchased certain articles; for example Saran, iron chain, jute bags, lock etc. It is further the prosecution case that after committing murder of boy Mayur by throttling his neck, his naked body was kept in a jute bag; his hands and legs were tied with a jute string ("Sutari"), Saran was tied around the body with iron chain having a lock. A1 thereafter took the gunny bag with dead body of the deceased in his fiat car and disposed of the same by throwing it in the Kans/ subcanal near Anand.

50. For the purpose of proving purchase of articles, the prosecution has examined PW 11 Ramshanker Rajput who is dealing in the business of iron scraps and is having his shop at Santoshi Nagar, Four Roads of Thakkar Bapa Nagar. According to him, A1 came to his shop on 3.3.2000 at about 9.00 a.m. He purchased iron Saran weighing 13.5 kgs. by paying Rs. 175/-. According to him, A1 had come on his motorcycle with one Hasmukhbhai (A2), the pillion rider. PW 11 identified A1 in the Court as the person who had purchased Saran. This witness, however, identified A3 as the person who had kept Saran with him while sitting as pillion rider on the motorcycle. Thus, instead of identifying A2, he misidentified A3 as the person keeping Saran with him.

51. PW 12 Hiralal Lokchandra Gokani, Ex. 46 was examined to show that A1 had purchased iron chain and lock from his shop at 11.00 a.m. on 3.3.2000. According to him, he had issued bill for the purchase of said articles. However, A1 without taking bill, went away. He, therefore, produced the bill already prepared by him when A1 was brought before him by police.

52. Likewise, PW 14 Rameshchandra Mirchimal, Ex.52 who is running a grocery shop is examined to show that A1 had purchased two jute bags and jute string on 3.3.2000 by paying Rs. 25/-. He has produced kutchra bill in lieu of sale of the said articles.

53. The prosecution has also examined one Rustamsinh G. Rajput, PW 13, Ex.48. This witness is serving with Ajay Petrol Pump situated at Odhav. According to him, on 3.3.2000, he had filled in petrol of Rs. 500/- in fiat car bearing registration No. GJ 1 AP 3414 and given bill to the customer. According to him, after about 8 to 10 days, the police had recorded his statement. He stated that he was not in a position to identify the customer.

54. The evidence of aforesaid witnesses is criticised by the learned advocate appearing for A1 by contending that no reliance can be placed on the evidence of these witnesses from whom A1 purchased those articles. It was contended that the manner in which the bills were seized from these witnesses for the alleged sale of articles would go to show that they were made to give statements at the instance of Investigating Officer.

55. The learned advocate invited our attention to the evidence of PW 12 Hiralal and submitted that the kutchra bill was issued by writing the name of A1. This witness has admitted that it was done at the instance of police. The learned advocate, therefore, submitted that the police has created evidence just with a view to involve A1.

56. After having closely scrutinised the evidence of aforesaid witnesses from whom A1 had purchased various articles, we are of the opinion that there is no merit in the said contention. These witnesses have been cross examined at length and nothing substantial has been brought out to help the defence.

57. PW 11 Ramshanker Gumansinh Rajput, Ex.45, in fact, not only identified A1 as the man who had purchased Saran from him when he was brought before him by the Investigating Officer, but also in the Court. A1 was produced before this witness three to four days after his arrest. Therefore, it is quite natural on his part to identify A1 as the person who had purchased Saran from him. Likewise, PW 12 also identified A1 in the Court. Nothing has been asked in the cross examination on this point as to how they had identified A1. In absence of any cross examination, the evidence of these witnesses cannot be overlooked. These witnesses have given specific reasons for identifying the articles sold to A1. That is also an additional ground to accept their evidence. As far as the evidence of PW 12 Hiralal on the point of preparing bill Ex. 47 at the instance of police is concerned, it is to be noted that no question is put to Investigating Officer Mr.

Bhatt seeking any clarification and, therefore, it cannot be contended that the witnesses were acting as per the dictum of Investigating Officer.

58. Thus, the prosecution has established purchase of various articles by A1 for the purpose of destroying dead body of the deceased and those articles were found and seized under panchanama when the dead body was discovered at the instance of A1.

