

(2019) 08 BOM CK 0053

In the Bombay High Court

Case No : Confirmation Case No. 3 Of 2018, Criminal Application No. 1, 2, 1072 Of 2019, 1585 Of 2018, Criminal Appeal No. 747 Of 2018, 859 Of 2019

State Of Maharashtra

APPELLANT

Vs

Imtiyaz Ahmad

RESPONDENT

Date of Decision : 14-08-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 201, 302, 354(3), 363, 364, 364A

Evidence Act, 1872 — Section 27, 65B, 106

Code Of Criminal Procedure, 1973 — Section 161

Citation : (2019) 08 BOM CK 0053

Hon'ble Judges : B.P. Dharmadhikari, J;Swapna Joshi, J

Bench : Division Bench

Advocate : J.P. Yagnik, Ravi Dwivedi, Saima Ansari, Fakruddin Khan

Final Decision : Allowed/Disposed Off

Judgement

B.P. Dharmadhikari, J

1. The Additional Sessions Judge, Greater Mumbai has by judgment and order dated 23/05/2018 convicted accused no. 1 Imtiyaz and accused no. 2 Azad for the offence punishable under sections 302, 363, 364-A, 201 read with 34 IPC and sentenced accused no.1 to death and accused no.2 Azad to life imprisonment and fine of Rs.25,000/-, in default of fine he has to suffer RI for one year. For the offence punishable under section 364A, both the accused persons are sentenced to suffer life imprisonment for rest of their life and fine of Rs.25000/- each in default of fine, they have to undergo RI for one year.

2. Sessions Court has not sentenced both the accused persons for other minor offences i.e. under section 363 and 201 IPC. Original accused no. 3 is found to be child in conflict with law and hence, the case against him is forwarded to Juvenile Justice Board. Accused no. 4 and 5 i.e. Israr and Arsil are acquitted of the offences punishable under sections 302, 363, 364-A, 201 read with 120B IPC.

3. Both accused no.1 Imtiyaz & accused no.2 Azad have filed separate appeals challenging their conviction. Accused no. 1 Imtiyaz has filed two more applications vide Criminal Application No. 1 of 2019 and Criminal Application No. 2 of 2019 for shifting him to other jail or for medical treatment. Similarly accused no. 2 Azad has moved Criminal Application No. 1585 of 2018 for bail.

4. We have heard APP Mr. Yagnik for the State and Adv. Ravi Dwivedi for accused - appellant Imtiyaz and Mr. Fakhrudin Khan for appellant accused Azad.

5. Respective counsel for the accused state that the conviction is based upon the circumstantial evidence. They point out that the trial court has based its judgment on the circumstances like : --

(i) Previous acquaintance of PW 1 Rajesh (father of deceased child) with accused nos. 1 and 2 as they were/are employees.

(ii) Deceased was last seen alive with the accused persons on 27/05/2012.

(iii) Call demanding ransom were received by PW 1 Rajesh Bhadange (father of deceased child victim) on his mobile from the unknown numbers.

(iv) Employee of PW 1 by name Yogesh Patange identified the voice of caller as that of Imtiyaz.

(v) After arrest of accused no. 1, mobile handsets with IMEI number from which calls were made to PW 1 Rajesh were seized from him. Similarly un-used SIM cards were also seized from him.

(vi) Call Data Records ie CDRs support the calls made by accused no.1 to PW Rajesh demanding ransom.

(vii) The demands made by accused no. 1 were recorded in the memory card in Nokia mobile handset given by PW-20 IO Shri Desurkar and voice in the said conversation matches with the sample voice of accused no. 1 as per CFSL report.

(viii) Accused nos. 1 and 2 led the panch witnesses and police to the site where the body of deceased child was concealed, leading to discovery under section 27 of the Evidence Act.

6. Effort of respective learned counsel before us is to demonstrate that these circumstances are either proved or are not proved.

7. Advocate Dwivedi and Advocate Khan submit that the employment of accused no. 1 Imtiyaz with PW 1 has not been proved by any clinching evidence. Similarly the acquaintance or relationship between accused no. 1 and 2 inter-se, has also not been brought on record.

8. It is argued that PW 2 Gulabchand Yadav examined to show that he saw the deceased boy with accused nos. 1 and 2 fifteen days before the police contacted him is untrustworthy. He claims to be the person selling ice balls and so many children and people visit him daily. He could not have therefore, identified the

deceased from the photograph and claimed that the deceased had come to his shop. He could not have also identified the accused nos. 1 and 2 in TIP. His statement under section 161 Cr.P.C. is recorded on 09/06/2012 and his claim that he is doing the business appears to be doubtful. In any case, he is a person surviving at the mercy of the police.

9. Evidence of PW 3 Mohd Shaikh is also assailed on the same grounds. He happens to be a waiter serving in the restaurant and deposes that 15 days before, the deceased boy came there with two persons. He could also point out the food ordered by them. His section 161 Cr.P.C. statement has been recorded on 13/06/2012 and in TIP conducted on 14/08/2012 he identified accused no. 1 Imtiyaz and accused no. 3. The respective counsel submit that his police statement has been recorded twice.

10. Evidence of PW 7 Ananda Sutar is challenged by pointing out that his presence in the family house on the day of alleged disappearance of the boy has not been pointed out to police at the earliest possible opportunity. Claim that he saw deceased victim with accused nos. 1 and 2 in the evening of 27/05/2012 is a fabricated story. Phone call allegedly made by him on 08/06/2012 to PW 1 Rajesh is not proved at all. Moreover, he has sight problem and even in court, he was required to go near the place where the accused persons were sitting to identify them. He did not tell the name of accused no. 1 to police and there are several omissions brought on record in his cross examination. He was also shown the photograph of accused nos. 1 and 2 at the time of recording of his statement.

11. It is contended that thus the statements of 'last seen' witnesses have been recorded after arresting the accused persons and the circumstance does not inspire confidence.

12. TIP is also challenged on the ground that it is held more than two months after the accused were taken in custody. In the meanwhile, TIP witnesses like PW 2 and PW 3 were called in the police station and had occasion to see the accused persons. The photograph of the deceased boy was shown to these witnesses only as a farce and these witnesses were under the police pressure and have obliged the prosecution. PW 4 Nayab Tahsildar who has conducted TIP did not follow the guidelines of avoiding the police participation in it.

13. A serious doubt has been raised about the date on which the accused persons are shown to be arrested. It is submitted that the prosecution has taken them in custody actually long before 05/06/2012 and the farce of creating documents has been made on said date. The arrest memoes therefore, do not mention any date or time and the relevant columns are left blank. Support is also being taken from the information received under Right to Information Act to demonstrate that the accused persons were in custody of Crime Branch which was conducting parallel investigation till 05/06/2012.

14. The alleged recovery of 3 handsets and 9 SIM cards from Imtiyaz is also assailed by pointing out that the witnesses thereto are stock witnesses and are

under the pressure of police machinery. The basic facts whether these mobiles were in working condition, had any SIM in it and whether the accused no.1 Imtiyaz was owner thereof, had not been verified. The SIM cards were un-used and there was nothing to connect any accused person with those SIM cards. The deposition of PW 15 Mr. Sirajuddin Shaikh to show that accused persons purchased SIM cards from his shop is unacceptable. The IO has not brought on record the permanent or temporary address of any accused persons and mobiles not belonging to them have been foisted on their person. Advocate Khan has advanced similar arguments in an attempt to demolish the recovery of handset from accused no. 2 Azad.

15. While dealing with the tape-recorded conversation pertaining to demands, respective advocates submit that the employee Yogesh who is claimed to have identified the voice of Imtiyaz after hearing that conversation, has not been examined. Not only this, the said employee Yogesh could have thrown light on the status of Imtiyaz as to whether he was employee or was never employee of PW 1 and therefore, he has been deliberately withheld.

16. The conversation has been recorded in the memory card which was in the Nokia mobile handset provided by IO PW 20 to PW 1 Rajesh. This fact of handing over of mobile to PW 1 Rajesh has not been brought on record by any convincing evidence or in the shape of any panchanama. The alleged recorded conversation therein is also not free from doubt. PW 1 Rajesh himself admits that the demands were made by more than one person and this fact is not explained by the investigation.

17. Total 10 conversations are recorded in the memory card and the initial conversations are of date when that memory card or mobile with recording facility was with PW 20 only. Handing over of that mobile by PW 1 to PW 20 is also not satisfactorily proved and there is no panchanama regarding it or of any recorded conversation at that time. The evidence of PW 12 Mr. Zuber Qureshi is attacked on this ground.

18. It is pointed out that the recovery of Nokia mobile from PW 1 by PW 20 and its sealing looses its sanctity since PW 11 Jayraj Jaiswal does not support it. The memory card or Nokia mobile through which the transfer of recorded conversation has been done by this witness, is not shown to be the same which was taken back from PW 1 in the presence of PW 20. The respective counsel for the accused persons submit that the alleged recorded conversation in the said memory card in Nokia mobile of PW 20, therefore becomes redundant.

19. Respective counsel also state that the submission of these recorded conversations for the voice analysis to Central Bureau of Forensic Science Laboratory and the report obtained on it are therefore not relevant. PW 14 Mr. Neharkar who has recorded the specimen voice sample of Imtiyaz is therefore, irrelevant in the present matter. It is submitted that the effort to show that the voice recorded in the sample i.e. sample voice of Imtiyaz and the voice recorded

on memory card matches, is therefore of no use in the present matter. The report dated 07/08/2014 of Auditory Analysis is therefore, not decisive.

20. Advocate Dwivedi also invites our attention to the fact that the statement of PW 1 on oath that the demands were recorded and the demands were made by more than one person prove that the recorded conversation is also in the voice of more than one person. The report of auditory analysis at Exh.140 mentioning that the recorded questioned voice and the specimen voice reveal that the questioned voice is similar to the specimen voice, is itself incorrect. When the conversations are in the voice of more than one person and hence Exh. 140 could have pointed out which part of conversation matched with the sample/specimen voice. It is submitted that the spectrographical exercise therefore, needs to be discarded.

21. Counsel for accused no. 1 Imtiyaz invites attention to the deposition of PW 1 to show how his conduct is un-natural and therefore, doubtful. On one hand he claims to be searching for child while on the other hand he take casually the ransom call first received. It is contended that when this call was received by PW 1 (as alleged), police officers were also with him and still he made no efforts to bring that call to the notice of the police authorities or to trace it. The other part of his deposition is also relied upon to show how he has himself stated that the phone calls and demands were made by more than one person. It is argued that PW-11-Jairaj also states the same.

22. The CDR records at Exh. 129 and at Exh. 121 onwards are also pressed into service to demonstrate how the demands supposed to be taped in the memory card in mobile handset provided by PW 20 are found recorded in some other mobile. Advocate Dwivedi submits that the CDR records therefore, do not assist the prosecution at all.

