HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NOS. 171/2017, 409/2017, 410/2017 AND 220/2016.

....

CRIMINAL APPEAL NO. 171/2017.

Akshay Kailash Purohit,
Aged about 19 years,
Occupation -Labour, resident
of Sai Nagar, Telhara, Tahsil
Telhara, District Akola.
Convict No. C-4884, detained
in Central Prison, Amravati. ... **APPELLANT.**

VERSUS

State of Maharashtra,
through P.S.O., Police Station
Telhara, Tahsil Telhara,
District Akola. ... **RESPONDENT.**

Shri R.M. Daruwala, Advocate (Appointed) for the Appellant.
Shri S.S. Doifode, A.P.P. for the Respondent - State.

WITH

CRIMINAL APPEAL NO. 220/2016.

Akshay @ Santosh Datta Pachange,
Aged about 19 years,
Occupation -Labour, resident
of Gadegaon Road, Telhara, Tahsil
Telhara, District Akola. ... **APPELLANT.**

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VERSUS

State of Maharashtra,
through P.S.O., Police Station
Telhara, Tahsil Telhara,
District Akola. ... **RESPONDENT.**

Shri S.V. Sirpurkar, Advocate for the Appellant.
Shri S.S. Doifode, A.P.P. for the Respondent - State.

WITH

CRIMINAL APPEAL NO. 409/2017.

State of Maharashtra,
through P.S.O., Police Station
Telhara, Tahsil Telhara,
District Akola. ... **APPELLANT.**

VERSUS

Akshay @ Santosh Datta Pachange,
Aged about 19 years,
Occupation -Labour, resident
of Gadegaon Road, Telhara, Tahsil
Telhara, District Akola. ... **RESPONDENT.**

Shri S.S. Doifode, A.P.P. for the Appellant - State.
Mrs. Jyoti Wajani, Advocate for the Respondent.

WITH

CRIMINAL APPEAL NO. 410/2017.

Sagar s/o Kedarkumar Bagani,
Aged about 31 years, Occupation
Business, resident of Telhara,
Tq. Telhara, District Akola. ... **APPELLANT.**

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VERSUS

1.State of Maharashtra,
through Police Station Officer,
Police Station Telhara, Tahsil Telhara,
District Akola.

2.Akshay @ Santosh Datta Pachange,
Aged about 21 years, Occupation
-Labour, resident of Gadegaon Road,
Telhara, Tahsil Telhara,
District Akola.

3.Akshay Kailash Purohit,
Aged about 11 years,
Occupation -Labour, resident
of Sai Nagar, Telhara, Tahsil
Telhara, District Akola.

(Respondent Nos. 3 presently
in jail at Akola). ... **RESPONDENTS.**

Mrs. P.M. Chandekar, Advocate for the Appellant.
Shri S.S. Doifode, A.P.P. for the Respondent No.1 - State.
Shri S.V. Sirpurkar, Advocate for the Respondent No.2.

CORAM : Z. A. HAQ AND VINAY JOSHI, JJ.

Date of reserving the Judgment : 20.03.2019
Date of pronouncing the Judgment : 16.04.2019

JUDGMENT (PER VINAY JOSHI, J.) :

These appeals are arising out of judgment and order of conviction dated 01.06.2016, passed by the learned Sessions Judge,

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Akot in Sessions Trial No.21/2014. Accused No.1 - Akshay Pachange and Accused No.2 – Akshay Purohit, were charged for offences punishable under Sections 363, 364A, 302, 201, 120B read with Section 34 of The Indian Penal Code, and Section 66A of The Information Technology Act.

After holding full fledged trial, the learned Sessions Judge has convicted accused No.1 for offences punishable under Sections 363, 120B and 201 read with 34 of The Indian Penal Code, whilst acquitted him for the offence punishable under Sections 302, 364A of The Indian Penal Code and Section 66A of The Information Technology Act. Likewise, the learned Sessions Judge has convicted accused No.2 for the offence punishable under Sections 302, 363, 120B, 201 of The Indian Penal Code and acquitted him for the offence punishable under Section 364A of The Indian Penal Code and Section 66A of The Information Technology Act. Different quantum of sentences have been awarded for the proved offences, and directed to run them concurrently.

2. Accused No.2 - Akshay Purohit has filed Criminal Appeal No. 171/2017, challenging the order of conviction for the offences stated above. Accused No.1 Akshay Pachange has also challenged his conviction and sentence by filing Appeal No.

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220/2016. The State has challenged acquittal of Accused No.1 Akshay Pachanage for offence punishable under Sections 302, 364A of the Indian Penal Code, vide Criminal Appeal No. 409/2017. Likewise, the original informant vide Criminal Appeal no. 410/2017, has challenged the acquittal of both the accused for respective offences, and also sought for enhancement of the punishment.

3. During the trial, Accused No.2 refused to take legal assistance from the Legal Aid Panel. The learned Sessions Judge made every endeavor to convince him for seeking assistance of a competent Lawyer from the panel of Legal Aid, but, he refused. Since accused No.2 was under trial prisoner, and there was considerable delay in the progress of the trial, the learned Sessions Judge aptly appointed Advocate Ajit Deshpande as Amicus Curiae to defend accused no.2. It emerges from the record that the learned Sessions Judge took every care to see that the accused were properly and ably represented and every opportunity was given to put up their defence. In the appeal, no grievance is made that there was no proper representation to accused no.2 before the trial Court. We are satisfied from the record that every opportunity was given to accused no.2 Purohit, and he was properly defended.

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4. The prosecution case, as emerges from the record, can be stated as follows :

The informant Sagar Bagani, was running a hardware shop at village Telhara, District Akola. His residence was abutting his shop precisely on the rear side of his shop. He was residing with his family, including his minor daughter Vishaka @ Lado, (deceased) aged 2½ years. The informant had employed five servants at his shop which included Accused no.1 – Pachange. Minor Lado was looked after by accused no.1. The informant had specifically directed accused no.1 that the child shall not be taken anywhere except the shop and residence. On 27.02.2014, around 6 p.m., the informant was at his shop with the child. He asked the accused no.1 to leave the child at his residence with her mother. After half an hour, the informant returned to his residence after closing the shop, but, did not find his daughter Lado. He searched for Lado, and also tried to contact accused no.1. Within short while, he had received a phone call from accused no.1, informing that the accused no.2 – Purohit, had assaulted him, snatched Lado and had taken her away. Immediately, the informant rushed to the place i.e. near petrol pump, where he found accused no.1. On enquiry, the accused no.1 gave evasive answers. The informant suspected foul play, hence, he took accused no.1 to the police

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station. The Informant suspected that accused no.1 alongwith accused no.2, had hatched conspiracy and had kidnapped Lado.

