
(2013) 05 BOM CK 0062

In the Bombay High Court

Case No : Confirmation Case No. 2 of 2011 with Criminal Appeal No. 764 of 2012

The State of Maharashtra

APPELLANT

Vs

Nihal Ahmed Rais Ahmed Shaikh @ Neharulla Karamtulla Rais
Shaikh and Rafiq Mohammad Unijan Sayye
 Nihal
Ahmed Rais Ahmed Shaikh @ Neharulla Karamtulla Rais
Shaikh and Rafiq Mohammad Unijan Sayyed Vs The State of
Maharashtra

RESPONDENT

Date of Decision : 07-05-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162, 164, 313, 366, 46
Evidence Act, 1872 — Section 106, 114, 27, 30
Penal Code, 1860 (IPC) — Section 201, 302, 33, 34, 364(A)
Telegraph Act, 1885 — Section 19A, 25, 25A, 5, 5(2)

Citation : (2013) ALLMR(Cri) 3152

Hon'ble Judges : V.M. Kanade, J;P.D. Kode, J

Bench : Division Bench

Advocate : Aniket Vagal, No. 1, Ms. Indu Verma, No. 2, for the Appellant; J.P. Yagnik, Ld. , Assistant Public Prosecutor, for the Respondent

Judgement

P.D. Kode, J.—The aforesaid Confirmation Case arises out of a reference made by learned Extra Joint Ad-hoc. Additional Sessions Judge, Thane u/s 366 of the Code of Criminal Procedure (hereinafter referred as "Code" for the sake of brevity) for confirmation of sentence of death awarded to both accused in Sessions Case No. 78 of 2005. The said accused have preferred above stated Criminal Appeal challenging judgment and order of the conviction, sentence of death and so also other sentences awarded to them. By the judgment and order delivered on 28/29th March, 2012, the learned Judge convicted both the accused/appellants for in furtherance of their common intention along with juvenile accused Nasim Muddus Ansari having committed the offences punishable under:-

(i) Section 364-A read with Section 34 of Indian Penal Code and sentenced each of them to death for committing murder of one Kumar Nitesh of aged 4 years i.e.

son of PW1 Prakash Wadhwa and his wife PW5 Naina, kidnapped and detained by them for compelling PW1 to pay a ransom of Rs. 15 lacs demanded by them;

(ii) Section 387 read with Section 34 of Indian Penal Code, for in order to commit extortion putting PW1 in fear of death of his said son and sentenced each of them to suffer R.I. for 7 years and to pay a fine of Rs. 1,000/- and in default to suffer R.I. for 6 months;

(iii) Section 386 read with Section 34 of Indian Penal Code, for committing extortion by putting PW1 in fear of death of his said son and sentenced each of them to suffer R.I. for 7 years and to pay a fine of Rs. 1,000/- and in default to suffer R.I. for 6 months;

(iv) Section 302 read with Section 34 of Indian Penal Code, for committing murder of said Nitesh son of PW1 & PW5 and sentenced each of them to death;

(v) Section 201 read with Section 34 of Indian Penal Code, for causing disappearance of the evidence of the offences committed by them (and/or giving false information knowingly in respect of the offences committed) with intention to screen themselves from the legal punishment and sentenced each of them to suffer R.I. for 7 years and to pay a fine of Rs. 1,000/- and in default to suffer R.I. for 6 months;

The learned Judge also ordered concurrent running of sentences awarded on second, third and fifth count with set off for the period undergone by them in custody.

2. Such of the facts of said prosecution, necessary for deciding present proceedings are as under:

2.1 According to the prosecution both the appellants i.e. original accused no. 1 Nihal and original accused no. 2 Rafiq and the juvenile offender Nasim (hereinafter for the sake of brevity are respectively referred as A-1, A-2 and J.O.) are original inhabitant of District Ajamgadh, State of Uttar Pradesh. They came to Mumbai for livelihood and were residing in room no. 876 at Turbhe Stores, Navi Mumbai of PW38 Ramsaroj Rajbhar on rent. PW1 was residing in Sector No. 8, Navi Mumbai, Washi. Nitesh son of PW1 used to play in evening along with his friends in front of row houses. A-1 used to sit at said place since 6 to 10 days preceding 26th April, 2004. A-1 by giving chocolates developed intimacy with Nitesh.

2.2 A-1 at 1830 hours on 24th April, 2004 kidnapped Nitesh and boarded Autorickshaw of PW14 Satish More at Sector 8 and asked PW14 to take autorickshaw hurriedly towards Navratna Hotel situated in Sector 17. On the way to said hotel, A-1 abruptly asked PW14 to stop the rickshaw at Shivaji Square. He alighted along with Nitesh by paying Rs. 10/- and ran towards Hotel Navratna.

2.3 PW9 Ramnihor Gupta running grocery shop, PW10 Dindayal Gupta running a tea-stall and PW15 Sou. Mangal Patil also running a grocery shop at Turbhe

Stores Navi Mumbai were acquainted with A-1, A-2 and J.O. visiting their shops. So also PW16 Kesharbai More neighbour of PW15 was acquainted with them. According to the prosecution on 27th April, 2004, Nitesh was lastly seen alive in the company of A-1, A-2 and J.O. by the said witnesses when they had taken him at their grocery shop and tea-stall for pacifying by giving sweets and cold-drinks. The said witnesses then inquired about child and they replied that child was their relative.

2.4 On 26th April, 2004, PW5 mother immediately reported missing of Nitesh to PW1 on phone. PW1 and others searched for him. As PW1 was unable to locate him, on the same day, he lodged missing report Exh. 15 with Vashi Police Station giving description of Nitesh and of his clothes. PSI Jadhav initially and after him PW20 API Vele made inquiry of the said missing case No. 16/04 registered thereon. Circulation about the missing case were issued to all Police Stations in Navi Mumbai, to Assistant Police Commissioner, Control Room, Mumbai, Control Room, Thane City. The pamphlets bearing photograph of child were given to Police Stations from Navi Mumbai, Thane City, Mumbai etc. for displaying at public places. The letters Exhs. 215 to 220 and pamphlet Exh. 221 containing photograph of Nitesh were issued by Vashi Police Station to Control Room Thane City, Mumbai and so also to Publication Branch and Missing Person Bureau, Mumbai and so also to other Police Stations.

2.5 PW1 and PW5 since 1st May, 2004 received phone calls from kidnapper. PW1 received message from kidnapper on phone on 1st May, 2004 that chit containing message was kept at Saibaba Temple near Kamgar Hospital, Turbhe Stores, Navi Mumbai. PW1 approached Vashi Police Station and disclosed regarding it. PW20 went to said temple along with panchas and PW1. They noticed chit Exh. 187 in Hindi script amongst other stating for not to worry about the child and for returning him ransom would be required to be paid. PW20 seized said chit under the panchanama Exh. 58 in presence of panchas PW2 Sumit Ranjane and PW3 Raju Rathod. The reply was prepared and kept in the temple on 2nd May, 2004 with police watch to ascertain if anybody arrives for picking up the reply, but nobody turn-up. However, kidnapper used to make phone calls to PW1 and PW5 disclosing that child was with him and they want ransom for his return. PW1 realising that Nitesh was kidnapped for ransom, approached Vashi Police Station on 5th May, 2004. PW39 P.H.C. Bhagat on duty recorded complaint Exh. 19 lodged by PW1 against unknown persons for kidnapping. Crime No. 124/2004 for offence under Sections 366 and 384 of I.P.C. was registered and the investigation was entrusted to PW40 P.I. Shri Sonwane.

2.6 As PW1 and PW5 were continuously receiving phone calls from kidnapper, PW40 issued requisition letter to Police Commissioner, Navi Mumbai for seeking permission from Home Department for tapping phones of PW1. The order Exh. 157 granting permission to intercept the mobile as well as land line telephone of PW1 was issued by the Home Department upon the request of Police Commissioner, Navi Mumbai. Thereafter conversation ensued in between

kidnapper and PW1 & PW5 were recorded in "11" cassettes by intercepting the telephones since 8th May, 2004 uptill 24th May, 2004, i.e., Exh. Q-1 to Q-11.

2.7 On 10th May, 2004, kidnapper informed PW1 on phone that another chit was kept in the temple of God Jagruteshwar, Sector no. 8 and PW1 was asked to act as per the matters in the chit. On 10th May, 2004, PW40 visited the temple along with PW1 and seized chit Exh. 188 under panchanama Exh. 117 in presence of panch PW13 Jitendra Vasant Raut and one another. The said chit scribed in Hindi was addressed to mother of the child stating that she would not be able to trace out the child despite her efforts as the child was in custody of author and he would return only on payment of ransom.

2.8 PW1 again on 13th May, 2004, received a phone call informing that one plastic bag was kept at the gate of Church situated opposite to Hotel Ramdeo, Sector No. 5, Navi Mumbai and PW1 should go and see the articles in the bag. PW40 visited said place alongwith PW1, pancha PW-6 Jitendra Patil and by drawing panchanama Exh. 97 seized one plastic bag found attached to main gate of said Church containing Chit Exh. 189 scribed in Hindi and a pair of sandle. It was stated in the Chit that as per the assurance author had send the articles of child for the mother to convince her that her child was with him and for getting back mother would be required to pay an amount of Rs. 15 Lacs as a ransom.

2.9 On 13th May in the night PW1 received phone call with caller asking him to keep Rs. 15 lacs ready as per the chit. PW1 showed willingness to make arrangement of Rs. 1 Lac. On 14th May, in the morning PW1 received a phone call of same unknown person asking him to come towards beetle shop near hotel Cafe Sagar Nagpada, Mumbai with the amount and handing over amount to a person with red colour scarf. PW1 disclosed it to PW40. PW40 decided that API PW20, PW1 and they would along with the other police staff towards Cafe Sagar Hotel in civil dress and PW20 would accompany PW1 along with the amount of Rs. 1 Lac for offering to kidnapper and to take custody of child and thereafter to apprehend kidnapper on the spot. Accordingly they went to Cafe Sagar Hotel at about 12 noon and waited for a person with red colour scarf.

2.10 A-2 with red colour scarf at about 1.45 p.m. came towards PW20 and PW1 at Betel Shop. However, child was not with him. A-2 made demand of ransom with PW1 and PW20. They asked him whereabouts of the child. A-2 told that boy was kept at Nagpur and would be returned on receiving ransom of Rs. 15 Lacs. PW1 and PW20 started bargaining with A-2 and disclosed that PW1 could give only Rs. 1 Lac. Thereupon A-2 told PW20 and PW1 that he would inquire with boss and by saying so, A-2 went towards telephone booth and had a talk on phone and thereafter informed them that his boss has agreed to accept an amount of Rs. 1 Lac for returning the child. An amount of Rs. 50,000/- was given to A-2 on his assurance that the child would be returned on the next day i.e. on 15th May, and then he would receive the remaining ransom to get child back. A-2 went away along with the amount. However, child Nitesh was not returned on 15th May or thereafter. PW1 went on receiving phone calls upto 24th May,

wherein demand of ransom of Rs. 5,50,000/- was made for returning the child.

2.11 On 24th May, PW1 went to Vashi Police Station and informed that he was called by kidnapper near Cafe Sagar Hotel at Nagpada, Mumbai with amount of Rs. 5,50,000/-. PW40 decided to lay a trap to catch kidnapper. PW40, API PW20 and other police staff went towards Hotel Cafe Sagar at Nagpada, Mumbai at 12 noon in civil dress. However, they had not taken PW1 along with them. On 24th May, at about 13.00 hours, A-2 known to PW20 and PW40 and the other police staff having seen him on 14th May near said Hotel, was seen along with two more persons, i.e., A-1 and J.O..

2.12 PW40, PW20 and other police staff encircled and caught them on the spot in presence of panchas PW12 Ravikumar Sanap and one another and enquired about their names and residence. All of them disclosed their names and place of residence as Turbhe Stores to the backside of office of Shiv Sena Party, Navi Mumbai. During the personal search taken in presence of panchas PW14, seized visiting card with name of PW1 written on the rear side Exh. 190 found on the person of A-1 by drawing arrest and personal search panchanama Exh. 115.

2.13 On 25th May, at about 8 to 8.30 hrs. PW40 visited the residential place of accused persons at Turbhe Stores locality, Navi Mumbai for tracing child and incriminating articles. However, PW40 and panchas did not find child but found one bottle containing chemical namely Domex. They seized it under panchanama Exh. 160 in presence of panch PW27 Raju Shetty and one another. PW40 sent the three accused persons to Medical Officer of Municipal Corporation Hospital, Vashi for examination.

2.14 According to the prosecution, on 25th May, 2004, in the evening A-1 expressed willingness to make a disclosure statement. PW40 recorded statement made by A-1 that he would point the place where the dead body of the child was buried by drawing panchanama Exh. 89 in presence of panch PW4 Hitesh Khosla and one another. PW40 thereafter issued requisition letter to Tahsildar Thane and Medical Officer, Municipal Corporation Hospital, Navi Mumbai to remain present at the place where the dead body of child was buried, for taking out the dead body by making excavation and for performing postmortem examination. PW40 also took PW1 and his other relatives with him for identification of dead body. Thereafter as per the direction of A-1, PW40, PW22 Tahsildar Patkar, PW21 Dr. Jain, two panchas, PW1 and his relatives went towards the place. A-1 took them towards Pauvna Bridge from village Kopri and showed heap of earth stating that the dead body of the child was buried at said place. Thereafter, the earth was excavated and the dead body of a child found, was taken out in presence of panchas. It was decomposed. The same was identified by PW1 as being dead body of Nitesh, on seeing the clothes and tight from the dead body. PW40 completed discovery and recovery panchanama Exh. 90 in presence of panchas PW4 and one another. PW22 Patkar also drew inquest Exh. 91 in presence of said panchas. The dead body of Nitesh was then sent to Municipal Corporation Hospital, Vashi, Navi Mumbai for postmortem.

2.15 PW21 Dr. Jain performed the postmortem on 25th May, 2004 in between 2015 hours to 2115 hours with the assistance of Dr. S.M. Chitnis. PW21 during the said autopsy noticed following ante-mortem injuries:-

(i) Linear and depressed fracture over right temporal bone, horizontally placed of length 9 cm with blood infiltration at the fractured margins.

(ii) Linear fracture of left zygomatic bone (arch) near medical end with blood infiltration at the fractured margins.

Dr. Bhushan Jain (PW21) and his colleague Dr. Chitnis noticed skeletons with scalp attachment at places on skull with hairs and injury No. 1 as mentioned in column No. 17 and also co-related with injury to skull. Dr. Jain preserved two molar teeth of deceased child for DNA typing test and muscle pieces for carrying chemical analysis. As per the opinion of Dr. Bhushan Jain (PW-21) and his colleague Dr. Chitnis, the probable cause of death was due to head injury sustained to the head. The notes of postmortem performed by Dr. Jain are at Exh. 135. After postmortem, the corpse of Nitesh was handed over to him for obsequies.

2.16 PW34 PSI Shri Dhamal in the same night seized clothes of deceased Nitesh and so also one black thread and tight by drawing seizure panchanama Exh. 85 in presence of panch PW3 and another. On 28th May PW40 sent two teeth of the deceased child to C.A. Mumbai for analysis under requisition letter Exh. 232.

2.17 On 30th May PW20 collected 11 sealed cassettes from custody of PW26 PSI Mhatre of Interception Wing of the Office of Police Commissioner, Navi Mumbai and through PW28 P.H.C. Khopde got conversation from the said cassettes typed by drawing panchanama Exh. 151 regarding the said transcription effected in presence of panchas PW33 Narayan Thadani and one another

2.18 On 2nd June, PW40 received letter from C.A. Mumbai viz. PW-25 Dilip Desai carrying the DNA test upon the parts of the corpse and sample sent, that two teeths of the deceased were not sufficient for carrying DNA test examination and more limbs or parts of the body of the deceased child should be sent to the office of the C.A. for DNA examination. PW40 again requested Tahsildar, Thane and Medical Officer of Municipal Corporation, Vashi to remain present at graveyard at which corpse of deceased was buried. Accordingly PW17 More, Tahsildar-cum-Executive Magistrate, Tahsil Thane, PW21 Dr. Jain, relative of the deceased child along with panchas went to graveyard. Kishor Wadhwa uncle of the child pointed out the place at which dead body was buried. After excavation, body was taken out in presence of panchas, PW17 and PW21 and PW21 collected the skull bone, scalp hair, mandible bone, bones of hands and legs, teeth and bones of thigh and scalp with hair under panchanama Exh. 112 in presence of panchas PW11 Nikhilesh Wadhwa and one another. and thereafter body was reburied at the same place. PW40 on 5th June, under requisition letters Exh. 236, 237 and 238 forwarded said bones collected, viscera of the child and blood samples of parents of child to C.A. Mumbai for carrying DNA test.

2.19 According to the prosecution on 5th June, A-2 during interrogation showed willingness to make a disclosure statement to PW40. Accordingly PW 40 called two panchas PW7 Mangesh Hastak and another and recorded disclosure statement made by A-2 that he would point out the weapon-stone, by drawing panchanama Exh. 103, A-2 thereafter led panchas and PW40 towards Pavna bridge in the vicinity of village Kopri and at said place, some distance away from the place from which the body of the deceased was firstly taken out showed one stone stained with the blood. PW40 seized said stone by drawing panchanama Exh. 104.

2.20 According to the prosecution on 5th June, during interrogation A-1 showed willingness to make disclosure statement PW40 called two panchas PW8 Shankar Morey and another and recorded statement made by A-1 that he would show the place from which articles purchased out of the amount of Rs. 50,000/- were kept, by drawing panchanama Exh. 106. A-1 thereafter led panchas and PW40 to one room in Baiganwadi area and gave a call to a land-lady. Salmabanu the daughter of land lady came with a key and the lock of the room was opened with the said key. PW40 and panchas found one T.V., one D.V.D. Player, one suit case, mixture, wall clock, carpet, one stool, one small table, electrical tube, household utensils, other articles and one bag containing an amount of Rs. 2300/- in the said room. PW40 seized the said articles by drawing further seizure panchanama Exh. 107. He also found one plastic bag containing article 24-sixteen receipts.

2.21 On 6th June, PW40 collected blood samples of all the three accused through Medical Officer, Municipal Corporation Hospital, Vashi by issuing requisition letter Exh. 239. On the same day he collected natural handwriting of J.O. from a milk dairy at Vashi at which the said offender was working by taking him to said dairy. He collected one note-book found in said dairy containing handwriting of J.O.. PW40 seized said note-book Art. 25 Under the panchanama Exh. 86 regarding said event in presence of panch PW3 and another. On the same day, he obtained specimen handwriting of the J.O. on six paper-sheet Exh. 60 under panchanama Exh. 59 in presence of panch PW2 and another. He also obtained specimen figures of telephone numbers in the handwriting of said J.O. on six paper sheets Exh. 191 by drawing panchanama Exh. 118 in presence of panch PW13 and another. On the same day by calling land lady PW30 Salmabanu at Police Station, he seized Lease Deed Exh. 165 and deposit amount of Rs. 1000/- brought by her as asked by him by drawing panchanama Exh. 202 in presence of panch PW37 Kisan Vyawahare and another.

2.22 On 8th July PW40 sent blood samples of A-1, A-2 and J.O. and other seized articles to C.A. Mumbai under requisition letter Exh. 240. He sent specimen handwriting of J.O. the note-book Article A, Article-B and Article-C; three seized Chits Exh. 187, 188, 189, visiting card Exh. 190 to Handwriting Expert, Pune for examination under requisition letter Exh. 241. PW36 Pandit, Assistant State Examiner after examination came to the conclusion that author of writing from question documents marked as Q-1 to Q-4 i.e. Exh. 187 to Exh. 190 and author

of writing from specimen writing marked by him as S-1 to S-12 and natural handwriting from note book marked as N-1 to N-3 was of one and the same person.

2.23 PW40 on 3rd June with assistance of PW32 Suresh Ramchandra Sapkal from MTNL got recorded sample voices of parents of Nitesh and of the A-1, A-2 and J.O. at Vashi Police Station in presence of panchas on two different landlines. Sample voice of A-1 was recorded in two cassettes i.e. Exh. 12 and 13 and that of A-2 in cassette Exh. 14 and that of J.O. in cassette Exh. 15 and that of PW1 in cassette Exh. 16 and that of PW5 in cassette Exh. 16 by drawing panchanama Exh. 161 in presence of panch PW27 and another.

2.24 Upon the request of PW40, the Session Court sent 11 cassettes containing conversation of kidnapper on one side and PW1 and PW5 on the other side; six cassettes containing sample voice of three accused persons and parents of Nitesh to Forensic Science Laboratory, Chandigarh for examination. PW35 Shri Singh, Assistant Director of said laboratory carried the examination and opined that the voice from cassettes Exh. Q-1 to Q-10 and cassettes Exh. 12 and 13 marked as S-1 is of one and the same person i.e. of A-1 and voice from cassette Q-11 and voice from cassette Exh. 14 marked as S-2 is of same person i.e. of A-2 and had accordingly issued the Report Exh. 181.

3. On 19th August, PW40 at the conclusion of the investigation submitted a charge-sheet in the court of J.M.F.C., Vashi against all the accused persons for offences u/s 367, 384, 302, 201 of I.P.C. As directed by the said Court, he submitted separated charge-sheet against Nasim Kuddus Ansari who was found to be of age 16 years and six months in the Juvenile Court, Bhivandi. The J.M.F.C. at Vashi committed case of A-1 and A-2 to the court of session on 8th February, 2005.

4. Both the appellants pleaded not guilty to the charge for offences u/s 364(A), 387, 386, 302 and 201 read with Section 34 of I.P.C. framed against them on 7th June, 2005 and claimed to be tried.

5. The prosecution in support of the case examined in all 40 witnesses, i.e., "34" so far referred and additionally PW18 Rakesh Sharma having a Mobile and Watch Shop at Byculla, from whom on 22nd May, 2004, A-1 had purchased Nokia Mobile Handset Art. 24 and BPL SIM Card having No. 9821658371; PW-19 Abdul Razak Abdul Satar Shaikh from whom on 18th May, 2004, A-1 had purchased a table Art. 22 by visiting his Shop at Janta Market, Turbhe alongwith A-2 and one more boy and carried the said table in the Tempo brought containing T.V., V.C.R. and Cushion; PW23 Jitendra Fool friend of Nitesh and one who had seen A-1 sitting in front of their houses and giving chocolates to Nitesh for 6-10 days; PW24 Riyaz Ahmed Gulab Khan acquaintance of A-1, who had referred him to PW18 Rakesh for purchasing mobile handset required by A-1; PW29 Faridabanu W/o. Sadik Khan from whom A-1 had taken her one room at Bainganwadi, Gowandi on lease on 17th May, 2004; PW31 Ashfak Ahmed Abdul Samad Shaikh

Utensil Trader from whom A-1 and A-2 on 17th May, 2004 had purchased one steel water container, grain container, cooker, mixer etc.. The prosecution, in addition to the oral testimony of the witnesses and the documentary evidence referred, also relied upon other documentary evidence which was prepared during the course of investigation.

6. The defence of A-1 and A-2 was that of denial. Both of them denied that on 26th April, A-1 had kidnapped Nitesh from Sector No. 8, Vashi and taken him through autorickshaw towards Turbhe Store, Navi Mumbai for ransom amount from his parents. They denied of having given phone calls to parents, i.e., PW1 and PW5 to pay ransom. They have also denied of having put any chits anywhere in handwriting of J.O.. They also denied that on 14th May, A-2 took away an amount of Rs. 50,000/- (Fifty Thousand only) from the PW1 in presence of police officer PW20 API Vele and others. They denied that on 25th May, A-1 made any disclosure statement of pointing out the place where the dead body of child was buried and pointed out the place and the dead body of Nitesh was taken out from said place. They also denied that on 5th June, A-2 made disclosure statement disclosing that he would point out weapon-stone and he produced that stone before investigating officer in presence of panchas. They denied that on 5th June, A-1 made disclosure statement disclosing that he would point out the purchased articles and the rented room, where the purchased articles were kept and he did produce any articles before Investigating Officer. According to the defence story, police personnel purchased articles out of the amount given by PW1 and falsely shown recovery from them on their disclosure statement. They denied the voice from cassettes bearing Exh. Q-1 and Q-11 being any of them and also denied that their sample voice was recorded by the police. According to the defence version, one Sanjay Ghadge was the real perpetrator, but police personnel in order to save him, falsely implicated them by creating false evidence.

7. The trial Court after due assessment of evidence came to the conclusion that the prosecution has proved that A-1, A-2 and J.O., in furtherance of their common intention (i) on 26th April, 2004 kidnapped Nitesh for ransom and kept him in their detention and put PW1 and PW5 under the fear of causing death of his son to compel them to pay ransom, (ii) during the period 26th April to 24th May, had put PW1 in fear of causing death of his son for committing extortion of ransom amount of Rs. 15 Lacs, (iii) on 14th May at about 1.30 p.m. committed extorting by taking away an amount of Rs. 50,000/- from PW1 by putting him under the fear of causing death of Nitesh, (iv) in last week of April or first week of May, 2004 had committed murder of Nitesh by assaulting him on his head by stone and (v) caused to disappear of evidence of kidnapping and murder by burying the dead body of Nitesh for screening themselves from the legal punishment of kidnapping for ransom and murder. In consonance with said finding arrived, the trial Court convicted the A-1, A-2 and J.O. for commission of the offences as narrated earlier. The trial Court, after giving hearing to the A-1, A-2 and J.O. as well as the learned counsels for both the sides and duly considering the decisions relied by both the sides, for the reasons stated in

paragraph Nos. 196 to 222 came to conclusion that the case was falling in the category of rarest of rare case and awarded death sentence and the other sentences as narrated earlier to A-1 and A-2.

