

(2016) 02 GUJ CK 0104
In the Gujarat High Court

Case No : Criminal Appeal Nos. 2890 and 2902 of 2008

Yusuf Mahmmadbhai Isakani

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 12-02-2016

Acts Referred:

Bombay Police Act, 1951 — Section 135
Constitution of India, 1950 — Article 161, Article 72
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 24, Section 25, Section 26, Section 27
Penal Co

Citation : (2016) 02 GUJ CK 0104

Hon'ble Judges : K.S. Jhaveri and G.B. Shah, JJ.

Bench : Division Bench

Advocate : Hriday Buch, Advocate, for the Appellant; C.M. Shah, Addl Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J.—1. Both these appeals arise out of a common judgement and order dated 29.09.2008 passed by the Additional Sessions Judge, Fifth Fast Track Court, Veraval in Sessions Case No. 01 of 2006 whereby original accused Nos. 1 & 2 were convicted for the offence punishable under section 302 r/w 114 of Indian Penal Code and sentenced to life imprisonment and fine of Rs. 5000/-, in default, simple imprisonment for two years thereunder. The accused were also convicted for the offence punishable under section 397 r/w 114 of Indian Penal Code and sentenced to rigorous imprisonment for 7 years and fine of Rs. 3000/-, in default, simple imprisonment for one year thereunder. The accused were further convicted for the offence punishable under section 449 r/w 114 of Indian Penal Code and sentenced to life imprisonment and fine of Rs. 5000/-, in default, simple imprisonment for two years thereunder. Original accused Nos. 1 & 2 were, however, acquitted of the offence under section 135 of B.P. Act. Being aggrieved by the said conviction, original accused No. 1 has preferred Criminal Appeal No.

2902 of 2008 and original accused No. 2 has preferred Criminal Appeal No. 2890 of 2008.

2. The short facts of the prosecution case as narrated in the complaint lodged with Veraval City Police station is that on 13.10.2005 at around 02.00 pm, the husband of the deceased i.e. Dr. N.D. Gohil had left for Kodinar from his residence for hospital visit and thereafter the complainant went to the residence of the doctor to hand over the keys of the chamber where the deceased person was sitting on sofa and watching tv. Thereafter the complainant left for lunch. At around 05.30 pm when the complainant came back to collect the keys, he found that the main door was open and when he rang the door bell, no one answered and hence the complainant went to the hospital. It is stated in the complaint that after a while one Mr. Bipinbhai came to the hospital and was sent to get the keys from the residence of the doctor but he also returned without the keys as no one came at the main door. Thereafter, around 06.45 pm both the persons went to the residence of doctor and on entering the house they found clothes scattered on the bed and the place appeared to be in a mess. Thereafter they checked the bathroom and found the wife of doctor lying on the floor and saw a black wire entangled around the neck of the deceased and the bathroom floor covered with blood. Thereafter, the complainant informed one Dr. Rathod and the police authorities. Thereafter, the husband of the deceased was informed and the police recorded his statement. The husband of deceased pointed a finger of suspicion on the accused and accordingly they were arrested on 15.10.2005. Necessary panchnamas were drawn and cash alongwith bloodstained handkerchief and a wrist watch was seized from the accused.

2.1 Pursuant to the complaint, investigation was carried out. After investigation, on the basis of material collected against the accused, since the Investigating Officer found a prima facie case against the accused, chargesheet was filed and as the case was triable by the Court of Sessions, it was committed to the Court of Sessions. The trial Court framed charge against the accused. The accused pleaded not guilty to the charge and claimed to be tried.

2.2 Trial was initiated against the accused and during the course of trial the prosecution examined the following witnesses whose evidences were read before us by learned advocates for both the sides:

2.3 The prosecution also relied upon the following documents as documentary evidences which have been perused by us such as complaint at Ex. 10, discovery - recovery panchnama at Ex. 12, inquest panchnama at Ex. 17, panchnama of scene of offence at Ex. 19, death report at Ex. 47, postmortem report at Ex. 50, FSL report at Ex. 51, investigation order at Ex. 56/61, yadi for preparing map of local place at Ex. 65, muddamal dispatch note at Ex. 77 etc.

2.4 At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the trial court convicted accused as mentioned aforesaid. Being

aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the accused have preferred the present appeals.

3. Mr. Hriday Buch, learned advocate appearing for the accused has submitted that there is nothing on record to establish that accused are involved in this case. He submitted that in absence of any eye witness in the present case, the trial court has erred in convicting the accused on the basis of circumstantial evidence when the chain has not been completed by the prosecution.

3.1 Mr. Buch has drawn the attention of this Court to the evidence of P.W. 1 and contended that he being the compounder and confidant of the husband of deceased has given the evidence to protect the husband of deceased. He submitted that during the course of investigation there was some doubt regarding the character of deceased and therefore the police was under the impression that Dr. Gohil - husband of deceased is involved in the crime in question and to that effect, police statement of Bipinbhai Baraiya was recorded who was also working as compounder in Dr. Gohil's hospital. He submitted that Bipinbhai though has been cited as witness and his police statement is also recorded, was not examined by the prosecution during the trial for reasons best known to the prosecution.