5. Accordingly, P.W.1 informant Sagar Bagani lodged the report regarding kidnapping of his daughter Lado by accused no.1 Pachange and accused no.2 Purohit. On the basis of said oral report regarding cognizable offence, initially crime came to be registered vide crime No.121/2014 for the offence punishable under Section 363 read with Section 34 of the Indian Penal Code and P.W.13 P.I. Nikam, commenced investigation.

6. During the course of investigation, the informant had shown the place where he had entrusted Lado to accused no.1 of which police drew panchnama. While accused no.1 was in custody, he showed his willingness to show the place where he had handed over Lado to accused no.2, of which memorandum panchnama was drawn. Accused no.1 led police party towards the Ther Road and took them to a field of gram. The police seized two bicycles, one sandal of small child, one broken knife blade from said place under panchnama. Accused no.2 was arrested around 3.30 p.m. on the following day i.e. on 28.02.2014. His blood stained clothes were seized under panchnama. Accused no.2 expressed desire to show the place where dead body of minor Lado was

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buried. Police recorded his memorandum statement. Accused no.2 led police to the field where maize crop was sown. He had shown the place where Lado was buried, which was in between two rows of maize crops. Accused no.2 had removed the soil under which naked body of Lado was found. There was white colored string around her neck. Police had collected mud from said place and had drawn panchnama. Again after few days, accused no.2 expressed that he is ready to show the place where he had concealed certain articles. Accused no.2 led police to a field where maize crop was sown, and there was some waste material near the Neem tree. Accused no.2 removed the waste material and took out one Sandal and clothes of child, so also he took out one broken grip of knife. Police had seized all these articles and panchnama was drawn. The seized articles were sent for chemical analysis. Statement of relevant witnesses were recoded. After completion of investigation, as there was sufficient material against both accused, police filed final report in the Court of concerned Magistrate.

7. On trial, both the accused denied the guilt and put the prosecution to the task of establishing the charges levelled against them. The prosecution examined fifteen witnesses to establish the charges levelled against the accused including the informant, panch

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witnesses, medical officer, witnesses who had last seen the victim alongwith the accused and investigating officers. The prosecution also banks upon certain documents of which contextual reference is made.

8. The Trial Court recorded statement of the accused for obtaining their explanation on incriminating material. Accused no.1 took a specific defence. It is his stand that on 27.02.2014, he was proceeding with minor Lado towards the house of owner (informant), however, on the way he was accosted by three unknown persons, who assaulted and forcibly snatched Lado. After said incident, he had conveyed about the incident to the informant and had gone to police station. He had given report regarding the incident, however, police had not taken cognizance. He was sent for medical examination, since he had sustained injuries in the assault. In short, he stated that he himself was the victim of the incident, however, at the behest of the informant, he was falsely implicated in the crime. Defence of accused no.2 – Purohit, is of simplicitor denial and of false implication. He raised a faint plea of alibi.

9. At the conclusion of the trial, the learned Trial Judge convicted both the accused for the offence punishable under Section

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363 read with Section 34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for five years and fine of Rs.5000/- and in default to suffer further rigorous imprisonment for six months. The learned trial Judge also convicted both the accused for the offence punishable under Section 201 of the I.P.C., and sentenced them to suffer R.I. for 3 years and fine of Rs. 3500/-, with stipulation of default. Both are also convicted for the offence punishable under Section 120B of the I.P.C. and sentenced to suffer R.I. for 3 years and fine of Rs. 2000/- with default clause. The learned trial Judge convicted accused no.2 Purohit for the offence punishable under Section 302 of the I.P.C. and sentenced him to suffer imprisonment for life and to pay fine of Rs. 10,000/-, in default further R.I. for eight months. However, the trial Judge acquitted accused no.1 Pachange, for the offence punishable under section 302 of the I.P.C. The trial Court acquitted both the accused for the offence punishable under Section 364A of The I.P.C. and Section 66A of The Information Technology Act.

10. Heard the learned Advocates for the parties, exhaustively. With the assistance of learned Advocates appearing for the parties, we have scrutinized the entire material on record. Several citations have been referred by the learned Advocates.

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However, we do not wish to reproduce or refer to all of them, which would unnecessarily flex the size of the judgment. Needless to mention that we will be referring the judgments, which we consider to be relevant.

11. Learned Public Prosecutor for the State, submitted that in the present case the prosecution has proved all the incriminating circumstances beyond reasonable doubt. He further submitted that the prosecution has also established complete chain of events which has proved every hypothesis about the guilt of accused and the evidence on the circumstance of deceased last seen in the company is finally established. He submitted that the time gap between the deceased and accused seen together and the death of child occurring is so narrow that it cannot lead to any other conclusion except that the accused is guilty. He argued that several incriminating articles were seized at the instance of the accused, particularly dead body was recovered on memorandum under Section 27 of the Evidence Act at the instance of the accused No.2. He further submitted that the chemical analysis report and SMS for ransom are proved beyond doubt to establish the guilt of the accused.

Learned Advocate for the informant argued on similar line and urged for capital punishment.

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12. The learned Advocates for the accused No. 1 and accused No. 2 advanced their submissions separately regarding the respective accused, and generally on the prosecution case. It is submitted that the prosecution case is full of lacuna. The witness on last seen theory is planted and unreliable. Stock panch witness is examined for recovery. The learned Advocates further submitted that all the witnesses are acquainted with informant and they have falsely deposed at the behest of the informant. It is submitted that accused no.1 himself is victim of incident but is falsely implicated in the crime. It is further submitted that the alleged recoveries at the instance of accused are farcical and planted. The place from where dead body was recovered was already known to the police. In the totality of circumstances, it is submitted that prosecution case is fabricated; chain of circumstances is incomplete and therefore, both the accused deserve acquittal by allowing their respective appeals.

13. After examining the matter, we find that this case is an example of heartless and perverse youth which recedes to the lowest level. This case demonstrates distracted mind of youth, which has left the informant and his family in sufferings.