8. Mr. Aniket Vagal, learned counsel for A-1 and so also Ms. Indu Verma, learned counsel for A-2 by meticulously taking us through the record and making pin pointed submissions thereon assailed the order of conviction and sentence and particularly the death sentence. It is the crux of the submission of both the learned advocates that the prosecution evidence and/or circumstances said to have been established by it fails to establish guilt of A-1 and A-2 for the offences for which they were convicted and sentenced and as such they deserves to be acquitted. The learned counsel for A-2 also contended that atleast benefit of doubt deserves to be given to A-2, in view of the prosecution evidence also denoting that he may not be involved in the offence/offences for which he was charged. Alternatively, the separate submissions were canvassed by placing reliance upon the decision of the Apex Court to contend that the present case would not fall in the category of the rarest of rare case and as such after taking into consideration aggravating factors and mitigating circumstances qua each of the said accused do not warrant imposing extreme penalty of death to any of them. It was also urged to commute said sentence to sentence of imprisonment for life.

9. Mr. J.P. Yagnik, learned APP by laying finger upon the particular part of evidence supported the judgment given by the trial Court. It was urged that cogent reasons has been given by the trial Court for the conclusions arrived on the basis of the evidence surfaced at the trial and as such no interference is warranted with the judgment appealed. By placing reliance upon the number of decisions of the Apex Court, it was canvassed that the trial Court has rightly concluded that case was of rarest of rare nature and the heinous offences committed by A-1 and A-2 with minor child Nitesh, warranted levying of death penalty after taking into consideration aggravating factors as well as mitigating circumstances qua them. The learned APP thus urged for dismissal of the appeal and confirming the sentence of death imposed upon them including the other sentences. It will not be out of place to state that for the sake of brevity instead of separately recording in detail the submissions advanced by both the parties only the crux of their submission is mentioned hereinabove and the submissions meriting reply are dealt hereinafter at appropriate stage.

10. Thoughtful considerations were given by us to the submissions advanced and the record of the proceedings was carefully examined for ascertaining merits of the submissions from the same keeping in the mind the duty of this court of examining the entire evidence on the record due to principal proceedings being the reference made u/s 366 of the Code for confirmation of sentence of death awarded to the A-1, and A-2.

11. At the first blush, we find that in the instant case there being no eye-witnesses for main crime in-question, the prosecution has squarely rested upon

the circumstances established through the evidence of the witnesses, and documents adduced at the trial. It is crux of the submission of the learned APP that said circumstances within themselves form a formidable chain leading to the inference of guilt of A-1 and A-2 in commission of the offences for which they are convicted and sentenced by the trial Court.

12. On the other hand, it is crux of the submission of learned counsels for A-1 and A-2 that all circumstances relied by the prosecution are not firmly established by cogent evidence as required by the law and as such leaving out such circumstances not established, the remaining circumstances relied fails to form a complete chain leading to the sole hypothesis compatible with the guilt of A-1 and A-2 in commission of the offences alleged. It is further submission that circumstances, which can be said to have been established do not lead to the hypothesis compatible with the guilt of A-1 and A-2.

13. The learned defence counsels particularly the learned defence counsel for A-2 has relied upon the following decisions:

(a) Nilesh Dinkar Paradkar Vs. State of Maharashtra, ; in view of possibility of tampering of voice extreme caution is required to be taken in basing the conviction purely on the evidence of voice identification;

(b) Ziyauddin Burhanuddin Bukhari Vs. Brijmohan Ramdass Mehra and Others, , that admissibility of tape recording evidence and caution to be taken that record is not tampered with;

(c) Mahabir Prasad Verma Vs. Dr. Surinder Kaur, , that tape-recorded evidence is corroborative evidence and in absence of deposition or conversation, such evidence cannot be relied;

(d) Chandrakant Ratilal Mehta and others Vs. The State of Maharashtra, that tape-recorded evidence must be sealed at the earliest point of time and should not be opened without the order of the court;

(e) Raman Rai V. Emperor-AIR (29) 1942 Alla. 424-that only Section 51 of Cr.P.C. allowed personal search after arrest, hence, formal arrest is required for personal search;

(f) Rabindranath Prusty Vs. State of Orissa, ; that personal search of police must be offered prior to effecting the search of the accused;

(g) Arizona V. Johnson, 555 U.S. 323 (2009) , regarding personal search under U.S. Law;

(h) Mahendra Mandal and Others Vs. The State of Bihar, , that discovery statement can be used only against the accused making the statement and not against the co-accused.

(i) Anant Bhujangrao Kulkarni Vs. State of Maharashtra, , that accused cannot be convicted merely on circumstance of last seen and finding of dead body near

building in his occupation;

(j) Periyasami Thevan, In re 1950 Madras Law Journal Reports 663, that pieces of circumstantial evidence not sufficient to bring home the guilt. Moral conviction not sufficient. Legal evidence is required to conclude that appellant was the murderer.

(k) Ram Nath Madhoprasad and Others Vs. State of Madhya Pradesh, , that no evidence as to premeditation or of prearranged plan, mere fact that all the accused were seen at the spot is not sufficient for conviction;

(l) State Vs. Mahender Singh Dahiya, , that courts have to be extra cautious not be swayed by strong sentiments of repulsion and disgust. Suspicion no matter how strong cannot and should not be permitted to take place of proof (para 19);

(m) Tulshiram Sahadu Suryawanshi and Another Vs. State of Maharashtra, , that Section 114 and 106 of Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt;

(n) Rajesh Kumar Vs. State through Govt. of NCT of Delhi, , that Life imprisonment rule and death sentence is an exception;

(o) Sangeet and Anr. Vs. State of Haryana-Criminal Appeal No. 490-491 of 2011, that crime and criminal are both important in deciding sentence;

(p) Leslie Small V. State of Delaware-decided on 11th September, 2012, that HIV AIDS one of the mitigating circumstance;

14. Now considering the law laid down by the apex Court in plethora of judgments since the decisions in the case of Hanumanta Govind Nargundkar Vs. State of M.P. reported in AIR 1952 S.C. 353, up-till this day, it is crystal clear that in the cases involving circumstantial evidence, the Court is duty bound to firstly ascertain whether the circumstance relied has been firmly established by the prosecution by leading cogent evidence. It is also settled that only the circumstance firmly established can be taken into consideration and in event of the same being not established, accordingly the same is required to be left out of consideration. Secondly, it is necessary to ascertain whether the circumstances established within themselves form a complete chain compatible with the hypothesis of the guilt of A-1 and A-2 and is not inconsistent with the hypothesis of innocence of the culprit.

15. On the said backdrop considering the record of the case and particularly the judgment under challenge, we find that the trial Court in paragraph No. 41 of the judgment enlisted in all 37 circumstances relied by the prosecution on the count of the same being established by prosecution evidence. Further more the trial Court concluded that the said circumstances established leads to the inference of the guilt of A-1 and A-2. Though we find that while charting out the said circumstances the trial Court instead of properly charting out the circumstances, intermixed circumstances emerging with the evidence pertaining to some

circumstance or circumstances, for the convenience of the discussion, we firstly proposed to consider whether the said circumstances were established or otherwise and thereafter to chart out appropriate circumstances emerging out of it for the purposes of discussion.

16. Now taking up the process of examining whether each of said circumstance can be said to have been established and in the said process taking up of 1st circumstance, i.e., both A-1 and A-2 and so also J.O. were original inhabitant of Uttar Pradesh and they had been to Mumbai for livelihood and were residing at Turbhe Store locality, the reference to the evidence of PW38 Ram Saroj resident of Turbhe Stores, Navi Mumbai discloses that the said witness was knowing A-2 having native place at Azamgar, Uttar Pradesh and he had leased out room No. 876 in Turbhe locality to A-2 on lease of monthly rent of Rs. 300/-. It discloses that witness was knowing A-1 as he was staying with A-2. It discloses that in month of April, 2004 when PW38 had been to Azamgar for attending a marriage, he had received a message from his brother at Mumbai that A-1 and A-2 had kept one boy with them in the room and subsequently killed that child. After careful perusal of the cross-examination of PW-38 effected on behalf of A-1 and A-2, we do not find that his evidence to such effect was dented in any manner due to any answer elicited during the cross-examination.

17. Similarly, the reference to the evidence of PW-10 Deendayal, PW-15 Mangala, PW-16 Kesharbai, and PW-9 Ramvilas reveals that all of them were residing at Turbhe Store locality and knowing A-1 and A-2. It reveals that one boy also used to reside with them. PW-15 Mangala specifically deposed of knowing them as they were residing opposite to her house, while PW16 deposed of themselves residing in her neighbourhood. The perusal of the evidence of aforesaid five witnesses, we do not find anything brought during the cross-examination of the said witnesses having any animus and/or grudge against A-1 and A-2 for giving such false evidence.

18. In the same context, the reference to the evidence of PW-12 panch for arrest panchanama (Exh. 115) of A-1, A-2 and J.O. and the evidence of PW40 reveals that at the time of arrest effected on 24th May, 2004, the arrested accused disclosed their names as stated in the panchanama and address as being Turbhe Store to the backside of Office of Shivsena Party, Navi Mumbai. Thus after considering such unsheltered evidence of the aforesaid witnesses, the trial Court coming to the conclusion of the 1st circumstance referred hereinabove established, we are unable to find any fault in such a finding recorded.

19. Now with regard to 2nd circumstance of A-1 sitting in front of the row house from the houses of locality Vashi Sector No. 8, Navi Mumbai near the place at which Nitesh used to play since 6-10 days prior to occurring of kidnapping and then used to give the chocolates to Nitesh; we find that the said fact has been duly established by the prosecution through the evidence of friend of Nitesh, i.e., PW23 Jitendra Fool. The reference to the deposition of PW23 reveals that the trial Court had asked preliminary questions to the said witness for ascertaining

whether he understands the sanctity of oath. On the basis of answers received to said questions, the trial Court came to the subjective satisfaction of the said witness understanding sanctity of oath. After carefully considering the record relating to the said questions asked and answers received contained in the deposition of PW23, we are unable to find any fault with the trial Court of arriving at such a satisfaction. Needless to add, PW23 having deposed on oath, his evidence will have presumption of truth for the evidence given on oath.

19.1 In the context of evidence of PW23, it will not be out of place to state that with regard to the evidence of a child witness, the Hon"ble Apex Court in the decision in the case of State of M.P. Vs. Ramesh and Another, , case after considering the law prevailing regarding the evidence of child witness in para Nos. 7 to 13, further observed in para no. 14 to the effect"

14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child had been tutored or not, can be drawn from the contents of his deposition.

19.2 The deposition of PW23 further discloses that he had identified A-1 at trial and deposed of knowing him. He deposed knowing him as he often used to sit in front of row house of their house. PW23 then deposed that A-1 often used to give chocolates to his friend Nitesh Wadhwa. He deposed that A-1 used to give chocolates to Nitesh Wadhwa for about 6 to 10 days.

19.3 The perusal of cross-examination of PW23 reveals that he denied the suggestion given of having identified A-1 at the trial due to A-1 being shown to him by the police outside the Court Hall. He also denied of not having seen A-1 earlier to the day of his deposition. He also denied of police having shown A-1 to him at police station at any point of time. PW23 volunteered of PW40 having shown him photograph of A-1 at Vashi police station. He however denied that PW40 after showing him said photograph had asked him to keep the photograph in his mind.

19.4 The learned defence counsels tried to assail the evidence of PW23 by submitting that PW23 having admitted that photograph of A-1 shown to him at the police station and so also further admitted that till disclosing to the police about A-1 giving chocolates to Nitesh, he had not disclosed the same to anybody else including his parents or the parents of Nitesh and having further admitted that two to four persons were often sitting in front of their house daily, urged that no reliance should be placed upon his evidence.

19.5 After carefully considering deposition of PW23 in entirety we do not find any

substance in the said submission canvassed, as we find that the evidence of PW23 neither contains any embellishment within it, nor any element indicating that he had given the evidence due to the tutoring as observed in a test given by the Apex Court, recited hereinabove, nor any element indicating that the same is imaginative evidence rather than based on crude reality. We are not impressed by the features tried to be highlighted by the learned counsels as the evidence of PW23 does not contain any admission for coming to the conclusion that he identified A-1 at the trial due to himself being shown photograph. Similarly, the conduct of PW23 of not disclosing the fact of giving chocolates by A-1 to Nitesh to the parents clearly appears to be of insignificant nature not warranting then to make such a disclosure by a child, who was about four years old at the time of incident. An attempt was made to assail his evidence by pointing out that as it is not supported by the identification made by him at T.I. Parade, coupled with the fact that it is the evidence of child witness, the same will not carry out value.

19.6 In the context of later part of the submission, we find that such submission was not accepted by the trial Court by placing reliance upon the decisions of Apex Court and of this Court referred in paragraph Nos. 53 to 55 of the judgment under challenge and the reasoning given upon such aspect. After considering the crux of the said reasoning that the identification made at T.I. Parade is only a corroborative evidence while identification made by a witness of a culprit at trial is substantive evidence, we are unable to find any force in the submission canvassed or any error on part of the trial Court for not accepting such submissions. We are of such considered view as identification made by the witness at trial being substantive evidence and in event of same inspiring confidence due to being not rendered unbelievable due to any circumstances surfaced on record discarding such evidence only on the count of the same being not corroborated by the evidence of identification made at T.I. Parade cannot be said to be a sound proposition of law. The same is obvious as the same presupposes necessity of such corroboration to substantive evidence in every case. We are of such a view, in view of decisions of the Apex Court in the cases of Munshi Singh Gautam (D) and Others Vs. State of M.P., ; Malkhansingh and Others Vs. State of Madhya Pradesh, and Kanta Prashad Vs. Delhi Administration, .

19.7 As an another facet, we are unable to accept the submission canvassed for discarding the evidence of PW23 as we find that his evidence has passed the test for child witness given by the apex Court narrated earlier, his evidence considered as a whole appears to be natural and without any artificialness inspiring the confidence. Resultantly, we find the 2nd circumstance being duly established by the prosecution.

20. Now considering the 3rd circumstance of A-1 having kidnapped Nitesh from Sector 8, Navi Mumbai and taken through auto-rickshaw to Navratna Hotel side, Sector 17, Navi Mumbai, the evidence of rickshaw driver PW14 Satish More was adduced by prosecution.

20.1 The perusal of deposition of PW14 reveals that on 26th April 2004 at about 6.30 p.m. when he was in Sector 8 of Navi Mumbai A-1 alongwith a child has boarded his rickshaw and asked him to take rickshaw to Navratna Hotel at Sector 17. It reveals that A-1 has abruptly asked for stopping the rickshaw while at Shivaji Square and given a note of Rs. 10/- towards freight and ran away towards Navratna Hotel side, with the child in his lap. It discloses that on 30th April, he had gone to native place with his family member and returned on 25th May, 2004 and then had an occasion to see photograph of missing child in the Office of the Association of Auto-rickshaw Driver at Navi Mumbai. It reveals that then he recollected the incident of 26th April of taking said child by one person and then on 30th May, he had approached the police station and at the police station he had seen the person who had hired his rickshaw and taken the boy towards Navratna Hotel and identified A-1 then at the police station as being the said person who had taken a child seen by him in photograph in his rickshaw. It discloses that thereon his statement was immediately recorded by the police. He identified A-1 at the trial as being the said person who had taken away the said child by his rickshaw etc..

20.2 After close scrutiny of his evidence in light of answers given by him during the cross-examination, we find that he had given the candid answers during the cross-examination regarding having not seen A-1 prior to 26th April, and till 30th May, not knowing the name, father's name and surname or the place of residence of A-1 and on 30th May, in his presence police having asked A-1 said details, himself attending Court of Sessions as a prosecution witness in some other cases, not remembering the date on which he had been to the Office of Association of Auto-rickshaw Driver and the date on which he seen the photograph, but the same being two days prior to 30th May, 2004. PW14 on reading the news he immediately felt of going to police station for disclosing the facts within his knowledge, but having gone 2-3 days after reading the news. He also replied of himself being not called to participate in any T.I. Parade. He duly denied all the suggestions of having deposed falsely at the behest of police.

20.3 Thus considering the evidence of PW14 as a whole, we find that his evidence is natural and does not contain any element revealing artificialness further denoting that he has not deposed the truth or deposed at the behest of police due to being under their thumb by virtue of his occupation. As a matter of fact hardly any material surfaced during his cross examination for supporting suggestion of such nature given to him. As we find that his evidence inspire confidence, for the same reasons for which we declined to discard the testimony of PW23 on the count of identification made by him at trial being not supported by earlier identification by him at T.I. Parade; we decline to accept the defence criticism that identification made by him of A-1 at trial as a passenger who had boarded rickshaw with a child does not inspire confidence. We are of such opinion after taking into account the chronology of events which made by PW14 to go to Vashi Police Station after seeing the photograph of a child in the Office of Association, i.e., the person had carried the said child with him by his auto-

rickshaw from Sector 8 to Navratna Hotel side in Sector 17 on 26th April. We also find that the time gap in between the relevant events or PW14 having been to Vashi Police Station in the month of May being duly explained by him and the explanation given by him of going to his native place etc., having remained undented after cross-examination. Without unnecessarily dilating we observe that considering his evidence as a whole, we do not find it disclosing any unnatural conduct on his part. Needless to add that the fact of circulars, pamphlets of missing child being exhibited at prominent places has been duly established by the prosecution through the evidence of investigating Officer PW40 and the same has practically remained unsheltered.

20.4 Similarly, considering in proper perspective the events which have occurred on 26th April, as disclosed by PW14, we do not find any substance in the defence criticism that even accepting occurrence of such event, it is difficult to perceive that PW14 could have remembered either the person or the child carried by him and travelled. We are of such view as the said events deposed by PW14 itself disclose the reason for remembering the said happenings, i.e., carrying of such a child by A-1, boarding the rickshaw, and abruptly alighting the same at Shivaji Square, paying Rs. 10/- and running away with the child towards Navratna Hotel side. We find that all the said events within themselves definitely indicate PW14 having a fair opportunity to observe A-1 and child and it cannot be accepted that he could have seen only glimpses of said passenger and as such the identification made by him of A-1 at the trial is vulnerable or not inspiring the confidence. Needless to add that hardly any material supporting such submission was elicited during the cross-examination. We further add that the evidence of PW14 reveals that he had seen A-1, i.e., the person who had carried the child at Vashi Police Station and identified him. The evidence of PW14 does not reveal that police had shown him A-1 at the police station. The said facet also reveals that identification made by him at trial is not on the basis of having seen the person only on 26th April, but it has also basis of having seen him in month of May at Vashi Police Station and having identified him and then during recording of his statement gathered the details regarding the name of A-1. As a net result, we find that the evidence of PW14 considered alongwith the relevant part of the evidence of PW40 duly establishes A-1 being the person who had carried Nitesh in rickshaw soon after he was found missing at the place he was playing or in other words Nitesh was in the company of A-1 after he was found missing. The same leads to the conclusion of the prosecution having duly established the 3rd circumstance under consideration.

20.5 The learned counsel for A-1 in the context of aforesaid evidence and particularly that of PW14 by making reference to the evidence of PW40 urged that the prosecution has not led any specific evidence regarding the places at which the pamphlets were distributed or affixed or PW40 having any steps taken for affixing the same at Railway Station, Rickshaw stand and concerned area. We do not find any substance in said submission, as in our view the prosecution had lead the evidence which had yielded positive result, i.e., PW14 having

approached the police station for informing having seen the child with a person after seeing the pamphlet affixed in the Office of Union. Needless to add, the prosecution being required to lead only evidence establishing commission of offences for which A-1, A-2 and J.O. are tried and not the evidence regarding every step taken by the police while inquiring the missing complaint, the evidence as tried to be canvassed cannot be said to be essential for the present trial, nor the prosecution can be blamed for not adducing such evidence. It can be further added that it is not the case of the accused persons that no such pamphlets were distributed and/or circulated. Thus the aspect pointed cannot be said to be affecting either the prosecution case or the evidence of PW20, PW40 or that of PW14 who had claimed to have approached the police after seeing the pamphlet.

21. Now with regard to the 4th circumstance of PW1 having lodged missing complaint (Exh. 15) in the night of 26th April and missing case being registered thereon and the pamphlets photographs of Nitesh being published, apart from any significant dispute regarding the said aspect made on part of the defence the same is found duly established by the evidence of PW1, PW20 and of PW40. It will not be out of place to consider the submissions advanced on behalf of defence that the reference to said missing complaint does not reveal that then PW1 has disclosed that Nitesh was wearing Tight, which was made basis by him while identifying the corpse found from the place near Puvna Bridge pointed by A-1. It was contended that PW1 had deliberately made the improvement of Nitesh wearing Tight at trial for the sake of implicating the accused with the said corpse in all probability due to his grief that his child was not found. We are unable to accept the said submission and particularly the submission that PW1 should have mentioned Nitesh wearing of Tight in a missing complaint. It needs no saying that the object behind lodging a missing complaint being always to furnish the necessary details enabling person searching the missing person to identify, it will be difficult to perceive that wearing of Tight which would be under the garments would have been feature necessary to disclose while lodging such complaint. We are of such view as the perusal of the evidence pertaining to missing complaint reveals the other necessary details such as age, complexion, height, physique, nature of the face and the clothes were duly found disclosed in the said complaint.

22. Now taking up the 5th circumstance of Nitesh being seen in the company of A-1, A-2 and J.O. by the persons residing at Turbhe Stores locality on 27th April, 2004, the prosecution has relied upon the evidence of the persons from the said locality, i.e., PW9, PW10, PW15 and PW16 about which some reference had been made by us while considering the 1st circumstance of A-1, A-2 and J.O. residing in Turbhe Stores locality. The further reference to the evidence of PW9 reveals that on 27th April, 2004, A-2 alongwith the child had been to his grocery shop, the said child was crying and PW9 advised A-2 to take the child to house and give the food to pacify him and accordingly A-2 has left. Similarly, evidence of PW10 Deendayal Gupta having Tea-stall reveals that one month prior to 25th

May, 2004 he has seen the child in a photograph shown to him by the police. He deposed that the child aged about 3 to 4 years with A-1 and A-2 to whom he was knowing due to themselves residing in adjacent lane to his Tea-stall. He deposed that on the said day, A-1 and A-2 brought the said child to his Stall and they had a cold-drinks for them as well as for the child. Similarly, the evidence of PW15 Mangal reveals that she was next door neighbour of the accused persons and on 27th April, 2004, A-1, A-2 and one more boy had been to her grocery shop alongwith a small child of age about 4 years and child was crying. Her evidence discloses that on her query to A-1, A-2 and J.O. and the boy regarding the said child they replied that the child was of their relative. Alike the evidence of the earlier witnesses, her evidence further discloses that on 27th April, 2004 police had been to her alongwith a photograph of a child and on looking the photograph, she informed that said child was seen by her in the company of A-1, A-2 and J.O. on 27th April, 2004. Similar is the evidence of PW-16 Kesharbai of having seen the child in the company of A-1, A-2 and J.O. for two days and then child was crying.

22.1 After carefully considering the deposition of all the said witnesses, we find that aforesaid core of their testimony has not been shaken in any manner. The trial Court considered all facets of evidence of the said four witnesses in the discussion made in paragraph Nos. 68 to 71. The said discussion amongst other reveals the reason for the said witnesses for remembering the said child in the company of A-1, A-2 and J.O. and identifying photograph of the said child when police had approached them. After careful perusal of said reasoning we are unable to find any fault therein or any cogent reason for not accepting the finding arrived by the trial Court on the basis of their evidence that by such evidence the prosecution having established the circumstance under consideration. At the cost of repetition, we observe that hardly there is any cogent reason for not accepting the said finding as a cumulative effect of the said evidence.

22.2 It is indeed true that while recording evidence of PW9 and PW10, they were not shown the photograph of a missing child to adduce their evidence whether the photograph shown to them by the police was that of missing child. However, such a lacuna is found covered while adducing the evidence of PW15 and PW16 as their evidence shows that they were shown the pamphlets at page No. 337 in the charge-sheet bearing the photograph of missing child. The evidence of both the witnesses discloses that the child seen by them with A-1, A-2 and J.O., was the child in the said pamphlet. Thus, as a cumulative effect the evidence of all the said witnesses leads to the conclusion of the child with A-1, A-2 and J.O. was Nitesh, we are unable to find any fault with such finding arrived by the trial Court. We are of such considered opinion as apart from the defect from the evidence of PW9 and PW10 pointed by the learned defence counsel and the same found to have been cured by the prosecution by adducing the evidence of PW15 and PW16; the said evidence considered in proper perspective reveals the period during which the said witnesses had seen the child was practically the same, all

of them were knowing A-1, A-2 and J.O. residing in the same locality and had reason to remember the relevant event of the child being in their custody as disclosed in the evidence of each of the said witnesses.