3.2 Mr. Buch submitted that the prosecution has failed to collect any evidence during the course of investigation with regard to Dr. Gohil's Kodinar visit. He submitted that no officer of R.N. Wala hospital, Kodinar has been examined by the prosecution to prove the story of Dr. Gohil that he had gone to Kodinar at the relevant time. He submitted that even according to the prosecution case and also as per the evidence, it is established that Dr. Gohil was last seen together with the deceased because according to him he had taken lunch with the deceased and thereafter had gone to Kodinar.

3.3 Mr. Buch has drawn the attention of this Court to the medical evidence more particularly, the evidence of P.W. 12 - Dr. Prithvirajsinh Vaghela, who is the medical officer who performed the post mortem of the deceased and submitted that as per the evidence of P.W. 12 and the post mortem report, it can be seen that no food was found in the stomach of deceased whereas according to Dr. Gohil, he had taken lunch with deceased before going to Kodinar.

3.4 Mr. Buch has further submitted that according to the evidence of P.W. 12 - Dr. Vaghela, the time of death could be ascertained prior to around 06 to 18 hours from the time of receiving dead body which in the instant case is at 09.00 am. He submitted that therefore even if 18 hours is taken into account, the death should have occurred after 03.00 pm on the previous day. He submitted that even if the prosecution case is accepted the evidence of witnesses shows the presence of the accused in the building at around 02.00 pm on the date of incident and therefore it cannot be said that the deceased was killed at that time.

3.5 Mr. Buch submitted that the last seen theory of the accused near the building cannot be believed. He submitted that if both the accused were seen by P.W. 8 -

Dr. Gohil, P.W. 9 - Jivabhai and P.W. 11 - Harish Ganatra, why would they have not informed the police immediately on the day of incident.

3.6 Mr. Buch submitted that joint discovery panchnama is inadmissible in evidence and therefore the same cannot be relied upon. He submitted that the conscious possession of the accused over the alleged muddamal articles is not proved. He submitted that there are serious omissions, contradictions and improvements in the evidence of witnesses and that the prosecution has failed to prove the case against the accused beyond reasonable doubt. He submitted that considering the fact that the prosecution has not completed the chain of links, this court may atleast grant benefit of doubt to the accused.

3.7 In support of his submissions, Mr. Buch has relied upon the following decisions:

(1) State of Gujarat vs. Mohmed Fariq Haji Mohmad reported in 2000(2) GLH (U.J.) 9, more particularly para 9 which reads as under:

"9. The prosecution has to prove the charge beyond reasonable doubt. If the prosecution relies on blood marks on muddamal & also get the blood extracted, it is incumbent upon the prosecution to show to the Court what quantity of blood was extracted from the dead body and from the accused's body and whether the same quantity was sent to the laboratory for analysis. If before sending the same, some amount thereof was used, it must be shown for what purpose the same was used; or why the blood less in quantity then collected was sent to laboratory. The Laboratory has in its report mentioned that it received ML. blood of deceased and 70 ML. blood of respondent, but prosecution has shrewdly not led the evidence to show what was the quantum of blood extracted from both the bodies in order to show that the same quantum reached the F.S.L. and not less. When on that point, the evidence is not led, Mr. Chudasma is, in our opinion, right in contending that the possibility of any mischief having been played by the police agency cannot be ruled out and this possibility points to the innocence of respondent casting clouds of suspicion on the credibility of entire wrap and woof of prosecution's story."

(2) Hemat Ramji & Anr. vs. State of Gujarat reported in 1975 (16) GLR 783 wherein it is held that when more than one accused making jointly and orally a statement of fact, even if fortified by discovery it is difficult to know which of the accused persons were responsible and thus such joint statement cannot be relied upon.

(3) Madhu vs. State of Kerala reported in , (2012) 2 SCC 399, paras 47 to 58 of which read as under:

"47. The most significant issue in the present controversy is the veracity of the confessional statements made by the accused Madhu and Sibi before P.J. Thomas PW21, Circle Inspector of Police on 13.5.1998. It is evident that the aforesaid statements were made by the accused before a police officer while the accused

were in custody of the police. Section 25 of the Indian Evidence Act postulates that a confession made by an accused to a police officer cannot be proved against him. Additionally, Section 26 of the Indian Evidence Act stipulates that a confession made by an accused while in police custody cannot be proved against him. It is evident from the factual position narrated hereinabove, that the statements made by the accused Madhu and Sibi were made to a police officer while the accused were in police custody. It is, therefore, apparent that in terms of the mandate of Sections 25 and 26 of the Indian Evidence Act, the said statements could not be used against accused Madhu and Sibi. But then, there is an exception to the rule provided for by Sections 25 and 26 aforesaid, under Section 27 of the Indian Evidence Act.