14. The present case is a case which is based on circumstantial evidence. The law on the cases based on

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circumstantial evidence is well crystallized by Their Lordships of the Apex Court in the case of **Sharad Birdhichand Sarda .vs. State of Maharashtra (AIR 1984 SC 1622)**. At the inception, it will be appropriate to refer to the following observations of Their Lordships in paragraph nos. 152 and 153 of the judgment, which read as under :

> *"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made:*
>
> *"certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except*

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that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

"153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence." It could thus be seen that Their Lordships have held that before convicting an accused in a case based on circumstantial evidence, it will have to be established that the circumstances from which the conclusion of guilt is to be drawn are fully established. It is further necessary that the facts so established should be consistent, only with the hypothesis of the guilt of the accused. It should be established that the facts established should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of conclusive nature and tendency. It is necessary that the facts established should exclude every possible hypothesis, except the one to be proved, i.e. the guilt of the accused. It has further been held that there must be a chain of evidence so complete as not to leave any reasonable doubt for the

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conclusion consistent with the innocence of the accused and must show that in all human probability the acts must have been done by the accused."

15. The principle for basing conviction on the basis of circumstantial evidences has been discussed in number of decisions and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Various judgments clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts.

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16. At the inception, the learned Advocate for the accused no.2 submitted that mere suspicion cannot take the shape of proof, but, to establish the offence, the prosecution has to prove the case beyond reasonable doubt. In this regard, he relied upon the reported judgment in case of **Sujit Biswas .vrs. State of Assam [(2013) 12 SCC 406].** In the said case, the Hon'ble Supreme Court held that it is the duty of the Court to ensure that mere conjectures or suspicion do not take place of legal proof. Clear, cogent and unimpeachable evidence is must before the accused is condemned as convict.

17. Contextually, we wish to state that while appreciating the oral testimony of witnesses and the circumstantial evidence in a criminal case, the Courts shall advert to the observations laid down in case of **State of Punjab vrs. Jagbir Singh, Baljit Singh & Karam Singh [1974 (3) SCC 277]** wherein it is laid down as under :

> "*A criminal trial is not like a fairy tale wherein one is free to give fight to one's imagination and fantasy. It concerns itself with the question whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence*

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by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

18. Keeping in mind these principles of law, the evidence needs to be scrutinized. However, before adverting to the evidence, we find it apposite to make brief reference of undisputed facts, for quick appreciation. There is no dispute that the deceased Lado was daughter of the informant, the accused no.1 - Pachange was servant of informant and was looking after the child, on the date of occurrence i.e. 27.02.2014, the informant had entrusted Lado to accused no.1 for leaving the child at his residence. Besides that the homicidal death of Lado is, undisputed. In the compass of these admitted facts, we proceed further.

19. The prosecution relied on various of circumstances to establish the charges. We have culled out the following circumstances on which the prosecution relied and claimed that these circumstances are firm, consistent and the chain is complete.

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1) Homicidal death of child by strangulation.

2) Both the accused were well acquainted with each other;

3) Entrustment of child to accused no.1.

4) Both the accused were last seen together with the child.

5) Child died while in custody of accused no.2.

6) Dead body of the child was recovered at the instance of accused no.2.

7) Accused no.1 disclosed the place of occurrence from where incriminating articles were seized.

8) Recovery of incriminating articles at the instance of accused no.2.

9) Seizure of blood stained clothes of accused no.2.

10) Finding of blood Group "B" on the clothes of accused no.2, which was the blood group of deceased Lado.

11) False and misleading explanation by accused no.1.

12) Demand of ransom.

13) Motive of ransom.

20. In order to establish aforesaid circumstances, the prosecution has examined fifteen witnesses. The trial Court has analyzed in detail the evidence of all the witnesses. We have minutely gone through the evidence of relevant witnesses and all documents which are held to be proved in the case.

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21. We will deal with each of the circumstance independently. Since the circumstance of death of the child being homicidal, is not disputed, we are not discussing the medical evidence in detail.

22. It is the case of prosecution that Lado met with a homicidal death. Defence has not challenged the homicidal death of Lado, however, to establish charge of murder, it is pre-requisite for the prosecution to independently establish that the deceased met with a homicidal death. In this regard the prosecution has examined P.W.10 – Dr. Tapadia, who conducted autopsy around 8.50 p.m. on 28.02.2014. Besides that, the prosecution relied on postmortem notes [Exh.99] and inquest panchnama [Exh.73]. A bare look at the evidence of Dr. Tapadia, discloses that the cause of death is due to "Asphyxia due to strangulation." On external examination, following injuries were found on the person of the deceased :

(a) Abrasion 2.5 x 4 cms reddish in colour, Lft side of nose above the lip.

(b) Ligature mark in form of abrasion with contusion 22 cm by 3-6 mm reddish brown in colour encircling the neck upper part, prominent and broad anteriorly, hemorrhage under the subcutaneous tissue under mark.

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(c) Laceration circular 3 mm by 1 mm on right wrist extensa surface.

At the time of postmortem examination, a white ligature was found on the neck of the deceased. The defence has not projected any other possibility of cause of death. The cause of death by way of strangulation is not challenged. Since the death was by way of strangulation, much exercise is not required to be undertaken, to decide the nature of death. Therefore, we have no hesitation to hold that the prosecution has ably proved that Lado died a homicidal death.

23. This brings us to the evidence of informant – P.W.1 – Sagar Bagani, who is father of ill fated child. It is his evidence, that at the relevant time, he had entrusted Lado to his servant, accused no.1, for leaving the child at his house. Accused no.1 had taken the child somewhere else than leaving the child at the house. As the child was not found in the house, he called accused no.1 and learnt that accused no.2 had snatched the child and went away. Since accused no.1 gave evasive answers, informant suspected and took him to police station. Evidence of this witness is on the point of entrustment of the child with accused no.1, and disclosure by accused no.1 that the child was taken away by accused no.2.

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24. So far as the first aspect of entrustment is concerned, it is not in dispute. Moreover, the informant has stated that the accused no.1 had disclosed that the child was snatched by accused no.2. It is the specific stand of accused no.1 that while he was on the way along with the child, towards the informants house, three unknown persons had assaulted him and had snatched the child. Rather his defence is that he himself is victim of incident, but, has been falsely implicated.