22.3 Learned counsel for A-1 tried to assail the said evidence by urging that the evidence of all four witnesses is regarding having seen the child with A-1, A-2 and J.O. on 27th April, 2004. However none of them have deposed that thereafter they had not seen either A-1, A-2 and J.O. or the boy in the said area. It was urged that since the evidence reveals that all of them have seen them on the same day and almost about the same time sounds artificialness in the said evidence and their evidence is liable to be discarded as evidence of got-up witnesses. We are unable to find any force in said submission. The said evidence is adduced by the prosecution for establishing that deceased was seen alive in the company of A-1, A-2 and J.O. on the said day in the said locality. In event of the deceased being in company of A-1, A-2 and J.O. even thereafter in the said locality, the A-1, A-2 and J.O. could have elicited such material from the said witnesses. In event of the said witnesses having not seen the A-1, A-2 and J.O. and the deceased together in the said locality after 27th April, or even prior to that then they were not expected to depose to such effect. A-1 and A-2 on their own part having not brought any material on the record for any meaningful purpose for establishing that either prior to the said date or thereafter they were together, on the submission canvassed the evidence of the said witnesses cannot be branded as smacking artificialness. Even the case regarding the other submission is no different, i.e., in event of the A-1, A-2 and J.O. and the deceased having been together in the said locality only on the said day and said time then it could not have been expected from the said witnesses to depose of having seen them earlier or afterwards. It can be added that considering the purpose for which the child was kidnapped, it is difficult to perceive even though the residents of said locality the A-1, A-2 and J.O. would have openly roamed alongwith the child. Further more the evidence of said witnesses considered in proper perspective also denotes the reason for which the said child was taken out by the A-1, A-2 and J.O., that is for pacifying the crying child. Thus even examining from said angle none of the said submissions have any merit of affecting the conclusion arrived regarding the 5th circumstance.

23. Now taking up the 6th circumstance of PW1 having received phone calls making a demand of ransom amount and chits being kept with message in two temples, i.e., first chit (Article A-Exh. 187) found on 1st May, 2004 in the temple of Sai Baba, second chit (Article B-Exh. 188) found on 10th May, 2005 in the temple of Jagruteshwar and third chit (Article C-Exh. 189) alongwith pair of sandal on 13th May, 2004 in a bag at the gate of Church situated in front of Hotel Ramdeo from Navi Mumbai locality, the same are found established by the prosecution mainly through the evidence of PW1, to some extent the evidence of PW5 and by and large the evidence of police officers who had taken the steps upon the information received from PW1 of receipt of phone call from the kidnapper and the panch witnesses who had accompanied PW1, police personnel

and the panch witnesses who had visited the relevant spot.

23.1 The reference to the evidence of PW1 reveals that he has given the evidence by and large in conformity with the prosecution case narrated hereinabove relating to occurrence of such events on the respective dates, i.e., 1st, 10th and 13th May, 2004. With regard to the events of 10th May, 2004, PW20 and panch witnesses viz. PW2 and PW3 who had accompanied PW1 and police for going to the spot had given evidence in conformity with the prosecution case and particularly in consonance with the seizure panchanama Exh. 58 under which Chit (Art.A) kept in the said temple was seized by the police. The evidence of PW5 also reveals of PW1 started receiving the call from kidnapper since 1st May, 2004. The evidence of PW1, PW2, PW3 and PW20 reveals that after PW1 receiving the phone call from kidnapper on 1st May, 2004, had informed the said matter at Vashi Police Station and thereafter he alongwith PW20, PW2 and PW3 had been to the said temple and as informed on phone a Chit (Art.A-Exh. 187) containing message was found kept at the Sai Baba Temple near Kamgar Hospital Turbhe Stores Navi Mumbai and was seized by the police by drawing panchanama Exh. 58.

23.2 After careful scrutiny of the evidence of the said witnesses, we do not find any significant material elicited during the cross-examination rendering their account of occurring of such event unbelievable. In the said context, though the learned defence counsel for A-1 tried to assail the said evidence by pointing out that PW2 claimed that police pick up the chit which was behind Saibaba Temple, while PW3 claimed that PW1 pick-up the chit and same was in the Temple. It was also pointed that panchanama Exh. 58 reveals that PW2 and PW3 were required to act as panch for something produced by the complainant. It was urged thus the panchanama reveals that they were aware as to what was to be recovered. It was urged hence the evidence regarding seizure u/s 27 is vitiated. After careful consideration of the evidence of PW1, PW2 and PW3 and the panchanama Exh. 58, we find that the said trivial disparities cannot be said to be affecting the main core of their evidence of receiving message, of keeping of Chit, visiting the place and Chit being found at the said place. Similarly, considering the evidence of panch witnesses and panchanama Exh. 58, we find that Section 27 of the Evidence Act has no application for said seizure panchanama effected regarding the article found in the said temple and as such the submissions canvassed by the learned counsel are thoroughly misconceived.

23.3 Further part of evidence of PW1 amongst other discloses that by the said Chit written in Hindi PW1 was communicated that for returning of the child payment of ransom of Rs. 15 Lacs was necessary and amongst other, material giving him threats, he was asked to prepare the reply in event of himself being ready for the same and keeping the same in the temple. It discloses that accordingly PW1 prepared the reply and kept in the said temple and police kept watch, but nobody arrived for picking up of said reply. The evidence of PW1 to such extent is found corroborated by the evidence of PW40.

23.4 With regard to the aforesaid evidence, the learned counsel for A-1 pointed out that as per the evidence of PW40 on 1st May, 2004 itself the reply-chit with some cash was kept while the evidence of PW20, PW2 and PW3 does not reveal the day on which the said reply was kept or any cash was kept alongwith the reply. The learned counsel urged that the evidence also does not explain the manner in which the chit was kept, i.e., whether any weight was kept on it or any inquiry was made. The learned counsel also tried to canvass that no evidence is adduced whether any inquiry was made in the temple to ascertain whether anybody had seen the person who had kept the chit. It was urged that reply allegedly kept was also not produced at the trial. It was urged that the call dated 25th May, 2004 received by PW1 regarding the said chit was not traced during the interception. After carefully considering the said submissions, we are of the view that no dilation upon the said matters pointed is necessary except stating that the said matters cannot be said to be affecting the evidence adduced at the trial regarding the relevant event.

23.5 The evidence of PW1 further discloses that on 3rd and 4th May, 2004, he had received threatening from kidnapper on phone at his residence that if he failed to pay ransom of Rs. 15 Lacs, then his son would be cut into pieces and body would be thrown near Sagar Vihar Boat Club. It discloses thereon 5th May, PW1 had lodged F.I.R. (Exh. 19). All the said evidence of PW1 referred so far being found corroborated by the matters stated in FIR (Exh. 19), the same is worthy of credence and accepted. Thus by all the aforesaid evidence the part of the circumstance regarding the event of 2nd May, 2004 and particularly the demand of ransom of Rs. 15 Lacs from PW1 by kidnapper and dire consequences in event of not satisfying the same is duly established.

23.6 Now considering further part of the same circumstance regarding further event occurred no difference is found, as the same is found duly established by the evidence of PW1 and that of PW40. The said evidence reveals that PW1 on 10th May, 2004 at about 7.45 p.m. from the same kidnapper, received a call that 2nd chit (Art.B-Exh. 188) was kept for him at Jagruteshwar Temple in Sector No. 7 and afterwards footwear would be send as a proof of kidnapping of his son by them. It reveals that PW1 thereafter informing the happening to PW40, alongwith panch PW13 Jitendra Raut and another they had been to the said place and seized the Chit (Art.B-Exh. 188) by drawing panchanama Exh. 117. After careful perusal of all the said evidence alike the evidence regarding the earlier event, we do not find core of their evidence being shaken during the cross-examination except bringing on record minor discrepancies regarding the details of the events taken place at Jagruteshwar Temple. The evidence of PW13 and so also of other witnesses is found duly corroborated from the matters stated in the panchanama Exh. 117, would be an another ground for placing reliance upon the said evidence. Without detailing the matters stated in the said second Chit (Art.B), it can be said that the said chit was mainly written for the mother of child reiterating demand of Rs. 15 Lacs and about the consequences in event of failure to comply the same and sounding the inability of the police to trace out

her son etc.

23.7 Thus all the said evidence worthy of acceptance duly establishes the further part of the circumstance under consideration.

23.8 Now considering the last part of the circumstance under consideration pertaining to the events which had occurred on 13th May, 2004, the reference to evidence of PW1 and PW40 and panch witness PW6 as well as PW1 reveals that PW1 after receipt of the telephone message from kidnapper on 13th May, 2004 at 11.20 a.m., stating that third chit was kept with pair of sandal of child in a bag hanging at the gate of Church opposite to Ramdeo Hotel Navi Mumbai and informing the same to PW40, the police party, panchas and PW1 had been to the said place and seized the plastic bag containing pair of the sandal and Chit (Art.C) by drawing the panchanama. The perusal of said Chit amongst other reveal that the same was also addressed to the mother of child, i.e., PW5 and amongst other conveying that after seeing the sandal sent she would realize of her son was in the custody of kidnapper. Amongst other, it also conveyed that it was the last letter and the decision regarding paying price of Rs. 15 Lacs for return of child was to be taken by her and she would decide whether she requires the child dead or alive and delay would cause problem for her etc.

23.9 After careful perusal of all the said evidence alike the evidence regarding the event of 10th May, 2004, we do not find core of said evidence being shaken during the cross-examination except bringing on record minor discrepancies regarding the details of the events taken place at the gate of Church. The evidence of PW6 and so also of other witnesses is found duly corroborated from the matters stated in the panchanama Exh. 97, would be an another ground for placing reliance upon the said evidence. After considering the matters stated in the third Chit (Art.C) of which gist is stated hereinabove, it can be very well said that all the said evidence duly establishes occurrence of such event and in turn the demand for ransom made by the kidnappers by giving the calls and/or sending the Chits to PW1.

23.10 We are unable to give any credence to the attempts made by both the learned defence counsels for A-1 and A-2 to assail the aforesaid evidence by submitting that since the evidence adduced by the prosecution does not link both the accused with the matters stated in the said chits, as it is the prosecution case that both A-1 and A-2 were illiterate. It was further canvassed that even prosecution evidence is to the effect that the said chits were written by J.O. Needless to add that, the Chit being in the handwriting of J.O. and not in the handwriting of A-1 and A-2 would not be a circumstance absolving them as the said circumstance is required to be considered alongwith the other circumstances. Without enlisting all the events occurred, it can be safely said that the said events had clearly established that A-1 and A-2 were acting in consonance with the matters stated in the said chits. The link of A-1 and A-2 with the said matters is duly established by the evidence adduced at the trial regarding such acts committed by them. Thus all the said evidence worthy of

acceptance duly establishes the further part of sixth circumstance and all the aforesaid evidence in turn establishes 6th circumstance under consideration.

24. Now taking up of 7th circumstance charted out by the trial court to the effect of PW1 having lodged complaint Exh. 19 with Vashi Police Station on 5th May, 2004 regarding demand of ransom for return of child, during the discussion made earlier regarding the evidence of PW1, it has been already observed about the said facet is spelt from his evidence and his evidence is corroborated by the matters stated in the said complaint. The fact that such a complaint was lodged by PW1 on the said date and time is further spelt from the evidence of PW39 P.H.C. Janardhan who had recorded said complaint and registered the crime thereon.

24.1 Though both the defence counsels tried to assail the evidence of PW1 by submitting that as Nitesh was missing since 26th April, phone calls were allegedly received since 1st May, there appears to be unexplainable delay in lodging said complaint as the matters from the phone calls or the Chit allegedly received on 1st May, discloses the prosecution case of child was kidnapped for ransom. It was urged that said delay raises grave suspicion regarding of occurrence of such events uptill 4th May, as claimed by the prosecution and in turn leads to the inference that same is fabrication made for explaining the delay occurred in lodging the complaint.

24.2 After carefully considering the evidence pertaining to the said events on the backdrop of the conduct of father whose child was missing and inspite of the reply kept by him in Sai Baba Temple, nobody had turn-up for picking the same, we are unable to accept that the conduct of PW1 for not lodging the complaint uptill 5th May shows unnatural conduct suggestive of the inferences as tried to be canvassed. We are of such a view because the evidence of PW1 reveals that he had already lodged a "Missing Complaint" and inquiry thereon was in progress. Similarly, considering the interruption occurred after reply was not pick-up by the kidnapper, we do not find any fault on part of PW1 of not rushing to lodge the complaint on 3rd May. Such a conclusion is fortified from the further conduct of PW1 of lodging the complaint on the next day after the call demanding ransom and threat was repeated on 4th May. We may add that having due regard to the situation in which PW1 was placed would not warrant judging his conduct with mathematical scales as attempted by the defence. Hence, we do not find any substance in said submissions canvassed and observe that prosecution has duly established the 7th circumstance under consideration.

25. Now taking up crucial 8th circumstance of A-2 having come near Hotel Cafe Sagar at Nagpada for receiving the amount towards the ransom and without returning the child having taken away part payment of Rs. 50,000/- with assurance of returning the child on next day, the reliance is placed by the prosecution upon the relevant part of the evidence of PW1, PW20 and PW40. The perusal of said evidence reveals that on 14th May, 2004 in the morning PW1 received a message from kidnapper asking him to come towards the said Hotel

at Nagpada with ransom amount and child would be returned after giving the amount to a person having red colour scarf on his person. It discloses that after receipt of said information, PW40 decided to lay a trap by going in civil dress and to catch the kidnapper after having the child in custody. It discloses that accordingly PW1, PW20, PW40 alongwith other staff had been to said place. As decided PW20 remained alongwith PW1. After seeing A-2 having red colour scarf coming towards Cafe Sagar Hotel but without child, the inquiry was made with him regarding whereabouts of the child. A-2 disclosed that the child was at longer distance and would be returned after full payment of ransom amount. It discloses in detail the events occurred including that of bargaining of ransom amount and lowering the same to Rs. 1 Lac after talking with his Boss on telephone, A-2 talking on telephone with PW5 and warning her of not receiving son back, PW5 insisting PW1 to make the payment, PW1 making the payment as per the signal given by PW20 who heard the said talks, A-2 leaving the said place in taxi, one police official following him in a private car, police then having decided not to arrest A-2, in view of the safety of son of PW1. The evidence of PW1 further discloses in the evening receiving the call from kidnapper, PW1 apprising him about the payment made to A-2, kidnapper turning down his request to talk with the son on the count of his son being kept at Nagpur etc..

25.1 After careful scrutiny of the evidence of said three witnesses, we do not find any disparity in their evidence regarding occurrence of such event except minor natural discrepancies occurring in describing details of the said event due to narration of the same by three different persons who were party to the same. We further add that even after taking into account the answers elicited during the cross-examination, we do not find the core of their evidence described hereinabove having shattered in any manner due to the variance upon trifling matters.

25.2 The learned defence counsel for A-1 also urged that the prosecution has not brought anything on record as to how the A-1, A-2 and J.O. were acquainted with the area from which Nitesh was kidnapped or why they had selected only son of PW1 for kidnapping from the area which was only about 10-15 kilometers away from the place of residence of the accused. It was canvassed that nothing had surfaced on the record as to how the A-1, A-2 and J.O. had got residential phone number and mobile number of PW1. It was urged that it was necessary for prosecution to establish the same as PW1 admitted that he never seen the accused persons in his locality. It was canvassed that it could not be visualised that kidnapped boy would have given the said numbers to the kidnappers. The learned counsel thus contended that absence of such material further denotes that investigation was not proper and A-1, A-2 and J.O. were made scapegoat and as such in absence of such material evidence, it will be risky to place reliance upon the evidence of PW1 as apparently the same is evidence of father who had blown the puppet as instructed by the investigating officer.

25.3 We are unable to find any merit in such submission canvassed without there

being any foundation for canvassing such submission. It is difficult to perceive that the prosecution was bound to establish the source from which A-1, A-2 and J.O. gathered said details, i.e., phone numbers of PW1. It is difficult to perceive that it was necessary for the prosecution to establish the reason for which son of PW1 was kidnapped, i.e., child from the area only about 10-15 kilometers away from the residence of A-1, A-2 and J.O.. As a matter of fact, the reason for committing such act qua Nitesh being a fact within the knowledge of A-1 and A-2 and establishment of such fact being not necessity for proving the commission of crime, we find it extremely difficult that non-establishing the same or the source from which A-1, A-2 and J.O. gathered the details about the phone numbers of PW1 can be said to be affecting the prosecution or the evidence adduced by the prosecution establishing commission of crime. Further more in light of the defence submission that PW1 admitted that he had not seen A-1, A-2 and J.O. in his locality within itself reveals there being no earlier connection in between PW1 and A-1, A-2 and J.O.. Hence, investigating agency having not explored the reason or unable to explore the reason regarding said aspects canvassed cannot be said to be a facet pointing either faulty or improper investigation. Needless to add, that without there existing any material on the record, the evidence given by PW1 on oath raising presumption of truth for such evidence cannot be branded as an evidence of a person blowing the puppet as instructed by the investigating officer.

25.4 Thus we do not find any merit in such submission canvassed and so also another misconceived submission canvassed that there is no statement of PW1 recorded regarding the matters deposed by him and recorded on page Nos. 193 to 198 of the paper-book, i.e., the matters pertaining to the events which had occurred on 10th of May, 2004 and thereafter uptill the recovery of dead body. Such submission is canvassed upon the erroneous assumption of necessity of recording statement of PW1 for every event to which he was party during the said period. Needless to add, the glance at the said evidence reveals that during the same PW1 has duly deposed about lodging of his complaint on 5th May, 2004. At the cost of repetition, it can be added that the law being set in motion after the missing complaint was lodged on 26th April, 2004 and inquiry/ investigation thereon having commenced and the further events occurred thereafter with certainty having led to the inference of kidnapping for ransom was committed and then PW1 having lodged the complaint and crime thereon being registered, we find it difficult to perceive any necessity of recording his statement regarding the events occurred thereafter and the one to which he was party. Needless to add, that for significant events occurred during the course of investigation the documentary evidence being prepared, i.e., drawing of panchanama of the relevant event, also rules out the necessity of recording statement of PW1 qua occurring of such further event.

25.5 Similarly, the fact of Rs. 50,000/- were paid to the kidnapper being established by the prosecution evidence and/or the circumstance having not surfaced rendering the said established facet of prosecution case unreliable, we

find it difficult to give any undue significance to the circumstance pointed that no panchanama was drawn or no entry was made when PW1 had gone for making the said payment. Even further submission canvassed that the police had not arrested A-2 on the spot or no efforts in said respect was made, or failure of the police party to follow A-2 in spite of themselves having vehicle or A-2 was allowed to go without gathering any further information and the same being indicative of non-occurrence of such event and the evidence thereto being imaginary also does not deserve any credence. We are of such opinion as a fact cannot lost sight of child being in possession of the kidnapper and the police being interested in retrieving the child. It is difficult to perceive that in such situation the police could have taken any hasty steps as canvassed. Similarly, considering the situation prevailing at the spot at Nagpada, which is one of the over crowded area of Bombay, it is difficult to view with suspicion the failure of police to follow A-2. Hence, we find no merit in further submission canvassed that then police could have nabbed A-2 and asked him to give a call to his associate and inform that entire amount was given and what next step should be taken, and hence non-acting by them in such a manner makes the story canvassed doubtful.

25.6 The learned counsel for A-1 also urged that though the evidence reveals that A-2 had dialed from PCO to his Boss, no efforts were made to trace out the number which he had dialed or the person with whom he had a talk. It is difficult to find any substance in such submission canvassed, as A-2 then dialing to his Boss was an unexpected movement and as such no pre-arrangement could have been made for gathering the details of the number or the person with whom he had a talk.

25.7 The learned counsel for A-2 on her part had tried to assail the aforesaid evidence on the count of there being no statement of PW1 recorded regarding the said events nor there being any panchanama of occurring of event of police party alongwith PW1 having been to the spot at the Sagar Hotel, nor any station diary being effected regarding the said event. We find no force in the said submission as panchanamas are drawn as a contemporaneous document/ corroborative evidence for making record of either act of the accused or the effect of an act of the accused. In the present case, it was decided to allow the kidnapper-A-2 to go after the bargaining was over, for the sake of safety of child in the custody of the other kidnapper, i.e., A-1 whose involvement by then was transpired. It was also not certain that on the said day kidnapper would visit said place, as on earlier occasion the reply-chit kept in the temple was not collected on his behalf. Hence, it is difficult to perceive any inherent need of drawing of panchanama of the relevant event as canvassed. Further more the fact of occurrence of such event being established through the evidence of PW1, PW20 and PW40, it is difficult to perceive that absence of such evidence would render their evidence unbelievable. The case regarding the prosecution having not adduced the evidence of photograph of kidnapper attempted to be taken at said spot is also not different. It can be added that the learned counsel for A-2 has

not brought to our notice any evidence surfaced regarding said arrangement of taking photographs had successfully resulted in having photograph of the kidnapper. Even the submission advanced by the learned counsel that there is no corroborative evidence to the evidence of PW1, PW40 and PW20 regarding occurring of such events is without any merit due to the same being based upon presupposition of necessity of such corroborative evidence. It can be added that considering the events occurred at the spot and the circumstances related to said events, it is difficulty to perceive that there could have been any other corroborative evidence.

25.8 We do not find any significant substance in the submission canvassed by the learned counsel for A-2 by pointing out variance occurring in the deposition of PW1, PW20 and PW40 regarding the part of body at which the person was wearing red scarf, i.e., whether at head as claimed by PW1 or at his neck as claimed by PW20 or at his wrist as claimed by PW40. We are unable to give much significance to said aspect in absence of precise evidence on record regarding the exact spot at which each of the witness had seen said kidnapper with such scarf. We are of such view as such a movable article could have been moved by him during the episode from one part to another part of his body. We also do not find any merit in such variance pointed out by learned counsel regarding PW40 claimed PW20 was given the money for payment, while PW1 claimed that he had paid the money, i.e., Rs. 50,000/-. The claim staked by both the witnesses being regarding different occasion, i.e., claim of PW40 being regarding the person who was given money for payment and that of PW1 regarding the person, i.e., himself having actually paid the money; the difference pointed is immaterial. After perusal of the evidence of PW1 and PW40, we do not find that there exists any irreconcilable indifference regarding the place at which talk had ensued in between A-2 and PW1, i.e., as per PW1 opposite side of Hotel Cafe Sagar and as per PW40 near the Betal Shop. We are of such view as discrepancy is apparently regarding the nomenclature of the place, i.e., PW1 described the same qua the location of the hotel while PW40 qua the location of Betal shop.

25.9 Resultantly, we are unable to agree with the submissions canvassed that in absence of documentary evidence, i.e., any evidence in the nature of photographs or video-shooting regarding payment of ransom, due to the said variances pointed or the features canvassed, the cogent evidence of PW1, PW20 and PW40 fails to establish the circumstance under consideration. We also do not find any substance in the ancillary submission canvassed that said variances pointed also adversely reflect ability of police witnesses to nab A-2 on 24th May, 2004 alongwith A-1 and J.O. as said disparities reveal that they do not have sufficient opportunity to observe A-2 and identify him on the said occasion. Thus it can be safely said that by said evidence the prosecution has duly established the 8th circumstance under consideration with addition that establishment of said event amongst other establishes involvement of A-2 in the episode of kidnapping Nitesh and demanding ransom for his return and accepting part thereof. Further

more said evidence also establishes PW1, PW20 and PW40 and the other police staff on 14th May, during the day time had come across A-2 for substantial time though they had not caught him. The said aspect has a significance in appreciating further prosecution case and/or circumstances relied of A-2 alongwith A-1 and J.O. was apprehended later on, as discussed in the further part of the judgment.

26. Now taking up the 9th circumstance of the conversation on phone with A-1 and A-2 at one end and PW1, PW5 on the other hand during the period 8th to 24th May, 2004 was got recorded by the police by intercepting, by affixing a Machine of tape recording to the phones of PW1 after obtaining the requisite permission (Exh. 157) from Home Department of Government of Maharashtra, the evidence of PW26 and Investigating Officer PW40 and the Sanction Order placed on record duly establishes that such a recording was effected after obtaining said sanction from the Home Department as ordered by the Commissioner of Police, Navi Mumbai. The said evidence amongst other establishes that the conversation effected in between kidnappers-A-1 and A-2, and PW1 and PW5 was recorded in 11 cassettes, i.e., Exh. Q-1 to Q-11.

26.1 The aforesaid evidence was tried to assail on the part of defence and particularly advocate Ms. Indu Verma by urging that as per the prosecution case after the missing complaint was lodged, Vashi Police Station had taken steps of publishing the posters of missing boy with the numbers of PW1. It was urged hence anybody could have given a call to him with object of profiteering by obtaining amount from him without such a caller being concerned with the kidnapping effected. No doubt there could have been such a possibility but the same appears to be bleak having due regard to the further evidence surfaced at the trial amongst other establishing both A-1 having pointed out the place at which the dead body was buried and body being found at the said place after excavation and so also A-2 having pointed out the same place and a stone at a place nearby the said place. The said evidence definitely establishes that A-1 and A-2 had knowledge at which the corpse was buried. Not giving of any otherwise explanation by both of them for their such knowledge is only the pointer of themselves being deeply involved in the offence of kidnapping, and causing the death of the child.