48. Section 27 of the Indian Evidence Act is being extracted hereunder:

"27. How much of information received from accused may be proved - Provided that, when any fact is proved to be discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

49. As an exception, Section 27 of the Indian Evidence Act provides that a confessional statement made to a police officer or while an accused is in police custody, can be proved against him, if the same leads to the discovery of an unknown fact. The rationale of Sections 25 and 26 of the Indian Evidence Act is, that police may procure a confession by coercion or threat. The exception postulated under Section 27 of the Indian Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance under the exception postulated by Section 27 aforesaid, is limited "...as it relates distinctly to the fact thereby discovered....". The rationale behind Section 27 of the Indian Evidence Act is, that the facts in question would have remained unknown but for the disclosure of the same by the accused. Discovery of facts itself, therefore, substantiates the truth of the confessional statement. And since it is truth that a court must endeavour to search, Section 27 aforesaid has been incorporated as an exception to the mandate contained in Sections 25 and 26 of the Indian Evidence Act.

50. We shall now endeavour to apply the exception postulated in Section 27 of the Indian Evidence Act, to the facts of the present controversy, in order to determine whether or not the confessional statements made by Madhu-accused No. 1 vide Exhibit P-10, and Sibi-accused No. 2 vide Exhibit P-9, can be proved against them in view of the exception stipulated in Section 27 of the Indian Evidence Act. As already noticed hereinabove, relevance of the confessional statements would depend on the discovery of facts based on the information supplied by the accused. If any fresh facts have been discovered on the basis of the confessional statement made by the accused, the same would be relevant. If not, the confessional statement cannot be proved against the accused, to the detriment of the accused.

51. We have extracted the relevant portion of the statement of P.J. Thomas PW21, Circle Inspector of Police hereinabove. It reveals that Madhu-accused No. 1 was arrested on 13.5.1998 at 1 p.m. from near the boat-jetty at Valadi. On the same day, Sibi-accused No. 2 was arrested from near a toddy shop at Valadi at 1.30 p.m. It is thereupon, that the confessional statements of accused Madhu and Sibi came to be recorded. In his cross- examination P.J. Thomas PW21 has acknowledged, that the confessional statements of the accused persons were recorded between 2 and 2.45 p.m. It was sought to be clarified, that the confessional statement of Madhu-accused No. 1 was recorded first, and thereafter, the confessional statement of Sibi- accused No. 2 came to be recorded.

52. As against aforesaid, we would like to refer to the statements made by Madhu PW7, Neelakantan Nair PW11, Gopinathan PW13 and Chacko PW15. Madhu PW7, during the course of his cross-examination, stated that he had left for his work on 13.5.1998 at 7.30 a.m. He further stated that he returned back from his work and reached his residence at 2.30 p.m. In so far as his return from work is concerned, in his examination-in- chief he stated that he would ordinarily return back from work only around 9 p.m. at night. The reason for his return back early on 13.5.1998 was explained by stating, that he had come to know that the accused would be brought to their residences at around 4 p.m. for the recovery of the stolen gold articles. He also asserted, that just like him, a lot of people had gathered at the jetty to witness the recovery and seizure of the stolen ornaments. The statement of Madhu PW7 clearly establishes that he came to know that the police would effect recovery well before 2.30 p.m. Therefore, as an exception to his coming home from work late in the night, he had reached his residence at 2.30 p.m.

53. Likewise, the statement of Neelakantan Nair PW11 reveals, that in the morning itself, on the date of arrest of the accused i.e., on 13.5.1998 he had heard, that the accused persons would be brought for recovery of the stolen articles. He further stated, that a large crowd had gathered to witness the recovery of the stolen articles, and that, he also witnessed the recovery of stolen articles. He reiterated, that just like him all those who were assembled there were aware that the police would bring the accused there for recovery of the stolen articles. Gopinathan PW13 acknowledged, that there was information available by "noon" that the police party would come along with the accused to recover the stolen articles. It is, therefore, that he had gone to witness the recovery of the stolen articles. Even Chacko PW15 while deposing before the Sessions Court asserted that a large crowd had gathered to witness the recovery of the stolen articles at the house of the accused.

54. The statements of PW7, PW11, PW13 and PW15, narrated (and relevant portions extracted) hereinabove, clearly lead to the positive conclusion that the fact that the stolen articles would be recovered from the premises of the accused was known before the accused were brought to the recovery site. These

witnesses, as also the crowd present, were aware of the said factual position at around "noon" (as per statement of Gopinath PW13) but definitely before 2.30 p.m. (as per the statement of Madhu-PW7). But according to PJ Thomas (PW21), the confessional statements were recorded between 2 and 2.45 p.m.

55. The question to be determined is whether the confessional statements made by the accused (vide Exhibit P-9 and P-10) can be said to have led to the discovery of an unknown fact?

56. The answer to the aforesaid query has to be in the negative, because the statements of PW7, PW11, PW13 and PW15 reveal that the factual position in respect of the recovery of the articles from the place from where the same were shown to have been eventually recovered, was known to the public at large by noon (and certainly before 2.30 p.m.) i.e., well before the confessional statements had been recorded. As per the deposition of P.J. Thomas (PW21), Circle Inspector of Police, "...A-2's confession statement was recorded at about 2.45 p.m....." Interestingly, the public had become aware of the recovery by "noon", whereas, Madhu-accused No. 1 was arrested at 1.00 p.m., and Sibi-accused No. 2 was arrested at 1.30 p.m. and their confessional statements were recorded by the police after their arrest. In the background of the aforesaid factual position, it is not possible for us to conclude that the confessional statements made by Madhu-accused No. 1 vide Exhibit P-10 and Sibi-accused No. 2 vide Exhibit P-9, can be stated to have resulted in the discovery of any fresh facts.