25. In support of said defence, the learned Advocate for the accused no.1, has taken us through several admissions and has referred to some documents to impress that accused no.1 sustained bleeding injuries in the assault. True, there is material to disclose that accused no.1 sustained injuries at relevant time. However, that by itself is not sufficient to accept his contention and it requires deeper scrutiny of all the circumstances to find worth of his contention. The learned Advocate for the accused no.1 submitted that the prosecution has not explained the injuries on the person of accused, therefore, the prosecution's case is doubtful. In this regard the defence placed reliance on the reported judgment in the case of **Lakshmi Singh and others .vrs. State of Bihar '(1975) 4 SCC 394)].** It was a case of assault in which the prosecution/victim

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failed to explain the injuries on the person of accused. In such peculiar facts, it was held that the failure of prosecution to explain the injuries caused to the accused would weaken the prosecution's case. The case in hand has peculiar facts of its own. It is not a case of an assault on prosecution witness, on which one could expect that the witness should explain the injuries sustained by accused. It is to be remembered that this is a case based on circumstantial evidence. There are no witnesses who have seen the incident. All the witnesses are on various circumstances. In such facts it is not possible to expect the explanation from the prosecution witnesses. Certainly the law would not expect such evidence in the facts of the present case. Therefore, in the peculiar facts of this case, the general proposition pressed into service would not apply.

26. It requires scrutiny of the prosecution's evidence to decide the trustfulness of explanation given by the accused no.1. Rather it requires serious consideration because, apparently accused no.1 sustained certain injuries on his person at relevant time. However, the learned prosecutor vehemently pointed out that the accused no.1 is hiding the real state of affairs, and has given evasive and different statement on said point. The circumstances reveal that accused no.1 can only throw light on said aspect, therefore, we

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have gone through the relevant portion of the evidence. We find that each time accused no.1 has changed colors. While answering question no.11 in the statement recorded under Section 313 of the Criminal Procedure Code, he came out with a story that at the relevant time, it being Mahashivratri, he had gone to the temple with the child, where people assaulted him. He stated that two persons had assaulted and had snatched the child. At first blush itself, this explanation seems to be unacceptable. When it was festival of Mahashivratri, presumably there would be heavy rush in the temple, and at such a busy place, the incident of snatching child would not have gone unnoticed by the devotees. Pertinent to note that the incident took place at Telhara, which is a small village. Naturally most of the villagers are known to each other. If such incident of snatching of child took place in the evening at the temple, then the news would spread like a wind in the village. However, the said story does not get support from any corner, hence, it is unreliable.

27. The accused no.1 also gave written explanation in his statement under Section 313 of the Code. This time he says that at relevant time, he was proceeding from shop towards house of the informant on bicycle with the child, but, three persons accosted him

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and forcibly snatched the child. Notably, this time he has changed the alleged place of incident. Earlier he stated that the so called incident of snatching took place at a temple, whilst later, he stated that it occurred in between the shop and house of the informant.

28. Contextually, we may note that the informant's house was just behind the shop, meaning thereby one is not required to pass long distance to reach the house. It has come in the evidence that his residence is just 20-25 feet behind the shop. The said aspect is not disputed by the defence. Therefore, even if it is presumed for a moment that while accused no.1 was carrying the child from shop to the house, and the incident occurred on the way, then certainly the nearby persons would have witnessed the incident. The alleged occurrence took place around 6 p.m. in the evening. In the circumstances, if the horrifying incident of snatching a child had taken place at a distance of 20 to 25 feet away from the informant's shop, then certainly there would have been commotion and informant would have known of the incident then and there only. In that case, naturally accused no.1 would have gone to the owner's shop to inform about the incidents, instead of going towards the petrol pump which is quite away. Therefore, apparently the accused no.1 was hiding the reality, and gave untrue and false explanation.

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Therefore, explanation given by the accused no.1 in this regard is totally unacceptable and works against him.

29. There is another reason to discard his explanation. Within few minutes of the occurrence of the incident, the accused no.1 had stated to the informant that accused no.2 assaulted and snatched the child. The said statement has come in the evidence of P.W.1 Sagar Balani, as well as corroborated by FIR [Exh.41], which was recorded within 2/3 hours from the occurrence of the incidnet. However, accused no.1 had not disclosed that the accused no.2 was involved in the alleged incident, but, stated about unknown assailants. Thus, apparently he tried to screen the accused no.2, which again adds a cause to disbelieve his explanation.

30. It is argued that as per the station diary entry no.152, the police also investigated about the third assailant, therefore, the explanation given by accused no.1 about unknown assailant is acceptable. No doubt, the station diary entry no.152, speaks about the third assailant, however, it very much bears the name of accused no.2 along with accused no.1. It is the case of the prosecution that accused no.1 gave misleading information, therefore, such initial entry based on the information given by the accused no.1 would not affect the prosecution case.

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31. Reverting back to the evidence of P.W.1 – informant, he deposed that no sooner he met accused no.1 near petrol pump, the later disclosed that the child was taken away by accused no.2. It has come on record that accused no.1 and accused no.2 were friends and frequently met each other. Therefore, it is difficult to accept that accused no.2 forcibly took the child from accused no.1. In the result, we are not satisfied about the explanation offered by accused no.1, about the story of assault by unknown persons and snatching of the child.

32. It brings us to consider the prosecution's case about the conspiracy in between both accused to kidnap the child, raise demand for ransom and eliminate the child. We may recapitulate that the trial Court held that the prosecution has proved the conspiracy to the extent of kidnapping of the child. Since the State as well as the Original informant have challenged the acquittal of both the accused from the charge of conspiracy on the point of demand of ransom, and charge of murder as far as accused no.1 is concerned, we are required to scan the evidence from said angle also.

33. On the point of conspiracy, we must advert to the settled principles in the field. It is difficult to prove conspiracy by

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direct evidence. The law with regard to the conspiracy has been discussed by Their Lordships of the Apex Court in the case of ***Damodar .vs. State of Rajasthan, (2004) 12 Supreme Court Cases 336.***

> *"15. ...The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not (sic) sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120B of the Indian Penal Code 1860."*

It could thus be seen that Their Lordships have held that the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct or by circumstantial evidence or by both. It has been further held that it is

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a matter of common experience that direct evidence to prove conspiracy is seldom found. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide the complicity of the accused.

34. Section 120A of The Indian Penal Code defines criminal conspiracy, as under:

> "*120A. Definition of criminal conspiracy. When two or more persons agree to do, or cause to be done,*
> *(1) an illegal act, or*
> *(2) an act which is not illegal by illegal means, such an agreement is*
> *designated a criminal conspiracy:*
> *Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.*
> *Explanation. It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.*"

Section 120B of The I.P.C. provides for punishment for an offence of criminal conspiracy. The basic ingredients of the offence of criminal conspiracy are:

(i) an agreement between two or more persons;

(ii) the agreement must relate to doing or causing to be

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done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means.

It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. A conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators can be inferred from the circumstances proved by the prosecution, if such inference is possible.