26.2 With regard to the interception of telephone line, the learned counsel for A-2 by laying her finger upon Section 25 of Indian Telegraph Act, 1885 urged that in the instant case the prosecution had only adduced the evidence regarding obtaining of permission for intercepting telephone line. It was urged that even after grant of such permission the procedure as provided under the Act is required to be followed, i.e., as per the Section 25 of the said Act, the consent of the person whose telephone is to be intercepted is required to be obtained. Further more the interception device is required to be installed by the service provider such as MTNL. It was urged that as per the provisions of Section 19A of the Indian Telegraph Act, 1885 giving of Notice to the Telegraph Authority was

necessary, even if, valid permission was obtained. However, such a Notice was not issued. It was urged that the Rule Nos. 419 and 419A of the Act pertains to lawful interception or monitoring of telephone lines and the manner in which the same is to be carried out. It was urged that Rule 419-A (4) makes it mandatory to specify the name and designation of the officer or the Authority to whom intercepted message or class of message are to be disclosed. It was urged that Rule 419-A (6) requires that the Officer who issued directions for interception "shall" make a request in "writing" to the telegraph Authority for extending the facilities and cooperation for interception.

26.3 Learned defence counsel for A-2 contended that though the order permitting interception provides the name of the authority, no express order entrusting the work of interception to PW26 to carry out the interception is brought on the record. It was contended that no documentary evidence regarding compliance of Rule 419A (6) of Indian Telegraph Rules, 1951 has been brought on record and so also issuing of Notice as mandatory u/s 19A of Indian Telegraph Act is brought on record. It was urged that no officer from MTNL has deposed that on 5th May, 2004 any interception device was installed or interception was carried out for recording conversation which is alleged to have intercepted from 8th May, 2004 till 24th May, 2004. It was pointed that during sample voice recording effected on 3rd June such procedure has been followed and PW32 have deposed of having installed the device for interception on 3rd June, 2004. It was urged that consent of PW1 for tapping telephone was not obtained.

26.4 After taking into consideration of the provisions of Section 25 and 25A of the Indian Telegraph Act, 1885 which relates to intentionally damaging or tampering with the telegraphs or injury to or interference with telegraph line or post, we find the submission canvassed being misconceived. We are of such opinion as bare reading of said provisions reveal that same has no bearing for the interception made in instant case. We are of such considered view as the relevant provisions for the interception made in instant case would be falling within the provisions of Section 5 of the said Act, which relates to power of Government to take possession of licences telegraph and to order interception of the message. The bare reading of Section 5 of the said Act reveals that such powers are conferred upon the Central Government or State Government to authorise amongst other for the reason of interest of the public interception of telephone lines in a manner as stated in the sub-section 2 of the Section 5 of the Act. Further reference to Rule 419 reveals such a power being conferred on telegraph authority for verifying violation of rules or for maintenance of the equipment. The reference to the Rule 419-A reveals procedure to be followed by the Government, Central or State for authorising interception permitted by virtue of provisions of Section 5 of the Act. The glance at the said Rule which is having as many as "19" clauses making specific provisions amongst other regarding passing of an order the period for which interception would remain in force. Now considering the evidence of PW26 alongwith order Exh. 157 passed by Addl.

Chief Secretary (Home) and Secretary In-charge of Home Department substantial compliance of the provisions of Rule 419-A is spelt from said evidence surfaced at the trial.

26.5 Such conclusion is inevitable as said order apart from the reasons for which said order was passed also discloses wealth of details regarding the materials relied for passing said order telephone numbers, which were permitted to be intercepted, giving of the information collected to the Commissioner of Police, Navi Mumbai or the police officer/staff deputed by him and the further directions regarding the use of the messages received by interception and/or destruction of the same.

26.6 Having regard to it and having regard to the provisions of said Rule 419-A of the Indian Telegraph Rule, 1951 we do not find any substance in the submission canvassed running contrary to the provisions of the said Rules and so also the necessity of giving the Notice u/s 19-A of the Indian Telegraph Act as erroneously urged. Needless to add, in view of specific stipulation contained in paragraph No. 3 of Order Exh. 157 submission does not survive that the name and person to whom messages intercepted were to be disclosed was not specified in the order. Similarly, considering the purpose for which the sample voices were recorded, i.e., comparing the same with the voices of intercepted conversation and for the same it being essential of getting the same recorded on the same telephone lines and for which using the services of PW32 or adducing his evidence thereon, the conclusion cannot be drawn that the procedure for interception was improperly followed.

26.7 Learned defence counsel for A-2 further contended that PW26 during the cross-examination admitted to have stated in his statement before PW20 that the voice of intercepted calls were saved on their computer (pg. 389 line Nos. 3-7). It was urged that there is nothing on record to show that the calls intercepted were transferred to 11 cassettes through the computer system. It was urged that no panchanama has been placed on record as to who had and in what manner had transferred from computer to the cassettes the calls intercepted and recorded. It was urged that since there was no express order in the name of PW26 to conduct the interception, the possibility of tampering cannot be ruled out and as such authenticity of the matters recorded in 11 cassettes is highly doubtful. It was urged that no record has been produced regarding purchase of 11 cassettes or tape-recorder or any test for empty cassette effected prior to tapping the conversation. It was urged that there is no panchanama regarding tapping of conversation in the 11 cassettes, on the record, so also written order of transcribing alleged intercepted conversation recorded on the tapes.

26.8 With regard to the aforesaid submission and the admission referred from the cross-examination of PW26 of having admitted in his statement before API Vele (PW20) that the "voice of intercepted calls were saved on the computer" being not in the nature of the contradiction should not have been permitted to be

brought on record as permitting asking of such question without there being contradiction or omission is violative of the provisions of Section 162 of Code of Criminal Procedure. Thus such material brought on the record will have to be discarded from consideration. The further submission canvassed thereon is on the presumption of call being intercepted on the computer and thereafter being transferred to the Cassettes. Needless to add, that no such position having surfaced at trial, the submission cannot be entertained of such evidence of transfer being not adduced at trial or not adducing the said evidence creates the doubt about the authenticity of the conversation recorded on the cassettes and so also further submission canvassed of no evidence being adduced regarding purchase of cassettes or tape-recorder or no test for empty cassettes being effected prior to tapping of conversation or no panchanama being drawn regarding tapping of cassettes.

26.9 With regard to the last two submissions canvassed and recorded in paragraph No. 27.7, it can be well said that receiving of call from kidnappers has commenced since 1st May, 2004. It needs no saying that receiving time of such call was uncertain due to making of such call was sweet choice of the kidnapper. As the order of interception was received on 5th May, 2004, hardly there was any time for making test interception. So also time of receipt of call being uncertain, there could not have been a panchanama for said interceptions, which were carried out from time to time in the period extending from 5th May to 24th May, 2004. It can be further added that law by itself does not stipulates drawing of panchanama and generally the same are drawn regarding the acts committed by the investigating agency to afford a record of independent person for supporting their evidence of such events having taken place. Since the conversation to be intercepted was a talk in between PW1 and PW5 on one part and kidnappers on the other part and not a talk in between the police officers with either of the parties, it is difficult to perceive any need of drawing of panchanama as canvassed.

26.10 Resultantly, we do not find any substance in any of the said submissions canvassed. Needless to add, that it is difficult to perceive of there being any tampering while producing the record of intercepted conversation as tried to be suggested by learned defence counsel. Hence, it can be said that by the aforesaid evidence the prosecution has duly established the circumstance under consideration relied by the prosecution/trial court.

27. Now taking up the 10th circumstance of the trap being arranged on 24th May, 2004 to apprehend the kidnappers nearby Cafe Sagar Hotel at Nagpada, Mumbai after phone call was received by PW1 on 23rd and 24th May, that kidnappers would come to said place for accepting the ransom; the reference to the evidence of PW1 reveals that he had deposed in detail about the talk ensued in between himself and kidnapper on 14th May, evening and thereafter taken place on 15th May at 3.16 p.m.. He had also deposed in detail regarding the talks occurred in between him and A-2 on 17th May. His evidence discloses that

all the said talk was either regarding allowing him to talk with his son, condition of son, his feelings, the amount send by him being less and amount of Rs. 5,50,000/- required for release of his son. Amongst other, it reveals that police had asked PW1 for fixing a place for meeting the kidnapper.

27.1 The further part of the evidence of PW1 reveals that on 23rd May, at about 10.45 a.m. on mobile he had received a call from first kidnapper that if he was ready to pay Rs. 5.50 Lacs then he would hand over custody of his son within two hours from the payment. Upon PW1 asking him regarding the place he told that they would be meeting at the same place, but the timing of meeting would be told on the next day. The evidence discloses that on 24th May, at about 11.00 a.m. PW1 received telephonic call on mobile from first kidnapper that he was not able to talk with PW1 at 10.30 a.m. at the residence and the said call was attended by his wife. The first kidnapper confirmed the timing for meeting at 4.00 p.m. at Cafe Sagar Hotel, Nagpada and also confirmed from PW1 that the amount of Rs. 5.50 Lacs was ready with him. The evidence discloses that PW1 informed the said development to the police and police told him that he should stay at his house and their team would proceed to said Hotel Sagar and would inform him as to when he should go to the said place.

27.2 In the same context, reference to the evidence of PW20 and PW40 reveals that after receipt of the said development, the police had decided to arrange a trap at Nagpada to catch the person to whom an amount of Rs. 50,000/- was given on 14th May and without taking PW1, PW40 alongwith other staff including PW20 went to Nagpada locality by 12 noon and started roaming in the locality for tracing out the person who had received the amount on 14th May.

27.3 Though the aforesaid evidence was tried to be assailed by the learned defence counsel for A-1 by urging that the evidence reveals that kidnapper had told PW1 on 23rd May, to come to Nagpada with rest of amount on the next day by 4.00 p.m. It was urged that then how the police party would have been earlier and reached the said place at 1.00 p.m. in the afternoon and arrested A-1, A-2 and J.O. by 1.30 p.m. It was urged that no explanation had forth-come of A-1, A-2 and J.O. coming much before the arrival of PW1. It was also canvassed that admittedly PW1 was not present at the time of arrest and was called at the place of Pauvna Bridge and at the said place A-1 was shown as the person who had kidnapped his son. The learned counsel thus urged that PW1 had no knowledge of the act committed by A-1 and/or his evidence is based upon the knowledge derived by him from the investigating officer.

27.4 With regard to the said submission though later part is true, i.e., due to there being no eye-witness for crime in-question, i.e., either of kidnapping or killing of the child merely because of the same neither the evidence of PW1 can be said to be insignificant, nor the other circumstances established through his evidence. With regard to the earlier part of the submission, it was not brought to our notice that any effort was made to obtain the explanation from the police official for visiting the spot much earlier to 4.00 p.m.. As a matter of fact the

evidence referred hereinabove clearly reveals that on 24th May, 2004, the police party had not taken PW1 alongwith them while proceeding to the spot. Since the police officers particularly PW20 having earlier seen A-2 on 14th May, 2004, they might have been to the spot for nabbing him and so also his associates. However, without questioning the police officers regarding the said aspects and since their visit could have been for such purpose, the occurrence of such event and during the same nabbing of A-1, A-2 and J.O. at the spot can neither be faulted, nor can be viewed with suspicion. The same is the case regarding the submission canvassed regarding arrival of A-1, A-2 and J.O. at the spot much earlier than the stipulated time. Since the reason for their such arrival earlier to the time also could be for causing reconnaissance for ascertaining the presence of police officials at the spot, merely they had arrived earlier cannot be said to be a circumstance leading to inference that the events as claimed by the prosecution having not occurred. Thus after careful consideration, we find that the said disparity was not on any vital points worthy of any credence and core of the said evidence has remained unsheltered and by the said evidence the circumstance under consideration is duly established.

28. Now taking up 11th circumstance of at about 1.30 p.m. on 24th May, 2004 near Hotel Cafe Sagar, A-1, A-2 and J.O. were apprehended together by the police and 12th circumstance of themselves being arrested by drawing arrest panchanama Exh. 115, and during the personal search of A-1 a Card (Exh. 190) containing number of PW1 was found recorded therein, the evidence of PW20, PW12, PW40 and the panchanama Exh. 115 and so also to some extent of PW1 is relevant.

28.1 The reference to the evidence of PW20 and PW40 reveals that at about 1.00 p.m., they were roaming in civil dress to locate the person who had accepted Rs. 50,000/-. It reveals that the person who had accepted the said amount was seen by them sitting on a bench in front of hotel where the meat was roasted. By that time, two other persons came towards him and they talked with each other. It reveals that thereafter they had apprehended the said three persons and two panchas were called namely PW12 and another and the personnel search of the said three apprehended persons was taken. Out of them, one person disclosed his name as Nihal Ahmed Shaikh (A-1) and another person as Nasim Khurdus (J.O.) and person who had accepted the amount, i.e., Rafik, as Rafik Unnijan Saiyad (A-2). It also discloses that the said persons had given their address at Turbhe Stores as observed while discussing circumstance No. 1. It reveals that during personnel search of A-1, visiting Card (Art.A4-Exh. 190) containing the telephone numbers of PW1 was found written on Exh. 190. The police arrested all of them and panchanama Exh. 115 was recorded regarding the said event.

28.2 The learned defence counsels for A-1 & A-2 tried to assail the aforesaid evidence by pointing out minor disparity in the timings brought on record with the evidence of PW12, who deposed that he was stopped by the police at about 12.30 p.m. It was urged that as per the prosecution case A-1, A-2 and J.O. came

by 1.00 p.m. and were arrested by 1.30 p.m. It was urged that since PW12 was stopped at 12.30 p.m., they must have been arrested prior to 1.00 p.m. and the recitals in the panchanama that it was commenced by 1.30 p.m. (13.30 hrs) and concluded by 2.00 p.m. (14.00 hrs.) reveals falsity of the prosecution case. We are unable to accept the said submission canvassed solely on the basis of the said admission given by PW12 of himself being stopped at 12.30 p.m. After considering the evidence in proper perspective the same does not reveal the basis on which the said timings were disclosed by PW12. Upon such a marginal difference in between the timings the conclusion cannot be drawn as canvassed. We are of such view as PW12 was signatory to the panchanama Exh. 115 which reveals that the same had commenced by 1.30 p.m. and completed by 2.00 p.m. It is pertinent to note that during the cross-examination, PW12 denied that when he had reached the spot the panchanama was already prepared. The further submission canvassed by laying the finger upon recitals in the panchanama that the crime in-question was also for offence u/s 302 of I.P.C. is indicative of a foul play or story being not proved and also cannot be accepted with a favour. Needless to add in the same context, the learned defence counsel had not pinpointed any answers elicited during the cross-examination either from PW12 or PW40 who had drawn the said panchanama. Suffice to say, that drawing of such conclusion on the basis of the recitals in the panchanama, which is not a substantive piece of evidence and further more without drawing attention of authors to said aspect affording them an opportunity to explain mainly the said recitals pointed, is impermissible in law.

28.3 The further submission was canvassed by the learned counsel for A-1 regarding Remand Application, i.e., date of arrest being shown at 25th May, 2004 at 10.40 a.m. also supports such conclusion. We are unable to accept the said submission as any such remand application containing such date and timing of arrest was not brought to our notice. Further more even assuming remand application containing such recitals, the concern Investigating officer being not questioned regarding said aspect, mere mentioning of such date in such application which is admittedly not primary record of arrest, cannot be said to be supporting the theory tried to be canvassed.

28.4 With regard to further submission canvassed by learned counsel for A-1 that A-1, A-2 and J.O. are said to be residents of Turbhe, no railway tickets were found with them at the time of arrest or PW20 having said that PW1 was present also supports the defence version, only deserves to be said to be rejected. Needless to add, that the evidence of PW1 and so also PW40 in terms reveals that PW1 was not present at the said spot on 24th May, 2004.

28.5 It was also tried to canvass by both the learned counsels for A-1 and A-2 that there exist disparity in the evidence of PW12, PW20 and PW40 inasmuch as the later two claimed to have seen A-2 sitting on bench in front of Hotel while PW12 claimed that when he had been to the spot A-1, A-2 and J.O. were already in the custody. PW12 being the panch and PW40 had called him after A-1, A-2

and J.O. were nabbed, it is difficult to perceive that PW12 could have known the precise place at which PW20 and PW40 had seen A-2. Thus the submission canvassed is devoid of any merit.

28.6 In the same context, we do not find any merit in the submission canvassed by learned counsel for A-2 that no arrest panchanama is on record, as the evidence of panch PW12 and Panchanama Exh. 115 reveals the contrary position. The said evidence duly establishes A-1, A-2 and J.O. were arrested on 24th May, 2004. Having regard to the same, we do not find any merit in the further submission canvassed by making reference to Exh. 236, Exh. 237, Exh. 238, Exh. 240 and Exh. 241 mentioning their date of arrest as 25th May, 2004 that they were not arrested on 24th May and no event as claimed by the prosecution witnesses of 24th May, had ever occurred. We are of such view as all the said Exhibits are the letters prepared by PW40 during the course of investigation for the purposes as stated in the letters. The said letters are not the record of the event of the arrest of the accused persons. The learned counsel has also not drawn our attention to any part of the evidence of PW40 denoting that he was questioned about the said aspect during the cross-examination, muchless having failed to explain regarding such date of arrest being mentioned in said letters.

28.7 With regard to the arrest of accused persons, the learned counsel for A-2 by making reference to the provisions of Sections 46, 50 and 51 of Cr.P.C. tried to canvass that there was no proper compliance of said provisions as existed in the year 2004 when the said accused were arrested. It was canvassed hence the alleged seizure of the articles from the said accused particularly A-1 is vitiated and the same deserves to be left out of consideration. After carefully considering the said provisions referred and the matters stated in the arrest panchanama Exh. 115 and the evidence of PW20 and PW40, we do not find any substance in the said submission canvassed. Needless to add, after considering the said evidence and nothing being brought on record regarding the requisite compliance being not made the submission deserves to be rejected. Hence, we do not propose to make any threadbare submission regarding the decisions relied by the learned counsel including the judgment in case of Terry V. Ohio-392 U.S. 1 in the said context. Resultantly, we find that by the evidence referred and discussed earlier the prosecution has duly established the 12th circumstance under consideration.

29. Now taking up the 13th circumstance of discovery of place at which the corpse of Nitesh was buried upon disclosure statement made by A-1 as recorded in discovery and recovery panchanamas (Exh. 89, 90) and panchanama of exhumation of corpse (Exh. 91), the evidence of PW40 and panchas PW4 Hitesh and one another reveals that on 25th May, 2004 at about 2.45 p.m. after examination by Doctor, A-1 expressed willingness to make a statement and accordingly in presence of panchas PW4 Hitesh and one another, A-1 told that he would point out the place where the dead body of child was buried and accordingly panchanama (Exh. 89) was drawn regarding the statement made by

A-1. It reveals that thereafter A-1 has taken them towards Pauvna Bridge in the Khoprigaon by giving directions for taking police vehicle occupied by them. It reveals that at the said place A-1 pointed out a small heap of earth as a place at which dead body was buried. It reveals that thereafter PW40 had called Medical Officer of Corporation Hospital PW21 Dr. Jain, Executive Magistrate of Thane PW22 Patkar and employee of Fire-brigade by giving message on phone and the said persons arrived at 4.00 p.m.. PW40 gave an idea to Executive Magistrate and Medical Officer orally and requisition letters (Exh. 223 and Exh. 224) for assistance in exhumation of body. They also called PW1 for identification of body. A-1 again pointed out the spot at which the body buried. The body was exhumed in presence of the said persons and panchas. It was in decomposed condition. PW1 identified the said body after seeing clothes from the dead body and the Tight. The Executive Magistrate recorded panchanama (Exh. 91) of the exhumation of the body. Similar sort of corroborative evidence is given by PW1 regarding himself being called at the said place, body being exhumed and himself having identified the said body. So also, similar sort of evidence with some variation occurring due to same events being deposed by number of witness is given by panch PW4. So also the corroborative evidence, corroborating evidence of PW40 and PW4 and regarding the relevant part played in said episode is given by PW21 and PW22.

29.1 The learned defence counsel for A-1 tried to assail the aforesaid evidence by urging that the evidence of PW4 reveals that 15 minutes were required to reach Pauvna Bridge from Vashi Police Station and volunteered that on reaching the said place Tehsildhar and employees of Corporation came at the said place and on their arrival the work of digging was commenced. It was urged that as per panchanama Exh. 89 and 90 after reaching the spot, A-1 showed the place and then PW4 called the Doctor and Tehsildhar and they arrived by 4.10 p.m. whereas as per the evidence of PW4 digging of the earth has started by 4.00 p.m.. It was urged that it indicates that the said work was commenced much before arrival of Doctor and Tehsildhar. It was urged that the evidence of PW4 reveals that employees of Corporation came alongwith the Tehsildhar, but the panchanama Exh. 89 and 90 shows that after the place was pointed out the workers were called from the locality of Turbhe, Airoli and they have reached within five minutes. It was urged that the said places were away at a distance of about 5 Kilometers from the place of recovery of dead body. After close scrutiny of the evidence of PW4, PW21 and PW22, we find that the said interest discrepancies cannot be said to be affecting main core of the evidence of the said witnesses about the sequence in which the relevant event had occurred. As a matter of fact, the entire submission is based upon the timings as tried to be elicited from PW4. Hence, it is difficult to perceive that on such basis the conclusion as tried to be canvassed can be accepted that no such event as claimed by the witnesses had occurred due to the said disparity pointed.

29.2 With regard to the further submission canvassed that the evidence of PW40 reveals that the requisition was given to them on the spot and that the same

bears stamp of the Office of PW40. It was urged that it was unlikely that any person would be carrying stamp alongwith him in anticipation of necessity of giving of such requisition. It is difficult to accept the said submission as the evidence of panch witness as well as PW40 reveals that the statement was made by A-1 in the police station. Thus considering the purpose for which the entire party was proceeding to the said spot, it cannot be gain said that PW40 could not have contemplated of arising of giving requisition to such persons and having carried stamp of his office with him. Needless to add, that the police officers carrying their seals alongwith them while going to the work of panchanamas is not an unknown phenomena. Thus, we do not find any substance in said submission canvassed.

29.3 In the context of the aforesaid evidence, the learned counsel for A-1 urged that the evidence of PW40 also denotes that though A-1, A-2 and J.O. were arrested on 24th May, 2004, the disclosure statement was made on 25th May. It was urged that the prosecution claimed that thereafter A-1 having made disclosure as claimed by the relevant witnesses referred hereinabove. It was urged that there was unexplained delay of 24 hours of not interrogating the accused for receiving the clue regarding the body. We find no merit in said submission canvassed, as perusal of evidence of PW40 does not reveal that interrogation was not made earlier to the event of A-1 making disclosure statement. Further more the evidence of PW40 also discloses the other steps which were taken during the relevant period. Further more the submission was canvassed that evidence of PW40 also discloses that A-1 informed him that boy was kept at Sawantwadi and accordingly he had sent staff for tracing, but the boy could not be traced. It was urged on the contrary evidence of PW20 reveals that job of tracing the child at Sawantwadi was entrusted to Sawantwadi police. It was urged that PW40 admitted that he had not drawn memorandum regarding the said statement made by A-1 of boy being at Sawantwadi. It was thus contended that the evidence of further statement made by A-1 regarding showing body etc., considered in the light of the aforesaid is artificial and/or deserving no credence.

29.4 We are unable to find any merit in said submissions canvassed. Needless to add, that the investigating officer is required to draw memorandum in event of the concerned accused showing willingness to make the statement and not in event of statement being already made by the said accused. Further more only the statement leading to the discovery of incriminating fact are covered u/s 27 and as such no obligation is casted upon any I.O. to draw memorandum regarding statement not giving the precise clue and of vague nature, i.e., in the instant case boy being at Sawantwadi which by itself is large area. Similarly, the discrepancy occurring in the evidence of PW20 and PW40 regarding the persons entrusted with a job to trace the child at Sawantwadi is wholly immaterial as non-finding of the child at the said place indicates A-1 having attempted to mislead the police upon false track.

29.5 In the context of circumstance no. 13, the learned counsel for A-1 vehemently contended that even establishment of the said circumstance would not lead to the conclusion that A-1 had committed the offence of the murder. It was urged that the said circumstance only reveals that A-1 had knowledge of the place at which the body was buried, i.e., knowledge about the place at which the body was disposed. It was urged that A-1 might have had such knowledge of disposal of the said body at the said place due to several reasons, such as having seen somebody else disposing the body at the said place or somebody having told him about the body being buried at the said place. It is difficult to accept the said submission as A-1 has chosen not to give any explanation regarding the said circumstance and particularly the source of his such knowledge. A-1 having chosen to keep silence about it, rules out existence of any such possibility and leads to the sole conclusion of A-1 being responsible and/or connected with murder of the person whose body was found at the said place. It can be added that nondisclosure or non-explanation about the said grave incriminating circumstance warrants drawing of an adverse inference against A-1 fortifying the conclusion arrived earlier of himself being closely connected with the offence of murder taken place regarding the said boy.