23. Prosecution has failed to correlate any mobile set with the accused persons and therefore, have failed to link the recorded conversations with accused no. 1. Hence, the CDR record and evidence of Nodal Officers like PW 13 Gaikwad and PW 17 Kodwadkar cannot be relied upon in the present matter. It is submitted that the apparent inconsistency in the CDR record has been attempted to be explained by PW 13 by stating that the last digit in the IMEI of caller is automatically reflected as zero in their system. He argues that this method of working is not mentioned in section 65-B certificate and hence, oral explanation given by PW 13 must be rejected.

24. It is pointed out that there is no effort made by the prosecution to point out the place of residence of any of the accused persons or then their friendship or relations with each other. No communication made by accused nos.1 to 2 and vice versa has been brought on record. PW 7 Sutar has been introduced only to implicate accused no.1 and 2 falsely. When the missing report was lodged by employee Ravindra on behalf of PW 1 Rajesh, accused no. 2 Azad was very much present and had gone to police station to lodge it. The Police Officer taking down

the report had also made enquiry with Ravindra and Azad at that time. Even thereafter, Azad was on his duty with PW 1 Rajesh.

25. It is submitted that PW 7 Sutar had stayed with PW 1 Rajesh on 26th though PW 1 left for Ajmer. He would have definitely realized the omission of the fact that he saw victim with accused nos. 1 and 2 and thereafter disclosed it to PW 1 on telephone. He does not depose accordingly and the mobile call allegedly made by him on 8.6.2012 is also not reflected in CDR. It is submitted that thus the prosecution story is not convicting and full of suspicious circumstances since beginning.

26. So called recovery of body of victim at the instance of accused persons is attacked by pointing out that the disclosure statement has not been established in accordance with law. The witness therefor, namely PW 5 Jagtap is again a stock witness and his deposition does not show the statement made by any specific accused persons leading panch witnesses and police party to the spot.

27. Evidence of PW 6 Sambre, Fire employee in the work of taking out the body of victim is relied upon to demonstrate that when the body was taken out, none of the accused persons were there. Support is also taken from the evidence of PW 18 Jaywant Shinde, API then employed at Shantinagar Police Station, Bhiwandi in whose jurisdiction the dead body was lying and taken out. It is pointed out that as per this police officer, the gutter from which the body was taken out, was shown by accused no. 3- juvenile.

28. Advocate Khan on behalf of accused no. 2 states that most of the material brought on record by the prosecution is against accused no. 1 Imtiyaz. There is no cogent and convincing material to show any meeting of mind between accused nos. 1 and 2. No phone call has been exchanged between them. Prosecution itself claims that lastly when deceased was seen alive by PW-3-Mr. Shaikh and thereafter by PW-8 Kausalkumar Yadav, accused no. 2 Azad was not with him. He adds that the reasons which prompted the trial court to acquit accused nos. 4 and 5 hold good even qua accused no. 2 Azad.

29. Both the learned counsel therefore, request for quashing and setting aside the judgment of conviction and to acquit the accused persons.

30. Advocate Dwivedi invites our attention to Criminal Application No. 1072 of 2019 filed by accused no. 1 seeking opportunity to cross-examine & to lead evidence. The grievance is about denial of opportunity to lead evidence in defence and for cross examining the prosecution witnesses. It is submitted that accused no. 1 did not get effective legal assistance and could not cross examine some of the important witnesses.

31. It is further pointed out that before the trial court, application at Exh. 204 was made on 19/04/2018 itself for calling and examining the defence witnesses i.e. doctor who medically examined Imtiyaz at Bhabha Hospital, Kurla and Officer of DCB CID Unit No. 5 who arrested Imtiyaz detaining him in custody and sent

for medical examination to Bhabha Hospital. It is submitted that as the trial court did not grant that opportunity, this Court must grant that opportunity as it has got important bearing on his body search panchanama.

32. Both learned counsel submit that the Presiding Officer of the trial court was expecting his transfer and therefore, has acted with undue haste. He did not permit the defence witnesses to be examined and also did not hear the accused persons through their advocates on death penalty as per section 354(3) IPC. The judgment convicting them, and thereafter the order sentencing them has been delivered on the same day.

33. Mr.Yagnik, learned APP has at the beginning, pointed out that it is a case of brutal murder and the death has taken place atleast one week before the arrest of respective accused. After killing boy, accused persons attempted to extort money and for that purpose, used different mobile handsets and SIM cards. None of these phones were in their own name. Innocent Victim who was son of their employer knew accused persons and taking advantage of that acquaintance, they misled him. Perhaps the child never realized that he was kidnapped or then, there was any plan to demand ransom from his father PW-1 Rajesh.

34. He submits that the report that the boy went missing was lodged initially by one employee Ravindra in the employment of PW-1 as PW-1 at the relevant time had gone to Ajmer for pilgrimage. He left Mumbai on 26/5/2012 for Ajmer. His wife, victim son and daughter were at home. On 27/5/2012, PW-1 received phone call from his nephew Ravindra that son had gone to factory in the evening at about 4.00 p.m. on the previous date but did not return and was not found after search. PW-1 then asked Ravindra to report the matter to police and Ravindra then filed report at Shahu Nagar Police Station where he went along with accused No.2. PW-1 Rajesh returned on 28/5/2012 and started search by contacting friends and persons in acquaintance. Victim was taking education at 'Gurukul Sanstha', Lonavala where also he went in search. On 31/5/2012, PW-1 had gone along with police to village Kivale, Taluka Haveli, District Pune where friend of victim resided. While returning he received a phone call at about 10.15 p.m. demanding ransom of Rs.25 lakhs. This call was reported on 1/6/2012 when police registered offence under section 363, 364 of IPC and investigation then started.

35. Calls received by informant were recorded and for that purpose Investigating Officer PW-20 provided a Nokia mobile with recording facility to PW-1. Conversations between informant (PW-1) and person making demand were recorded.

36. Police found that the calls were coming from Bhiwandi area. One employee with PW-1 Yogesh while listening to this recorded conversation, recognized the voice of person making demand as that of accused No.1. Police were keeping watch in Bhiwandi area and on servants of PW-1 informant. As a result on 5/6/2012 accused Nos.1, 3 and 4 were apprehended from Bhiwandi, accused

No.2 from Dharavi and accused No.5 from Mandla village at Mankhurd.

37. Our attention is invited to deposition of PW-7-Mr. Sutar to show that on 26/5/2012 he saw victim son in company of accused Nos.1 and 2 in the evening. Evidence of PW-2-Gulabchand is also relied upon for this purpose. Deposition of PW-3-Mr. Shaikh waiter in hotel is also relied upon to show that he saw deceased with accused Nos.1 and 2 in his hotel. PW-8 who happens to be friend of accused persons also stated that he saw deceased, accused Nos.1 and 3 together.

38. Test Identification Parade conducted on 14/8/2012 is also relied upon to show that evidence of PW-4 Tehsildar is duly proved. PW-2 and PW-3 who had seen photograph of child only can identify accused persons in that identification parade and this brings their involvement in the crime on record.

39. The recorded conversation are also relied upon to show involvement of accused persons in the crime. CDR of mobile of PW-1 proved by PW-13-Mr.Gaikwad, Nodal Officer and PW-14-Mr. Neharkar are heavily relied upon for this purpose.

40. Learned APP submits that three handsets and 9 SIM cards were found with accused No.1 at the time of his arrest. IEMI Number of these mobiles are reflected in CDR of PW-1 thereby showing that calls demanding ransom were made from these mobiles. This also shows their involvement in the crime. Evidence of Mr. Sirajuddin Shaikh, examined as PW-15 shows that he sold SIM cards to accused persons but they did not furnish necessary identity proof. Not continuing with same mobile number, procuring them clandestinely & changing SIM cards exposes criminal intention.

41. Apart from CDR, taking back mobile from PW-1 on 7/6/2012 and sealing it in the presence of PW-12 is also pointed out. It is submitted that the memory card in which demands were recorded, was in this mobile. This memory card was taken out in presence of PW-11-Jairaj and PW-10-Savane and conversation therein were noted down. Transcript Ex.109 was prepared for the purpose of record.

42. PW-14-Mr. Suresh obtained voice sample of accused No.1. It was then forwarded to CFSL. Experts there conducted audio analysis and found that the voice making demand and sample voice were of the same person.

43. Evidence of PW-5, PW-6 and PW-18 is relied upon to show that accused No.1 while in custody, made disclosure statement and agreed to show the place where body of victim was concealed. While proceeding to the spot accused persons also led panch witnesses and police team to the room in which they stayed. PW-8-Mr. Yadav was also one of the occupants of that room and he had seen Juvenile accused No.3, accused No.1 and one boy coming to the room.

44. Learned APP states that at the instance of accused persons body was taken out from drainage. Our attention is invited to post mortem report to submits that boy was dead and demand calls were made after killing him.

45. Learned counsel states that thus investigation made by PW- 20 Shri Desurkar shows that circumstances forming a complete chain showing involvement of accused persons only has been brought on record and proved by prosecution.

46. He also prepared 2 charts and handed it over to respective learned counsel for appellants and to the Court to facilitate consideration of CDR data.

47. Both sides have relied upon precedents of Hon. Apex Court & this Court to buttress their respective contentions. We will refer to those judgments as and when occasion therefor arises in the course of this judgment.

48. It is settled law that in a case based upon circumstantial evidence, prosecution has to bring on record events which form a chain together and lead to irresistible conclusion of involvement of accused only in the crime. Each event/circumstance must be proved by cogent and convincing evidence. Similarly, no circumstance which shows possibility of involvement of third person should be left un-investigated. This chain has to be so complete that it rules out involvement of any other person as accused. Keeping this basic principle in mind, material on record needs to be perused.

49. The employment of accused nos. 1 and 2 with PW 1 Rajesh who happens to be father of deceased victim is deposed to by PW 1 himself. He states that one of his employee by name Yogesh Patange was called by police for enquiry and he was asked to hear the recorded mobile conversation. Yogesh identified the voice as that of another employee Imtiyaz. His cross examination reveals that in the year 2012, he had 7 to 8 workers and he had removed Imtiyaz from employment 6 to 7 months prior to the incident. He, among other things, also disclosed to police that Yogesh Patange identified the voice in the mobile as that of Imtiyaz. He has stated that Imtiyaz worked for about two years. He also could not explain as to why the name of Imtiyaz did not appear in the FIR. He also could not explain why the termination of employment of Imtiyaz or then the identification of his voice by Yogesh did not appear in his FIR or supplementary statement.

50. The other witness who speaks about this employment is PW 7 Ananda Sutar. He claims that he knows PW 1 and his family as they resided in the same chawl. He also explains why he came to PW 1 on 26/5/2012. He also states that on the said day, he stayed there. On the next day, i.e. on 27/5/2012, PW 1 Rajesh went to Ajmer at 5.00 am early in the morning. Victim then went to the factory of PW 1 to bring CDs. Thereafter PW 7 Ananda also went to the factory. He claims that he knows Azad and Imtiyaz and they were working in the said factory. Imtiyaz had left the factory two years back. On 27/5/2012 he saw deceased victim, Azad, Imtiyaz and other workers in the factory. He returned to home of Rajesh at about 6.30 pm. While returning, he saw victim, Azad and Imtiyaz going outside the factory. In the cross examination, he accepted that he had not stated the name of Imtiyaz to police when police recorded his statement under section 161 Cr.P.C. on 09/06/2012. He further states that he informed the police about Imtiyaz leaving the factory of PW 1 two years prior to the incident but he could not

explain why this portion regarding leaving job two years prior to the incident did not appear in his statement. He accepted that PW 1 had informed him that Imtiyaz left the job two years before the incident. He also accepted that while recording his statement on 09/06/2012, police had shown to him photograph of Imtiyaz and Azad. He accepted that he learnt about the police finding Imtiyaz and Azad involved in the matter from Rajesh.