In case of **Mohammad Usman Mohammad Hussain Maniyar & Ors. Vs. State of Maharashtra**, **(1981) 2 SCC 443)** it was observed that for an offence punishable under Section 120B of The Indian Penal Code, the prosecution need not necessarily prove that the perpetrators expressly agree to do and/or cause to be done the illegal act, the agreement may be proved by necessary implication.

In another case of **Kehar Singh & Ors. Vs. State (Delhi Administration) [(1988) 3 SCC 609]**, the gist of the offence of the conspiracy has been explained succinctly in the following words: "The gist of the offence of conspiracy then lies, not in doing the act,

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or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough.

35. Then in case of **State (NCT of Delhi) Vs. Navjot Sandhu @ Afsan Guru [(2005) 11 SCC 600],** making exhaustive reference to several decisions on the point, including in State Through Superintendent of Police, CBI/SIT Vs. Nalini & Ors., Venkatarama Reddi, J. observed thus:

> *"Mostly, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. Usually both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused (per Wadhwa, J. in Nalini's case at page 516). The well known rule governing circumstantial evidence is that each and every incriminating circumstance must be clearly established by reliable evidence and "the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible." (Tanviben Pankajkumar case, SCC page 185, para 45). G.N. Ray, J. in Tanibeert Pankajkumar observed that this Court should*

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not allow the suspicion to take the place of legal proof."

Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy, but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement.

36. Though the nature of proof to prove conspiracy is diluted, however, there must be circumstances, from which an agreement to do an illegal act can be inferred. We are conscious that the conspiracy is hatched in the mind of a conspirator, therefore, it is hard nut to crack, but, still the material must disclose that a reasonable inference of conspiracy could be safely drawn from these circumstances. It is the prosecution case that both the accused were well acquainted with each other, rather they were friends. It has come in the evidence of P.W.6 – Vijay Chormale, that

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the accused no.1 was well acquainted with accused no.2, who lived at his house. He has deposed that accused no.1 occasionally used to meet accused no.2 and both used to go out for a walk. P.W.8 – Madanmohan Oza, had stated that on 27.02.2014, he had seen both the accused near temple. P.W.7 – Dirajkumar Padiya, has stated about the incident dated 25.02.2015, when he saw both the accused together at Dattawadi. P.W.9- Gajanan Gothe, has also stated that on 2/3 occasions, he had seen both the accused sitting together near the Neem tree in the field. The consistent evidence of these witnesses clearly conveys that these two conspirators had intimacy with each other.

The evidence of these witnesses further discloses that two days prior to the occurrence they had gone to Dattawadi, along with the child. Moreover, on the date of occurrence, accused no.1 took the child in the evening in the field, where accused no.2 arrived. These circumstances indicate that there was well designed plan, since accused no.2 was well aware, about the place and went to the place as per design.

37. After arrest, the accused no.1 had expressed desire to show the place where he had handed over the child to the accused no.2. Police recorded memorandum statement in presence of P.W. 3

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Prashant Vikhe. The police visited the place and seized the bicycle of informant used by accused no.1 and another bicycle of Hero Jet Company. Contextually, we have gone through the evidence of P.W.6 – Vijay Chormale, where it has come on record that on 27.02.2014, in the evening at the request of accused no.2 he had given his bicycle to him. He has identified the bicycle owned by him. His evidence strengthened the presence of accused no.2 on the spot where the girl was handed over. These circumstances, clearly convey that both had engineered a plan and in pursuance thereof, accused no.2 was waiting at the specified place i.e. gram field, where accused no.1 went with the child, as designed. Therefore, it can be well inferred that at least there was a prior meeting of mind in between both the accused to kidnap the minor from lawful custody of her parents, and we hold accordingly.

38. The learned Advocate for the accused no.1 vehemently argued that the offence of kidnapping cannot be proved against accused no.1. It is submitted that accused no.1 himself was lawful custodian of the child, therefore, the offence of kidnapping cannot be established against him. According to him,the offence can be said to be committed/completed when the child was taken from his custody [custody of accused no.1]. In short, it is the contention

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that accused no.1 being lawfully entrusted with the custody of the child, he cannot be charged with the offence of kidnapping. In order to impress said submission, initially he relied on the reported judgment in case of **State .vrs. Harabsingh Kisansing (AIR 1954 Bom 339)**. In said case, this Court has explained the term "lawful guardian", as employed in Section 361 of the Indian penal Code. It is observed that as per the explanation to Section 361 of the Indian Penal Code, the term "lawful guardian" includes any person lawfully entrusted with the care or custody of a minor. In short, the term "lawful guardian", is to be liberally construed and not in the strict sense like "Legal Guardian". The observations of said case can be read only to that limited extent. Rest of the conclusions are on the basis of the facts of that case.

In said case, one Abbas, who was second husband of the mother of child, filed complaint with the police about kidnapping. The mother of child was not examined to show that the child was taken from her custody without consent. In that context, it was ruled that a person to whom a child is entrusted comes within the compass of term 'lawful guardian', and therefore, his evidence is sufficient to prove kidnapping. Basically the object of Section 361, seems as much to protect the minor child from being

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seduced for improper purpose and also to protect the rights and privileges of the guardian. The legislature has specifically explained the term 'legal guardian', so as to remove the mischief and to constitute an offence of kidnapping even if the child is taken from anybody, who was lawfully entrusted with the custody of the child.

39. The learned defence Advocate further relied on the reported judgment in the case of **Parkash .vrs. State of Haryana [(2004) 1 SCC 339]**, on very same aspect. In the said case, the Hon'ble Supreme Court ruled that taking or enticing need not be shown to have been by means of force or fraud, but, guardians consent is material. These are the general principles explaining the essential ingredients to constitute an offence of kidnapping, as defined under Section 361 of the Indian Penal Code. The informant also relied on the very same judgment to explain the meaning and essentials to constitute the offence of kidnapping.

40. Coming to the submission that there cannot be an offence of kidnapping against accused no.1, we do not find any merit in said contention. The said argument is based on the admitted fact that accused no.1 was entrusted with the custody of child, and therefore, he being the lawful guardian, cannot be termed

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as a kidnapper. If said proposition is accepted, then a servant or anybody who was temporarily entrusted with the custody of the child would escape from the clutches of law, though he takes child with deceitful intent. No doubt, in the case at hand, accused no.1 was lawfully entrusted with the custody of the child to hand it over to her mother. Accused no.1 was under the umbrella of the term 'lawful guardian', till he acted in accordance with his role and particularly, as per the directions of his master. No sooner, he exceeded his limit or violated the specific direction, he comes out of the purview of lawful guardian and would turn kidnapper, if rest of the ingredients are proved.