29.6 The similar submission was canvassed by the learned counsel for A-2 by urging that even though as per the provisions of Section 106 of the Evidence Act, the burden is shifted upon the accused to prove the facts which are within exclusive knowledge of said accused, still the said accused not giving such explanation does not exonerate the burden of the prosecution to prove the case. It was urged that the prosecution cannot take advantage of conduct of the accused unless relevant facts are proved by the prosecution. The learned counsel by placing reliance upon the decision in the cases of Periyasami Thevan (supra), State through C.B.I. V. Mahender Singh Dahiya (supra), Tulshiram Sahadu Suryawanshi V. State of Maharashtra (supra), canvassed that the prosecution has failed to prove that the body of Nitesh was recovered and only the presumption is drawn to such effect that body was that of Nitesh. It was thus canvassed hence, non-explanation on part of the accused is wholly irrelevant.

29.7 All the aforesaid submissions are so misconceived that the same deserves no reply than stating stands rejected. However, considering the enthusiasm with which the submissions were canvassed, we reiterate that the question of giving an explanation during examination u/s 313 of Cr.P.C. or otherwise arise only after particular incriminating fact being established by the prosecution. However, the accused persons having failed to give said explanation in spite of the prosecution having established that the body found at the behest of A-1 was the body of Nitesh, the non-explanation about the said circumstance would be an additional circumstance against said accused and so also even against A-2 in view of the place pointed out by him at which the dead body was buried and stone used was thrown, was found to be the same place, which was pointed by A-1, i.e., the place from which the body was exhumed. We also fail to appreciate the submissions that inference arising from proved facts can be termed as a

presumption as canvassed. Since the facts and circumstances involved in the cases referred being altogether different, we do not propose to make threadbare dilation regarding the said decisions for the sake of brevity, except stating that careful perusal of said decisions in light of the facts established in the present case, the said decisions cannot be said to be of any useful purpose for A-1 & A-2.

29.8 With regard to another submission canvassed that disclosure statement of A-1 cannot be used against A-2, we find the submission is canvassed without taking into consideration the provisions of Section 30 of the Evidence Act. We further add that even accepting the said proposition still the relevant evidence having proved that dead body was buried near Puvna Bridge, apparently there is no legal bar for considering the said proved aspect for appreciating the another facet established that A-2 also having knowledge of said fact, denoted by himself pointing the same place. Similarly, we also do not find any force in the submission that in such contingency, A-2 cannot be held guilty only on the basis of the circumstance of the last seen theory, i.e., deceased was last seen alive alongwith him and the other accused. We observe that other established circumstances being against the said accused, such consideration will not be available for him, nor he will be entitled for benefit of the decision in the case of Anant B. Kulkarni (supra), pointed for supporting relevant proposition canvassed.

29.9 The another submission canvassed by both the learned counsels for A-1 and A-2 that since the said place was nearby Bridge, it was impossible to commit the murder and dispose the body by digging the earth and burying the body, as, such acts could have been well noticed by the passers-by on the said Bridge. The said submission deserves no dilation except stating that deserves to be rejected as hardly any evidence has surfaced that the said Bridge was frequented by the people and/or was frequented at the time at which the offence of murder/disposing body was committed.

29.10 Thus after closely scrutinizing of the said evidence, we find that the evidence of PW4 is duly corroborated by the matters stated in panchanama Exh. 89 and Exh. 90 and so also by the evidence of PW40. The evidence of said witnesses is corroborated regarding exhumation of body by the evidence of PW21 and PW22. We do not find any embellishment in the said evidence destroying the effect of the said evidence establishing the place at which the body of Nitesh was found was disclosed and pointed out by A-1. We also add, that interest discrepancies of trivial nature tried to be pointed has no destroying effect of core of their evidence of the dead body being exhumed from the place pointed out by A-1. Having regard to the same, we find that by the said evidence the prosecution has duly established the 13th circumstance under consideration.

30. Now taking up the 14th circumstance of the recovery of bloodstained stone made from the place near the place at which corpse of Nitesh was found buried on the disclosure statement made by A-2 as recorded in disclosure panchanama (Exh. 103) and recovery panchanama (Exh. 104), the reference to evidence of panch PW7 discloses that on 5th June, 2004 he was called at Vashi Police Station

and on the said day statement made by A-2 that he would point out the place at which the stone was kept near the place at which body was buried and would take out the stone, was recorded by the police by drawing memorandum panchanama Exh. 103 and thereafter A-2 has taken the police and the panchas to the place nearby Pauvna Bridge and taken them to one heap of soil at which body was buried and thereafter to a place at some distance from the said place and taken out bloodstained stone from the shrubs, which was seized by the police by drawing seizure panchanama Exh. 104 and Art. 12 being the said stone. PW7 vouched for the correctness of the said panchanamas of the said events prepared by the police and signed by him. The reference to the evidence of PW40 also discloses similar sort of evidence given by him regarding the said event.

30.1 After close scrutiny of aforesaid evidence, we find that core of their testimony of occurring of such events, i.e., A-2 making statement, leading to the panchas and police to the place, pointing out the place and pointing and taking out the bloodstained stone from shrubs and police seizing the same has remained undented inspite of cross-examination effected. The evidence of PW7 is by and large corroborated by the matters stated in the panchanamas, i.e., Exh. 103 and Exh. 104, of which correctness of contents is vouched by him. Similarly, his evidence is also corroborated by the evidence of PW40. The scrutiny does not show any circumstance brought on record during the cross-examination leading to the conclusion of the events as claimed by them having not occurred. In the premises aforesaid, we find that by the aforesaid evidence the prosecution has duly established the circumstance No. 14 under consideration.

31. Now taking up the 15th circumstance of PW1 having identified the body in spite of same being decomposed and appearing non-identifiable, at the place at which the same was found from the clothes and tight on the dead body of the child. The prosecution has mainly relied upon the evidence of PW1 for proving the circumstance while the defence has relied upon the medical evidence adduced by the prosecution for urging that no reliance should be placed upon the identification made by PW1.

31.1 In the context of aforesaid circumstance, the material evidence of PW1 which is already referred while discussing circumstance No. 13 is to the effect:

The decomposed body of the body was found from that place. I identified the dead body of my son because the same clothes appeared on the dead body which were put on by my son on the day of kidnapping. I could identify the dead body of my son as there was "Tavij" (divine locket) around his neck. The same Tavij was put on by me around the neck of my son and therefore I could identify the dead body of my son.

In the same context, the corroborative evidence of fact of PW1 identifying the body is also given by panch PW4 who was called by the police while exhuming the body. Similarly, reference to the evidence of PW21 Dr. Jain also called at the

said place near Pauvna Bridge also reveals that on 25th May, 2004, he had been to the said place, dead body of the child was taken after excavation and from the clothes of dead body of the child, the relatives of the deceased child identified the body being that of "Nitesh Prakash Wadhwa". Even the evidence of Tehsildhar PW22 who was present for the event of excavation reveals that PW1 then present had identified the dead body to be of his son from the clothes which were on the dead body. Even the evidence of PW40 Investigating Officer is not different. After close scrutiny of the evidence of the said witnesses, we find that the fact of PW1 having identified the dead body exhumed from the place nearby Pauvna Bridge was that of his son is duly established by the said evidence. The evidence of panch PW4 and that of PW40 is also corroborated by recitals in panchanama Exh. 90.

31.2 Both the learned defence counsels for A-1 and A-2 by placing heavy reliance upon the condition of the body as disclosed from the evidence of PW21 and so also from postmortem Notes (Exh. 135) and so also the evidence of the witnesses regarding the said aspect, urged that the said evidence makes the identification made by PW1 vulnerable. It was canvassed that PW1 had not identified the said body on any other basis except the clothes on the body and so also on the basis of "tight". With regard to the later aspect, it was urged that PW1 having failed to narrate in the missing complaint that Nitesh was wearing a "tight" denotes that the theory of Nitesh wearing "tight" is subsequently developed by the prosecution for justifying the identification made by PW1 of the decomposed body to frame A-1, A-2 and J.O. and particularly A-1. It was further canvassed that thus leaving aside the aspect of "tight", the clothes found on the body being a separable feature cannot be construed as an integral feature of the body for justifying, accepting and relying the identification made by PW1.

31.3 During the reasoning given earlier while discussing circumstance No. 4, it has been already observed that it was not expected on part of PW1 to describe Nitesh wearing a "tight" while lodging a Missing Complaint due to the same could not have been much helpful for tracing the child, the same cannot be construed as a circumstance leading to the conclusion of such theory being deliberately developed later on by PW1 or prosecution for justifying his identification to frame A-1, A-2 and J.O.. Needless to add, that beyond giving bare suggestions no concrete material has been brought on record for supporting and hence, accepting such submission. Similarly, though it is true that the clothes of the person of human being by themselves cannot be construed as integral identification mark of the said person as the same is a severable feature still in the present case considering sequel of events occurred, we do not find any substance in the submission canvassed that due to the said reason the identification made by PW1 can be said to be vulnerable as canvassed. We are of such considered opinion, as we do find PW1 having described the clothes while lodging the missing Complaint (Exh. 15) and similar clothes were found on the said body as disclosed from the evidence of panch PW3 in whose presence the clothes brought by police constable after postmortem were seized under the

panchanama (Exh. 85) drawn. The finding of similar sort of clothes on the said body of the same age, in our opinion, is not a matter of coincidence or possibility but a probability denoting that the dead body was that of Nitesh.

31.4 Now even after taking into consideration the evidence of PW21 or that of others who were present at the time of taking out the body near Pauvna Bridge and even accepting that the same denotes that the body was in decomposed condition or even accepting the feature pointed that Nitesh was kidnapped on 26th April, body was found on 25th May and or the evidence of PW21 that the death must have occurred 20-25 days prior to date of autopsy, i.e., 25th May, 2004 and as such accepting the defence contention that considerable time has lapsed after the death, still we are unable to discard the identification made by PW1 on the said basis as the perusal of the evidence of the above referred witnesses, we do not find any evidence surfaced that the body was in such a condition that it could not have been identified. Hence, we find it extremely difficult to accept the submission that identification made by PW1 was vulnerable or not worthy of placing reliance.

31.5 Such view is found further fortified by the positive result ensued during the DNA test performed from the parts of body and the samples taken of the parents. Needless to add, thus by the said evidence the prosecution has duly established of establishing the 15th circumstance under consideration.

32. Now taking up together 16th circumstance that the DNA test performed from the collected pieces of bones of the body discovered and blood samples of the parents namely PW1 and PW5, it was found that the said body was that of Nitesh and so also the 17th circumstance that the death of Nitesh was homicidal, due to the evidence pertaining to both the circumstances being closely connected, firstly, the reference to the evidence of PW21 Dr. Jain reveals that after the body was excavated and inquest was held, he had been to Municipal Corporation Hospital at Vashi. It reveals that after receipt of requisition letter on the same day at about 8.10 p.m., he had conducted autopsy in between 8.15 p.m. to 9.15 p.m. alongwith Dr. S.M. Chitnis. It reveals that PW21 had taken out clothes namely T-shirt with reddish/yellowish strips, half pant of blue colour with one button missing and yellowish underpant with cartoon picture and black colour thread in the neck with silver metal pendant and after the autopsy handed over the same to the police, i.e., the articles to which reference has been made by us while discussing the earlier circumstances pertaining to identification of the body and the articles found on the body which was exhumed at a place near Pauvna Bridge.

32.1 It reveals that during autopsy they have found following ante-mortem injuries on the corpse, i.e.,

(1) Linear and depressed fracture over right temporal bone, horizontally placed of length 9 cm with blood infiltration at the fractured margins.

(2) Linear fracture of left zygomatic bone (arch) near medical end with blood

infiltration at the fractured margins.

Similarly, they also noticed that scalatenized with scalp attachment at places on skull with hairs, sutures loosen at the places on skull and internal organs were missing due to decomposition. It discloses that the aforesaid injury no. 1 was corresponding to injury no. 1 mentioned by PW21 in column no. 17 of the Autopsy Note (Exh. 135) prepared by them. His evidence also discloses that they have preserved two molar teeth for DNA typing test and muscle pieces for carrying chemical analysis. PW21 gave the cause of death as due to head injury sustained to the head of the child and accordingly issued the autopsy notes (Exh. 135) bearing their signatures.

32.2 The evidence of PW21 reveals that on 4th June, 2004, he received letter dated 3rd June given by PW40, for remaining present at graveyard at Turbhe Store as dead body was to be exhumed in his presence and PW21 was to collect samples for DNA typing test. In the said context, the evidence of PW25 Asst. Chemical Analysis, Forensic Laboratory, Mumbai reveals that two teeths of the deceased and blood samples of the parents received from Vashi Police Station were insufficient for complying the requisition contained in letter dated 28th May, 2004 of giving the opinion whether they were belonging to male or female and the blood group of deceased and the results of DNA test. Hence, he has issued letter Exh. 154 to Vashi Police Station for sending some more specimen of deceased body. The evidence of PW40 reveals that for complying the said requisition he had issued requisition letters (Exh. 235) to Executive Magistrate, Thane, i.e., PW17 and Exh. 146 to Medical Officer PW21 for coming to the burial land of Turbhe at which the dead body was buried for taking out limbs and other parts of the corpse. Similarly, he has called PW1 to come at the said place.

32.3 The reference to the evidence of the aforesaid witnesses reveals accordingly, all of them except PW1 attended the said place and instead of PW1, PW11 Nikhilesh Wadhva had been to the said place. The evidence of PW11 reveals that on 4th June, 2004 he had received phone call from PW1 for attending the said place. The evidence of PW1 also reveals that after postmortem he had taken possession of dead body and it was disposed by burying in graveyard. The evidence of PW11, PW21 and PW17 considered individually as well as collectively within themselves establishes that at the said place body was exhumed from the place at which it was buried after the same was shown by Kishore Wadhva, brother of PW1 and PW21 had taken out left and right femur bone, piece of scalp alongwith hair, six teeths, skull bones and mandible. The panchanama Exh. 112 of the said event was prepared by PW17. PW21 had carried said parts to Municipal Corporation at Vashi, cleaned and dried it and affixing label and sealing the parcel, handed over the parcel to the police officers of Vashi Police Station for carrying to C.A., Mumbai alongwith his Report Exh. 136 and Forms Exh. 137 to 140 pertaining to the samples taken. PW21 after going to C.A. Reports Exh. 141 to 144 deposed that the said C.A. Reports were regarding the said parts/samples forwarded by him to Chemical Analyser as per the

requisition received. The reference to the said C.A. Reports and particularly Exh. 144 reveals that PW5 and PW1 were putative parents of deceased of which parts were sent for D.N.A. Test, that is of the corpse which was identified by PW1 as being that of his son.

32.4 With regard to aforesaid circumstance, the learned counsel for A-1 tried to urge that the identity of the body of which parts were collected from the place of burial as being same body which was found at the behest of A-1 was not at all established. It was canvassed that even assuming that PW1 had identified body which was found at the said place was that of his missing son still he had not identified the body of which parts were taken from the burial ground, nor he was present to point out the place at which the body was buried and DNA test being based upon such part a conclusion cannot be drawn that the body which was found nearby Pauvna Bridge was that of his son. It was urged that in absence of evidence of PW1 that the body from which parts were sent to DNA was the body of which he had taken the custody and performed burial rites leaves room for the possibility that the parts of some other body from the burial place were collected. It was urged that missing son of PW1 might have been buried at Turbhe Graveyard and parts from his body might have been collected in connivance with the police or the other authority for implicating A-1, A-2 and J.O.. It was urged thus identity of body being not conclusively established, none of the accused can be held responsible for the offences committed in respect of son of PW1 and PW5.

32.5 We do not find any force in said submission as the evidence which has been referred earlier clearly reveals that body was identified by Kishore Wadhva-brother of PW1, i.e., uncle of deceased. Visualizing the agonies of a father who had undergone the ordeal of seeing his child excavated at isolated place due to being murdered and buried at such place, being again not called for exhumation of body for collection of parts for DNA test as requisitioned by C.A., in our opinion, cannot be a circumstance for doubting identification of body made by the uncle of deceased or about the place at which the body was buried by father PW-1 after he has received it earlier after inquest. We are of such view as the evidence of PW17 amongst other reveals that while digging the body from the funeral ground in Turbhe locality, he had called Register of Municipal Corporation kept regarding burying of dead bodies and had verified entry No. 140 dated 25th May, 2004 that dead body of Nitesh Wadhva was buried at the said place.

32.6 In the aforesaid context, we further find no merit in the submissions canvassed that due to PW1 being not present on 4th June while exhuming the body and collecting the parts for DNA test the parts of some other body other than the body found at Pauvna Bridge given to PW1 and buried at the burial place at Turbhe were collected or that the same were collected for roping the accused persons. Truly speaking for the later aspect hardly any material has surfaced on the record. Further more as evidence reveals that PW1 was not knowing any of the accused, it is difficulty to perceive he would be interested in implicating the A-1 and A-2 merely because they were arrested by PW40 as the

culprits who had kidnapped his child and were forcing him to pay ransom. Similarly, it is highly improbable that the parts of any other body would have matched DNA Test results, i.e., putative father of the parts of the said body were PW1 and PW5. With regard to the legal submissions, we add that with regard to exclusion of the other hypothesis the Apex Court in the decision in the case of State of U.P. Vs. Ashok Kumar Srivastava, having observed to the effect:

9. This Court has, time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negated on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise...

(emphasis supplied)

It will be difficult to accept the submissions that the far fetched hypothesis as tried to be urged in the instant case, solely on the fact of PW1 having not attended on 4th June for showing the place at which the body was buried for collecting the parts of it after excavation, was required to be excluded by the prosecution.

32.7 Similarly, in light of the cogent evidence of the independent persons concerned with the event of exhuming body for taking the parts as required by C.A. for carrying DNA test, we do not find any substance in the submission canvassed by learned counsel for A-1 that no panchanama of the said events were drawn. It can be added that the submission is canvassed upon misconception that for every steps taken into investigation, it is necessary to effect the panchanama thereto. Such being not legal position no credence can be given to the said submission.

32.8 With regard to aforesaid evidence and particularly that of PW21, both the learned defence counsels for A-1 & A-2 urged that the C.A. Report received regarding the stone not revealing finding of any bloodstains thereon leads to conclusion the prosecution not having any material for connecting A-2 with the offence of murder. It was urged that inability of prosecution to produce the weapon for murder or particularly the weapon by which the injuries were caused to the head of the deceased indicates falsity of the prosecution case. It was further urged that PW21 opined that the death must have ensued prior to 20-25 days of recovery. It was urged the same indicates that the said death could have

been in between 1st May and 5th May, 2004. It was contended that as per the prosecution case the boy was killed on the second of kidnapping on 28th April, 2004. It was urged that inability of the prosecution to prove the actual death of Nitesh cast grave doubt regarding the prosecution case.

32.9 In the context of evidence of above referred witnesses about collection of the parts for DNA Test by again exhuming the body, the learned counsel for A-2 submitted that reference to the first Postmortem Report Exh. 135 reveals presence of seven teeth out of which two teeth were taken for DNA. It was urged that postmortem Report reveals that the said teeth were molar teeth. It was urged that on the contrary the second Postmortem Report of exhumed body reveals presence of canine tooth in the cranial cavity. It was urged that thus there existence of difference of the description of teeth mentioned in Postmortem Report Exh. 135 and the Report Exh. 137 to Exh. 140. After careful perusal of the relevant materials and particularly the description given in column No. 9, we do not find any substance in the said submission as the said description reveals existence of two molar teeth intact on both the sides-upper jaw showed two molars on left side and one molar on right side. Rest of the teeth loosen and fallen down-cavity seen. Needless to add, the same does not convey the absence of the canine tooth in the cranial cavity as canvassed. Thus the said description does not reveal any difference between the type of teeth found on the body exhumed at Puvna Bridge as well as graveyard at Turbhe. Further more we do not find any questions being asked during the cross-examination to PW21 Dr. Jain who was present at both the occasions and taken the parts for DNA test.

32.10 After careful consideration of the evidence of PW21 Dr. Jain who is an Expert, we are unable to accept the other submissions canvassed regarding disparity within prosecution case and expert evidence about the date of the death. It is the common knowledge that the evidence of an Expert is primarily based upon the data on the basis of which he forms his opinion. In the instant case, the corpse was found buried in the ground and was in decomposed condition. Having regard to the same, the no inference as tried to be canvassed on behalf of A-1 and A-2 can be accepted as there was likelihood of occurring of such a marginal error in giving the opinion regarding time of death of Nitesh, i.e., of the corpse recovered near Puvna Bridge.

32.11 With regard to the further submissions, it can be said that the same are apparently misconceived as the recovery of weapon of offence or establishing of precise time of death cannot be said to be sine-qua requirement for establishing offence of murder and further more the evidence pertaining to such offence being circumstantial. Needless to add that, it is well settled that the prosecution is required to be established only the "corpus delicti", i.e., the necessary facts showing commission of crime. Hence, merely because the stone was not found stained with blood would not lead to the inferences as canvassed on behalf of the defence, as the relevant evidence of memorandum and discovery within itself

reveals that A-2 also had knowledge regarding the place at which the corpse was found buried and the place at which the stone was thrown. Further more even excluding the last aspect in view of nexus of stone with the crime being not firmly established still the other circumstances available against A-2 in event of being capable of showing his involvement, then no benefit could be given to him from the said feature pointed. Suffice to add, that A-2 has also not given any explanation about the said incriminating circumstance against him. Resultantly, we do not find any substance in any of the submissions canvassed and as such it can be concluded that by the evidence referred hereinabove, the prosecution has successfully established 16th and 17th circumstances under consideration.

33. Now taking up the 18th circumstance which pertains to recording of conversation during the period of 8th to 24th May, 2004 in between kidnapper on one hand and PW1 and PW5 on the other hand on 11 cassettes by tapping phone of PW1 and PW20 collecting the said cassettes, and 19th circumstance which pertains to PW20 getting conversation in the said cassettes transcript on paper through PW28 in presence of PW33, PW26 and another panch. Both the circumstances being co-related, for the sake of convenience, it appears proper to discuss the same collectively.

33.1 The reference to evidence of PW40 reveals that in view of the parents of Nitesh repeatedly receiving the phone calls from the kidnapper, he had through proper channel sought the permission from Home Department of Government of Maharashtra for tapping the phones of PW1 for recording the conversation in between kidnapper on one side and PW1 and PW5 on the other side. After receipt of such permission (Exh. 157) accorded by Home Department, after considering the Report sent by the Commissioner of Police, Navi Mumbai alongwith the note of Dy. Commissioner of Police, of which the material part runs as under:

Therefore, I hereby order and authorise U/s. 5(2) of the Indian Telegraph Act, 1885 that all telephonic communication to and from the MTNL landline numbers 27821806, 27820942 can be observed on Interception Office landline number 27560261. Orange Mobile No. 9820350372 can be observed and intercepted on interception Mobile No. 9819432129 and MTNL Mobile No. 9869377990 can be observed and intercepted on Interception Office No. 27565794 available at Navi Mumbai Police Commissioner Office, with the caller line identification and all the required information so collected should be given to the Commissioner of Police, Navi Mumbai or Police Officer/Staff deputed by him.

he had made the arrangement for interception for recording the conversation on the said Mobile phones and landline of PW1 at his place of residence and at his shop. The work of recording the said conversation was entrusted to PW26 PSI Mhatre of Confidential Branch, Commissioner of Police Office, Navi Mumbai.

33.2 The reference to the evidence of PW26 reveals that the said order was received by him on 5th May, 2004 for making the interception from 5th May uptill 3rd July. PW26 in detail deposed in paragraph No. 2 of his evidence regarding

interception made and arrangement made for recording the conversation. His evidence discloses that recording of conversation was made by diverting two landline nos. 278210806 and 278209402 of PW1 on their (police) landline number 27560261 and Mobile No. 9820350372 of PW1 on no. 9819432129 and another Mobile No. 9869377990 of PW1 on no. 27565794. The interception and recording was started in the night of 5th May, 2004 and was effected as under:

His evidence discloses that he had recorded the said calls in 11 mini cassettes (Exh. 1 to 11) and kept in his custody. The evidence of PW26 as well as that of PW20 reveals that on 30th May, he had handed over the said cassettes to PW20. The evidence of PW20 reveals thereafter in presence of panch PW33 and another in the Office of Crime Branch, he has opened said sealed cassettes and played same in presence of panchas and recorded the conversation by writing minutely as per the cassettes and thereafter got it typed on computer with the help of police constable Kopade and resealed the said cassettes. It discloses that he had drawn panchanama Exh. 151 of the said event.

33.3 With regard to aforesaid evidence and the matters stated in panchanama Exh. 151 though we find substance in the defence criticism that the entire conversation recorded nowhere reveals that any threat for life of boy was given and conversation was regarding negotiations taken place in between PW1 and PW5 on one side and kidnappers on other side, still in our opinion no advantage for the same can be given to the accused persons. We are of such opinion as considering the said conversation as a whole, we find that the same cannot be considered in isolation with the matters stated in the Chit or the events occurred in between as the same is intrinsically connected with the said events. We further add that after considering together, the matters stated in the chit, event occurred of, i.e., particularly sending of pair of sandal to the parents, not permitting PW1 to have talk with his son and nature of negotiations made. The conversation ensued cannot be said to be innocuous talk in between PW1 and the kidnappers or with the persons who were not concerned with the kidnapping and merely interested in grabbing the money from PW1 by taking advantage of the fact of his son being kidnapped. As a matter of fact, we find that entire conversation shows shrewd kidnappers forcing PW1 to pay the ransom by putting him under fear of the safety of the child kidnapped.