59. The prosecution has relied on an important circumstance of discovery of dead body of Mayur at the instance of A1. The discovery panchanama Ex. 30 of the dead body of the deceased recovered from the canal water 8 k.ms. away on kutchra road from Anand on Anand Bombay Highway, started at 7.40 a.m. on 7.3.2000. The said panchanama is proved by panch PW5 Dharamsinh Jairam, Ex.29. According to this witness, he was called by Bapunagar Police Station on 7.3.2000 at 7.15 a.m. A1 was present there with police. As per the say of this witness, accused showed desire to lead to the place where he threw the dead body of the boy. Thereafter, this witness with another panch and police staff left in a Govt. vehicle. Along with them, the staff of Fire Brigade as well as Photographer were also there. When they reached 8 k.ms. before Anand, vehicle was stopped as per the desire of A1. Thereafter A1 led the police to the place and pointed out canal having water. He thereafter informed that the dead body was thrown there. The Fire Brigade staff thereafter entered the Kans/subcanal and took out the jute bag tied with a string. Another bag was there which was also tied. After opening the same, dead body of the boy tied with iron chain together with Saran was found. The articles found from the person of the deceased were seized under panchanama.

60. Learned advocate appearing for A1 challenged the discovery of dead body at the instance of A1 by contending that there was no discovery of the dead body at the instance of A1 as police knew the exact place before discovery. By inviting our attention to the panchanama Ex. 30, it was submitted that the panchanama started at 7.40 a.m. He further invited our attention to the evidence of PW 5 Dharamsinh wherein he has stated that the accused had made disclosure statement at 7.30 a.m. to show the place where the dead body was lying. Learned advocate also invited our attention to the evidence of Photographer as well as Fire Brigade persons and submitted that they were already there at 5.00 a.m. on 7.3.2000 i.e. before the disclosure statement; in other words, everybody knew the place where the dead body was thrown. Learned advocate submitted that since the Anand police personnel were present at the place from where dead body was discovered would further go to suggest that a show was made by the Investigating Officer of discovery of dead body at the instance of A1.

61. Reliance is placed on the decision of the Supreme Court in the case of *Thimma and Thimma Raju Vs. State of Mysore*, wherein it was observed as under:

"Once a fact is discovered from other sources there can be no fresh discovery

even if relevant information is extracted from the accused and Courts have to be watchful against the ingenuity of the investigating officer in this respect so that the protection afforded by the wholesome provisions of Section 25 and 26 of the Indian Evidence Act is not whittled down by the mere manipulation of the record of case diary. It would, in the circumstances, be somewhat unsafe to rely on this information for proving the appellant's guilt. We are accordingly disinclined to take into consideration this statement."

62. Keeping in mind the principle laid down in the said decision, we have to examine the case on hand. As stated above, the panchanama Ex. 30 commenced at 7.40 a.m. It is also true that the panch Dharamsinh and other panchas were called by Bapunagar Police Station prior to drawing of panchanama Ex 30. According to Dharamsinh, he was called by Bapunagar Police Station at about 7.15 a.m. In the cross examination, he has stated that the preliminary panchanama started at about 7.30 a.m. He has explained that time 7.40 a.m. mentioned in the panchanama was the time of signing the panchanama. Therefore, merely because 7.40 a.m. was mentioned as the starting time of the panchanama in Ex.30, it cannot be contended that after A1 made disclosure statement, the panchanama started. In view of the oral evidence of panch witness Dharamsinh, it is clear that after disclosure statement made by A1 at 7.30 a.m., writing of the panchanama commenced which was over at 7.40 a.m.

63. PW 10 Mangelal Fakirdas, Ex.44 is the Jamadar of Ahmedabad Fire Brigade who, in his evidence, has stated that he received "Wardhi" from Control Room that as per the desire of Bapunagar Police Station, he had to go to Anand Kheda Highway. He accordingly, along with staff, went to Bapunagar Police Station and after waiting there for some time, as per the instructions of Bapunagar Police Station, he followed the police vehicle and reached the spot from where the dead body was discovered. In his cross examination, he has stated that the person on night duty had informed him to go to Bapunagar Police Station at 5.00 a.m.