41. It has come in the evidence of the informant that he had specifically warned accused no.1, not to take the child anywhere else, except his shop and house. At this juncture, we may recall the evidence of P.W.7 – Padiya. It has come in his evidence that two days prior to the incident i.e. on 25.02.2014, he had seen accused no.1 with child near Dattawadi area, and he had informed about it to the informant. In this regard, it has come in the evidence of P.W.1 informant that on 25.02.2014, Padiya (PW 7), had come to his shop and had enquired as to how accused no.1 went to Dattawadi with child. Informant specifically deposed that after

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getting knowledge about the incident he had scolded accused no.1 and had strictly warned that the child should not be taken anywhere except the house and the shop. This piece of evidence had gone unchallenged as well as, there is no reason to disbelieve the same. Moreover, informant deposed that, at the relevant time he had entrusted the custody of the child with the accused no.1 and had specifically asked him to hand over the child at his house to his wife. In the circumstances, though accused no.1 temporarily assumed the character of lawful guardian, but, as soon as he went to gram field, against the directions of his master, he came out of that character, and therefore, the argument advanced by the defence cannot be accepted. The attempt of defence to clothe accused no.1 with the character of lawful guardian cannot save him because he lost that character when he took the child deceitfully to gram field and handed over to his companion.

42. This takes us to the crucial aspect of the case relating to the evidence on the point of last seen together, meaning thereby the deceased was last seen in the company of the accused. It is prosecution's case that on 27.02.2014, around 6 p.m., deceased Lado was last seen with both accused and then within 24 hours, her dead body was recovered. Undoubtedly, it is settled legal

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proposition that the last seen theory comes into play only in a case where the time gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead,is so small that there may not be any possibility that any person other than the accused may be the author of the crime.

The conviction on the basis of "last seen theory" and the circumstantial evidence is accepted in our jurisprudence. The "last seen together theory" will apply with greater force in cases where the victim is of tendering age and / or where the mobility of the victim is restricted because of some physical deficiency / deformity. The time gap between sighting of the victim in the company of the accused and death of the victim is a relevant factor as there is a chance that after the victim was lastly seen in the company of the accused, the victim might have moved away from the accused and the death is caused by some person other than the accused. But in a case where the victim is a child of tender age or where the victim is suffering from physical deficiency / deformity because of which independent mobility of the victim is restricted and the victim is not able to move on his/her own, the time gap between the sighting of the victim in the company of the accused and the death of the victim will not be fatal to the case of prosecution. Of course, this will depend on the other evidence on

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record also.

In the present case, the victim was aged about 2 ½ years and the evidence on record shows that the accused no. 1 had been entrusted with the work of taking the child from the house of the informant to the shop of the informant and from the shop of the informant to the house of the informant. We have recorded that as per the evidence on record, the child was handed over by accused no. 1 to the accused no. 2. The accused no. 2 had taken away the child and then dead body of the child was recovered on the following day i.e. time gap was very short. In these facts, the "last seen theory" would apply with full force and this is a strong circumstance pointing out the guilt of the accused no. 2.

43. The prosecution has examined P.W. 9 Gothe, who is a star witness on the point of last seen theory. It has come in his evidence that on 27.02.2014, around 6.30 p.m., while returning from the field, he had seen both accused along with the child. He specifically deposed that both were talking with each other and walking holding their bicycles. Evidence of this witness is largely criticized on the ground of delay in recording of his statement. The leaned Advocate for the appellant endeavored to draw home the point that the credibility of the testimony of the said witness is

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impaired on account of delay in recording of his statement under Section 161 of the Criminal Procedure Code. It is argued that though this witness was very much available on the day of incident, however, his statement was recorded after four days. In the context of factual scenario, according to the learned Advocate for the appellant, the delay is inordinate. It is trite, that mere delay in recording the statement of witness by itself could not be a ground to discard his testimony. Two factors assume significance, where credibility of testimony of witness is questioned on account of delayed interrogation (1) Whether there is plausible explanation for such delay and secondly, are their any concomitant factors or circumstances, coupled with delay, which renders it unsafe to place reliance on the testimony of such witness.

In this context, a useful reference can be made to the ruling of the Hon'ble Supreme Court in the case of **State of U.P. V/s. Satish [(2005) 3 SCC 114]**, wherein the position is explained in following words :

> *"18. As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application*

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that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion [See Ranbir and Ors. v. State of Punjab (1973) 2 SCC 444, Bodhraj @Bodha and Ors. v. State of Jammu and Kashmir, (2002) 8 SCC 45 and Banti @ Guddu v. State of M.P. (2004) 1 SCC 414.

19. The High Court has placed reliance on a decision of this Court in Ganesh Bhavan Patel and Anr. v. State of Maharashtra, (1978) 4 SCC 371. A bare reading of the fact situation of that case shows that the delayed examination by IO was not the only factor which was considered to be determinative. On the contrary it was held that there were catena of factors which when taken together with the delayed examination provided basis for acquittal.

20. It is to be noted that the explanation when offered by IO on being questioned on the aspect of delayed examination, by the accused has to be tested by the Court on the touchstone of credibility. If the explanation is plausible then no adverse inference can be drawn. On the other hand, if the explanation is found to be implausible, certainly the Court can consider it to be one of the factors to affect credibility of the witnesses who were examined belatedly. It may not have any effect on the credibility of prosecution's evidence tendered by the

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other witnesses".

Reverting to the evidence of P.W.9 Gajanan, admittedly his statement was recorded by the police on 05.03.2014. Notably, defence has not categorically asked the explanation to the investigating officer about delay in recording of statement. If such explanation was sought and the investigating officer had offered explanation, then it would have been tested on the touchstone of credibility. In absence of that, mere delay ipso facto would not affect the credibility of the witness.

44. P.W.9 Gajanan, during cross examination, though admited that he was cultivating the field of informant, however, he denied that he was in good relations with the informant's family. The defence was not able to bring enmity of this witness with the accused. Normally, a witness is considered to be an independent unless he springs from the waves which appear to be tainted with enmity. Here again it would depend on the facts of each case.