51. The employment of accused no. 2 Azad with PW 1 Rajesh is not in dispute at all. In fact, he went with Ravindra , to police station to lodge the report. This Ravindra is disclosed to be his nephew by PW 1. The fact that Azad had come to police station to lodge the complaint with Ravindra is brought on record even by PW 19 Mr. Raut, API attached to Crime Bureau. Even in cross examination, this witness admitted that he made enquiries with Ravindra and Azad and then recorded the missing report. The cross examination of this witness shows that the identification of voice of Imtiyaz by Yogesh Patange was not narrated to him while recording the FIR. He also stated that the fact of removal of Imtiyaz from the employment 6 to 7 months prior to the incident was also not disclosed. PW 20 Mr. Desurkar in paragraph 29 of his cross examination accepted that accused no.2 Azad was working in the factory of informant before and after the incident.

This discussion therefore, shows that the employment of accused no. 2 with PW 1 has been satisfactorily proved by the prosecution. However, the same cannot be observed in relation to accused no. 1 Imtiyaz.

52. Prosecution has examined PW-7-Ananda as witness to demonstrate that he saw the victim boy with accused Nos.1 and 2 on 27/5/2012. His police statement has been recorded on 9/6/2012 i.e. 3-4 days after arrest of accused persons. In examination-in-chief, he has disclosed his reason for coming to Mumbai. Otherwise he is a carpenter working at village Nanibai in Kolhapur District. He states that he has a room in Dharavi which used to be let out and PW-1-Rajesh being his friend used to collect rent on his behalf. He used to come to Mumbai once in 6 months to receive that amount. Accordingly on 26/5/2012 he came to collect the rent and he was staying in the house of PW-1. He got rent amount of Rs.19,800/- and stayed overnight. On 27/5/2012 at 5.00 a.m. PW-1 Rajesh left for Ajmer. Victim went to factory of his father to bring CD of movies. He also thereafter went to factory. He claims that he is knowing accused Nos.1-Imtiyaz and 2-Azad, since they were working in the factory of PW- 1. He also states that accused No.1 left the factory about 2 years prior to the incident. On that day he saw victim, Azad, Imtiyaz and other workers in the factory. He returned to house of PW-1 by 6.30 p.m. While returning, he saw victim, Azad and Imtiyaz leaving the factory. He came back to house of Rajesh, collected his luggage and proceeded to S.T. stand to go to his village.

53. His deposition shows that on 8/6/2012 he made a phone call to PW-1, PW-1 informed him about the incident. Hence he left village to come to Mumbai to meet Rajesh. After arrival at Mumbai he and PW-1 went to police station, where he narrated the incident to police. Their statement was recorded. He told trial

Court that he could identify Azad and Imtiyaz. He requested the Court to allow him to see accused persons from close distance as he was having sight problem. Thus after stepping down from witness box, he went towards accused persons and there identified Imtiyaz and Azad. He also identified photograph of the victim. However accused have not put any questions to him to show that he had that problem even on 27/5/2012.

54. His cross examination shows that he went to police station only once and at that time PW-1 was not with him. He reached Mumbai on 9/6/2012 and met PW-1. He stated that he has purchased room (at Dharavi) in year 1982 and he had good relations with neighbours in the chawl. He did not give any document of title to police and never received rent through cheques. The deposition to the extent of statements that he knew Rajesh because they were residing in same chawl; that he was knowing family of Rajesh, that Rajesh use to let out his(PW-7's) room and used to collect rent are not appearing in his police statement.

55. Little later in his cross examination he accepted that PW-1 Rajesh did not share anything about his family problems and or factory. He further stated that children of PW-1 were studying at Lonawala and he did not disclose name of Imtiyaz to police while recording his statement. In next line he has stated that he informed police about Imtiyaz leaving factory of PW-1, 2 years before the incident. He could not explain why this period of 2 years was not mentioned in his police statement. He also stated that two days after Imtiyaz leaving job, PW-1 told him about Imtiyaz leaving the employment. He accepted that Imtiyaz and Azad are common names in Muslim community. He accepted that police had shown photographs of Azad and Imtiyaz at the time of recording his statement. He stated that as victim was acquainted with Imtiyaz and Azad hence, he did not inform the fact of seeing victim with them to mother of victim on 27/5/2012. He stated that he did not make any reservation of bus for going to Kolhapur and even while coming to Mumbai again on 9/6/2012. Police did not demand his travel documents. While taking search of victim, wife of Rajesh did not inquire from him. He accepted that during investigation police did not show him photograph of victim. He learnt about involvement of Imtiyaz and Azad by police in the crime from PW-1. He denied that because he was shown photograph of Imtiyaz and Azad, he identified them in the Court.

56. Thus, evidence of this witness shows that he got knowledge about the incident relating to victim on 8/6/2012 and he came to Mumbai to meet Rajesh on the next day. There is inconsistency about fact of PW-1 accompanying him to police station on 19/6/2012. On one hand he states that PW-1 did not disclose to him his family matters or even business matters, in next breath, he states that just after two days of Imtiyaz leaving his employment, PW-1 told him about the same. The arrangement between him and Rajesh about Dharavi room has not been disclosed to police.

57. In this backdrop, perusal of relevant part of evidence of PW-1 shows that

Imtiyaz was removed by him from service about 5-6 months prior to the incident and accused Azad was working with him. In paragraph No.25 he also states that Imtiyaz was working with him for about 2 years. He has not spoken about the fact that PW-7 stayed with him on 26/5/2012 and 27/5/2012. He also does not point out that on 8/6/2012 PW-7-Mr. Sutar made any phone call to him and gave information about involvement of accused Nos.1 and 2. PW-7 has deposed that he was aware of the mobile number of PW-1. However, CDR record produced by prosecution does not disclose call made on 8/6/2012 by PW-7 to PW-1. Thus, material on record along with inconsistencies about the date on which Imtiyaz was terminated by PW-1 casts serious doubt on the credibility of this witness.

58. Other witness examined by prosecution is PW-2 Gulabchand. He is working as ice ball vendor in the area of Shahunagar police station. He states that on 9/6/2012 police approached him with a photograph of boy. After seeing photograph he remembered that 15 days before, in the evening at about 6.30 p.m. two persons had brought that boy and purchased ice balls from him. He gave ice ball to that boy and one of the person accompanying him gave him Rs.2/-. He identified photograph of boy given in Court. He then states that on 14/8/2012 in Arthur Road jail, TIP was conducted and in it he identified accused Imtiyaz. He also identified accused Imtiyaz in Court. In latter part of identification parade, this witness identified accused No.2 Azad. He also identified Azad in Court.

59. His cross examination shows that he has no license to do business. He accepted that sometimes he is required to pay money to police department as gratification. He stated that Shahu Nagar Police Station was at 10-15 minutes walk from the place where he used to park his handcart for doing the business. He accepted that he did not give description of boy, his clothes or his age to police. He was not aware of name of police officer who showed him photograph. His cross examination in relation to test identification parade shows that complexion of dummies was black and fair. Some were fat, slim or dwarf or with more height. Accused No.1 had beard and other dummies also had beard at that time. His attention was invited to a statement "B" in his supplementary police-statement and he deposed that same was wrongly mentioned in supplementary statement recorded on 14/8/2012 after test identification parade. Said portion shows that he went to the TIP room with police employed in Jail. He has stated therein that on 9/6/2012 he was called to police station, where photograph of child was shown to him. He was asked whether two persons had come with said boy in photograph for purchasing ice balls. Portion marked "B" in his supplementary statement shows that police constable in service of jail administration had come to call him for latter part of TIP in which accused No.2 was identified.

60. Next witness examined by prosecution on last seen is PW-3-Mohd. Dilawar Shaikh. He used to work as waiter in Shalimar Hotel. On 13/6/2012 Shahu Nagar Police came to that hotel at about 3.00 pm. He was shown photograph of a boy.

He remembered that 15-20 days before, that boy had come to hotel along with two young persons between 20-22 years of age for dinner. He also deposed that they had placed an order for two chicken soups and 6 parathas. They came there at about 10.15 pm and left hotel at about 11.15 p.m. by making payment of Rs.54 towards cost of meals. He then pointed out that on 14/8/2012 in test identification parade, he identified accused No.1 and accused No.3. These two persons had come to hotel along with the boy for taking dinner.

61. His cross examination shows that police recorded his statement twice and he had gone to police station twice. He was working in Shalimar hotel for about 15-16 years, 7 waiters used to serve the food at mezzanine floor while only one waiter used to serve food on ground floor. There were 16 tables on ground floor and 9 tables at mezzanine floor and PW-3 used to work on mezzanine floor. He states that he had given description of accused No.1 and boy to police. He could not explain why that description was not appearing in his police statement. He could not give description of other customers and table occupied by them and food ordered by them 15-20 days before. He denied that cost of one chicken soup is between Rs. 40-60. He could not explain why the fact of visit by police to his hotel on 13/6/2012 and identification of photograph of victim though narrated by him to police, did not appear in his police statement. He stated that his statement was recorded on 13/6/2012 itself on laptop. He also submitted that dummies in TIP were in between 20-22 years of age and all were having small beard.

62. Thus, PW-2 and PW-3 who entertain several visitors per day, have been examined to bring on record the fact that they have seen deceased boy with accused persons. The deposition of PW-2 shows that he saw victim with Imtiyaz and Azad while deposition of PW-3 shows that he saw victim Imtiyaz and juvenile accused. The date on which they saw accused or boy is not on record. When number of customers frequent ice ball cart of PW-2 or then hotel in which PW-3 was waiter, there has to be some reason for these witnesses to claim that they could recollect visit of one boy with accused persons. It is also difficult to accept that 15 days after such visit, they could also claim to remember the identity of persons with whom boy came to their respective establishments. Their deposition before Court does not show the statement that they were remembering the description of persons who accompanied that boy and were therefore in position to identify them. The police also did not attempt to obtain from them description of accused persons while recording their statements.

63. It is to be noted that the police statements of last seen witnesses are recorded on the day on which police made inquiries in the police station. Accused persons were already arrested and in police custody of Shahu Nagar Police Station on that day.