64. PW 25 Mohanbhai Solanki, Ex.88 was, at the relevant time, serving as Photographer Constable in Crime Branch, Gaekwad Haveli Police Station. According to him, while he was on duty, he was asked to go to Bapunagar Police Station with camera. On reaching there, he was told by Police Inspector that he had to take photographs of the dead body of boy at Anand. He had accordingly gone to Anand in the police vehicle. In the cross examination, this witness has admitted that on getting information, within 15 to 20 minutes, he reached Bapunagar Police Station. When he reached there, it was about 5.45 p.m. From the evidence of PW 10, the defence has taken out the fact that when the dead body was taken out from the Kans, Anand police was already present. In para 8, he has also admitted that when they reached the spot, Anand police was already there prior to their arrival.

65. The presence of Fire Brigade Jamadar, Photographer and Anand police at the spot from where the dead body was discovered will not lead us to the conclusion that the Investigating Officer manipulated discovery of dead body. It is to be kept

in mind that the complaint was filed at 10.00 a.m. on 6.3.2000 on the confession made by A1 wherein the fact that the dead body of the boy was thrown in the Kans water near Anand was disclosed. However, the exact spot was not disclosed. On the basis of the said information, the Investigating Officer in anticipated need of Fire Brigade requisitioned in advance for the services of Fire Brigade personnel and Photographer, which is quite natural. In our opinion, this hardly creates any doubt about the bonafide investigation.

66. Regarding the presence of Anand police prior to the arrival of Bapunagar Police with A1 at the spot, the prosecution has examined Gauridutt Sharma, PW 20, who at the relevant time was serving as S.O. Mobile Inspection Van, Ahmedabad City FSL. According to him, at about 6.00 a.m. on 7.3.2000, he was told by Bapunagar Police Station about the incident. He accordingly reached Bapunagar Police Station at 7.15 a.m. After discussing about the offence, he had gone to Flat No. 10 of Bansari Apartment with police where the boy was allegedly done to death. However, nothing incriminating was recovered. He has stated that thereafter he telephoned FSL Officer in DSP's Office, Anand about the offence in question. He has produced the report of inspection of Flat No. 10 at Ex.67. Thus, the prosecution has explained the presence of Anand Police at the spot from where the dead body was found. We also find nothing unusual about the presence of Anand Police before the Investigating Officer, along with A1, could reach the spot from where the dead body was recovered. We also get some indication from the record that Anand Police was reported about foul smell in that area and that could be the reason for their presence at the spot. This, however, does not decrease or diminish evidential value of the circumstance regarding recovery of the body made at the instance of A1.

67. Thus, the prosecution has established the circumstance of recovery of dead body of child Mayur at the instance of A1. The relatives of the deceased recognised the dead body, the dead body was recovered under the panchanama Ex. 30. The lock applied to the iron chain was opened by the key recovered from Flat No. 10 of Bansari Apartment which admittedly belonged to A1. It was also established from RTO book that A1 was the owner of the fiat car which was used for carrying dead body from Ahmedabad upto the spot of discovery of dead body. It was also sent to FSL. In the report of FSL at Ex.116 and 117, it is stated that the rear seat of driver side contained human blood of B+ group. Likewise, the fibres of jute bags were found in the car containing human blood. Similarly, jute bags, saran, iron chain lock, handkerchief, kanthi, string and viscera, all contained human blood of B+ group of the deceased. These circumstances, in our opinion, clearly lead to the conclusion of crime having been committed by A1.

68. These circumstances proved by oral as well as documentary evidence are consistent and in conformity with the extra judicial confession made by A1 before PW 1 and PW2. Therefore, the prosecution, in our opinion, has established beyond reasonable doubt the charge levelled against A1.