33.4 With regard to further criticism canvassed, the evidence of PW26 in terms disclosing that he has kept the 11 cassettes with him in safe custody, remained shattered during the cross-examination repels the defence submission regarding the custody of the cassettes during the period after last recording on 24th May, 2004 uptill the recording of transcription. Similarly, neither PW26 nor PW20 or PW40 being questioned for not taking the custody of the cassettes from PW26 earlier or getting matters recorded in cassettes transcribed, we find it difficult to give any undue importance to the submission canvassed that lying of cassettes with PW26 is suspicious circumstance. Similarly, the learned defence counsels though urged that PW26 had not informed about the interception effected to

Commissioner of Police, Navi Mumbai such admission from his evidence was not brought to our notice. Similarly, the concerned witnesses being not even suggested about tampering of the cassettes, apart from bringing on any record any such eventuality, merely on the basis of the conversation being transcribed after five days of the arrest of accused by ipso-facto cannot lead to conclusion about there being doubt regarding the actual date of the arrest of the accused as canvassed by learned counsel for A-1. The further submission canvassed that evidence of PW26 reveals that the conversation was effected on 8th May, 2004 on landline, but the panchanama reveals the conversation on mobile phone of PW1, being in derogation with panchanama which also contains recitals regarding conversation on landline on said day, would not warrant any further dilation about such erroneous submission canvassed. Similarly, since the talk transpired on 8th May, 2004, at 14.23 hrs. was regarding finding of the child at Lake in Sector-8 and not about the chit, we do not find any substance in the submission canvassed that no chit was found on 8th May, 2004. Similarly, we do not find substance in the submission canvassed that Exh. 151 does not reveal a talk in between the kidnapper and PW1 on 23rd May, 2004 and one more talk at 11.00 a.m. in spite of PW1 having staked such claim. We add that the relevant event having occurred in 2004 and the evidence of PW1 was recorded in 2008, the same could not have been expected to be correct with mathematical accuracy and when it was not a case of receipt of single call, but much more than one, in the episode. The submission canvassed that conduct of PW26 not informing about receipt of call everyday to PW20 or PW40 creates suspicion is not worthy of credence as the further submission itself reveals that the said police officers were receiving the information about receipt of call from PW1. Further more even it is also not brought to our notice that any admission was given by PW26 during the cross examination of having not reported receipt of calls to the police officers.

33.5 In the context of calls received the learned counsel for A-2 urged that though record of the intercepted call reveals that first suspicious call was recorded on 8th May, 2004, the evidence of PW1 does not depict about it and even though the matters from the call reveals that information about the boy was contained therein, no action was taken by the police. It was urged that the same creates doubt regarding the claim of interception of call on 8th May and imaginary record is created during the course of investigation. We do not find any force in said submission for the similar reasons given earlier regarding failure of PW1 of depicting about the one call leading to such inference. Similarly, even considering the information received by the said call, we fail to understand that without receipt of further more clue how the police could have taken any further action than the action already taken. Similar submission was canvassed by learned counsel for A-2 by pointing out PW1 having deposed of receiving numerous calls on 14th May, 2004 from the accused as well as one call from his wife when he was with A-2. However no record of said call has been reflected in panchanama Exh. 151. It was urged thus there being no interest corroboration in between the record of conversation with evidence of PW1 the entire evidence is

liable to be discarded. In the said context, the learned counsel placed heavy reliance upon the decision in the case of Mahabir Prasad (*supra*) relied by her.

33.6 After considering the decision relied, we find that in the said case there was absolutely no evidence of concerned person regarding occurring of talk as sought to be established by producing the talk recorded on tape-recorder and as such Court declined to accept the said corroborative evidence in absence of substantive evidence of a person, who was involved in the talk regarding talk ensued. In the instant case, the fact of talks being ensued with kidnappers due to the receipt of several calls from kidnappers is well established from the evidence of PW1. The appreciation of evidence being not expected to be upon the mathematical scale, merely because PW1 out of several calls fails to depose about receipt of a call on particular day or number of the calls on said day, in our opinion, cannot be said to be affecting his testimony. We are of such considered opinion as the fact of receipt of numerous calls within itself does not reveal that on every occasion the talk had ensued between the parties. It is common experience that on number of occasions after receipt of call the same is disrupted. Further more PW1 having deposed about the material call and the same being found corroborated by the record of conversation contained in Exh. 151 and interception established through the evidence of the concerned witnesses, i.e., PW26 and few others, we do not find any substance in such submission canvassed. Hence, we discard the same and so also the similar submission canvassed about the other dates. We also do not find any merit in the further submission canvassed regarding there being no record of any conversation ensued on the mobile phone of PW1 when he had kept the same open while being with A-1 on 14th May, 2004 for payment of ransom. We are of such view because hardly anything has surfaced on record denoting that then the mobile of PW1 was at such a place from which it could have caught the talks ensuing at the spot.

33.7 In the context of further submission canvassed by learned counsel for A-2 and after taking into account the fact that A-2 had not talked with PW1 on many occasions, we find it difficult to draw an adverse inference against the prosecution as canvassed by the learned counsel on the count of A-2 voice being not contained in the 11 recorded cassettes or more than one occasion.

33.8 In the context of the evidence of conversation, by making reference to the transcription regarding call received on 13th May, 2004, learned counsel for A-1 urged that the said conversation reveals only about keeping of sandal in bag and not about the chit. It was urged that the same adversely affects the prosecution case or the claim of the concerned witnesses that chit was also kept. We do not find any substance in said submission after taking into account the purpose for which the pair sandal was kept and the call was given and the chit was kept. Needless to add that kidnapper was assuring PW1/PW5 through calls or chit about sending of the articles of missing child for supporting his claim that the child was in his custody. Hence, merely he referred about sending of sandal and

did not refer about the chit kept, also cannot be said to be affecting the prosecution case as canvassed. It can be added that even considering the said conversation, the same does not lead to an inference that chit was not kept or only the sandals were kept.

33.9 In the context of the evidence adduced by prosecution regarding interception of call, the learned counsel for A-2 had contended that in support of such interception, the prosecution should have adduced the evidence pertaining to the call records of the telephone/mobiles of PW1 for corroborating such evidence. It was urged that it would be improper to rely upon the evidence of PW26 and others in absence of production of such record. We reject the said submission canvassed, which was erroneously based upon the assumption of necessity of corroborative evidence for corroborating cogent, convincing and reliable evidence given by the person who had effected the interception and got recorded intercepted calls on cassettes.

33.10 In the context of the evidence of intercepted calls the learned counsel for A-1 submitted that the glance at the said evidence reveals that the calls were allegedly received after gap of four to five days, i.e., 1st call on 1st May, 2004, thereafter on 5th, 8th, 13th, 14th 17th and 23rd May, 2004. It was urged that receipt of calls at such intervals denotes the evidence being artificial. It was urged that kidnappers interested in receiving the ransom would have given the calls during short span. It is difficult to give any credence to such submission as the fact of receipt of such call is duly established and the evidence thereto being not impaired, no conclusion as canvassed will deserve any credence. Resultantly, we find no merit in the submissions canvassed and find that the prosecution has duly established circumstance Nos. 18 and 19 under consideration.

34. Now taking up the 20th circumstance to 29th circumstance charted by the trial Court, the same pertains to the conversation in between kidnapper on one side and PW1 and PW5 on the other side during the period in which the said calls were received i.e., 8th to 24th May, 2004. Out of them, 20th circumstance relates to the conversation ensued on 8th May, regarding keeping of a chit for PW1 in the temple of God Jagruteshwar; 21st circumstance also relates to the conversation ensued on 13th May, about keeping of pair of sandle of kidnapped child and chit at the Gate of door of Church situated opposite Hotel Ramdev; 22nd circumstance relates to the conversation ensued on 13th May, regarding making inquiry whether pair of chappal was received at the Gate and after ascertaining it kidnapper giving the assurance of returning the child on the next day, i.e., on 14th May after making payment of ransom amount to a person wearing red colour scarf who would come on 14th May, 2004, near Hotel Cafe Sagar at Nagpada, Mumbai.

34.1 Similarly, 23rd circumstance relates to the conversation ensued on 14th May at about 8.46 a.m. giving assurance to kidnapper by PW1 that he would pay ransom amount and the kidnapper repeatedly asking not to cheat and PW1 repeatedly requesting to arrange for listening the voice of child. So also 24th

circumstance relates to the conversation ensued on the same day at 1.55 p.m., as to why amount was not paid to the person and threat was given that if amount is not given then he would feel compunction and PW1 asked for arranging to listen the voice of the child and kidnapper giving the assurance that he would return the child and presently child was not with him. So also 25th circumstance relates to the conversation ensued on same day at about 8.26 p.m., regarding kidnapper inquiring whether his man had left and whether he had received the money or otherwise.

34.2 Similarly, 26th circumstance relates to the conversation ensued on 15th May at about 3.16 p.m. regarding PW1 making inquiry with kidnapper whether his man had come and kidnapper replying affirmatively, PW1 requesting him to arrange for a talk with the child, kidnapper replying that child was at longer distance, PW1 requesting him to have conversation with the child on mobile phone and the kidnapper replying in affirmative. Kidnapper making inquiry with PW1 about the remaining amount of ransom and assured to arrange conversation with child. Subsequently, kidnapper saying that he was giving medical treatment, toys to the child, and every care of the child was taken and the assurance to PW1 of giving conversation with the child on the next day.

34.3 Similarly, 27th circumstance relates to the conversation ensued on 17th May at about 9.11 a.m. between another kidnapper (A-2) and PW1, wherein another kidnapper disclosed that his Boss abused him and threw amount of Rs. 50,000/- in a dustbin and made demand of Rs. 5,50,000/-, PW1 giving assurance to another kidnapper of giving Rs. 5,50,000/- on receiving the child. So also, 28th circumstance relates to the conversation ensued on same day at about 11.33 a.m., regarding first kidnapper (A-1) talking with PW1 and showing disgust for PW1 giving only Rs. 50,000/- and demanded more amount of Rs. 5,50,000/-, thereafter only first kidnapper would arrange for conversation with the child and PW1 told that he would make arrangement for giving the amount, but child should be brought before him.

34.4 Similarly, 29th circumstance relates to the conversation ensued on 24th May at about 10.42 a.m., regarding receiving of phone by another person on behalf of PW1 and appraisal to the kidnapper that PW1 had gone out and he would be returning soon.

34.5 Now considering the above referred circumstances in light of the evidence of PW26, PW20, and panch PW33 referred earlier regarding recording of conversation on cassettes and getting the same typed and panchanama Exh. 151, the same in terms reveal that aforesaid circumstances are duly established by the prosecution. The bare perusal of said panchanama reveals that matters therein duly corroborates the evidence of PW20 and panch PW33. It reveals that the conversation got typed from the cassettes has been neatly recorded date-wise and time-wise in said panchanama which is also bearing signature of panch witnesses at appropriate places. Thus by the said evidence the prosecution has duly established the corroborative evidence corroborating the evidence of PW1

regarding ensuing of such talk in between himself and two kidnappers as revealed from said conversations. The matters from the said conversation being self-explanatory corroborating the prosecution case regarding unfolding of events happened after Nitesh was kidnapped and demand for ransom was made as deposed by PW1, PW20, PW40 and so also the panch witnesses who were present for the particular event of receipt of Chits, pair of sandal and payment of ransom. Thus on the basis of said evidence, it can be safely said that by the same alone as well as in conjunction with the evidence of PW1 in particular and so also the police witnesses and panch witnesses, the prosecution has duly established all the said circumstances under the consideration and further more genuineness of the prosecution case as stated in earlier part of judgment regarding the events occurred during the period from 8th May uptill 24th May, 2004.

34.6 With regard to the 23rd circumstance after carefully considering the evidence of PW1, PW40 and PW20 and the talks about the payment of ransom of Rs. 50,000/- recorded in the Exh. 151, we do not find any disparity in the same as urged by the learned counsel for A-2 to the effect that the evidence discloses time of payment as 1.30 to 2.00 p.m. while conversation in the Exh. 151 depicts the same being at about 3.30 p.m. It appears that the learned counsel for A-1 has misconstrued the time of said talk recorded therein as 13.30 as being 3.30 p.m.

35. Now taking up the 30th, 31st and 32nd circumstances, the same relates to establishing the identity of the persons involved in the conversation, which was recorded in 11 cassettes referred, i.e., establishing the same by means of voice samples taken during the course of investigation. The 30th circumstance relates to collection of voice sample of PW1, PW5, A-1, A-2 and juvenile offender with the assistance of MTNL personnel PW32 Sakpal in presence of panch PW27 Rajesh under the panchanama (Exh. 161), i.e., two cassettes in respect of voice sample of A-1 (Exh. 12 & 13), one cassette in respect of voice sample of A-2 (Exh. 14), one cassette in respect of voice sample of juvenile offender (Exh. 15), one cassette in respect of voice sample of PW1 (Exh. 16) and one cassette in respect of voice sample of PW5 (Exh. 17). While circumstance Nos. 31 and 32 relates to sending of said cassettes to Forensic Science Laboratory at Delhi alongwith the cassettes of the conversation Exh. Q1 to Q11, and cassettes of sample voices (Exh. 12 to 17), and PW35 Shri. Singh, Asst. Director of said Laboratory after examination giving the Report (Exh. 181) While the circumstance No. 32 relates to said Report establishing that one of the person involved in the conversation from cassettes Exh. Q-1 to Q-10 was of A-1 while cassette Exh. Q-11 was similar to the voice of A-2 and thereby the prosecution establishing the kidnappers involved in the said conversation with PW1 and/or PW5 were A-1 and A-2.

35.1 After carefully considering the evidence of PW40 who had taken the steps for getting sample voice recorded and that of MTNL personnel PW32 Sakpal and

the panch PW27 regarding the said event we find that they have deposed in detail regarding recording of the sample voice in six cassettes Exh. 12 to Exh. 17 and the care taken while recording the same by recording it on the same instrument on which the conversation was made. The said evidence considered alongwith the earlier evidence pertaining to recording of conversation by interception on 11 cassettes Exh. Q-1 to Exh. Q-11 and sending of the same to Forensic Laboratory for comparison establishes the relevant part of the aforesaid circumstances. Similarly, the reference to the evidence of PW35 Singh and his Report Exh. 181 in detail establishes remaining part of the aforesaid circumstances. After careful consideration of all the said evidence, we are unable to find that the core of the said evidence that intercepted conversation was got compared with the sample voices of A-1, A-2 and J.O. and that of PW1 and PW5 having been shattered during the cross-examination or rendered unbelievable due to surfacing of any circumstance otherwise on the record. Thus by the said evidence pertaining to such events inspiring confidence, the prosecution has established the circumstance under consideration as observed earlier.

35.2 Both the learned counsels for A-1 and A-2 though had tried to assail the evidence by urging that the voice samples of the accused and the parents were allegedly taken on 30th June, 2004. It was urged that no evidence has been adduced about the place at which the said cassettes were kept before sending it to Central Forensic Science Laboratory for examination. It was also urged that the evidence of PW40 reveals that on 12th August, 2004, he had sent all the 17 cassettes to the Central Forensic Science Laboratory, Chandigarh (CFSL) for examination, but the cassettes were returned on 18th August, by the Director of the said Laboratory. It was urged that the prosecution has not adduced any evidence as to why those cassettes were then not examined at the said Laboratory and so also the place at which the same were kept from 30th June or thereafter after 18th August. It was urged that the same denotes the possibility that the material in the cassettes could have been well tampered. We do not find any substance in the said submission canvassed as it is not pointed out to us that regarding the said aspect related with the conduct of investigating officer, either PW20 or PW40 was questioned on behalf of the defence to elicit any material for inferring existence of any such possibility. In absence of any such material on record no cognizance can be taken of the possibility highlighted. We may add that proof beyond reasonable doubt only requires exclusion of reasonable possibility and not every possibility which can be visualized. Hence, in absence of any such evidence regarding tampering of the material in the cassettes through or by the persons who were having custody of the said cassettes, i.e., after the same were recorded and/or after were same received back or any further materials brought on the record indicating tampering of said sealed cassettes without any basis it cannot be inferred that material therein was tampered. Such a conclusion is supported by the observations made by the apex Court regarding such aspects in the case of Bilal Ahmed Kaloo Vs. State of Andhra Pradesh, . We are of such view, as the further evidence reveals that after the said cassettes

were returned by the Director as after the charge-sheet was filed the prosecution had moved the Court and the Court had sent the said cassettes for obtaining the opinion to the CFSL at Chandigarh. Apart from the said later aspect spelt from the evidence of PW40 having remained unsheltered during the cross-examination, the record of the case reveals the said cassettes were sent to the said Laboratory by the Court. Further more even the evidence of concerned witness, i.e., PW35 considered in proper perspective reveals that parcels of all the said cassettes was bearing the seal of the Court and the said parcels was containing the parcel bearing seal of Vashi Police Station containing 17 cassettes. Since at the time of examination of said cassettes, it were found to be duly sealed also takes away sting of the grievance canvassed of the prosecution having not adduced the evidence as to why they were not examined at CFSL on the earlier occasion. It can be added that though the defence had an ample opportunity to question PW35 from the said Laboratory, no effort was made to elicit material thereon for supporting the defence submission. Similarly, since the evidence of fact can be received from different sources, i.e., in the instant case PW 35 having deposed that cassettes received for comparison were sealed, we find no substance in the submission canvassed that since PW26 who was having custody of the cassettes after recording ought to have given the evidence that he had sealed the cassettes. Needless to add, such evidence would have been necessary only in the event of either, cassettes being not found sealed by PW35 or his evidence being silent on the said aspect. We also find that in facts and circumstances of the present case and the facts and circumstances in a case of C.R. Mehta Vs. State (supra) relied by learned counsel for A-2 being different, the reliance placed being highly misplaced. All the said evidence having remained unsheltered during the cross-examination repels such submission canvassed for the sake of submission. Hence, we do not find any substance in said criticism.

35.3 With regard to the submission canvassed regarding the aforesaid evidence and particularly that of PW35 on page no. 430 of the tabulation, it was urged that with regard to the matching scale of the cassettes examined only for Exhibit-4 while for others the same is not firm as he has observed with regard to Exhibit-2, 3 as possible and with regard to Exhibit-10 as probable identification. It was urged that with regard to voice matching scale of PW1 no specific opinion was given by PW35. It was urged that the same creates the doubt regarding the opinion given by him. We are unable to accept the said submission as the expert opinion is required to be based upon several facts, i.e., the circumstances in which the sample voice was recorded and the circumstances in which the voice to be compared were recorded. It is obvious that the care can be taken while recording the sample voice, but such care would never be possible when voice to be compared, i.e., the intercepted voice were recorded. The same is obvious as in the earlier occasion, i.e., recording the sample voice of the parties recording can be effected in ideal condition for having best of sample for comparison. Such a thing is not possible for the intercepted voice as the condition from where the kidnapper was talking were beyond the control of the interception officer. Hence,

occurring of such a phenomena, i.e., the difference in scale in the relevant cassettes cannot be said to be a circumstance diminishing value of his evidence or of the opinion, which is obviously not based upon the isolated comparison of one sample voice and the intercepted voice. Resultantly, we do not find any merit in the submissions canvassed regarding the opinion given by the PW35 was not firm.

36. Now considering the 33rd circumstance regarding seizure of notebook (Art. 25) containing natural handwriting of J.O. Nasim, the reference to the evidence of PW40, panch PW3 and corroborating evidence of panchanama Exh. 86 reveals occurrence of such event. The said evidence discloses visit of all of them on 6th June, to Milk Diary at Vashi at which the said J.O. was working and seizure of note-book (Art. 25) containing handwriting of said J.O. found in the said Diary, under panchanama (Exh. 86). After scrutiny, we find that evidence of said three witnesses regarding occurrence of such event, is inspiring the confidence and deserving acceptance. By the said evidence the prosecution has duly established collection of the natural handwriting of juvenile offender and thus circumstance no. 33 under consideration.

37. Now taking up the 34th circumstance regarding collection of specimen handwriting of J.O. the reference to the evidence of panch PW2 Ranjane and the Investigating Officer PW40 in light of the panchanama Exh. 59 reveals that on the same day, i.e., on 6th June, PW40 in presence of PW2 had obtained specimen signature of J.O. on six paper sheets, i.e., Exh. 60. Even after careful scrutiny we are unable to find any fault with the said evidence for coming to any other wise conclusion of by the said evidence prosecution having not established the circumstance under consideration.

38. Similarly, with regard to 35th circumstance regarding obtaining of the handwriting of J.O. about telephone number and the name of the complainant, the reference to the evidence of PW40 and panch witness PW13 reveals that on 6th June, PW40 in presence of panch had asked J.O. to write telephone numbers and name of the complainant on six paper sheets (Exh. 191). The cogent evidence of both the said witnesses regarding occurrence of such event is not at all shaken during the cross-examination. Thus by the said evidence the prosecution has established the circumstance No. 35 under consideration.

39. Now taking up the 36th circumstance that after comparison of the natural handwriting and sample handwriting of J.O. taken tallying with three chits seized during the investigation, the reference to the evidence of PW36 Deepak Pandit, Assistant State Examiner of Documents considered alongwith the evidence of PW40 reveals that he has compared such documents send to him, i.e., specimen handwriting of J.O. during the investigation S-1 to S-12 and natural handwriting of notebook seized N-1 to N-3 with the three Chits kept by the kidnapper and seized during the investigation, i.e., Q-1, Q-2 and Q-3 and visiting card Q-4 found on the person of A-1. PW36 gave the opinion that Q-1 to Q-4 are in the handwriting of the person who had written S-1 to S-12 and N-1 to N-3, i.e., the

J.O.. The evidence of PW36 reveals that Exh. 200 is the statement of reasoning given by him for the said opinion. The perusal of evidence of PW36 reveals that he has deposed in detail regarding the procedure followed by him during the examination of said documents sent to him by Vashi Police Station. Similarly, perusal of Exh. 200 reveals the detail reasoning given by him regarding the opinion arrived. After scrutiny, we do not find the evidence of PW26 being shattered in any manner during the cross-examination rendering his evidence and the opinion given by him as unbelievable. Thus by the said evidence prosecution has duly established the 36th circumstance under the consideration.

40. Now reference to the 37th circumstance under consideration reveals that the same relates to the purchase of household articles, mobile handset, T.V., V.C.R., and other articles out of the amount of Rs. 50,000/- obtained by them on 14th May, 2004 towards the part payment of ransom amount and subsequently having kept them in the rented room at Baiganwadi, Gowandi, Mumbai. Thus broadly the circumstance is comprised of purchase of articles during the relevant phase and secondly keeping the same at the rented room and thirdly the same being out of the amount of Rs. 50,000/- received from PW1 through A-2.

40.1 With regard to the said circumstance the trial Court had charted eight following sub-circumstances and the evidence narrated below the relevant sub-circumstances:

(a) PW40 had made discovery of rented room of accused persons and recovery of articles at the behest of A-1 by drawing memorandum statement (Exh. 106) and discovery panchanama (Exh. 107);

(Evidence of PW8, PW40 and panchanamas Exh. 106 and 107)

(b) The evidence of Landlady PW29 Faridabanu and her daughter PW30 Salmabanu in respect of leasing out one room of PW29 to accused persons at Bainganwadi area, Govandi, Mumbai on monthly rent of Rs. 1000 and on depositing amount of Rs. 10,000/- corroborates the story of prosecution about articles belonging to the accused persons;

(c) The evidence of PW29 and PW30 corroborated by the Lease Deed (Exh. 165);

(d) The story of prosecution about taking of room by accused persons on lease at Bainganwadi out of the amount of Rs. 50,000/- also gets corroboration from the seizure panchanama of lease Deed and deposit amount of Rs. 10000/-, the seizure of which was made on the production of same by PW30 before PW40 and in presence of panchas;

(Evidence of PW37, PW40 and panchanama Exh. 202)

(e) That the prosecution story gets corroboration about purchase of articles made by accused persons out of an amount of Rs. 50,000/- from the evidence of proprietor of household utensils and articles, shopkeeper namely PW31 Ashfak;

(f) Evidence of PW19 Abdul who is the timber merchant also support the

prosecution story about making purchase of articles by accused persons out of amount of Rs. 50,000/-;

(g) That story gets corroboration from the evidence of PW18 Rakesh who had sold mobile handset to A-1 on 22nd May, 2004 by obtaining signature on the requisite form (Exh. 130); And

(h) Story gets corroboration from the evidence of witness, i.e., PW24 Riyaz at whose recommendation PW18 Rakesh had given one mobile handset (Art. 24) to A-1 without getting completed the requisite formalities and same was identified by PW18 and PW24:

40.2 With regard to the aforesaid circumstance, at the first blush, we say that after careful consideration of the evidence adduced by the prosecution, in support of each of the said circumstance as mentioned hereinabove, we find that by the said evidence prosecution having established the said circumstance. With such preliminary remarks, now we would be dealing with taking up the criticism advanced on behalf of the defence regarding the said circumstance and so also criticism in general regarding the prosecution evidence.