57. The factual position that recovery of stolen ornaments would be made by the police was a matter of common knowledge well before the confessional statements were made. The said statements recorded vide Exhibits P-9 and P-10 are inadmissible inspite of the mandate contained in Section 27 of the Indian Evidence Act for the simple reason, that they cannot be stated to have resulted in the discovery of some new fact. In the factual background of the present controversy, the gold ornaments which eventually came to be recovered by the police, allegedly at the instance of accused, may well have been planted by the police.

58. On account of the fact that the confessional statements made by Madhu-accused No. 1 and Sibi-accused No. 2, which is the main linking factor in the circumstantial evidence of the prosecution version of the controversy, being inadmissible as the same cannot be proved against them, we are of the view that the prosecution's case stands fully demolished. In view of inadmissibility of evidence which was taken into consideration by the Trial Court, as well as, the High Court to implicate the accused with the commission of the offence alleged against them, shall have to be reconsidered on the basis of the remaining evidence."

(1) Gautam Maroti Umale vs. State of Maharashtra reported in 1994 Supp (3) SCC 326 wherein paras 7 & 8 read as under:

"7. It is well settled that in a case of circumstantial evidence, the prosecution has to prove each of the circumstances and circumstances so proved should form a complete chain to bring home the guilt of the accused and they should be in consistent with his innocence and also exclude every other hypothesis, however, remote.

8. Having gone through the evidence of PWs. 1 and 2, we find it difficult to accept the prosecution case that the appellant was seen on the spot. The reasons given by the Sessions Judge, in this context, are quite reasonable and sound. So far as the minor abrasions that were found on the accused are concerned, that by itself cannot connect the accused with murder and it is probable that he received scratches and abrasions while working in the field. Then, we are left with the recovery. Both the courts have accepted the fact of recovery and even that by itself cannot connect the accused with the murder and to hold him to be murdered of the deceased. At the most, he can be convicted under Section 411 IPC for being in possession of the stolen property for which he has no explanation. Under these circumstances, the conviction for the appellant under Section 302 IPC and the sentence of life imprisonment awarded thereunder and his conviction under Section 394 IPC and the sentence awarded thereunder are set aside. Instead he is convicted under Section 411 IPC and sentenced to undergo two years" RI and to pay a fine of Rs. 1000, in default of payment of which to further undergo three months" RI. The appeal is allowed to that extent."

4. Ms. C.M. Shah, learned APP appearing for the respondent - State supported the impugned judgement and order and submitted that trial court has given cogent reasons for sustaining the conviction under section 302 of Indian Penal Code and this court may not interfere in these appeals. She stated that the trial court has based the conviction not only on the evidence of witnesses but also considered entire circumstances of the case and the facts which are proved by cogent evidence. She has drawn the attention of this Court to the statements of P.W. 1, 9 & 11 who have supported the contents of the FIR and the conduct of the accused in wandering around the building premises. She has submitted that in view of the post mortem report and the cause of death, the possibility of accidental death is clearly ruled out. She submitted that the subsequent recovery of ornaments and blood stained clothes of one of the accused as well as the recovery of knife from their house establishes the guilt of the accused. She contended that no benefit of doubt is required to be given to the accused.

5. We have perused the records of the case. The case is based on circumstantial evidence in the absence of any eye witness. There is no direct evidence implicating the appellants. It is trite that all the proved circumstances must provide a complete chain, no link of which must be missing and they must unequivocally point to the guilt of the accused and exclude any hypothesis consistent with his innocence.

5.1 As per the latest decision of the Apex Court, we have appreciated, re-appreciated and re-evaluated the evidence led before the trial court in its

entirety but we are unable to persuade ourselves to take a different view than the one taken by the trial court. In the present case, the trial court has mainly relied upon the testimonies of three witnesses viz. P.W. 1 - Babubhai Vaja, P.W. 9 - Jivabhai Mucchal and P.W. 11 - Harishkumar Gordhandas Ganatra. Let us go through the evidence of these witnesses at the outset.

6. P.W. 1 - Babubhai Vaja has been examined by the prosecution at Ex. 9. This witness has stated that the incident occurred on 13/10/2005 on Thursday and as Dr. Gohil was supposed to go to Kodinar on that day, he went to his house from the Hospital at about 1.15 p.m. Thereafter, this witness went to the house of Dr.Gohil to take water bottle, his wife Pragnaben - deceased gave it to him and after taking it, he came back to the Hospital. Thereafter, Dr.Gohil came to Hospital from his house at 2.00 p.m. P.W. 1 has stated that he went to give water bottle and a bag of medical instruments to Dr.Gohil. Dr.Gohil had a Maruti Zen car and he left in it and this witness returned to Hospital. P.W. 1 has stated that he thereafter went to his house at 2.10 p.m. to give keys and that he handed over the keys to Pragnaben. She was watching television on sofa when he went there to give keys. After giving her keys, P.W. 1 returned to the Hospital. Thereafter, Bipinbhai Bariya came to relieve P.W. 1 and he went home for taking lunch.