69. Learned advocate Mr. Sheth tried to point out certain discrepancies in the

extra judicial confession that was reproduced by PW 1 and PW2 in their evidence and the extra judicial confession contained in the complaint. The so-called discrepancies as pointed out by Mr. Sheth are too minor in nature and insignificant and, therefore, no importance can be attached to the same. We, therefore, do not think it necessary to reproduce those minor discrepancies in the judgment. The Supreme Court, in the case of Baldev Raj Vs. State of Haryana, has observed as under:

"The extra judicial confession, if voluntary, can be relied upon by the Court with other evidence in convicting the accused. The value of the evidence as to the confession depends upon the veracity of the witnesses to whom it is made. It is true that the Court requires the witness to give the actual words used by the accused as nearly as possible but it is not an invariable rule that the Court should not accept the evidence, if not the actual words, but the substance were given. It is for the Court having regard to the credibility of the witness to accept the evidence or not. When the Court believes the witness before whom the confession is made and it is satisfied that the confession was voluntary, conviction can be founded on such evidence."

In the instant case, the witnesses have mentioned actual words used by the accused as nearly as possible. Merely because PW 1 and PW 2 are the close relatives of the deceased, that fact by itself cannot be a ground to reject their evidence. Likewise, they did not do anything to trace out the missing boy and that no complaint was given about the ransom alleged to have been demanded by A1 are also not the grounds to doubt the credibility of PW 1 and PW 2. After minutely examining the evidence of PW 1 and PW 2, we are clearly of the opinion that the confession made before them by A1 was voluntary and conviction can be formed on such evidence especially when other circumstances which are individually established, complete the chain unerringly pointing to the guilt of A1.

70. Further, non examination of concerned Police Constables and the Panchas to prove arrest panchanama will not lead us to hold that A1 did not make extra judicial confession before PW 1 and PW2 and that A1 was already in the police custody since the morning of 6.3.2000. The suggestion made to this effect is denied by the Investigating Officer in his evidence. There is no reason for us to doubt the testimony of Investigating Officer Mr. Bhatt. Likewise, the submission advanced before us that A1 could not have confessed before PW1 Jivaraj, the father of deceased is also devoid of any merit. Normally, one may like to confess before close relative or a person of trust. However, in a given case, guilty conscious mind of the accused while repenting, may confess before the relative of the deceased which has been done in the present case. We, therefore, don't see anything unusual about the confession alleged to have been made by A1 before PW 1 and PW 2. A1 has in fact stated in his confession that he was repenting for the act committed by him. We also do not see anything wrong about the conduct of PW1 and PW 2 of not scolding or beating A1 and allowing him to go no sooner he made extra judicial confession before them. It is difficult

to say about human behaviour as how a person will behave or react in a given situation. The disclosure by A1 of committing murder of Mayur must have been the shock of life to PW1 and PW2 and, therefore, spontaneously they could not have reacted and on coming out of shock, they might have approached police. This may be the possible and plausible explanation. In any case, the conduct of PW 1 and PW 2 in not strongly reacting will not lead us to conclude that A1 did not make extra judicial confession. We, therefore, see no merit in any of the submissions advanced on behalf of A1. We accordingly hold A1 guilty of committing offence of kidnapping, murder as well as destroying the evidence. The prosecution, in our opinion, has clearly established the charge against A1 in toto and we are in complete agreement with the trial court on that count. We, therefore, uphold the order of conviction of A1 u/s 302 of IPC passed by it.

71. Having discussed the aforesaid circumstances and the resultant effect thereof, now we may turn our attention to the question of sentence that has been imposed by the trial court upon A1 Vinubhai. The trial court, after assigning reasons which are reflected in its judgment, while dealing with the question of sentence, has come to the conclusion that so far A1 is concerned, he deserves to be awarded capital punishment because the crime committed by him falls in the category of rarest of rare cases. While holding this, the factors which have mainly weighed with the trial court are that the victim was a helpless boy aged about 11 years; the manner in which he was done to death and thrown in the canal by tying a chain and iron saran around his body and by putting the body in a jute bag. Mr. J.M. Panchal and Mr. K.G. Sheth have also addressed us on the question of sentence. According to them, this is not a case where the capital punishment could be awarded since it is not a rarest of rare cases. They have further submitted that the trial court has been unduly swayed away by the fact that a boy aged 11 years was kidnapped and done to death for the sake of money. As against that, Mrs. Harsha Devani, learned APP has supported the reasons assigned by the trial court for awarding capital punishment.