40.3 Now with regard to aforesaid sub-circumstances though the defence counsels tried to assail the evidence pertaining to seizure of the said articles on the count of PW31 having not produced any receipts regarding the sale/purchase of such articles by the accused persons. We do not find any substance in the said submission in view of the presumption of truth available for the evidence given on oath and the same having remained unsheltered by bringing anything on record repelling such presumption. As a another shade the submission is canvassed upon the pre-supposition of receipts being taken and/or passed for the said transaction. No such position being spelt from the evidence of relevant witnesses, we find no merit in the said submission.

40.4 It was also tried to urge that though the statement u/s 164 of Cr.P.C. of juvenile offender Nasim Ansari was recorded by J.M.F.C. Vashi, the same was never produced. The said submission needs no dilation except stating that deserves to be rejected. Such observation is inevitable as the trial was pertaining to A-1 and A-2 and the said J.O. was tried before another Forum, i.e., the Juvenile Court. Hence, we fail to understand said statement even assuming to be confession, could have been used for any meaningful purpose in the present trial and most particularly in view of specific stipulation contained in Section 30 of the Indian Evidence Act, which permits limited user of the said statement against the co-accused only in the event of trial of confessing accused being joint with the other co-accused.

40.5 In view of prosecution having examined panch PW27 at the trial and nothing has been elicited during the cross-examination for fortifying the submission canvassed that he was a stock panch of Vashi Police Station, we are unable to give any credence to the submission canvassed that the fact of PW27 has acted as panch witness for the said police station in the present case on four

occasions itself denotes that he was stock panch for the said police station. At the cost of repetition, we add that such an inference could have been warranted in event of defence having elicited any materials during the cross-examination raising a doubt in a mind regarding the reason for which he had acted as a panch witness for all the four occasions.

40.6 Similarly, we do not find any merit in the submission canvassed of prosecution or particularly PW40 having not thrown the light as to why the accused persons had selected Nitesh for such purpose, when evidence shows that there was no connection of any nature in between any of the accused with the family of PW1. The reason is obvious as the said fact which was within the knowledge of the accused persons, the investigating officer could not have thrown any light upon said aspect without receiving clue thereof from accused persons during the course of investigation. Needless to add, the evidence of PW40 or even PW20 does not reveal any such clue what received by them. As a matter of fact inability of PW40 to throw light upon the said object is also indicative of no attempt being made on his part of using unlawful methods for extracting the clues in the investigation and in turn investigation being fair.

40.7 With regard to another submission canvassed regarding PW40 having not arranged any identification parade during the course of investigation also we do not find any substance, after taking into consideration the purpose for which the identification parades are required to be carried out. We reiterate that arranging such parades relate to the arena of the investigation and the purpose for the said parade is primarily for ascertaining whether the investigation is proceeding in the right direction or otherwise. Secondly, the identification parade may be warranted for an incident which had lasted for short duration and thereby having not afforded fair time for the concerned witness to observe the culprit and the said facets raising the possibility of witness committing mistake while identifying culprit at trial which is held after a considerable lapse of time. Upon said backdrop, since in present case the accused persons were caught at the spot and out of them A-2 was already known to the police, i.e., particularly PW20 and PW40 and the other police personnel due to having seen him while collecting part of ransom of Rs. 50,000/-, it is difficult to perceive any need of holding Test I.P. for the witnesses, who were present while apprehending and arresting accused persons. With regard to the witnesses from the locality who had seen deceased last seen alive in the company of A-1 and A-2 hardly there could have been any necessity to hold I.P. as A-1 and A-2 were well known to them due to residing in the same locality and visiting their shops, i.e., tea-stall, grocery shop etc. No identification parade for any witness regarding keeping of chits in temple would have been held as no witness having such events was traced out during the investigation. Similarly, the persons alike shopkeepers, attendants at counter, taxi drivers, bus-conductors, ticket collectors everyday coming across the large number of persons during the course of the business unknowingly developing uncanny habits of remembering such a person, we do not find any substance in the submission that it was necessary for PW40 to hold identification parade for

the witnesses from whom the accused persons had purchased the articles.

40.8 With regard to Circumstance No. 37(a) pertaining to discovery and seizure of articles from the room at Vashi, it was urged that the said evidence is vitiated in view of PW8 during the cross-examination having given the admission that A-1 was handcuffed as the same shows the coercion and or duress. We are unable to agree with said submission as the relevant had taken place on 5th June, and by then the involvement of the appellants in the serious offence was transpired. After considering the evidence of PW8, we do not find that the admission referred does not reveal since when the said handcuffs were utilized. The evidence of PW8 does not reveal that at the time of making a statement A-1 was handcuffed, hence, while taking A-1 for showing the place user of the handcuffs as a precautionary measure ipso-facto cannot be said to be a factor vitiating the said evidence, which is otherwise convincing and cogent. Similarly, since the evidence of PW8 and contemptuous record of the event, i.e. panchanama Exh. 107 reveals the relevant event having occurred on 5th June, minor discrepancy appearing in the evidence of PW30 regarding the event having occurred on 6th June, instead of 5th June, cannot be given any undue significance as tried to be canvassed by the learned counsel for A-1. Such a conclusion is obvious as the core of the evidence regarding of occurrence of such event had remained shattered and occurring of such event on 5th June is duly established by the evidence of PW8 and PW40. Similarly, we do not find any difference in signature upon the copies of agreement at page nos. 414 and 416 of the paper-book as canvassed by the learned defence counsel. Hence, the submission canvassed that the same creates doubt the occurrence of relevant event will be required to be discarded as not survive.

40.9 With regard to circumstance Nos. g & h charted in paragraph No. 41.1, the learned counsels for the accused assailed the evidence of PW18 and PW24, by urging that the prosecution has not produced any record showing user of the said mobile or the bills of the mobile or any application for purchase of mobile and further more no such mobile was recovered from A-1 or any other accused at the time of arrest are indicative of the relevant witnesses is got up witnesses. In support of the said submission, it was canvassed that if at all ransom of Rs. 50,000/- was received by A-2 then the story told by PW24 that A-1 had taken loan of Rs. 50/- from him two/three days prior to its return on 22nd May, 2004 also indicates cooking up cock and bull story for adding sanctity to the evidence of said witness.

40.10 After careful scrutiny of evidence of both the witnesses, we are unable to accept the said criticism as the earlier submission pre-supposes necessity of such corroborative evidence for the evidence of PW18 who has deposed of having sold mobile handset and SIM card. It is settled legal position since the decision in a case of Vadivelu Thevar Vs. The State of Madras, that no corroboration is required for the evidence of witness who is found to be reliable. Since perusal of evidence of PW18 does not reveal any circumstance therein suggestive of himself

being not reliable witness without corroborative evidence as canvassed, his evidence is not liable to be discarded. With regard to the further submission it can be safely said that for the reasons known to them if the accused persons had not chosen to use the ransom amount for some period under the apprehension of same being marked currency notes, the inference as canvassed by learned counsel for A-1 cannot be accepted that PW24 had canvassed false story of A-1 taking loan for adding sanctity to his evidence. Thus such a far fetch inferences as tried to be canvassed by pointing out such features deserves to be rejected.

40.11 As a net result of the aforesaid discussion though we find substance in the criticism that even accepting that the accused persons had taken on lease such a room by paying such deposit and/or had purchased such articles and were in possession or custody of said articles hardly there is any evidence to reveal that the said transactions were made by them out of the ransom amount of Rs. 50,000/- received by them through A-2 on 14th May, 2004, still the submission cannot be accepted that said evidence is absolutely of no use to the prosecution for establishing the main circumstance under consideration.

40.12 We are of such opinion as reference to the evidence of PW24 Riyaz Ahmed who had recommended A-1 to PW18 Rakesh for purchasing the mobile amongst other reveals that in month of May, 2004, A-1 had been to him for demanding the money on the count that his money purse was stolen and A-1 had taken loan of Rs. 50 from him. The said facet within itself reveals A-1 then not having any money and as such in need of money due to his purse being stolen. It is indeed true that said witness during further part of his deposition has deposed that on 22nd May, A-1 having refunded the said money. PW24 has also deposed that he had given Rs. 50/-, 2-3 days prior to 22nd May. However, considering the amount taken by A-1, it is clear that A-1 then must be in dire need of money. It has also come in evidence that A-1 and A-2 and J.O. were residing together. Thus the said evidence considered in proper perspective reveals that all of them must be short of money as otherwise A-1 instead of taking the money from PW24 had taken the same from A-1 and J.O..

40.13 Now considering the evidence relating the other transaction without unnecessarily detailing the said evidence, it can be safely said that the evidence of PW29, reveals that she has leased out room to A-1 on 17th May and then he was having T.V. set, Mixture, cooker and other articles and A-2 and J.O. were with him. The Lease Agreement at Exh. 165 reveals date of Agreement and Lease on 17th May, 2004. The evidence of PW29 is corroborated by evidence of her daughter PW30 regarding the aforesaid event and so also establishes the visit of the police alongwith A-1 on 6th June and on the next day she has handed over lease document and deposit amount of Rs. 10,000/- given by A-1 with the police. The corroboration to the said evidence is found from the evidence of panch PW37 Kiran for panchanama (Exh. 202) under which the said currency notes and Lease Deed was seized. The evidence of shopkeeper PW31 reveals that on 17th May, A-1 and A-2 had purchased steel water container, grain

container cooker, mixture, cooking pots carpet, lemon juice and many articles from him and initially asked for engraving the name of the A-1 upon the said articles and later on A-2 upon the utensils. The evidence of PW19 reveals that that on 18th May, A-1 had been to his shop for purchase of table for keeping T.V., kept T.V. and V.C.R. in his shop and gone for purchasing cushion and subsequently returned with a tempo and cushion and purchased a table for Rs. 400/-. It also discloses that thereafter A-1 had carried the table, T.V., V.C.R. by the said Tempo alongwith cushion already in the Tempo. It also reveals that A-1 was then accompanied by A-2 and another boy. Similarly, the evidence of PW-18 reveals that on 22nd May A-1 had purchased mobile set and SIM card in consonance with prosecution case. Thus the said evidence considered in proper perspective though does not directly establish that said purchases were made from the part of ransom received, definitely reveals that A-1 and so also the other accused persons in the need of money in the earlier part of month of May, 2004 were suddenly in the possession of the handsome amount. The reference to the statement given u/s 313 of Cr.P.C. does not reveal A-1 and A-2 having given any plausible explanation for suddenly being in possession of the handsome amount in the second part of month of May, 2004. Having regard to the same, earlier need of money by A-1 and all of them suddenly being in possession of such amount leads to the plausible inference of all the said transactions being made out of the ransom amount of Rs. 50,000/- received by them from PW1 through A-2. Resultantly, we find that prosecution having established the main 37 circumstances under consideration.

41. In the premises aforesaid after reappraisal of entire evidence in light of the reasoning canvassed, it can be safely said that the trial Court has committed no error in coming to the conclusion of prosecution having established the 37 circumstances referred in paragraph no. 41 of the judgment under consideration. As observed earlier by us while charting out the said circumstances, the trial court having intermixed the circumstances with the evidence establishing the circumstances had resulted in erroneously charting out 37 circumstances. After careful perusal of said circumstances established in true sense it can be said that the said circumstances established by the prosecution are:

- (1) A-1 had an opportunity to commit the offence of kidnapping and the further offences is denoted by the fact of himself sitting for 6-10 days prior to 26th April, 2004 nearby the place at which Nitesh used to play in the evening and himself giving him chocolates for developing acquaintance;
- (2) Nitesh was kidnapped on 26th April, 2004 at about 6.30 p.m. while playing nearby the residential house of PW1 and PW5;
- (3) Nitesh was seen in the company of A-1 in the rickshaw of PW14 on 26th April at about 6.30 p.m. from Sector-8, Vashi to Shivaji Square;
- (4) PW5, PW1 and their relatives, as well as Vashi Police were unable to locate Nitesh in-spite of search made by them;

(5) Nitesh was lastly seen alive in the company of A-1, A-2 and J.O. in the locality of Turbhe Stores on 27th April, 2004.

(6) A-1 had given various phone calls to PW1 as described in detailed in Exh. 151 during the period from 1st May, 2004 upto 24th May, 2004, giving the threats, demanding ransom, negotiating ransom amount, keeping of chits containing various directions for PW1 regarding payment of ransom and/or articles of Nitesh;

(Motive behind the crime)

(7) As informed by A-1 the Chits in the handwriting of J.O. were found kept at the places informed, i.e., Chit (Art.A) on 1st May in Saibaba Temple, Chit (Art.B) on 10th May, in Jagruteshwar Temple and Chit (Art.C) alongwith pair of sandal of Nitesh on 13th May at the main gate of Church in front of Ramdeo Hotel;

(Motive behind the crime)

(8) The phone calls made and/or the Chits sent were calculated effort on part of A-1 for forcing PW1 to pay ransom amount of Rs. 15 Lacs demanded and/or reduced after negotiation ultimately to the tune of Rs. 1 Lac for release of Nitesh detained by A-1 and his associates;

(Motive behind the crime)

(9) As informed by A-1 on phone on 14th May, 2004, A-2-a person wearing red scarf had been to nearby Cafe Sagar Hotel, Nagpada and after negotiation collected ransom amount of Rs. 50,000/- brought by PW1;

(Overt-acts on part of A-2 showing his involvement)

(10) A-2 had given phone call to PW1 on 17th May, 2004 as described in detail in Exh. 151 informing that Rs. 50,000/- paid by him was less and his boss has thrown the money in dustbin and demanded amount of Rs. 5,50,000/- and after paying such money PW1 would be able to hear the voice of his son within two hours. and upon PW1 asking him as to where he should come for paying money had told that his Boss would be again contacting PW1 on phone;

(11) On 24th May, 2004 at about 1.30 p.m., near Hotel Cafe Sagar, the police had caught A-2, A-1 and juvenile offender arrived much earlier for collection of further ransom amount to be paid at 4.00 p.m. as informed by A-1 on phone on the same day at about 11.00 a.m.

(12) During the search of A-1 taken at the said spot visiting Card Art.Q on the rear side containing name of PW1 and his telephone number was found with A-1;

(Preparation made for commission of crime)

(13) Decomposed dead body of Nitesh was found buried at the place nearby Pavna Bridge to which place A-1 had led police, panchas and PW1 after making the disclosure statement of showing such place on 25th May, 2004;

(Knowledge of A-1 showing his connection with crime)

(14) Bloodstained stone pointed by A-2 was seized from the place nearby the place shown by A-2, at which the body of Nitesh was disposed by burying, i.e., the place to which A-2 had led panchas, police and PW1 after making the disclosure statement on 5th June, 2004 and it was the same place as earlier shown by A-1 and from which the body was exhumed;

(Knowledge of A-2 showing nexus with the crime committed)

(15) Nitesh having met homicidal death;

(16) The unnatural conduct of A-1 and A-2 in the episode when they were questioned by the witnesses regarding the custody of the child;

(17) A-1 soon after his arrest upon query made by PW40 attempted to mislead PW40 by stating that the child was at Sawantwadi in spite of the fact that the child was dead;

(18) A-1 and A-2 were found in possession of the large amount of money after 14th May, 2004 and from the said money they had procured new residence at Baiganwadi much away from their residence at Turbhe store and so also purchased new articles including luxury articles like T.V., V.C.R. and mobile handset etc.; And (19) A-1 and A-2 failed to give any plausible explanation to any of the aforesaid incriminating circumstances established and/or the part of the same;

42. Now considering the aforesaid established circumstances on the backdrop of the evidence that PW1 or his family had no whatsoever sort of connection with either A-1, A-2 or the J.O. inasmuch as unsheltered evidence of PW1 that he had not seen them earlier and no sort of explanation having forthcome from A-1 and A-2, we are unable to find any fault with the findings arrived by the trial Court by the said 37 circumstances established by the prosecution, i.e., by the 19 circumstances charted by us, the prosecution has established A-1 and A-2 having committed the offence under Sections 364-A, 387, 386, 302, 201 read with Section 34 of Indian Penal Code.

43. The learned counsels for the accused persons particularly that of A-2 tried to urge that even accepting the aforesaid circumstances as it is, the same does not reveal any role played by A-2 either in kidnapping or committing the murder of Nitesh. It was canvassed the connection of A-2 with the murder is not at all established as the stone allegedly recovered at the behest of A-2 is not found containing any bloodstained upon it. It was urged even the place for residence procured was not in the name of A-2 and was in the name of A-1. It was urged that even the articles were purchased by A-1. It was canvassed that accepting the slender evidence of giving one call which is also of doubtful nature, no evidence has surfaced of A-2 having given any threatening call to PW1. It was canvassed that even none of the Chit was in the hand writing of A-2. It was thus contended that merely because A-2 had associated A-1 in the said venture by

committing some acts still he would not be liable for all the acts which were committed by A-1. It was urged that the role at the maximum played by A-2 can be said to be of assisting A-1 in knocking out the ransom amount from PW1. It was thus canvassed that hence he deserves to be acquitted or atleast deserves to be given benefit of doubt for commission of offence of murder and kidnapping.

44. The learned counsel for A-1 reiterated his submissions which are dealt by us earlier, and canvassed that hardly any evidence has surfaced that A-1 had actually committed the murder of child. It was urged that inference to the said effect rest upon the sole circumstance of the place from which body was exhumed was discovered at the behest of A-1. It was urged that A-1 could have knowledge of the said fact for several reasons and hence merely upon the said circumstance he cannot be held guilty for the offence of murdering the said child. It was thus contended that at the maximum guilt of the A-1 can be said to be proved for the offence of kidnapping or the offence of extorting money and not for the other offences. The learned counsel vehemently contended that it is cardinal principle of the juris prudence that the prosecution is required to prove the guilt beyond pale of doubt. It was urged that since the other view is possible upon the evidence of A-1 being not guilty for the other offences other than kidnapping and extortion, he deserves to be given benefit atleast for the commission of said offences for which he has been held guilty by the trial Court.

45. Since we have already dealt with such submissions canvassed while assessing the prosecution evidence for determining the establishment of the circumstances, we do not think it necessary to reiterate the reasoning already given while discarding such submission canvassed. Additionally, for rejecting we feel it proper to make the reference to the provisions of Section 34 of Indian Penal Code with the aid of which A-1 and A-2 is found to be guilty for the commission of the offences and so also the definition of an Act referred in the said section, under the Penal Code.

46. In the said context, the reference to the Section 34 of I.P.C. reveals that the same runs as under:

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

Further more the reference to the definition of an Act given u/s 33 runs as under:

"Act". "Omission".-the word "act" denotes as well a series of acts as a single act, the word "omission" denotes as well a series of omissions as a single omission.

47. Thus combined reading of both the above referred sections reveals that a criminal act may include a series of an acts. On the said backdrop, now considering the aforesaid circumstances, we are unable to find any substance in the submissions canvassed by either of the learned counsel for A-1 and A-2. As the evidence surfaced amongst other clearly denotes that A-1 and A-2 as well as

J.O. were staying together at Turbhe Store locality. Now, considering the conduct of A-1 and A-2 as revealed from the evidence and particularly the child being lastly seen alive in their company makes it amply clear that all of them were aware regarding the reason for which A-1 had brought the child to the place at which they were residing. Further more the conduct of A-2 of going to the spot near Cafe Sagar Hotel on 14th May, 2004, the talks ensued in between A-2 and PW1, his disclosure that he was professional kidnapper from the gang of Chota Rajan, negotiation taken place, and so also his talk with PW1 on phone on 17th May, 2004 clearly repels the argument that he was only assisting A-1 for knocking out the money from PW1. A-1 asking shopkeeper PW31 to put the name of A-2 upon the utensils purchased is also self-explanatory. The same is repelled by the further evidence regarding his knowledge about the place at which the dead body was found to be buried. All the said evidence clearly reveals that all the said accused were acting in furtherance of their common intention to kidnap the child of PW1 for the ransom, detain him for forcing PW1 to pay the ransom by putting him under the threat of killing of his child, and the events occurred in the process of causing homicidal death of the child and destroying the evidence of the offences committed by all the accused in furtherance of their common intention. Hence, we do not find any substance in the submission canvassed by the learned counsel for A-2 by pointing the circumstances narrated earlier. Though it is true that stone was not found stained with human blood, still after taking into consideration the number of days after which the said seizure was effected, the evidence of PW21 in proper perspective and nature of injuries caused to the child assumes relevance. Though it is true that A-1 having already shown the place the police had the knowledge at which the body was buried and infact the body was exhumed from the said place, still the place pointed out by A-2 being the same is capable of denoting his knowledge about the place at which the corpse was buried. All the said evidence also reveals that all the acts committed in the said transaction including the burial of the corpse were committed in furtherance of common intention of all. Thus considering the evidence in proper perspective, we do not find any substance in the submission canvassed by learned counsel for A-2.

48. Since, we find that the parameters of Section 34 of I.P.C. are wide enough to cover all the acts committed on part of A-1 and A-2 in achieving the common mission of kidnapping, detaining, forcing PW1 to pay ransom, commission of murder and causing disappearance of the evidence of murder by disposing of the body by burying it and active role played by both of them in the mission with the assistance of the person who had written the Chits being established by the aforesaid circumstances, we do not find any substance in the submission canvassed by either of learned counsel. We further add, since it is settled legal position that a guilt can be established by direct evidence as well as by in-direct evidence, i.e., circumstantial evidence and the prosecution in the instant case having established the above referred circumstances leading to the sole inference of an guilt of A-1 and A-2 in commission of the offences under Sections 364-A,

387, 386, 302, 201 read with Section 34 of I.P.C., we neither find any substance in any of said submissions canvassed, nor find any fault with the trial Court in finding A-1 and A-2 guilty for commission of such offences and convicting and sentencing them.

49. Having concluded aforesaid now taking up the question of sentences awarded by the trial Court on various counts and particularly the sentence of death awarded to A1 and A2, in light of the submissions canvassed by the rival parties, at first blush, we feel it necessary to say that we are unable to find any fault with the sentences other than sentence of death awarded, by the Trial Court to both of them on various counts as recorded in the commencing part of the judgment. We are of such a considered view as we find that such sentences have been awarded in accordance with the principles behind sentencing the accused found guilty for commission of offences i.e. the sentences awarded should be in accordance with the severity of the offence committed by the concerned accused and sufficient to remove the element of criminality in him which has led him for committing such offences. Needless to add, hence, no interference is warranted on our part regarding the other sentences imposed other than death sentence.

50. Now considering the question of sentence of death awarded to A-1 and A-2 and examining the aspect of confirming the same, in light of the submission advanced by the rival parties of confirming or not confirming the same, we feel it appropriate to make the reference to the observations made by the apex Court in the landmark decision in the case of Machhi Singh and Others Vs. State of Punjab, page 957 wherein with regard to the question of awarding the death sentence and the aspect of rarest of rare case, the apex Court observed in paragraph No. 32 to the following effect:-

32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence in no case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict

death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

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

(2) Motive for commission of murder: When the murder is committed for a motive which evinces total depravity and meanness;

(3) Anti-social or socially abhorrent nature of the crime: when murder of a member of a schedule caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath. This would also cover bride burning and dowry death cases;

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

(5) personality of victim of murder: When the victim of murder is an innocent child or a helpless person or a public figure. If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court must proceed to do so.

51. In the same decision after considering earlier decision in the case of Bachan Singh Vs. State of Punjab, at page 898 also relied by both the parties the Apex Court about "death sentence" further observed in paragraph Nos. 33 and 34 to the following effect:

33. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh's case:

(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) before opting for the death penalty the circumstances of "offender" also require to be taken into consideration along with the circumstances of the "crime"

(iii) life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime and provided, and only provided, the option to

impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances,

(iv) a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

34. In order to apply these guidelines inter-alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for death sentence ?

(b) are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

52. We also find it appropriate to make reference to the recent decisions of the apex Court in the case of Sangeet and Another Vs. State of Haryana, , wherein after making elaborate discussion of the cases decided after the decision in the cases of Bachan Singh and Macchi Singh (supra) and thus regarding sentencing policy followed thereafter observed in paragraph Nos. 77 to 77.4 to the effect;

77. The broad result of our discussion is that a relook is needed at some conclusions that have been taken for granted and we need to continue the development of the law on the basis of experience gained over the years and views expressed in various decisions of this Court. To be more specific, we conclude;

77.1. This Court has not endorsed the approach of aggravating and mitigating circumstances in Bachan Singh (supra). However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.

77.2 Aggravating circumstances relates to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.

77.3 In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become Judge-centric sentencing rather than principled sentencing.

77.4 The Constitution Bench of this Court has not encouraged standardisation and categorisation of crimes and even otherwise it is not possible to standardise and categorise all crimes.

(emphasised supplied)

53. The apex Court referring the decision in the case of Sangeet (Supra), further observed in the recent decision in the case of Gurvail Singh @ Gala and Another Vs. State of Punjab, ;

15. This Court has recently in Sangeet v. State of Harayana (supra), (in which one of us K.S.P. Radhakrishnan, J. was also a member) elaborately discussed the principles which have to be applied in a case when the Court is called upon to determine whether the case will fall under the category of "the rarest of rare cases" or not. The issue of aggravating and mitigating circumstances has been elaborately dealt with by this Court in para 27 of that judgment (at SCC pp. 463 et seq.)