P.W. 9 Gajanan, had no enmity with the accused and he is an independent and natural witness. Since he revealed the truth after some time, that cannot be a factor to discard his evidence in toto. There cannot be a prosecution case with cast iron perfection in all respects, and it is obligatory for the Courts to analyze, sift and

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assess the evidence on record, with particular reference to its trustworthiness and truthfulness and natural conduct of the parties. The entire evidence with reference to broad and reasonable probabilities of the case is to be seen.

45. To impeach the evidence on last seen theory, the defence relied on the reported case of **Ashraf Hussain Shah .vrs. State of Maharashtra (1996 CLR L.J. 3147)**. In said case, this Court disbelieved the witness since there was delay in recoding statement. Infact the said conclusion was based on the facts of that case. In said case two witnesses had seen the incident, then they were at police station for 1 ½ hours, still they had not disclosed the incident to police, and therefore, their delayed disclosure was disbelieved. The said case is distinguishable on facts, because, in said case the witnesses had allegedly seen the actual incident of assault, still they preferred to remain silent despite sitting in police station. In case at hand, on the day of incident, P.W.9 Gajanan, alongwith other villagers had gone to police station, but had not disclosed that he had seen the child with the accused. The marked distinction is that this witness had not seen any assault or gruesome act so as to immediately disclose about the incident to the police, as a natural reaction. What he had seen is just a routine affair that the

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servant was proceeding with master's kid and nothing else. Since it was an usual affair for him, he had not paid attention nor thought it to be of importance to disclose. It is to be remembered that this witness is a rustic agriculturist. Therefore his non-disclosure of routine affair for few days cannot be treated as a weakness in prosecution's case, unless his evidence is found to be unworthy.

46. In view of the attaining facts and legal position coupled with the circumstances in the case at hand, we are not persuaded to accede to the submission made on behalf of the appellant that the testimony of P.W.9 Gajanan is untrustworthy, solely on account of delay in recording his statement under Section 161 of The Code of Criminal Procedure. His evidence is found to be natural, truthful and credit worthy, therefore we hold that the prosecution has proved that on 27.02.2014, around 6.30 p.m. deceased Lado was last seen alive in the company of both accused.

47. The defence submited that the last seen together theory itself is not sufficient to rope the accused in the crime. To uphold said submission, reliance is placed on the reported case of **Gambhir .vrs. State of Maharashtra [(1982) 2 SCC 351]**. In the said case, on the basis of the facts, it was observed that last seen together by itself was not sufficient to connect the accused with the crime. True,

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it is risky to convict the accused only on the basis of last seen together evidence, but, in case at hand, there are several other circumstances which unerringly points the complicity of the accused.

It has come in the evidence that dead body of Lado was found at the instance of accused no.2, on the following day around 6.30 p.m. Apart from the recovery of dead body at the instance of accused no.2, it is an well established fact that within 24 hours of deceased seen in the company of accused, dead body was found. Of course we are coming to the evidence on the point of discovery of dead body at the instance of accused no.2 after short while. It is evidence of P.W.10 Dr. Tapadia, that the death might have occurred in between 12 to 24 hours prior to the postmortem, which was conducted on 28.02.2014 around 8.50 p.m. Though the defence tried to create doubt on the experts opinion on the point of death on theoretical proposition, the expert's evidence cannot be lightly brushed aside. As per his opinion, the death might have been during the night between 27.02.2014 and 28.02.2014, meaning thereby within few hours when the victim was “last seen”, with the accused. In the circumstance, we found that the last seen theory is very much intact due to very short time gap between the two things.

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Since the victim was child barely aged 2 ½ years having no mobility, we hold that this is strong peace of circumstances against the accused No.2.

48. Then the prosecution relied on various memorandum and consequential discovery at the instance of both accused. Rather this is an important link which prosecution tried to establish by tendering various memorandum, seizure panchnamas and examining the relevant witnesses in support thereof. For this purpose, the prosecution heavily relied on the evidence of P.W.3 – Prashant, who is Panch witness. The learned Advocate appearing for the defence would submit that this witness was panch for all disclosures and seizures, therefore, he cannot be relied upon, being stock witness. Merely because the police repeatedly called him at the time of execution of memorandum and seizure panchnamas, that by itself cannot be the ground to discard his evidence, if otherwise, found credit worthy. His evidence requires usual scrutiny.

49. It is argued that P.W.15 – Dy.S.P. Rashni Nandekar, had admitted that accused no.1 was takenout from lockup for interrogation in between 2.25 a.m. to 4.35 a.m. on 28.02.2014, and

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therefore, the disclosure and recovery shown in the morning is not reliable. It is submitted that the investigation was handed over to Dy.S.P. Nandekar, on 01.03.2014, therefore, the same also creates doubt. We are not ready to accept said submission because P.W.15 Dy.S.P. was a superior officer and had every right to monitor the investigation, though formally it was not handed over to her. Secondly, though she interrogated accused no.1 during the night intervening 28.02.2014, and it does not mean that in the morning again there was no interrogation and disclosure.

50. It has come in the evidence of P.W.3 – Vikhe that on 28.02.2014, in his presence accused no.1 had expressed willingness to show the place where he had handed over child to accused no.2. Accordingly memorandum panchnama [Exh.48], was prepared. It is his evidence that thereafter, accused no.1 led all of them from police station towards Thar road and had asked to halt vehicle near a field of gram. The accused no.1 led all of them on foot to the Neem tree. On inspection, police had found one cycle bearing name on chain cover as K.S. Bagani (informant). Another cycle a sandal of small child and one broken knife blade were seized from said place and panchnama [Exh.49] was drawn. This witness is cross examined at length, but, nothing has come out because of which his

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testimony can be discarded. This witness has shown the place where child was transposed in the custody of accused no.2, which is confirmed by the circumstance of finding of cycles of both the accused as well as sandal of small child. This is an important circumstance which lends support to the evidence of this witness and it also speaks about involvement of both the accused.

51. The prosecution next relied on the vital circumstance of finding dead body at the instance of accused no.2. On the point of recovery of dead body, evidence of P.W.3 is crucial. P.W.3 Vikhe, is a panch witness on the memorandum under Section 27 of The Indian Evidence Act. He has stated that on the same day i.e. 28.02.2014, around 6 p.m. he was called by police to act as Panch witness. In his presence accused no.2 had stated that he was ready to show the place where Lado's dead body was buried. Accordingly police had recorded memorandum panchnama – Exh.51. Thereafter, accused no.2 had led them near the field of gram, and then to the field where maize was sown. Accused no.2 had pointed out a heap of soil between two rows of crop and had stated that he had buried Lado at said place. Accused no.2 had removed the soil and naked dead body of a small girl was found. There was a white coloured string on her neck. The police called the informant for

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identification of the body, and accordingly panchnama [Exh.52] was drawn. Except for the objection of using same panch for different panchanma, nothing material is pointed from the side of defence to discredit his evidence.