64. The other witnesses examined by prosecution to throw some light in this respect is PW-8-Mr. Kaushalkumar Yadav. He claims that he was residing in Rehman compound at Pandole Nagar Zopadpatti, Bhiwandi since 2012 along with

juvenile accused and other persons (not other accused). Other persons were also working with him at same place. One key of the room used to be with this witness while other key was with juvenile accused. Police came to him on 13/6/2012 and showed him photograph of boy. He told police that said boy had come to their room on 27/5/2012 along with juvenile accused. When this witness inquired, juvenile accused told him that boy was of uncle of Imtiyaz. Thereafter PW-8 went for work. While going to work he saw accused No.1 coming towards their room. He knew Imtiyaz as Imtiyaz was relative of juvenile accused and occasionally he used to visit their room. In the Court he identified photograph of boy as also juvenile accused and accused No.1. He accepted during cross that on 1/1/2017 police approached him and showed him his statement under section 161 Cr.P.C. and asked him to depose accordingly. Police had also told him that photograph of boy would be shown to him.

65. PW-8 also accepted that on 13/6/2012 police took him to Shahu Nagar Police Station and showed him juvenile accused and Imtiyaz there. They also told him that they had murdered a boy. He told police that he was not aware about the murder. Police did not inquire about his duty hours and did not ask him to show the place where juvenile accused worked. He denied that on 27/5/2012 he did not go to work at 9.00 p.m. or then he did not meet juvenile accused. He denied that juvenile accused and he himself never resided together. He denied that he deposed as told by police. He accepted that he did not tell police that one key of room was with him while other was with juvenile accused and he was disclosing that fact for the first time in the Court. He accepted that police did not seize key nor tried to open the lock with the said key. He denied that he identified juvenile and Imtiyaz on the say of police.

66. Thus, this witness states that on 27/5/2102 in the evening juvenile accused and victim boy came to the room at Pandole Nagar Zopadpatti, Bhiwandi at about 9.00 p.m. and thereafter he saw accused No.1 coming to the room. Thus, this witness does not take name of accused No.2 at all.

67. The appreciation of deposition of this witness is called for again while looking into the circumstance of recovery of dead body at the instance of accused Nos.1 and 2 under section 27 of the Evidence Act.

68. Next circumstance to be considered is of seizure of mobile handsets and SIM cards from accused Nos.1 and 2. The prosecution has attempted to demonstrate that PW-1-Rajesh received demand calls from these handsets. The unused SIM were seized from accused Nos.1 and 2 at the time of their arrest. They have also relied upon CDR to substantiate their contention.

69. The circumstance, if established by clinching evidence, may by itself be sufficient to convict accused Nos.1 and 2. However, accused Nos.1 and 2 have seriously disputed seizure of mobile handsets or unused SIM cards from them. They have pointed out that records have been fabricated and therefore cannot be relied upon. Not only this they have also submitted that demand calls of which

transcript record have been made are not connected with accused No.1. Use of memory card in mobile handset provided by PW-20 to PW-1 and use of that mobile handset with call recording facility for recording is itself not substantiated. The identity or photograph of that mobile handset with memory card allegedly taken back from PW-1-Rajesh on 7/6/2012 with the memory card from which transcript was prepared, is not established. Yogesh, employee of PW-1-Rajesh who has claimed to have identified voice of accused No.1 has not been examined. PW-11-Mr. Jaiswal who heard voice clipping in memory card and in whose presence transcript was prepared has in cross examination stated that conversation therein was between two different persons. In cross examination he accepted that there were many voices of different persons in voice clippings. He accepted that police did not prepare transcript of calls made by persons with different voices and he did not tell police "to write" all voices. The transcript prepared by him is at Exhibit 109 and in it, there are total 10 transcripts. At the beginning of each transcript, phone number from which call was received with date and time thereof has been recorded. According to accused- persons, all calls are not made by one person and demands are made by more than one person. Thus, accused persons attempted to demonstrate that the opinion given by expert after obtaining sample voice of accused No.1 alone, cannot be relied upon.

70. Material on record shows that though there are printed arrest forms on record at Exhibit 163 (of accused No.1), Exhibit 164 (of accused No.2), same are without any date or time. These columns are left blank. This observation apply even to printed arrest forms at Exhibits 165, 166 and 167 of juvenile accused and acquitted accused persons. These forms carry signature of one Ganesh and thumb impression of one Balu as witnesses. They are also countersigned by superior police officer. Under the seal put by superior police officer, date "6/6/2012" appears. This Balu has not been examined as prosecution witnesses at all. Ganesh has been examined as PW-10 but then these arrest forms were then not produced & he was not required to depose about it. These forms are produced by Investigating Officer PW-20 Mr. Gajanan Desurkar on 31/1/2018 when the Trial Court was recording his examination-in-chief. Accused therefore did not get chance to put questions to PW-10 how his signatures appear on documents containing blanks.

71. Exhibit 185 is the application moved by Shahu Nagar Police for obtaining police custody remand of all accused persons. This application is dated 6/6/2012 and in it date and time of arrest is shown to be 6/6/2012 at 12.20. Exhibit 186 is application for police custody remand submitted on 23/8/2012. There the date of arrest is mentioned as 5/6/2012. Exhibit 187 is similar application and in it date of arrest is shown as 5/6/2012. In Exhibit 188 dated 26/7/2012 date of arrest is shown as 6/6/2012 and time of arrest is mentioned as 00.20 i.e. night between 5th & 6th June, 2012. In Exhibit 189 which is application for remand submitted on 12/7/2012 date of arrest is 6/6/2012 while time of arrest is mentioned as 00.20 hours. In Exhibit 190 which is dated 29/6/2012 date mentioned is 6/6/2012 while time mentioned is 12.20. In Exhibit 191 which is dated

15/6/2012 same date and time has been mentioned. Thus, in applications seeking custody, the police have mentioned two different dates and two different times.

72. In the light of this controversial position, the evidence of PW-1 Rajesh needs scrutiny. His deposition in paragraph No.6 in examination-in-chief shows that police came to know that mobile calls were being made from Bhiwandi Zone, District Thane. Hence, on 4/6/2012 at about 12.30 a.m. PW-1 went to Bhiwandi with Police in search of his son. At about 3.00 a.m. police officer Shri Ahire and other staff brought accused Imtiyaz and other two accused persons near his car. Witness identified those accused persons in the Court as accused No.1-Imtiyaz, accused No.3-juvenile and acquitted accused No.4-Israr Lallu Shaikh. All three accused persons were then taken to Crime Branch Kurla, Mumbai in police jeep. Thereafter, PW-1 returned to his home. He deposed that on 4/6/2012 he went to Crime Branch Kurla and at that time police disclosed to him about murder of his son.

73. In view of this controversy about the date of arrest on record, learned APP has while advancing argument requested the Court to read the date "4/6/2012" in paragraph No.6 of deposition of PW-1 as "5/6/2012". He stated that no correction was required in date "4/6/2012" appearing in paragraph No.7.

74. However, on next day ie on 15/7/2019 while concluding his argument, after due instructions, learned APP clarified that date "4/6/2012" appearing in paragraph No.6 as correct but then time should be "12.30 p.m." instead of "12.30 a.m.". He further stated that date 4/6/2012 appearing in paragraph No.7 should be corrected as 5/6/2012.

75. Perusal of evidence of PW-19-Mr. Shinde reveals that he was then working as PSI attached to Shahu Nagar Police Station. In paragraph No.3 in examination-in-chief he deposed that two accused persons were arrested by police Inspector Desurkar (PW-20). He (PW-19) took their personal search through constable & arrested acquitted accused No.5 and accused No.2. He states that Nokia handset along with SIM cards was found in possession of accused No.5. One China made mobile handset along with SIM cards was found in possession of Azad. Accordingly, he prepared panchanama which has been exhibited as Exhibit 104.

76. His cross examination shows that he did not know Ganesh Chintaman Chawane, panch witness who was called by police constable at about 12.20 p.m. He stated that both panch witnesses came before him together and he verified their credentials and then prepared panchanama. He did not remember the names of persons who were present at the time of panchanama. He accepted that prior to arrival of panch witnesses, accused were apprehended and he did not find it necessary to draw separate panchanama. He denied that he did not draw panchanama of search and seizure of accused.

77. Ganesh Chintamani Savane has been examined as PW-10 and he has proved panchanama Exhibit 103, 104 as also 105. Exhibit 104 shows Ganesh and Balu

as panch witnesses.

78. Perusal of evidence of PW-20 Investigating officer Mr.Desurkar reveals that he got charge of investigation on 2.6.2012. All accused persons were apprehended by Crime Branch Unit-V. Three accused persons were apprehended at Bhiwandi at about 3.00 a.m. in the night on 5/6/2012. Accused person apprehended at Gowandi was taken in custody between 8.00 a.m. to 9.00 a.m. on 5/6/2012. Accused No. 2 was taken in custody from Dharavi at about 10.00 a.m. on that day in the morning at Dharavi and PW-20 states that he was then not present. He however clarifies that he was present when 3 accused persons at Bhiwandi and one accused person at Gowandi were apprehended. Accused No.1 Imtiyaz was apprehended at Bhiwandi at 3.00 am. He further states that Azad was taken to Crime Branch Unit V. PW-20 got custody of all accused persons at about 12.30 p.m. on 5/6/2012 and they were brought by police of Crime Branch Unit-V. PW-20 had not gone to Crime Branch Unit-V to take the custody. He was not aware whether Crime Branch Unit-V had drawn any panchanama or not. He did not remember whether he had collected copies of station diary of Crime Branch Unit-V regarding the investigation of crime. He also did not remember whether he made any station diary entries whenever he proceeded for investigation and no extract of Station diary on record was filed by him. He claims that after taking accused persons in custody he has drawn panchanama for arrest. He has not drawn one single panchanama for arrest of three accused apprehended from Bhiwandi. He claims that three accused persons at Bhiwandi were apprehended from Pandole Nagar Bhiwandi from their respective residences. He had no documentary proof to support their apprehension at 3.00 a.m. from their respective residences.

79. Deposition of PW-20 in paragraph 15 further shows that they started at about 12 in the afternoon on 4/6/2012 in search of accused. As they went to Crime Branch Unit-V and then to Bhiwandi, he could not tell the exact time thereof. PI Dinesh Aahire and his staff from Crime Branch Unit-V came with his team for investigation. One PSI Raut (PW-2) and two constables of Shahu Nagar Police Station were with him. He stated that accused No.3 was produced before Court for first remand on 6/6/2012. He could not give exact time thereof. He also did not remember whether he had got them medically examined before seeking remand. He had not personally gone for remand work but he deposed that he had personally prepared remand application. He further denied that station diaries were suppressed deliberately. Then his attention was invited to various remand applications, dates and other details mentioned therein.

80. On 31/1/2018 before Trial Court, when he was in witness box, he produced arrest panchanamas which were given Exhibits 163 to 167 by trial Court subject to objection. In paragraph 17, he has stated that he did not mention muddemal found at the time of arrest in arrest forms. He also accepted that date and time is not mentioned therein. He also accepted that in Exhibit 164 pertaining to Azad only month June and year was written, but date and time of arrest was left

blank. He also accepted that in any of these documents from Exhibit 163 to 166 he did not mention date below his signature. He deposed that inadvertently he did not mention those details. He further stated that he had drawn separate seizure panchanamas. He denied that he arrested accused persons on 6/6/2012 at 12.20 noon. He denied that nothing was recovered from accused persons.