72. We have given our careful consideration to this aspect. The law on this issue is by now crystalised by the Apex Court in its various judgments. Before us is the latest judgment of the Apex Court rendered in the case of *Lehna Vs. State of Haryana*, In this decision, the Apex Court has considered its earlier decisions also and has tried to carve out what could be termed as rarest of rare case. According to the Apex Court, when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. In this decision, the Apex Court has enumerated certain circumstances in which the community is likely to entertain such sentiment. They are as under:

"(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course of betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of "bride burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

Obviously, there cannot be any dispute with regard to the proposition of law regarding award of capital punishment which has been laid down by the Apex Court as well as by various High Courts. However, the circumstances of each case may differ and ultimately the question would center around the facts of each case. In the aforesaid background, we will have to examine the evidence of prosecution and to find out whether this case falls in the category of rarest of rare case. It may be noted here that according to the prosecution, the motive was to extort around Rs. 10 lacs from the parents of the deceased boy to make a motion film "Man Mouji". Though the prosecution has not been successful to establish motive, the fact remains that there was no other obvious reason for kidnapping the boy but to extort some money from the parents. At this juncture, it would be desirable to keep in view the age group i.e. early 20's to which the accused belonged. It also appears that all the accused were out to extort around Rs. 10 lacs to make a motion film. This would reflect their immaturity inasmuch as no motion picture can be produced for such a paltry amount and judicial notice can be taken of that fact. Further, they are not hardened criminals. The present crime seems to have been committed in a sheer panicky and may be as a result of an influence of present day TV/Film culture. It may also be noted here that A1, even according to the prosecution, has made judicial confession before PW 1 and PW2. The contents of the confession clearly reflect that it was out of sheer repentance for what had been done by him. This would support our conclusion that he is not hardened criminal. The entire crime has been detected only as a result of judicial confession that has been made. In view thereof, it can well be said that the accused and in particular A1 had realised his folly and he intended to surrender to law. He also knew that the matter regarding missing of the victim was already reported to police on that very day and pursuant thereto, the police was making inquiry. The evidence of Investigating Officer also shows

that A1 has fully cooperated with the investigation and that has smoothened the investigation completely. Had A1 been a hardened criminal, he would have absconded and would never have disclosed his own sin before anybody. No doubt, the dead body of the deceased boy was thrown in the canal. However, it may be noted here that so far the act of killing the boy is concerned, it is not done in a gruesome manner. He has been killed by throttling. It is only the manner in which the dead body had been disposed of, is very revolting and repulsive and that factor has weighed the most with the trial court. In our view, initially the accused made an attempt to see that his sin never surfaced and no one came to know about it. But within a period of three days, A1 himself went to the father of the victim and made a clean breast confession. In view of these circumstances, it appears to us that though the victim is a boy aged 11 years and he happened to be the neighbour of A1, the case cannot be put in the category of rarest of rare cases and awarding of capital punishment is not warranted. For that reason, we alter the sentence of A1 of capital punishment of death into imprisonment for life.

73. In the result, we do not accept reference made by the learned Addl. Sessions Judge, Court No. 12, Ahmedabad. So far as Criminal Appeal No. 1122 of 2003 is concerned, it is partly allowed. We acquit Accused No. 1 Vinu Laljibhai Patel of offences made punishable under sections 120-B and 384 of IPC. We, however, maintain the conviction recorded by the trial court for offences under sections 363, 364, 302 and 201 of IPC. So far as sentence of death imposed upon Accused No. 1 Vinu Laljibhai Patel for offence punishable u/s 302 of IPC is concerned, we alter it to imprisonment for life together with sentence of fine imposed by the trial court for the said offence. So far as offences under sections 363, 364 and 201 of IPC are concerned, we maintain the sentence awarded by the trial court for the said offences. All the aforesaid sentences shall run concurrently. Criminal Appeals No. 1209 of 2003 and 1157 of 2003 are allowed. Accused No. 2 Hasmukhbhai Karsanbhai Patel and Accused No. 3 Dilip Jerambhai Patel are acquitted of all the charges levelled against them and they are ordered to be set at liberty forthwith if not required in any other offence. The fine, if paid by them, be refunded to them.