6.1 P.W. 1 has further stated that he returned to the Hospital at about 5.00 p.m. after taking lunch. As Dr. Gohil went to Kodinar, he was supposed to come late, and therefore he used to sleep in the Hospital. Thereafter, he went to the house of Dr. Gohil at 5.30 pm. to take keys of the Hospital. The main door of his house was open at that time and the door of drawing room was in semi closed condition. This witness has stated that although, he rang the door bell for two to three times, Pragnaben did not come out. He therefore stood there for sometime and assumed that she might be busy in some work and he went to the Hospital. P.W. 1 has stated that thereafter, he sent Bipinbhai Bariya to the house of Dr.Gohil after sometime to take keys. P.W. 1 stated that Bipinbhai also came back immediately and told him that, though he rang door bell for two- three times, Pragnaben was not opening the door. Thereafter, Bipinbhai and P.W. 1 went to the house of Dr. Gohil at about 6.45 p.m. They went inside after opening the closed door and saw that, all the articles of the bed room were lying in scattered condition and the cup board was open. On making search in bath room, Pragnaben was lying there, her neck was tied with wire and she was in bleeding condition. Thereafter, they made a phone call from the house of Dr. Gohil. Dr. Rathod residing nearby was called. Therefore, Dr. Rathod and his wife came. Dr. Rathod examined Pragnaben and stated that she has died. Thereafter, Dr.Rathod called Dr. Gohil and other concerned doctors by making a phone call and informed the police. All of them came to the house of Dr. Gohil. This witness has stated that Dr.Gohil came to his house within one hour of making call. As he came back to the house, he made search and came to know on the next day that ornaments of Rs. 53,800/- and cash of Rs. 5000/- were stolen.

6.2 P.W. 1 has further stated that during the incident, one maid servant namely Hansaben was working in the house of Dr.Gohil and Hussain Isakani and Yusuf Isakani were working as compounders in the Hospital of Dr. Gohil earlier wherein, Hussain Isakani used to work in night shift and Yusuf Isakani used to work in day shift. They were relatives. He has stated that he did not know as to what was the relationship between them. When he was doing job, both of them used to come to the Hospital though they were not doing job in the Hospital and they used to come at the time of incident and at night for sleeping. They used to come together and sometimes after some gap of time. This witness has stated that one door of the Hospital is leading towards the lift. Both the aforesaid sometimes used to sit after keeping the back door open. The door that opens is the part of store room and one iron cupboard is situated there. Hussain was using that cupboard keeping his clothes in it. In the present incident, Dr.Gohil had gone for training before some days i.e. means 5-6 days. Therefore, both the aforesaid persons Hussain and Yusuf stayed in the Hospital for 4-5 days.

6.3 P.W. 1 has further stated that as Pragnaben - deceased had asked this witness to bring pencil cell at about 10.00 a.m. on the previous day of the incident, he went to her house to give it. He has stated that at that time, Dr.Gohil was sitting on swing and talking to somebody on mobile. This witness has stated that he gave pencil cell to the deceased and she fixed it in watch. P.W. 1 has further stated that thereafter the deceased told him to remove curtains as they were supposed to be washed. He has stated that as the maid Hansaben was not coming on that day he removed curtain and gave to her. He has further stated that as the watchman was not present on the previous day of incident, this witness fetched water for washing curtains and gave to her.

6.4 P.W. 1 has further stated that he went to the house of Dr. Gohil for giving keys on the day of the incident and thereafter when he returned to the Hospital, accused came there. This witness has stated that he was sleeping at that time and that he did not know as to which side they went. This witness has identified the accused in the court.

6.5 From the evidence of this witness, it is clear that the accused persons used to work in the hospital for quite some time and were quite aware about the routine of the doctor and his wife. They used to visit the hospital even after they were relieved from the hospital.

7. P.W. 9 - Jivabhai Muchhal has been examined at Ex. 38. This witness had been discharging his duty as a watchman at Shubham Towers, Veraval. This witness has stated that the timing of his duty was of twenty four hours and that he used to go to take lunch at 1200 to 1215 hours in the afternoon and return at 1415 hours. He has stated that he used to go to take his dinner at 2000 to 2030 hours and return at 2200 hours. P.W. 9 has stated that on the date of incident, he went to his house at about 1230 hours to take his lunch and returned at 1415 hours. He returned after having his lunch and he was sitting on cot in the parking. This witness has categorically stated that when he sat on the cot, both the accused

persons came there and entered the lift to go upstairs. He has stated that it was Thursday on that day and that as Dr. Gohil went to Kodinar every Thursday, he had gone to Kodinar on the day of the incident also. This witness has stated that both the accused went upstairs through lift and got down at about 1530 hours after going upstairs. He has stated that then they went towards Blood bank street. P.W. 9 has further stated that he met Dr. Rathod near his clinic and he told me to come on the seventh floor therefore, he went on the seventh floor. At that time, Dr. Rathod, his wife and a peon of Dr. Gohil were present near the house of Dr. Gohil. Peon of Dr. Rathod told this witness that Pragnaben-wife of Dr. Gohil has been murdered. This witness has further stated that he had not seen any persons apart from the accused persons present in Court entering Shubham towers on the day of the incident.