81. These documents at Exhibit 163 to 166 are signed by Ganesh and one Balu as witness. PW-19-Mr. Raut has deposed that two accused persons arrested by PW-20 were Accused No.5-Arsil and accused No.2-Azad. Then he points out material recovered from their possession and preparation of panchanama of personal search. He proved search and seizure panchanama at Exhibit 104.

82. This search and seizure panchanama Exhibit 104 is also brought on record through PW-10-Ganesh. This witness supports PW-19 and Exhibit 104. He however also speaks of presence of PW-20 at police station and request by PW-22 to him to act as panch. He states that he was shown 5 accused persons between 12 noon to 12.30 p.m. on 5/6/2012. Then he speaks of personal search and seizure from juvenile at Exhibit 103. In paragraph No.3 he deposes about personal search and seizure from accused No.1-Imtiyaz and panchanama Exhibit 105. He also speaks about material found with other accused persons.

83. Thus, documents at Exhibit 163 to 166 allegedly bear signatures of this witness Ganesh & Balu. These signatures are not put to them at all. It is important to note that PW-10 was examined on 17/4/2019 and the documents at Exhibits 163 to 167 have seen the light of day on 31/1/2018. Apparent inconsistencies noted supra about arrests & emerging from these documents at Exhibit 163 to 167, show that version of prosecution on arrests of accused cannot be accepted. Moreover, the accused 1 & 2 did not get opportunity to cross-examine Ganesh in this respect. It also becomes doubtful whether PW-20 was at all present while arresting accused persons at Govandi and Bhiwandi. Even if deposition of PW-20 is accepted to be correct he got custody of accused persons only in the afternoon i.e. after 12 noon. Thus, accused No.1 was in custody of Crime Branch Unit-V for over 9 hours till then.

84. Deposition of PW-1 that on 4/6/2012 at 12.30 a.m. he was searching along with police in Bhiwandi area and at that time at about 3.00 a.m. police officer Aahire and his staff brought Imtiyaz and two other accused persons near his car, therefore creates a serious doubt in mind. He then states that those accused persons were taken to Crime Branch Unit and he went home. He then states that on 4/6/2012 he went to Crime Branch Unit in the evening and at that time police officer disclosed him about murder. He was shown body of his son in Bhiwandi on 6/6/2012. Even if we presume the date of his visit to Crime Branch Unit to be 5th June, that does not improve the position for prosecution.

85. Exhibit 185 is the first request for remand made by Investigating Officer. It is dated 6/6/2012 and in it date of arrest is shown as 6/6/2012 with time 12.20. The documents proved by PW-12 and by prosecution at Exhibits 103, 104 and

105 shows outcome of body search of accused persons. Recording of these documents begins at 12.20 in the afternoon and is over at 13.00 hours. However these documents are dated 5/6/2012.

86. PW-5-Mr. Jagtap has been examined to show discovery of body of victim at the instance of accused persons. The recording of disclosure begins at 13.10 hours and it is finished at 13.35 hours on 5/6/2012. The actual recovery vide Exhibit 84A is shown to be between 13.10 hours and it continued upto 17.30 hours on 5/6/2012.

87. Thus, accused No.1 who was taken in custody at 3.00 a.m. on 5/6/2012 as per story of prosecution was not produced before the Court till working hours of Court on 6/6/2012. This observation holds good even in relation to accused No.2. We have already noted supra that in same remand application date of arrest is shown as 5/6/2012. If mentioning of date of arrest as 6/6/2012 in Exhibit 185 is presumed to be incorrect, still it does not help prosecution since even in that case "not producing" accused persons within 24 hours before the J.M.F.C. comes on record.

88. The fact that PW-20 does not accept that he apprehended accused persons and they were delivered in his possession by Crime Branch Unit-V militates with the version of PW-19 that the arrests were made by PW-20. Not maintaining station diary entries or in any case not producing it and evasive answers about visiting Crime Branch Unit-V by PW-20 casts cloud of suspicion on date of arrest. It appears that PW-1 had no reason to lie. His version that on 4/6/2012 at 12.30 a.m. he proceeded with police staff and at 3.00 a.m. on that day police officer Ahire and other staff brought accused Imtiyaz and other two accused persons therefore need not be lightly brushed aside. Trial Court has in paragraph No.7 of his deposition recorded that on 4/6/2012 he went to office of Crime Branch, Kurla in the evening and at that time police authorities disclosed to him fact of murder of his son. Submission that Trial Court has recorded wrong date or then PW-1 while deposing gave wrong date cannot be accepted. This witness has further deposed that on 6/6/2012 he went to Shahu Nagar Police Station in the morning and from there he was taken to Bhiwandi hospital where he saw dead body of his child.

89. Material on record therefore does not support the case of prosecution that accused persons were arrested on 5/6/2012 in the afternoon. In any case it appears that arrest panchanama of accused No.1 has been drawn almost 9 hours after his alleged arrest. Similarly, arrest panchanama of accused No.2 Azad is also not drawn immediately after his arrest. This becomes important when the seizure effected from them at the time of arrest is looked into. In search panchanama at Exhibit 103 names of juvenile and accused Israr appeared. One mobile handset with two IMEI numbers, 2 SIM cards and memory card is shown to be recovered. However, accused No.4 Israr is acquitted by the Trial Court.

90. In panchanama Exhibit 104 recovery of mobile is shown from acquitted

accused No.5. One mobile china made with two IMEI numbers and two SIM cards of Vodafone company are recovered from accused No.2. Vide panchanama Exhibit 105, seizure of one mobile phone from shirt pocket and two mobiles from pant pocket is shown. One mobile is of Blackberry Company with 2 SIM cards and 2 IMEI numbers, second is of Nokia make with one IEMI and third mobile is of Samsung Company with two IMEI numbers. Separately 9 SIM unused cards are also shown to be recovered from his person.

91. All these recoveries on 5/6/2012 are attempted to be proved through PW-10. It appears that no arrest panchanama of accused persons was prepared and only signatures of PW-10 and One Balu were obtained on documents at Exhibit 163 to 166. Exhibit 163 pertains to accused No.1-Imtiyaz and in it date and time of arrest is left blank. Even against column No.8 where articles found in body search are required to be mentioned, nothing is recorded. Same can be said about Exhibit 164 which is in relation to accused No.2. PW-10 or PW-19 do not speak of Exhibit 163 and 164. If signatures of witnesses at Exhibit 103, 104 and 105 as also on these documents were simultaneously obtained, it is surprising that these documents are left blank. It is apparent that signatures of witnesses were obtained on blank documents. Once we find some element of dishonesty in deposition of PW-19 and PW-20 about arrest of accused persons, the documents of body search at Exhibit 103, 105 and arrest panchanama at Exhibits 163 and 164 also becomes doubtful.

92. Supplementary statement of PW-1-Rajesh has been recorded by police authorities on 7/6/2012. In that statement he has mentioned that on 1/6/2012 he complained to police of kidnapping of his son and demand of Rs.25 lakhs. Police accordingly registered Crime No.94/2012 under sections 363 and 364 of IPC. He was given a Nokia make mobile with recording facility. He inserted his SIM Card No.9892010138 in it. When he and police were searching for accused persons, he got a call at 11.00 a.m. on 1/6/2012 from mobile No.7303245276. On 2/6/2012 at about 4.00 p.m. he received a call from mobile No.7666937900 and at 1.00 p.m. in the night he received a call from No.7666153880. On 3/6/2012 at 10.00 p.m. in the night he got a call from No.8767237582. On 4/6/2012 at 12.45 in the noon he got call from No.8080840471 and thereafter from mobile No.7303467269 at 4.15 in the noon demanding Rs. 25 lak. From same number on same day he got calls 4.30 in the noon and at 8.00 and 10.30 in the night. Person calling was asking for Rs.25 lakhs to be delivered at a place as he would direct, if Rajesh desired to have his son back. Rajesh in his supplementary statement, has stated that he was requesting that person to reduce the amount and to show his son. All these conversation has been tape-recorded and police listened to it. Police tried to verify the address and name of person calling, but was not getting it. However, police found that calls were being made from Bhiwandi area. Accordingly, he and police were constantly visiting Bhiwandi in search of accused and son. On 4/6/2012 when he was in Bhiwandi with police, police learnt about the location of accused. Accordingly, at 3.00 a.m. on 5/6/2012 police took three persons in custody and one of them was his ex-

employee Imtiyaz. However, his son was not present there. Police squad left with Imtiyaz. Thereafter he went to Crime Branch Unit, Kurla. After some time, squad which had left with Imtiyaz returned with two more persons and one out of them was his employee by name Azad. Police then asked him to go. On 5/6/2012 when in the night he was at Kurla Crime Branch Unit, he was informed about finding of his son's body. He was asked to come at Shahu Nagar Police Station on 6/6/2012 to identify it. Accordingly, on next day in the morning he identified the body of his son. After autopsy, he took the body and performed funeral.

93. In the night on that day, he learnt that Azad and Imtiyaz confessed to killing of his son after abducting him on the pretext of moving around. He has mentioned that accordingly on that day he has returned the mobile given by police in which conversation was recorded with its SIM card.

94. Before the Court, during cross examination he deposed that he was not remembering the date on which he gave mobile back to police. He also stated that he was knowing only one out of the three culprits which were taken in custody by police early in morning hours and police did not disclose to him names of two unknown persons. He was not aware whether they were taken in custody by police on 4/6/2012. In further cross he has revealed that he received call twice on 1/6/2012 and he was not remembering number of calls received before filing of FIR. He also did not remember the date on which he disclosed name of accused No.1 Imtiyaz to police. He also did not remember whether he requested police to record his further statement regarding identification of voice. However, during his examination-in-chief, in paragraph 8, he has deposed that police took mobile back from him on 6/6/2012.

95. PW-12-Mr.Juber Qureshi has been examined to prove panchanama of taking Nokia mobile from PW-1-Rajesh. He states that at about 5.00 p.m. he was called at Shahu Nagar Police Station on 7/6/2012. Co-panch was already there. Complainant Rajesh (PW-1) was also sitting there. Complainant placed one mobile before police and it was taken in custody by police. Mobile was kept in brown colour packet, packet was sealed. He signed on label along with co panch. Panchanama was prepared and it was signed by him, co-panch and police officer. He identified that panchanama with his signatures. That panchanama is at Exhibit 116. He stated that mobile handset was of Nokia company and he identified that handset. This mobile has been given Article No.2 (colly). Article 2-B is the label on it.

96. His cross examination shows that he is having chicken shop and doing business without any license. When he went to police station, only one police officer by name Mr. Nagare was present there. Panchanama was not read over to him

97. Panchanama Exhibit 116 is drawn as deposed by him. Panchanama also mentions the fact of use of mobile for recording conversation and its purpose. Witness however has not supported this part.