16. This Court in Sangeet case (supra) noticed that the legislative change and Bachan Singh case (supra) discarding proposition (iv) (a) of Jagmohan Singh Vs. The State of U.P., , Machhi Singh case (supra) revived the "balancing" of aggravating and mitigating circumstances through a balance sheet theory. In doing so, it sought to compare aggravating circumstances pertaining to a crime with the mitigating circumstances pertaining to a criminal. This Court held that these are completely distinct and different elements and cannot be compared with one another and a balance sheet cannot be drawn up of two distinct and different constituents of an incident. Reference was also made to the judgment of this Court in Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka, and this Court opined that not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in the light of the conclusions in Bachan Singh (supra).

17. This Court in Sangeet case (supra) held that even though Bachan Singh (supra) intended "principled sentencing", sentencing has now really become Judge-centric as highlighted in Swamy Shraddananda (2) (supra) and Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra, . The ratio of crime and criminal has also been elaborately dealt with in Sangeet (supra), so also the standardisation and categorisation of crimes. This Court noticed that despite Bachan Singh (supra), the particular crime continues to play a more important role than "crime and criminal".

18. This Court in Sangeet (supra) noticed that the circumstances of the criminal referred to in Bachan Singh (supra) appear to have taken a bit of a back seat in the sentencing process and took the view, as already indicated, balancing test is not the correct test in deciding whether the capital punishment be awarded or not. We may, in this case, go a little further and decide what will be the test that we can apply in a case where death sentence is proposed.

19. We notice that, so far as this case is concerned, the appellants do not deserve death sentence. Some of the mitigating circumstances, as enunciated in Machhi Singh (supra), come to the rescue of the appellants. Age definitely is a

factor which cannot be ignored, though not determinative factor in all fact situations. The probability that the accused persons could be reformed and rehabilitated is also a factor to be borne in mind. To award death sentence, the aggravating circumstances (crime test) have to be fully satisfied and there should be not mitigating circumstance (criminal test) favouring the accused. Even if both the tests are satisfied as against the accused, even then the court has to finally apply the rarest of rare cases test (R-R Test), which depends on the perception of the society and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crime or not. While applying this test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like rape and murder of minor girls, especially intellectually challenged minor girls, minor girls with physical disability, old and infirm women with those disabilities, etc., examples are only illustrative and not exhaustive. Courts award death sentence, because the situation demands, due to constitutional compulsion, reflected by the will of the people, and is not Judge-centric.

(emphasised supplied)

54. Having regard to the aforesaid observations and reference therein made to the decision in case of *Swamy Shraddananda* (supra) and significance of the same while considering the question of awarding death sentence or the other sentence, it will not be out of place to make the observations made in the said case in paragraph No. 92 to the effect:

92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial Court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a terms of 14 years would be grossly disproportionate and inadequate. What then should the Court do ? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purpose, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years" imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years" imprisonment would amount to no punishment at all.

(emphasised supplied)

The same principle is found followed in the later decision in the cases of Dilip Premnarayan Tiwari and Another Vs. State of Maharashtra, and Haru Ghosh Vs. State of West Bengal, .

55. Now considering the submission advanced by the rival parties, the learned APP urged for confirming the sentence of death awarded to A-1 & A-2. It was submitted that the trial Court has given cogent reasons in paragraph Nos. 191 to 222 for awarding death sentence to both the said accused after considering submission advanced by both the parties. It was submitted that considering the said reasons based upon evidence surfaced the sentence of death deserves to be confirmed. It was urged that during the said reasoning the trial Court has taken into consideration the guidelines given in the decision of Machhi Singh (supra) and Bachan Singh (supra) and particularly the five factors given in the decision in a case of Machhi Singh (supra). It was urged that the reasoning given shows that after correctly analyzing the facets from the evidence, the trial Court had concluded existence of such factor leading to the inference of the case being of rarest of rare type and had awarded the death penalty for the offence under Sections 364-A, 302 r.w. Section 34 of I.P.C. to A-1 and A-2. It was urged that while arriving at the conclusion of existence of such factors the Court has duly taken into consideration the manner in which the murder of helpless child was committed, the ransom was demanded even after his murder, the conduct of the accused as revealed from evidence denoting that they were harden criminals, the crime of enormous magnitude committed by them. It was urged that having due regard to existence of such factor and the same making the case of rarest of rare type the capital punishment awarded to A-1 and A-2 be maintained.

56. The learned APP, on his turn relied upon the following decisions:

- (1) Bachan Singh Vs. State of Punjab, ;
- (2) Machhi Singh and Others Vs. State of Punjab, ;
- (3) Vikram Singh and Others Vs. State of Punjab, ;
- (4) Jai Kumar Vs. State of M.P., ;
- (5) Shivaji @ Dadya Shankar Alhat Vs. The State of Maharashtra, ;
- (6) Sushil Murmu Vs. State of Jharkhand,
- (7) State of Rajasthan Vs. Laxman Singh and Others, ;
- (8) State of Maharashtra Vs. Suresh,
- (9) Rangnath Sharma Vs. Satendra Sharma and Others, ;
- (10) Girija Shankar Vs. State of U.P., ;
- (11) Akram Khan Vs. State of West Bengal ;
- (12) Rajesh Govind Jagesha Vs. State of Maharashtra, ;

- (13) Ashok Kumar Vs. State of Punjab, ;
(14) Jayaseelan Vs. State of Tamil Nadu, ;
(15) G. Parshwanath Vs. State of Karnataka, ;

And

- (16) Golakonda Venkateswara Rao Vs. State of Andhra Pradesh, .

57. Both the learned counsels for the respective accused assails the awarding/ proposing death sentence to A-1 and A-2 by placing the reliance primarily upon the decision in the cases of (i) Machhi Singh and Others Vs. State of Punjab, page 957 and (ii) Bachan Singh Vs. State of Punjab, at page 898. It was urged that awarding of such sentence to the said accused is improper as the same is not warranted in facts and circumstances of the crime and so also the mitigating circumstances relevant to the accused persons pointed to the Court. It is the grievance of both the counsels that the trial Court without properly appreciating the mitigating circumstances pointed qua the accused persons unnecessarily drew unwarranted inferences about the existence of the matters not established for enhancing the magnitude of the offences committed. It was urged that upon flimsy reasons the trial Court failed to take into consideration the vital aspect of possibility of reformation of A-1 and A-2. It was urged that the trial Court unnecessarily gave undue significance to the circumstances related to the crime and ignored the circumstances relevant to the accused persons.

58. It was urged that while considering the question of death sentence the observations made by the trial Court in paragraph No. 204 "the murder of child was brutal, grotesque, diabolical, dastardly manner and of extreme indignation of community" or the further observations "that child was killed when he was crying, the accused persons mercilessly shut the voice of the innocent, harmless child to screen themselves from the clutches of law" are without any basis and hence, the conclusion drawn that said act of accused persons can be termed as heinous and inhuman act is the surmise. After taking into consideration the fact that the evidence in the instant case being circumstantial and as such no evidence having surfaced precisely as to when or at which place the child was killed, the said submission cannot be said to be dehorse of merit. Though it is true that the evidence has established the fact of child having met homicidal death and the circumstances leading to inference that child was murdered, still there being no eye-witness for the crime and the medical evidence being confined to only the head injury of the child, we find it difficult to accept the said adjectives attached and inferences drawn thereon by the trial Court. Needless to add the same and particularly that child was murdered when he was crying or the accused persons mercilessly shut the voice of innocent are more in the nature of surmises rather than being based upon crude evidence surfaced at the trial. Such conclusion is inevitable as conviction for offence on both A-1 and A-2 is germane to the provisions of Section 34 of Indian Penal Code without there existing precise evidence regarding the manner in which the child was murdered,

that is, how many blows were given or at what time and what place child was killed. Similarly, no evidence having surfaced at the trial of involvement of A-1 and A-2 or J.O. in commission of the act of kidnapping or demanding the ransom for releasing kidnapped person earlier than the incident in-question, the learned counsels for A-1 and A-2 were very much right in submitting that the observations made by the trial Court in paragraph No. 205 of the judgment that they had adopted such a modus-operandi for becoming rich is unwarranted. Needless to add on the basis of singular act the concerned culprit cannot be said to have adopted particular modus-operandi. No doubt, the evidence reveals that whole exercise on part of the accused persons was for earning money, still absence of evidence of similar activities earlier, much less even the allegations of such nature, the same can be described in such a manner as observed by the trial Court.

59. We also find force in the submission canvassed that by and large every crime being either against person or property of person, the same is against the society. However, it is difficult to accept that hence every crime can be termed as an anti-social act as described erroneously by the trial Court. The crime by and large directed against the large number of the people or particular group of people or particular sect or against large group of person may be called as an anti-social act. Hence, we find substance in the submission of error being committed by the trial Court in terming the said isolated venture on part of the accused persons primarily for earning more money though was a crime, still the same can be termed as anti-social act.

60. We also find force in the submission canvassed by the learned counsels that the trial Court completely failed to appreciate difference in between "magnitude of crime" and "high handed act". Though we agree that the acts on the part of the accused persons can fall in the category of high handed act, still the crime committed by them which had affected primarily the child and his family by itself cannot be said to be crime of enormous magnitude. We may add that the "result" of the crime and "effect" of the crime being altogether different aspect, merely because likelihood of such crime being capable for causing the disturbing effect upon the locality can be sufficient, to term it as crime having enormity.

61. The learned counsels heavily assailed the reasoning given in paragraph No. 209 of the judgment that the observation of trial Court of accused persons having demanded ransom money even after death of child is indicates that their conduct was beyond imagination of an ordinary person and fully denotes of themselves being harden criminal. It was urged that no such inference was warranted in view of there being absence of the evidence precisely regarding actual date of the death of the child and prosecution having only established probable period of a death and that too on the basis of expert evidence. Since the said submission cannot be said to be contrary to the record as the prosecution has rested accordingly upon the opinion of PW21 for establishing the probable period of death and the evidence having not surfaced regarding precise

date on which the child was killed, the submission canvassed that unjustified label of harden criminal on such basis was attached to the accused persons also cannot be said to be devoid of merit.

62. We also find it difficult to accept such inference drawn by the trial Court in view of paucity of the material/evidence regarding earlier participation of the accused persons in commission of such acts. We further add that the evidence surfaced denotes that it was probably first venture for the purposes of earning easy money and in absence of any evidence regarding the circumstances in which the child was murdered, any such conclusion could have been drawn by the trial Court. We are of such view as hardly any evidence has surfaced establishing that accused persons even prior to kidnapping of child, had taken the decision to kill the child in any event, i.e., with or without receipt of ransom for the return. At the cost of repetition, we add that whole exercise on part of the accused being for the purposes of the money and in absence of precise evidence regarding the circumstances in which death was caused, drawing of such inference would be only surmise.

63. The learned counsels thereafter further in our opinion rightly criticised the inference drawn by the trial Court of the accused persons being shrewd and/or harden criminals on the basis of themselves having changed place of residence from Turbhe Stores to Bainganwadi and/or for having purchased the articles of luxury such as mobile handset, T.V., V.C.R. etc. after receipt of Rs. 50,000/-. We find drawing of such inference on the basis of said circumstance was wholly improper, as at the most such conduct on their part would be a factor supporting the inference of their guilt and nothing else. The learned counsels urged that by taking out such circumstances and further taking into consideration about the conduct of A-1 telling PW40 that the child was kept at Sawantwadi was indicative of himself being capable to mislead the investigating agency, the trial court coming to the conclusion that the case was of rarest of rare type would be in violation of the guidelines given by the apex Court.

64. It was urged that even accepting such inference about the conduct, which is generally of every culprit, i.e., for keeping himself out of the clutches of law or to enjoy the benefits as far as possible, due to such conduct, A-1 and A-2 can not be termed as an harden criminal without there being criminal antecedents. The learned counsels further urged that the trial Court completely brush aside the sight of mitigating circumstances pointed about their age, no criminal antecedents and completely overlooked possibility of reformation and rehabilitation required to be taken into consideration while awarding the capital sentence. It was contended that as apart from trial Court not considering the aspect of rarest of rare case on the basis of the guidelines given by the apex Court also failed to take into consideration the mitigating factors, the sentence of death awarded cannot be legally sustained.

65. Both the learned counsels contended that considering the case on the basis of guidelines given it can be safely said that there is clear cut absence of

evidence satisfying any of the five tests given in the case of Machhi Singh (supra), i.e., absence of evidence denoting extreme brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. It was urged that in all probability the death of child had occurred while in custody of the accused persons probably themselves being unable to take care of the child or due to negligence. The evidence does not indicate that the offences were committed for fulfilling any personnel vendetta of the accused against the family of PW1 or against the child. The evidence reveals that the only motive for the crime was for earning easy money by easy way. The crime occurred was not of enormous magnitude. Thus it was urged that even accepting that the crime was committed in respect of hapless child on the backdrop of young ages of both the accused persons themselves having no criminal antecedents, nor the injuries on the body denoting that they had acted in unduly cruel, dastardly manner, merely on the count that body was buried, i.e., in all probability in an anxiety to dispose the body to save themselves, would not bring the case within the ambit of rarest of rare case.

66. It was further urged that as pointed earlier the trial Court has lightly brush aside that both the accused being of young age, which by itself denotes existence of every possibility of their reformation. It was urged that considering the evidence surfaced in proper perspective, it also denotes that they are from poor-strata of the community and in an anxiety to become rich such acts had occurred at their hands. It was urged that absence of antecedents considered alongwith their young age, i.e., at the time of incident A-1 was of about 25 years and A-2 of about 22 years, indicate that there is every hope for reformation and rehabilitation of the said accused. It was thus contended that the sentence of death awarded to them may not be confirmed and be commuted to the imprisonment for life.

67. The learned counsel for A-2 additionally urged that in criminal law the sentence is required to be awarded for the precise role played by the concerned culprit. It was urged that the evidence surfaced indicates that A-1 was the senior member and the leader of the group and the others had acted may be in vain, as per his directions. It was urged even the evidence surfaced reveals meager role played by A-2 than A-1. It was urged that even though A-2 had the knowledge about the place at which the corpse was buried still hardly any evidence has surfaced that he was directly responsible for death of the child. The places of abode were in the name of A-1 and not in his name. It was urged hence after considering the role played by A-2, his case cannot be said to be of rarest of rare type and as such capital sentence awarded to him may not be upheld.

68. It was urged that the record of this proceeding itself reveals that A-1 has been suffering from the ailment of H.I.V. and as such he is struggling with life. It was urged that sentences are awarded not for punishing human being, but for eradicating the element of criminality, due to the said peculiar circumstance would warrant commuting sentence of death awarded to him to a lesser sentence.

69. Both the learned counsels in support of their submission relied upon the following decisions.

- (i) Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra, ;
- (ii) Rajesh Kumar Vs. State through Govt. of NCT of Delhi, ;
- (iii) Haresh Mohandas Rajput Vs. State of Maharashtra, ;
- (iv) Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka, ;
- (v) Neel Kumar @ Anil Kumar Vs. The State of Haryana, ;
- (vi) Brajendrasingh Vs. State of Madhya Pradesh, ;
- (vii) Sandeep Vs. State of U.P., ;
- (viii) Dilip Premnarayan Tiwari and Another Vs. State of Maharashtra, ;
- (ix) Dudh Nath Pandey Vs. State of Uttar Pradesh, ;
- (x) Amit @ Ammu Vs. State of Maharashtra, ;
- (xi) Bachhitar Singh and Another Vs. State of Punjab, ;
- (xii) Rabindra Kumar Pal @ Dara Singh Vs. Republic of India, ;
- (xiii) Bachan Singh Vs. State of Punjab, ;
- (xiv) Machhi Singh and Others Vs. State of Punjab, ;
- (xv) Surendra Pal Shivbalak pal Vs. State of Gujarat, ;
- (xvi) Bishnu Prasad Sinha and Another Vs. State of Assam, ;
- (xvii) Chandran @ Surendran & Anr. Vs. State of Kerala- 1991 SCC (Cri.) 245;
- (xviii) Pohalya Motya Valvi Vs. State of Maharashtra, ;
- (xix) Sangeet and Another Vs. State of Haryana, ;

And

- (xx) Leslie Small Vs. State of Delaware

70. After careful perusal of the judgment, we find substance in the submissions of learned APP that trial Court for the reasons recorded in paragraph Nos. 197 to 222 of the judgment has negatived various similar contentions raised on part of A-1 and A-2 for not awarding sentence of death and amongst others concluding that the case was of rarest of rare type and had awarded sentence of death for commission of offences under Sections 364A, 302 read with Section 34 of I.P.C. to both of them. While dealing with the submissions canvassed on behalf of the learned counsels for A-1 and A-2, we have already dilated about the reasoning given by the trial Court in said paragraphs and has come to the conclusion that except the factor of the offence being committed with regard to a tender age

child of three years and with his family members, no other factors justifying the conclusion as drawn by the trial Court has been established by the same.

71. We are of such considered opinion after examining the said facets relied by the trial Court in light of the guidelines given in by the apex Court in the decision in the case of Machhi Singh (supra). Further more examining all the circumstances relevant to the offence of murder committed by the appellants in the light of reasoning given by the trial Court for awarding sentence of death to the appellants, we are of the considered opinion that in facts and circumstances of the instant case, it cannot be said to be of rarest of rare nature warranting extreme penalty of death. At the cost of caution, we add that thereby it is not intended to convey that murder of the child of tender age kidnapped for ransom, in no circumstances would fall in the said category. It is only intended to convey that the said factor will be required to be determined in light of the guidelines/principles given by the apex Court for such purpose and recited by us earlier.

72. After discarding the other factors relied by the trial Court while coming to such conclusion, during the discussion made while considering the submission advanced thereon by the learned counsels for the appellants now taking up the remaining factors, i.e., precisely Vth factor as indicated in the decision in the case of Machhi Singh (supra), i.e., "(v) personality of victim of murder", in the instant case victim child being a tender age child, the commission of murder of such child to some extent would be definitely covered by the said Vth factor. However, considering the said guidelines in true perspective, we find it difficult that merely due to the said factor the case can be said to be of rarest of rare type. Such conclusion is inevitable, in view of the law laid down by the apex Court and recited by us hereinabove at the commencement of discussion regarding awarding of death penalty.

73. At the cost of repetition, we add that the decision in the case of Bachan Singh (supra) and so also the recent decisions in the cases of Sangeet (supra) and Gurvail Singh Alias Gala (supra), makes it abundantly clear that while considering the question of awarding capital punishment, the Court has not only to consider the crime, but also regarding the criminal or in other words the Court has to take into consideration aggravating factors as well as mitigating circumstances qua criminal and even thereafter the further aspect of case falling into category of rarest of rare case has to be determined/taken into consideration. Needless to add, in event of after taking into consideration such factors the case is falling with certainty in such category then the same would warrant awarding of death penalty. In other contingency the question of punishment will be required to be determined on the basis of observations made in the case of Swamy Shraddhanand referred earlier.

74. Now resuming to the threads of the earlier discussion and/or conclusions regarding the reasons given by the trial Court it has been already pointed out of the absence of precise evidence for coming to the conclusion of murder being committed with brutality, dastardly as required by first circumstance given in a

case of Machhi Singh (supra), and so also the motive being not of a nature as contemplated by the second circumstance, in spite of act being committed in respect of child of tender age, after taking into purpose, the purpose for which the same was committed, ourselves finding it difficult to term as an anti-social or socially abhorrence nature crime, the magnitude of crime committed being not enormous, we find it extremely difficult to place the case in the category of rarest of rare case as contemplated by said guidelines only on the basis of the offence being committed in respect of hapless child or his parents. As a matter of fact the case having rested upon circumstantial evidence, there exists no precise evidence regarding the manner in which the child was murdered. The guilt of accused having emerged out of the collective act committed by them in furtherance of their common intention for the purposes of obtaining ransom from the father of the child. During the discussion, we were unable to persuade ourselves to concur with the finding of trial Court of the facts and circumstances indicating the accused involved being harden criminal or acted in dastardly and cruel manner. It has been already pointed that even excluding the aspect of body being recovered after number of days, still the medical evidence does not denotes the accused committing the murder having acted in unusual cruel manner and/or having used the weapon indicating barbaric dastardly approached. On the contrary, there is absence of any criminal antecedents of the accused persons and foremostly regarding commission of such or similar type of acts earlier. Suffice to say, the same is indicative of the crime in-question being committed in the isolated venture carried by the accused persons for acquiring wealth in a easy manner. The evidence surfaced and/or the financial position of the accused persons reflected from the same indicates themselves hailing from poor-strata of community. No doubt, that the accused are not original residents of this State and had been to Bombay for earning livelihood. However, in our opinion, the said factor would be immaterial in determining whether their case would fall in the category of rarest of rare case. We are of such view, that commission of offence of such nature in own State, if not falling such a category would also not fall in such category merely due to the reason of same being committed in another State unless there is positive evidence that only for the purposes of commission of such crime the culprits had changed the State in said contingency only the said factor will assume some significance in deciding the relevant aspect. In the instant case, even such evidence is absent.

75. Apart from the aforesaid, the reasoning given by the trial Court do not reveal any fruitful discussion or consideration regarding the mitigating factors. The age of both the culprits and the aspects related to the same are not at all taken into consideration. In the said process, the trial Court had completely lost the sight of ascertaining possibility of reformation and rehabilitation of the accused persons. It is difficult to negative such a possibility on the backdrop of age of A-1 then being about 25 years and of A-2 being of about 22 years at the time of incident. The same is difficult due to both of them not having any antecedents. It can be further added that even considering the purpose for which the accused ventured

in committing such act indicates that they had no grudge, ill-will against either victim child or against his family. The absence of dastardly, or beast like behaviour also postulates the possibility of the reformation. The said factors definitely are in favour of the accused persons for not sending them towards the gallows as said factors had an potential to take out their case from the category of rarest of rare type.

76. With regard to A-1, it is undisputed that he is suffering from ailment of H.I.V. His condition was deteriorating and specific directions were required to be given for protecting his life. The same definitely supports the submission of his counsel that he is struggling for life. There also exists substance in the submission that whole object of levying a punishment is not for penalising the human being, but is for eradicating element of criminality existing in him which has led to commission of offences on his part. The reference to the decision in the case of *Leslie Small Vs. State of Delaware*, relied by learned defence counsel, reveals that suffering of such disease has been considered as a mitigating circumstance by the Supreme Court of the State of Delaware. Thus considering all the aforesaid facets including the said additional facets the case of A-1 cannot be said to be warranting capital punishment.

77. Similarly, after considering the submission of the learned counsel for A-2 and particularly that of A-1 being the leader of the group involved in commission of said offences and/or the role played by said A-2 being secondary in the whole episode or atleast the evidence having not denoted the said accused having played a role attracting any of the factors given in the case of *Bachan Singh (supra)* would be a factor for coming to the conclusion of even his case not falling under the category of rarest of rare case warranting the capital punishment.

78. Though both the sides with all anxiousness to assist the Court have placed plethora of the decisions for enabling us to arrive at the just decision of the case and though we have carefully considered each of the said decisions, we do not propose to make threadbare dilation regarding the same, in view of the settled legal position regarding the relevant aspect being embodied in the decisions which we have referred earlier from the decisions pointed by the parties, i.e., to say the law prevailing since the decisions in the case of *Bachan Singh (supra)* and as followed in the case of *Machhi Singh (supra)* and thereafter as followed in the recent decision in the cases of *Sangeet (supra)* and *Gurvail Singh (supra)* and other referred by us.

79. However, considering the manner in which the murder of the tender child was committed by A-1 and A-2, in furtherance of their common intention, and part of demanded ransom was obtained from PW1 by initially detaining and even after his murder and since the same definitely exhibits the magnitude of the element of criminality of A-1 and A-2, we are of the opinion that the same warrants following the course as suggested by the decision in the case of *Swamy Shraddhanand (supra)*. We are of such view as considering the facts and circumstances of the instant case, the nature of the crime committed, the

purpose for which the same was committed and the person who was the victim of the said crime leads to the conclusion that though for the reasons given earlier, we are inclined not to send the accused persons to the gallows, still merely awarding of imprisonment for life would not be also adequate and it would be necessary to order it to be for fixed duration for serving the purpose for which punishments are to be awarded including that of for safeguarding the interest of the people at the large. We are of such view as we are not oblivate of the fact commission of such crime against the tender age children for ransom is on rise for acquiring wealth in a easy manner. Hence, we are of the opinion that for the offences under Sections 364-A, 302 read with Section 34 of I.P.C., sentence of imprisonment of life with payment of fine amount of Rs. 5000/- on each count to each of the accused and in default of payment of fine to undergo R.I. for one year on each count, with a direction not to release them before completing actual terms of "30" years including the period already undergone in addition to other sentences imposed by the trial Court on the other count would be an appropriate punishment on the basis of principles explained by the Apex Court in the aforesaid decisions and the particularly in the decision in the case of Swamy Shraddhanand (supra) for serving the ends of justice. We sentence A-1 and A-2 accordingly with a direction that substantive sentences awarded to them to run concurrently.

80. In the premises aforesaid, the reference made by the trial Court for confirmation of death penalty stands rejected. Criminal Appeal No. 764/2011 preferred by A-1 and A-2 stands partly allowed to the extent of aforesaid modification regarding the death sentence awarded to each of A-1 and A-2. The rest of the sentences awarded to each of A-1 and A-2 for the other offences stand unmodified. Registry is directed to send the copy of this judgment to the Superintendent of Prison at which A-1 and A-2 are presently lodged for furnishing it to them.