7.1 P.W. 11 - Harishkumar Ganatra has been examined vide Ex. 44. This witness is the owner of shop namely Raghuvanshi Electronic at Veraval and his residence is located on the fourth floor in Shubham towers whereas the hospital of Dr. Gohil is situated on the first floor and his residence is situated on the seventh floor. This witness has stated that everyday he used to go to his shop at 9-00 am and that on the day of the incident, he went to his shop at 9-00 am and did his business up to 01.00 pm. This witness has stated that he usually returned home for lunch at around 01.15 pm and that on the day of the incident also, he came home to take lunch at around 01.20 pm. This witness has stated that he usually stayed home for around 30 to 45 minutes after taking lunch. He has stated that on the day of the incident also, he left to go to his shop after 45 minutes.

7.2 P.W. 11 has stated that he had parked his motorcycle in parking area of the tower and that when he was starting to go to his shop he saw two persons namely Hussain and Yusuf who were working as compounders in the hospital of Dr. Gohil going towards the lift of the apartment. P.W. 11 has stated that he knew both the persons for five years as they were working in the hospital of Dr. Gohil. He has categorically stated that he saw the accused as they used to go to his building frequently. This witness has reiterated that he saw both the accused going towards lift on that day and therefore, he thought that they might be going to the house of Dr. Gohil for some work. Then, he left towards his shop on his motorcycle. P.W. 11 has further stated that he returned home at 8-00 pm and that when he returned he saw many persons gathered on the ground floor of Shubham tower. He has stated that he came to know that somebody came in the house of Pragnaben-wife of Dr. Gohil and murdered her in her bathroom after strangulating and causing injuries on her throat. This witness has further stated that he had raised suspicion in his statement before Police as he had seen both the accused persons at the time of incident.

8. P.W. 8 - Dr. N.D. Gohil is the husband of the deceased. This witness has been extensively examined and cross examined by the prosecution and the defence. This witness has stated that as per his daily routine, he used to go to his hospital named Deep Hospital at 10.30 AM and used to be there up to 2 PM. Thereafter,

he used to go home situated on the seventh floor of the same building. After taking lunch, once again, he used to go to his hospital at 5.30 PM and remained there up to 8.30 PM. This witness has stated that he had staff in his hospital to help him and that at the time of incident, they were 3 persons. This witness has stated that one out of those three persons assisted him during the operation. Whereas, one out of the rest two persons, performed his duty in the day and other in night. He has stated that the employee who performs the duty in the day, had to perform his duty from 08.30 AM to 08.30 PM. The employee who performs the duty in the night, has to perform his duty from 08.15 PM to 08.30 AM. This witness has further stated that his chamber remained locked during the lunch break and its key remained with him. Whereas, two persons remained in his hospital. The key of his hospital remained with the employees who served day and night for 24 hours. But, in the morning, before his arrival to the hospital, one employee used to go to his house to take the key of his chamber for cleaning purpose as the key of his chamber remained with him only.

8.1 P.W. 8 has further stated that he knew the accused persons sitting in the court as both of them were serving in his hospital and both had left their job before 1.5 to 2 years of occurrence of the present incident. He has stated that his wife Pragnaben-the deceased, also knew both these accused persons as staff of the hospital. When the accused persons were serving in his hospital, they used to visit his home for exchange of key or other articles and therefore his wife knew them for this reason also.

8.2 P.W. 8 has further stated that the present incident occurred on 13/10/2005. He has stated that on the day of incident, he arrived at his hospital at 10.30 AM and examined the patients upto 01.15 pm. He stated that on that day, Babu Samat Vaja and Bipinbhai Veljibhai Bariya were on duty. He has stated that on that day, Ketan Dhirajlal Solanki discharged the night duty. Thereafter, he went home for lunch. This witness has stated that he went early for lunch that day because it was Thursday and he had to visit Kodinar. He has stated that after his arrival at home, he and his wife Pragnaben sat on the chairs of dining table. They finished lunch at 1.30 PM. He has stated that after completing lunch, he was sitting on the swing in the drawing room. At that time, Babu Samat- the compounder of his hospital came to have a water bottle. His wife gave him the water bottle. Thereafter, he left for Kodinar at 02.00 PM. He has stated that at that time, his wife Pragna was sitting on Sofa and she was watching the TV. This witness has stated that when he left home, nobody was there in the home, except deceased and that there was nobody in their family, except himself and his wife, who were residing in Veraval.

8.3 P.W. 8 has further stated that he came downstairs from his house and that at that time, the compounder of his hospital - Babu gave him water bottle and visit book. After collecting water bottle and visit book, he left for Kodinar on his Car - Maruti Zen bearing registration No. GJ-11-T-8633. He has stated that on the way to Kodinar, he filled petrol in his car at petrol pump at Kajali by paying Rs.

1399-00 in cash and at that time, it was 2.15 PM. At that time, he was alone in the car and thereafter he went to Ranavala Hospital in Kodinar. He has stated that he reached there at 03.00 PM and was there from 03.00 PM to 05.00 PM. Thereafter, he went to the dispensary of Ambuja Cement Factory and it was 05.15 PM. He stayed there up to 07.00 PM and examined about 15 patients.