98. PW-11-Jairaj Jaiswal is the witness who on 12/6/2012 claims to have heard the conversation in memory card in a silver and black coloured Nokia mobile handset and drawing of its transcript. His deposition at Exhibit 108 begins when police unpacked the mobile handset of silver and black colour with model Number-N-81. Police then removed memory card from mobile handset. This memory card was inserted in CPU of computer in police station. According to him it contained a voice clip.

99. The said memory card purportedly contains recorded conversation between accused demanding ransom and the informant Mr. Rajesh. We have already taken note of fact that this Nokia mobile with call recording facility was given to respondent (PW-1) by Investigating officer Shri Desurkar. This Nokia mobile was taken back by said Investigating Officer from Rajesh. PW-12 has witnessed this taking back. His deposition does not show reference to any memory card or its number. He only mentions taking back of mobile handset of Nokia company and preparation of panchanama. After said mobile was placed in brown colour packet, it was sealed and labelled with his signatures and signature of co-panch on the label. PW-11-Jayraj does not depose of mobile was taken out from any sealed packet. He does not point out that envelope contained any seal and signatures. PW-12 or then co-panch at Exhibit 116 was not present at that time. Thus, identity of memory card or mobile witnessed by PW-11 with identity of mobile handset sealed on 7/6/2012 in presence of PW-12 has not been established.

100. Not only this number of memory card while handing over the mobile with call recording facility to PW-1 or while taking it back has not been noted anywhere. The deposition of PW-12 does not contain even a reference to memory card. Hence, whether on 7/6/2012 or on any other day said memory card was obtained back from PW-1 is a moot question. Identity of memory card inserted in CPU on 12/6/2012 for preparing its transcript with one which was allegedly handed over to PW-1 therefore cannot be seen.

101. Panchanama Exhibit 109 does not refer to number of memory card. It contains transcript of total 10 conversations. First one is recorded at 11.00 on 1/6/2012 while last one is recorded at 22.15 hrs on 4/6/2012.

102. The said witness PW-11 during cross examination has stated that conversation was between two different persons. In paragraph No.9 has admitted that there are many voices of different persons in voice clippings and all those voices were played in his presence. He accepted that police had not taken note of all these voices and he also did not request police to write it down. He has stated that recording of panchanama started at 11.00 a.m. and was completed between 4.30 to 5.00 p.m.

103. At this stage, it will be appropriate to note the deposition of PW 14 Suresh Neharkar. He is working with Anti Corruption Bureau, Mumbai as ASI Radio Mechanic. On 14/06/2012, he was sent to Shahunagar Police Station where he recorded specimen voice of accused no. 1 Imtiyaz. Two panch witnesses were

also present. He took out his digital recorder and inserted in it micro SD card which was given by IO. He prepared three files of the voice samples. Two files are of two panchas and third one is of accused. This memory card was marked article 22.

104. The result of analysis i.e. auditory analysis is at Exh. 140. It is signed by one Mukeshkumar as Scientific Officer who has not entered in the witness box. This report mentions one cellphone and one battery. At Exh. 1/3, there is memory card of make 'Moserbaer 2GB' containing the speech recording. At Exh. 2 is memory card of make 'Bail 4GB'. Exh. 2 is stated to be specimen voice while Exh. 1/3 contains the questioned voice. The auditory analysis and subsequent spectrographic analysis reveal that the questioned voice is similar to specimen voice.

105. We have already noted supra that the details of make or any distinct number of memory card contained in Nokia mobile handed over by IO PW 20 to PW 1 Rajesh, taken back from Rajesh or then used for transcription on 12/6/2012 in the presence of PW 11 Jayraj did not find mention anywhere on record. PW 11 does not point out on oath that the memory card removed from the mobile was in a sealed or labeled packet or container though he specifically states that after the transcription, the said memory card was inserted in the mobile handset and again packed, sealed and labeled. This witness also deposes that in the memory card from which transcription was obtained, there were many voices and police have not taken cognizance of all those voices. The prosecution has opened the specimen sample only of Imtiyaz (accused no.1) and the document at Exh. 140 shows its comparison with memory card in Nokia mobile. If there were many voices, the other voices therein have not been identified and are ignored. It appears that choice or some discretion has been exercised while selecting conversations for transcription.

106. Accused No.1 Imtiyaz comes into picture because the employee by name Yogesh Patange of PW 1 after hearing the recorded voice, identifies the same as that of accused no.1. The prosecution has not examined this Yogesh Patange.

107. The body search panchanama at Exh.104 of accused no. 2 Azad shows that one 'Q9' China make mobile phone of 'G5' company was seized from him. It had two IMEI numbers with one SIM card. Moreover, two more SIM cards were recovered from him. Azad had stated that the said mobile was of his friend Nayab Ali and SIM card in it was purchased in the name of Yogesh Patange.

108. The prosecution has brought on record call data record of PW-1. It is proved by witness PW-17 Mr. Kolwadkar of Bharati Airtel. He has given certificate under section 65-B of the Evidence Act and in it he has mentioned that the details are for the period from 1/5/2012 till 10/6/2012 and they are of mobile N.9892010138 i.e. of PW-1. These details are at Exhibit 152. This CDR discloses IMEI number of caller handsets which according to prosecution is with accused No.1. Three handsets are claimed to be seized from him. These aspects are being

considered little later in this judgment. However, Exhibit 105 body search panchanama of accused No.1-Imtiyaz shows that handset with IMEI No.404929205725244 does not figure therein as of any of the three mobile handsets. In the result, Exhibit 152 does not have material impact on present controversy.

109. The other CDR is proved through PW-13 Mr. Gaikwad who happens to be Nodal Officer of Reliance Communication. According to prosecution IMEI numbers of three mobiles are figuring therein. As per Exhibit 105 Article 16 is white colour blackberry mobile handset with IMEI No.359860011009390. The other IMEI No. to it is 359860011009408. Article 18 is black colour Nokia Mobile handset with IMEI No.3593902490331/1. Last mobile handset Article 15 is of Samsung Company and it as IMEI Number 356650035065145 and 366650035065152.

110. The call data record produced by PW-13 is at Exhibit 120. Section 65-B certificate issued by him shows that CDR contains details of incoming and outgoing calls from Mobile Numbers 7666165302, 8767175875, 7303245276, 7666937900, 7666153880, 8767237582, 8080840472, 73034667269 and 7666995452. As per Exhibit 128 mobile No.7666995452 is of one Jahid Khan who is not an accused before this Court.

111. PW-13 Mr. Gaikwad has during examination-in-chief stated that as per their system, last digit of IMEI number becomes & is termed as "0" though the handset factually shows its last digit to be any number from "1 to 9".

112. It is in this backdrop, that his evidence and CDR at Exhibit 120 needs to be appreciated. As per Advocate Dwivedi out of 10 conversations contained in the transcript Exh. 109, the transcript dated 1/6/2012 pertaining to call made at 11.00 am and the transcript pertaining to call made on 4/6/2012 at 18.29 hrs did not appear in the CDR brought on record through PW 13 Gaikwad. Panchanama at Exh. 109 shows first recording to be from the caller Mobile No. 7303245276. Learned APP has also supplied to us relevant extract of CDR. We need not refer to CDR pertaining to date 31/5/2012 at this stage. Exh. 121 shows the call made on 1/6/2012 at about 16.00 hrs. There is therefore, no call as mentioned in Exh. 109 from mobile no.7303245276 at 11.00 am on that day.

113. Similarly though there are more than one transcriptions of calls made on 4/6/2012, there is no call from No. 7303467269 made at 18.29 hrs. The call recorded on that day from the same mobile number to PW 1 is at 18.21 hrs. This inconsistency is not explained by the State.

114. The second transcript in Exh.109 is from telephone no.7666937900 on 2/6/2012 at 15.51 hrs. This call finds mention in CDR proved by PW 17 and there IMEI number of call is shown as 404929205725244. This is not IMEI number of any of the mobile handsets allegedly found with the accused no. 1.

115. Third transcription is of call made from mobile No.7666153880 on 2/6/2012 at 19.53 hrs. This is supported by CDR proved by PW 17 at Exh. 152 and it is

also reflected in Exh. 124. In Exh. 152, IMEI number of caller is recorded as 404929205725244 i.e. same as of call mentioned supra but with different phone number. In Exh. 124 IMEI number of this caller is recorded as "356650035065150". Any of the three handsets allegedly found with accused no. 1 does not have this IMEI number.

116. On the same day at about 19.56 hrs the transcription shows the call received from 7666153880. In Exh. 124, none of the IMEI numbers found with the accused appear. On 3/6/2012 as per transcript call is received by PW 1 from mobile number 8767237582 at 22.05 hrs. Our findings in relation to IMEI number of accused no. 1 supra, hold good even in relation to this call.

117. The next transcript available in Exh. 109 is of the call dated 4/6/2012 at 12.37 hrs. This call is made by mobile number 8080840472. The IMEI number there does not show that the call emanated from any of the three handsets found with accused no.1.

118. The call made at 16.12 hrs on 4/6/2012 by caller having number "7303467269" is mentioned in the next transcript at Exh. 109. In Exh.127 IMEI number of caller is mentioned is "359339024903310". As per prosecution, this is IMEI number of article 18 black colour mobile handset seized from accused no. 1. It is not in dispute that as mentioned in Exh. 105, the said number is having following four digits at its end - Viz. "331/1". Even if the deposition of PW 13 Mr. Gaikwad that the last digit turns into zero as per their system is accepted, this number would become "331/0". This fact that the last digit becoming "zero" in the system of PW 13 is deposed to by him in the court for the first time and it is not certified in the certificate dated 19/6/2012 at Exh. 119 issued in terms of section 65-B of the Evidence Act.

119. The call in transcript mentioned at 18.21 hrs is coming from mobile number "7303467269" and IMEI number of caller is same as mentioned supra. The observations made above, therefore hold good even in relation to this call.

120. Exh. 109 then shows the transcript of call made at 19.49 hrs on 4/6/2012. This call has come from the very same number though it is not recorded in this document. The IMEI number is identical and hence the observations made in relation to that number apply to his call also.

121. The last call which is transcribed in Exh. 109 and it has been made from the same mobile number at 22.25 hrs. IMEI number of calling handset is the same as mentioned supra and hence, our observations on last digit becoming zero made supra fully apply here. On record, we get remand application Exh. 185 in which, the IO has mentioned that total six mobile phones and 9 SIM cards were recovered from 5 accused persons. We have already noted supra that as per certificate Exh.119 and document at Exh.128, mobile number 7666993452 is of one Jahid Khan. Learned APP has demonstrated that in the CDR produced on record this phone number is found with different IMEI number. Our attention has been invited to calls made on 1/5/2012, 27/5/2012 and 28/5/2012 till 29/5/2012

to buttress this submission. It is submitted that from 29th May, 2012 again IMEI number of Article 18 has been used till 05th June, 2012. As noted supra, article 18 is of black colour Nokia mobile handset allegedly found with accused no. 1. We have already commented upon the last 4 digits of the said IMEI number and the submission of witness Mr. Gaikwad (PW 13) that the last digit is shown as "zero" in their system. We find it difficult to accept this bare statement. Moreover, as per Exh. 128 this phone number (SIM card) is of one Jahid Khan. There is no explanation about him on record.

122. Thus the identity of memory card handed over by PW 20 to PW 1 has not been established by cogent and convincing evidence. The distinct number of mobile memory card has not been recorded anywhere and the CDR produced by the prosecution itself shows that the subject memory card is not always in Nokia mobile handset allegedly handed over by PW 20 to PW 1. It appears that PW 1 had also handset with recording facility. It is important to note that in paragraph 10 of his cross examination, PW 20 states that he had given mobile handset with recording facility to complainant on 02/06/2012. It is obviously due to fact that the complainant Rajesh did not have mobile with recording facility.

123. The call detail record also shows that IMEI number of PW-1 Rajesh undergoes changes on 2/6/2012 most probably because of mobile handset offered by PW-20. The fact that transcriptions are available at Exhibit 109 from 1/6/2012 shows that even on 1st June, PW-1 might have had call recording facility. Thus, submissions that he had recording facility from 2/6/2012 or on calls recorded in subject memory card do not appear to be correct. The prosecution relies upon recorded conversation in memory card in mobile handset handed over by PW-20. That conversation therefore should have been after mobile was handed over to PW-1 on 2/6/2012. Learned APP has submitted that calls in or voice in memory card could not have been edited. However, we fail to notice any material in support thereof on record. The very fact that the conversation alleged to be dated 1/6/2012 is reflected in Ex.109 shows an error in this contention. Call recorded on 1st June could have been shifted to subject memory card also.

124. Call detail record shows more than one call from same IMEI number alleged to be that of accused No.1. PW-11-Jairaj Jaiswal also states that police have not taken note of all voices. Thus, entire exercise of transcription and spectrograph analysis loses its relevance.

125. Prosecution is unable to show that mobile number from which calls were made to PW-1 was used by any of the accused persons. It relies upon seizure of mobile handsets from accused persons at the time of their arrest and IMEI number associated with these handsets to explain CDR and to connect accused No.1 with it through conversations mentioned supra. There we have noticed that one of the mobile numbers was belonging to a third person by name one Jahid Khan.

126. Prosecution got mobile number of caller and wanted to co-relate it with accused No.1. They could have therefore tried to investigate other calls either made by that caller or then received by that caller to identify the other person who either called the accused or received call from him. Evidence of such person could have been helpful in showing that at the relevant time that mobile number was being used by accused No.1. There is no such investigation on record.

127. In the light of this discussion, prosecution has not by satisfactory evidence established the circumstance that ransom calls to PW-1 were made by accused persons. The contention that IMEI Number of handsets from which ransom calls were made also changed frequently is therefore not very decisive. Prosecution has not shown that any of the admitted relatives or friends of the accused 1 had the contact with accused no. 1 on these handset/s.

128. The other circumstance relied upon by prosecution is about recovery of body of victim boy. PW-5-Vishwas Jagtap has been examined as witness in whose presence disclosure of spot where body was concealed has been made and then panch witnesses and police party was led to that spot. Disclosure panchanama is Exhibit 84 and consequential recovery panchanama is Exhibit 84A. Exhibit 84 is recorded on 5/6/2012 between 13.10 to 13.35 hrs. while Exhibit 84A is recorded from 13.10 till 17.30 hours. It is to be noted that Exhibit 84 and 84A are part of same process. This is within minutes of the body search panchanamas at Exhibit 103, 105 witnessed by other set of witnesses viz. Ganesh & Balu.

129. Exhibit 84 shows that PW-20 had called PW-5 and other panch Hanumant in Shahu Nagar Police Station at 13.10 hours and stated that accused persons were already arrested and they wish to give some statement. One person present there disclosed his name to be Imtiyaz and he stated that body of boy was thrown in a gutter in Bhiwandi. That place would be shown by him and his colleagues.

130. Further process is recorded in Exhibit 84A. Both panchas, police, accused No.1 Imtiyaz, accused No.3 (juvenile) and accused No.4 Israr together proceeded to spot in private vehicle. After reaching Bhiwandi, accused asked vehicle to be taken towards right then to take a left turn and again to take a right turn where vehicle stopped. In Exhibit 84A accused No.1 is shown as accused while other 2 accused are mentioned as colleagues and it is recorded that directions were given by accused. Learned counsel for accused persons argued that which of the accused persons gave directions is therefore not expressly recorded.

131. Exhibit 84A shows that one constable was sent to local police station by PW-20 and help was called for. API Shinde and staff of Shanti Nagar Police Station arrived there. Then accused led them to open ground and then in a lane on right side. They were taken to a room in a chawl in front of Ansaar Kirana Shop. There accused No.1 took a key seized by police in body search of juvenile

accused and opened the lock of that room. They all entered that room. In that room bedsheets as also clothes were lying scattered. Room was ad-measuring 12 ft. x 10.6 ft. All of them thereafter came out of room. Accused re-locked it and handed over key to police. Panchanama records that in that room accused No.1 Imtiyaz showed the place where he killed the boy. After coming out of room they were taken to a gutter which was having a lid. It is recorded that accused Imtiyaz, juvenile and accused No.4-Israr stopped near gutter infront of Haji Malang Stores. There, with finger, gutter was indicated with a statement that after opening gutter-lid, body tied in nylon bag was thrown in it. When lid of gutter was removed, it was found to be about 7 ft. deep and water was flowing through it. With the help of local police, Fire brigade was called for. Accordingly, the staff of Fire Brigade arrived. They found a white colour nylon bag in said gutter. It was taken out. At that time local photographer Amar Jamkar was called for and he took photographs of the place i.e. gutter and of nylon bag.

132. Police then opened the said bag. The bag contained a body of a child wearing sky blue lining shirt and track pant of blue colour with 3 white strips on it. Hands, legs as also the neck were tied with white colour rope. A dirty cloth of handkerchief size was also seen around throat. Photographs were again obtained. After inquest, body was sent for post mortem.

133. The panchanama therefore, shows that the initial disclosure by accused no.1 Imtiyaz mentioning that the gutter would be shown by him and his colleagues. Thereafter all three accused together are recorded to have taken panch witnesses and police officials to the road where the juvenile accused resided and thereafter, to the said gutter. It nowhere mentions that it is accused no. 1 Imtiyaz alone who led the team to the spot. It is apparent that accused no. 2 Azad was not party to this disclosure or recovery at all.

134. In deposition, PW 5 Vishwas deposed that all three accused led them towards the gutter. His cross examination shows that he was called on phone by police officer by name More and police station is near his house. He has denied that he has worked as panch witness whenever police requested him. He has further volunteered that all three accused were sitting near PW 20 and police did not tell him that they were taken out from the custody. He accepted that other two accused persons did not disclose anything. However, according to him at the time of disclosure by accused no. 1 Imtiyaz, other two accused persons were nodding their heads. But that fact of nodding heads is not recorded in the panchanama. He also accepted that the incident recording recovery of key from accused no. 3 is mentioned as per information given by police. No separate panchanama regarding handing over of or return of key was made. He did not see whether the key was sealed or labelled. He accepted that accused nos. 3 and 4 did not lead them to Haji Malang Store. He could not remember whether he has acted as panch witness earlier. He could not tell on how many occasions he has acted as panch after the panchanama in the present matter. It appears that the effect was made to point out certain documents and criminal case numbers

to him in which according to the accused, he had acted as panch. He could not remember it. He denied that he was not doing any other work except that of acting as panch witness. These evasive answers given by him make the story of discovery under S. 27 of the Evidence Act itself shaky.

136. PW 16 Ali Hussein is panch on inquest. He was called to Shantinagar Police Station on 05/06/2012. One Fire Brigade vehicle and police officers were present there. After some time, police brought a boy who pointed out a cap on the manhole ie gutter. A gunny bag was taken out from that gutter. He then points out drawing of panchanama and signing it. Exh. 146 is that panchanama. He also identified the boy who showed the gutter/manhole as accused no.3 - a juvenile. He identified the cloths put on by the deceased and gunny bag. Exhibit 146 panchanama also records that the gutter was shown by juvenile mentioning that the body was thrown in it. This witness therefore, does not point out accused no.1 Imtiyaz as a person who indicated that gutter.

137. PW 6 Harishchandra Sambre is the fire man who attended the duty on 5/6/2012 and helped in taking out the body. He and other fireman entered the gutter and brought out one gunny bag with dead body. He had brought the register maintained by fire brigade department which supported his version. His cross examination shows that the gunny bag taken out by him had no distinct mark. He does not point out that any of the accused persons were present there at the time when he entered the gutter and brought out the body.

138. PW 18 Jaywant Shinde was then working as API at Shantinagar Police Station. He was present with Shahunagr Police at the spot (gutter) from which body was taken out. He prepared inquest panchanama. He also identified the accused brought by Shahunagar Police Station. At that time, he pointed out accused no. 3 juvenile as the concerned accused. Thus, he does not see accused 1 Imtiyaz or then accused 4 Israr or then witness the alleged visit to a room where juvenile (accused-3) resided as recorded in Ex. 84A.

139. The panchanama Exh. 84A mentions visit by panch witnesses and police team to the room in which accused no.1 allegedly killed the boy. This exercise appears as part of recovery process and is not mentioned in the disclosure statement as per panchanama. It is surprising that the key required to open that room, which was already seized from accused no. 3 allegedly at the time of his arrest, was available on this day with the police at spot. Had there been advance disclosure and therefore the knowledge to police officers about the need of such key, availability of key could have been understood. However, there is no such advance disclosure and still key is produced by police and handed over to accused no. 1 to open the lock of the said room.

140. The said key was also produced before the trial court. If the key was already seized & sealed at the time of arrest of juvenile accused, police could have taken it out of the police station after making suitable entries in the station diary and allowed its use after recording its de-sealing in panchanama Exh. 84A.

Its re-sealing also accordingly ought to have been & could have been recorded in the said panchanama. These steps are conspicuously absent in it & have remained unexplained.

141. The facts noted supra, therefore cast serious doubt on the presence of accused no. 1 at gutter on 5/6/2012. It therefore, also throws a cloud of suspicion on the truth of story of disclosure by him recorded as Exh. 84 on 5/6/2012. The answers given by PW 5 Vishwas Jagtap show that he may be a stock witness who has deposed to oblige the police machinery.

142. We have recorded the above findings keeping aside the controversy about the date or time of arrest of the accused no. 1 or the other accused persons.

143. It can be seen that if the demands of ransom made by the accused persons are established conclusively through CDR, it may constitute one of the important circumstance by itself. However, the mobile numbers through which calls have come are not shown to be in possession of or in the use of accused no. 1 at the relevant time. The effort is only to demonstrate possession of handsets in which SIM cards supporting particular mobile number/caller number were placed. The authorities have not investigated into the other calls made with the help of these three handsets or through those IMEI numbers and did not point out that any relative or friend of accused persons has received phone call from the handset having that IMEI number. Police could not trace out the mobile numbers but then police also did not get any data to demonstrate that the user of those mobile numbers had called the particular person who happens to be the friend or relative of the accused. Police have not produced any statement of such person who got call from accused persons using that mobile number or using IMEI number of that handset.