8.4 P.W. 8 has further deposed that he made a call at 07.00 PM to his residence before returning to Veraval from Kodinar. He stated that the said call was attended by compounder of his hospital Babu - P.W. 1. P.W. 1 is said to have handed over the call to neighbour Dr. Rathod. This witness has further stated that Dr. Rathod informed him that his wife Pragnaben's health was not well and that therefore he needed to return to Veraval immediately. Therefore, he left for Veraval. He has stated that it was about 08.00 PM, when he reached home. On reaching home, he saw many persons had gathered. He has stated that his wife Pragnaben was lying in bathroom and a black electric wire was wrapped around her neck. There was a cut mark of sharp weapon on her neck. After bleeding, the blood congealed at that cut mark. This witness has deposed that when he inquired about the incident with Dr. Rathod, who was present there, he stated that his staff person called him and therefore, he had come to P.W. 8's place and saw that his wife had died.

8.5 P.W. 8 has further stated that when, he saw the dead body of his wife, it appeared that somebody killed her by wrapping wire around her neck and injuring her with a sharp weapon. He has stated that after seeing the dead body of his wife, he saw that articles were scattered in his room. The doors of cupboards were open. He has stated that they used to keep cash and ornaments and also suitcase in that cupboard. On the day of incident, an amount at about Rs. 5000/- was in the cupboard and there were gold ornaments of his wife. He has stated that when, he saw the scattered articles and the open cupboard, on examination he found the ornaments, wrist watches and cash missing. Moreover, the Bangles of yellow metal of his wife were found in as it is condition in the cupboard of his bedroom. He has stated that he used to keep his documents in a suitcase and that the said suitcase was lying on the cot of his bedroom. There were cut marks on both the side of that suitcase. It appeared that somebody tried to open it with the help of sharp weapon due to the non-availability of the key.

8.6 P.W. 8 has further stated that on seeing the condition of his house, he doubted that such act must have been done by somebody who was well acquainted with his house. This witness has stated that on the day of incident, when he was going to Kodinar in his car, he had seen both the accused in the lane where the blood bank was located. Therefore, he doubted them.

8.7 From the evidence of these witnesses, the presence of the accused at the scene of offence is proved. It is trite that these witnesses have not narrated that they had seen the accused at the house of the deceased. However, they have stated that they had seen the accused going upstairs by the lift at around 02.00

- 02.30 pm and coming down at around 03.00 to 03.30 pm. The timing mentioned in the evidence of these witnesses clearly matches the timing of death mentioned by the doctor in the postmortem report. From the evidences of these witnesses cited above, it is clear that the factum of presence of the accused persons at the said time is proved beyond reasonable doubt.

9. P.W. 14 - Vali Mohammad Hajibhai has been examined at Ex. 90. This witness, during the period of the incident, had been discharging duty as ASI at Junagadh crime branch. This witness has stated that during the course of investigation, P.W. 9 - Jiva Mucchal who was serving as a watchman in Shubham towers was interrogated and that P.W. 9 stated that on the day of the incident, he had seen two Muslim persons who were priorly serving in the hospital of Dr. Gohil and that they had come there before occurrence of the incident. This witness has stated that as he suspected both these persons in the offence, he inquired regarding both through private informant and obtained exact information that they were to get down at Sutrapada gate. This witness has stated that he received information that both the accused persons were serving at the hospital of Dr. Gohil. P.W. 14 has stated that his staff personnel kept a watch on 14/10/05 at 11.00 pm and that they were sitting separately. He has further stated that both the accused persons were seen coming on 15/10/05 at about 12.00 am. Both were arrested and produced at Veraval City Police station at 0040 hours. Mr. Zala carried out their physical search in their presence. Panchas were called. On searching two wrist watches were found from accused No. 1 and one handkerchief and cash amount of Rupees four thousand were found from accused No. 2. PI carried out their arrest panchnama from 2.00 am to 3.00 am and discovery panchnama was drawn. Preliminary panchnama in that regard was drawn in police station.

9.1 P.W. 14 has further stated that then, they went to Karadiya farm situated in outskirts of Sutrapada and the accused brought out one small bag of handkerchief from the place of glass bottles located in residential houses. Opening the same before panchas, golden ornaments were found therein. P.W. 14 has further stated that PI told him to go at Sutrapada to call goldsmith and to bring scales for weights and measures. Therefore, he went to Sutrapada and brought Goldsmith Raningabhai of Shri Raj Jewellers alongwith scales to the place of the incident in police van. On showing seized muddamal-golden ornaments to him, he verified and stated that the muddamal is of gold wherein there were different ornaments like mangalsutra, Ranmala, one golden chain, ring etc. All these ornaments were put in glass bottle and the same was sealed before panchas. Thereafter, both the accused persons brought out their blood stained clothes from thorny bushes which was beside the house. They also brought out a knife of stainless steel alongwith its sheath. It was stained with blood. The said knife was also seized before panchas.