144. The spectrographic analysis or audio-metric analysis lost its relevance because the voice sample only of accused no. 1 Imtiyaz was obtained. Voice sample of other accused persons were not obtained. Even the other voices which appear in the memory card as per PW 11 Jairaj have not been accounted for. We have also noted that the voice calls made prior to 2/6/2012 could not have been part of the memory card supplied by PW 20 Mr. Desulkar to PW 1 Rajesh. This discussion therefore, demolishes the CDR as one of the connecting circumstance.

145. The circumstance of discovery of dead body of the victim boy is also not satisfactorily established by the prosecution.

146. The 'last seen' by itself cannot constitute the valid ground here. Even if we assume the prosecution story to be correct, the deceased boy was last seen by PW 8 Kaushalkumar with juvenile accused and accused no. 1. Thus at that time, accused no. 2 Azad was not with them.

147. However, the witnesses in support of 'last seen' have not been found promptly and explained properly. PW 2 Gulabchand is an ice candy seller and he was called to police station after 10 to 15 days and shown the photograph of the

boy. He identified that photograph and then remembered the accused persons accompanying that boy. No description of accused no.1 or accused no. 2 was then obtained from him.

148. PW 3 Mohd Dilawar Shaikh is a waiter whose position again is not different than that of PW 2. Identification by these persons in TIP is therefore, not a clinching evidence at all.

149. PW 7 Ananda Sutar was staying with the family of PW 1 on the evening when the boy was abducted. Police did not make any enquiry with him and his presence with the family is not disclosed by PW 1 Rajesh to police immediately. He surfaces as a witness after 8/6/2012. He claims that he called PW 1 Rajesh on 8/6/2012 and learnt about the unfortunate abduction. He therefore, came to Mumbai and gave his statement to police on 9/6/2012. The prosecution has not shown any CDR proving the call made on 8/6/2012 by PW 7 to PW 1. Not only this, there is no independent material on record to show that on 27/5/2012 this witness was in Mumbai or then in the evening he left for his village in Kolhapur district. There is nothing to show that after 8/6/2012, he came from Kolhapur to Mumbai. The details about the employment of Imtiyaz given by him run counter to the facts deposed by PW 1 Rajesh.

150. Most important facet of the matter is about the date of arrest of accused persons. We have already looked into it at some length supra. Even if we presume that accused persons were arrested on 5/6/2012, the arrest panchanama of accused no.1 Imtiyaz is after about 9 hours of his arrest. Even the arrest panchanama of accused no. 2 is not drawn immediately. They have not been produced before the Court of JMFC within 24 hours of their arrest. The finding of mobile sets or unused SIM cards with accused no.1 is therefore, not substantiated by a clinching evidence. The prosecution has examined Mr. Sirajuddin Shaikh as PW 15. He claims that the accused no.1 and accused no.3 juvenile were residing in his area. In the year 2012, he was taken to Shahunagar Police Station wherein accused nos. 1 and accused no. 3 were shown to him. Police enquired from him whether he sold the SIM cards to them. He then deposed that both the accused persons had come to him jointly and requested for SIM cards. He had demanded the documents to prove identity. They assured to give the documents in the evening but did not return back. As they were residing in the neighbourhood of his shop, he gave them SIM cards without obtaining said documents. They had purchased 3 SIM cards each of reliance company. He identified both the accused in the court correctly. However he enters as prosecution witness because he identifies them first in police station. He also stated that the accused persons had come to his shop either on 20th or 21st or 22nd May, 2012.

151. His cross examination shows that he was not having any authorization from Reliance company to sell the SIM cards.

He did not maintain any record of sale of such cards. He further stated that if

such register is maintained, he could have given the particulars of the person purchasing the SIM card. He has also stated that if within one week of activation of SIM card, the documents are not sent to company, the card gets deactivated. He, however, added that some cards get deactivated while some remain active.

152. This evidence therefore, militates with the story of prosecution itself. The prosecution could have attempted to contact the relatives or friends of the accused persons and gathered from them the mobile numbers used by the accused during the said period or then the IMEI numbers of those mobile handsets.

153. With the result, we find that none of the circumstances mentioned supra have been proved beyond reasonable doubt. In a case based upon the circumstantial evidence, it is settled law that each circumstance constituting the chain must be established by convincing evidence. All such circumstances must link together & form the chain which indicates the accused as the only culprit. Such circumstances must exclude the involvement of any other person in the crime. The prosecution has to show that all possible links/angles incompatible with the presumption of innocence of the accused have been investigated into and such investigation leads only to accused persons. These requirements are not satisfied in the present matter. In the light of this finding, separate consideration of prayers made by accused 1 Imtiyaz to allow him to cross examine the expert & prosecution witnesses or to lead evidence in defence or to grant him opportunity to point out impropriety of death penalty, is not necessary. Criminal Application No. 1072 of 2019 is thus disposed of.

154. The accused persons have relied upon *Jairnal Singh and Ors. Vs. State of Punjab*:AIR 2010 SCC 3699 on appreciation of evidence of chance witnesses. *Anjan Kumar Sarma and Ors. Vs. State of Assam*:AIR 2017 SC 2617 on appreciation of circumstantial evidence, judgment dated 10/12/2018 in *State of UP Vs. Wasif Haider etc.* : Criminal Appeal No.1702 and 1706 of 2014 to point out effect of the defects in the TIP. *Narendra Singh and another Vs. State of MP* : AIR 2004 (10) SC 699 on circumstantial evidence, *P.V. Anwar Vs. Basheer and Ors.* : AIR 2014 (SCW) 5965 on certificate under section 65B of the Evidence Act, *Ashish Batham Vs. State of MP* : AIR 2002 SC 3206 on section 27 of the Evidence Act and TIP.

155. To urge that in such matters life imprisonment is the rule and death penalty can be inflicted only in the rarest of rare cases, support is taken from *Bachan Singh Vs. State of Punjab* AIR 1980 SC 898, *Machhi Singh and Ors. Vs. State of Punjab* : AIR 1983 SC 957 and *Madhu @ Madhuranatha @ another Vs. State of Karnataka* : AIR 2014 SC 394. It is submitted that accused no.1 Imtiyaz has during his imprisonment cleared 12th standards examination. The Division Bench judgment of this court in the *State of Maharashtra Vs. Vitthal Tukaram Atugade*: MANU/MH/0342/2016 is also relied upon for this purpose.

156. Learned APP has invited our attention to *Vinod Vs. State of Haryana* : AIR

2008 SC 1142 on the scope of section 364A IPC. Rajinder Kumar and anr Vs. State of Punjab : AIR 1966 SC 1322 is also relied upon to show how the circumstances proved by the prosecution in the present matter call for appreciation. State of Rajasthan Vs. Kashi Ram : AIR 2007 SC 144 is pressed into service to buttress the contention that section 106 of Evidence Act expected the accused persons to discharge the burden as the minor abducted victim has died while in their custody. Mahesh Janardhan Gonnade Vs. State of Maharashtra : (2008) 13 SCC 271 is relied upon to urge that the panch who has deposed properly cannot be disbelieved only on the ground that he is a stock panch. Dhanraj Singh @ Shera and Others Vs. State of Punjab : AIR 2004 SC 1920=(2004) 3 SCC 654 is relied upon to submit that the benefit of defects in the investigation cannot be given to accused persons. Suresh and anr. Vs. State of Haryana : (2015) 2 SCC 227 is relied upon to explain the scope of section 106 of Evidence Act. Vinod Kumar Vs. State of Haryana : (2015) 3 SCC 138 is relied upon to point out circumstances and its use. Himanshu Mohan Rai Vs. State of UP & anr : AIR 2017 SC 1425 is cited to urge that there is no delay in recording section 161 statements of PW -2,3 & 7 in the present matters and it cannot be seen as fatal here.

157. Dhanraj Singh @ Shera and Others Vs. State of Punjab , (supra) shows the law explained by the Hon. Apex Court on the impact of defective investigation. On facts presented to it, Hon. Apex Court observes in paragraph 8 that the stand of the appellants before it related essentially to acceptability of evidence. Even if the investigation was defective, in view of the legal principles explained, that paled into insignificance since the ocular testimony in the case was found credible and cogent by the Hon. Apex Court. Effect of non-examination of weapons of assault or the pellets, etc. in the background of defective investigation has been considered by it in Amar Singh case-AIR 2003 SC 1164. In the case before Hon. Apex Court, no crack in the evidence of the vital witnesses was noticed. In the wake of these findings, Hon. Court in para 5 observed that in the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. In case before us i.e. in present matter, there are no eye witnesses. The discussion supra shows absence of legal evidence to reach a finding of guilt. Thus law expounded by Hon. Apex Court is not attracted here.

158. Shivaji @ Daya Shankar Aliaf Vs. State of Maharashtra : AIR 2009 SC 56 is relied upon to submit that the death can be inflicted even in the matters where guilt is established through circumstantial evidence. Machhi Singh & Ors. Vs. State of Panjab : (1983) 3 SCC 470, Bablu @ Mubrak Hussain Vs. State of Rajasthan : AIR 2007 SC 697 and Bachan Singh Vs. State of Panjab : AIR 1980 SC 898 are also pressed into service.

159. In the light of the findings of facts noted by us supra, in this matter, we do

not find it necessary to dwell on all these precedents. We find that the prosecution has failed to bring home the guilt of the accused no.1 Imtiyaz and accused no.2 Azad.

160. We accordingly pass the following order :

(a) Criminal Appeal No. 859 of 2019 filed by accused no.1 Imtiyaz is allowed and he is acquitted of the charges under sections 302, 363, 364-A, 201 read with 34 of IPC.

(b) With the result, the punishment of death and other sentences imposed upon accused no. 1 by the Additional Sessions Judge, Greater Mumbai vide judgment and order dated 23/5/2018 in Sessions Case No.648 of 2012 are quashed and set aside.

(c) The conviction and sentence imposed upon accused no.2 Azad by the said judgment in Sessions Case No. 648 of 2012 for the offence punishable under sections 302, 364-A, 363 and 201 IPC is also quashed and set aside.

(d) Criminal Appeal No. 747 of 2018 filed by the accused no. 2 Azad is accordingly allowed.

(e) Criminal Confirmation Case No.3 of 2018 stands answered in negative accordingly by acquitting the accused no.1 and 2.

(f) Accused no. 1 Imtiyaz and accused no.2 Azad be set free if their custody is not required by the State Government in any other matter.

(g) Criminal Application No.1072 of 2019 is disposed of as no orders are required upon it.

(h) As accused nos. 1 and 2 are acquitted, Criminal Application No. 1 of 2019, Criminal Application No. 2 of 2019 as also Criminal Application No. 1585 of 2018 moved by them do not survive and are disposed of.

(i) Muddemal property be dealt with as directed by the trial court after the appeal period is over.