10. From the evidence on record, it is borne out that the cut marks on the suitcase found in the house were done by way of a knife. The blood stains found on the knife recovered from the accused matched the blood group of the

deceased. Even the clothes of the accused which were recovered from the bushes at the instance of the accused matched the blood group of the deceased. The cash and ornaments recovered from the accused persons belonged to the deceased. It is true that joint panchnama is inadmissible in law.

10.1 In this regard we have gone through the decision cited by learned advocate for the appellant in the case of Hemat Ramji & Anr. However, the point which has weighed with us is that in view of Section 27 of the Evidence Act which is in the form of proviso to Sections 24, 25 and 26, a joint statement made by the accused is not per se inadmissible in evidence. In the case of Hemat Ramji & Anr, this Court has held that the court must necessarily take into consideration the facts and circumstances of each case. In the present case, the subsequent conduct of accused in the discovery of the offending articles guarantees the truth of the information received from the accused persons.

10.2 In the case of Mohmed Fariq Haji Mohmad (supra), the case therein related to possibility of mischief having been played by the police agency. However, in the present case, learned advocate for the appellant is not in a position to explain as to how mischief, if any, has been played by the investigating agency. The ocular as well as documentary evidence are against the accused.

11. As per the latest decision of the Apex Court, the accused have not been able to prove by cogent evidence as to how and why they were last seen together at the scene of offence. It has come on record that the accused were in dire need of money in order to open a press which was one of the motives of doing away the deceased. Even the evidence of P.W. 8, 9 and 11 proves the same. We are supported in our view by the latest decisions of the Apex Court in the case of Raj Kumar Singh alias Raju alias Batya vs. State of Rajasthan reported in , AIR 2013 SC 3150 and in the case of Anuj Kumar Gupta alias Sethi Gupta vs. State of Bihar reported in , AIR 2013 SC 3013.

12. It is true that last seen together circumstance is a weak piece of evidence but the incriminating nature is proved to the hilt and therefore the decision relied upon by learned advocate for the appellants in the aforesaid cases will go against the accused. In the present case, considering the evidence of witnesses as well as the medical evidence, we are of the opinion that the prosecution has proved the fact that the deceased died a homicidal death beyond reasonable doubt. Learned advocate for the appellants is not in a position to point out any cogent evidence or circumstance so as to enable this Court to take a view contrary to the one taken by the trial court.

13. It goes without saying that the accused persons at one point of time were employees of P.W. 8 - Dr. Gohil. They knew the working style and routine of P.W. 8 - Dr. Gohil. They were aware about the visits of P.W. 8 to Kodinar on every Thursday. The present incident also happened on a Thursday during the hours when P.W. 8 left for Kodinar. The fact that the accused were seen at the time of death at the place of offence is also proved beyond reasonable doubt. The factum

of accidental death is also ruled out considering the FSL reports and the panchnamas on record. The demonstration panchnama supports the case of the prosecution. It is worthwhile to note that none of the witnesses have turned hostile in the present case and they have supported the prosecution case. The trial court has considering all these facts convicted the accused under sections 302 and 449 of Indian Penal Code which is just and proper. We, therefore, do not see any reason for interference in the appeals.

14. In a recent decision of the Apex Court in the case of Bhaikon @ Bakul Borah vs. State of Assam reported in , JT 2013 (10) SC 373 has held as under:

"15. This Court, in a series of decisions has held that life imprisonment means imprisonment for whole of life subject to the remission power granted under Articles 72 and 161 of the Constitution of India. [Vide Life Convict @ Khoka Prasanta Sen vs. B.K. Srivastava & Ors. , (2013) 3 SCC 425, Mohinder Singh vs. State of Punjab, , (2013) 3 SCC 294, Sangeet and Anr. vs. State of Haryana , (2013) 2 SCC 452, Rameshbhai Chandubhai Rathod (2) vs. State of Gujarat , (2011) 2 SCC 764, Chhote Lal vs. State of Madhya Pradesh , (2011) 8 SCR 239, Mulla and Another vs. State of Uttar Pradesh , (2010) 3 SCC 508, Maru Ram vs. Union of India & Ors. , (1981) 1 SCC 107, State of Madhya Pradesh vs. Ratan Singh & Others , (1976) 3 SCC 470 and Gopal Vinayak Godse vs. State of Maharashtra , AIR 1961 SC 600].

16. In view of the clear decisions over decades, the argument of learned senior counsel for the appellant-accused is unsustainable, at the same time, we are not restricting the power of executive as provided in the Constitution of India. For adequate reasons, it is for the said authorities to exercise their power in an appropriate case."

15. For the foregoing reasons, both the appeals are hereby dismissed. The judgement and order dated 29.09.2008 passed by the Additional Sessions Judge, 5th Fast Track Court, Veraval in Sessions Case No. 01 of 2006 is confirmed. However, it is clarified that after the original accused serve sentence for 14 years their cases may be considered for remission as it is not that life imprisonment should be treated till last breath and the case of the original accused may be reviewed by the appropriate authority considering the decision of Apex Court in the case of Bhaikon @ Bakul Borah (supra). The period of sentence already undergone shall be considered for remission and set off in accordance with law. The accused shall surrender before the concerned authority within a period of twelve weeks from today to serve out the remaining period of sentence. R & P to be sent back forthwith.