52. The defence, while criticizing the evidence on the point of finding dead body at the instance of accused no.2, argued that the policemen were already knowing the place where dead body was buried, and therefore, the memorandum and discovery is of no significance. This submission is primarily based on the informants admission that when the dead body was found, he was present on the spot. Infact this is a distorted submission, because it has come in the evidence that no sooner the dead body was unearthed, the police summoned the informant to identify the body. This was the reason for the informant's presence at relevant time, therefore, the said admission cannot be read out of context.

53. Defence tried to make a point about summons/notice Exh.71, issued by police for calling this witness to act as panch. True, summons [Exh.71] issued to the panch witness states that accused no.1 and accused no.2 were to make disclosure statement, for which panch witness was called. It is argued that P.W. 3 Vikhe, received summons in the morning, which bears name of accused

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no.2 also, who was infact arrested in the afternoon at 3.30 p.m. Therefore, according to the defence, the panchnamas are not genuine, but, fabricated one. In this regard the defence took us through the evidence of P.W.13 – P.I. Nikam, who admits that the said summons/notice was served in the morning of 28.02.2014. Though P.I. Nikam, admits accordingly, however, P.W.3 Vikhe, clarified that Exh.71 is not the summons by which he was called in the morning. He explained that he had received the Summons Exh.71, in the evening and further added that he had received total 7 to 8 summons, therefore, inadvertent admission on the part of the investigating officer would not discredit the prosecution case as against the specific evidence of panch witness, P.W.3 Vikhe. Though P.W.3 Vikhe has faced searching cross examination, it remained abortive. Evidence on the point of memorandum and disclosure of dead body at the instance of accused no.2 is specific and credit worthy. This circumstance is duly proved by the evidence of P.W.3 Vikhe coupled with the evidence of P.W. 13 PI Nikam. Rather it is very important link to connect accused no.2, since the place where dead body was buried was within his exclusive knowledge. Though it is argued that the recovery from open place is inadmissible, however, the evidence indicates that the dead body was buried beneath the surface of land and therefore, it can be well

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presumed that accused no.2 was in exclusive knowledge of the place where the body was buried. We must note that arrest panchnama [Exh.72], of accused no.2 shows that there are bite marks on his arm which reaffirms the complicity of accused no.2 in the crime.

54. The leaned Advocate for the accused no.2 argued that only on the basis of disclosure and recovery, the accused cannot be convicted. In this regard he placed reliance on the judgment in case of **Vijay Thakur .vrs. State of Himachal Pradesh [(2014) 14 SCC 609]**. In said case, the Hon'ble Supreme Court laid down a general proposition that, it would be risky to convict a person solely on the basis of alleged disclosure, when recovery is also shrouded with element of doubt. This case is distinguishable on facts, since in case at hand the recovery of dead body as well as other articles have been proved through reliable evidence. Inasmuch as, the conclusion of guilt is drawn as a cumulative effect of several circumstances, and not only on the basis of disclosure and recovery. In substance, finding of dead body from exclusive knowledge of accused no.2 is a strong circumstance which heavily goes against him.

55. On 04.03.2014, again accused no.2 expressed desire to disclose the place where certain incriminating articles were

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concealed by him. This time, police called P.W.4 – Balaji Kendre as panch witness. It has come in his evidence that accused no.2 stated that he had concealed clothes of deceased, knife, and sandal of child which he was ready to show. Accordingly memorandum panchnama [Exh.80] was drawn. It is his evidence that thereafter, accused no.2 led them to the field where maize crop was sown. Particularly he took them near waste material kept at the side of the tree, and pointed that he had concealed the articles at said place. The accused no.2 removed the waste and took out a sandal and clothes of small child, namely reddish colour jacket with blood stains, hosiery half shirt and hosiery full pant. Then accused no.2 took them at some distance and took out a broken knife and all these articles were seized under panchnama Exh.82. The evidence of this witness withstood to the scrutiny of cross examination. Moreover, the evidence of P.W.15 – Dy.S.P. Smt. Nandedkar, corroborates the memorandum and seizure panchnama. The trial Court has rightly appreciated said evidence on memorandum and consequential seizure of incriminating articles from accused no.2. Finding of blood stained clothes of small kid at the instance of accused no.2, is one another strong piece of circumstance against accused No.2.

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56. The learned Advocate for accused no.2 submitted that mere recovery is not admissible unless its link with the crime is established. On said point he sought to rely on a reported judgment in case of **Digambar Vaishnav and another .vrs. State of Chattisgarh [2019 Supreme (SC) 249].** In said case, it is ruled that under Section 27 of The Indian Evidence Act, it is not discovery of every fact that is admissible, but, discovery of relevant fact alone is admissible. No doubt, recovery is nothing but a link between the facts discovered with the crime. At the instance of accused no.1, the place where Lado was handed over to accused no.2 was disclosed. At said place, two bicycles, sandal and broken blade of knife was found, which very much linked to the crime. Not only these articles speaks about the occurrence, but, it also links accused no.2 as since his bicycle was found and particularly, presence of child was established at said place since one sandal was found. About recovery on 04.03.2014 at the instance of accused no.2, is concerned, it very much establishes a link between accused no.2 and the crime. Blood stained clothes of a child were recovered, which is highly incriminating circumstance in the background, that a naked dead body of child was found. Moreover, recovery of a sandal and broken knife, reaffirms the connection of accused no.2 with the incident.

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57. One more circumstance which suggests complicity of the accused is the chemical analyser's report. The prosecution has relied upon the expert evidence. It has come in the evidence that in presence of panch witnesses, clothes of deceased were seized at the instance of accused no.2. The police also seized blood stained clothes of accused no.2. All seized articles were forwarded to chemical analyzer vide letter Exh.135. The chemical analyzer's report Exh.18, indicates that on the half T-shirt of accused no.2, blood of "B" group was found, which was of the deceased. Though human blood was found on jeans of accused no.2, however, the blood group was not detected. The defence argued that since there were no bleeding injuries on the person of the deceased, the evidence in this regard is of no significance. On perusal of the postmortem notes, it reveals that the deceased had three injuries on her person. Injury no.1 was Abrasion of reddish colour and injury no.3 was laceration of circular shape. One must note that the deceased was barely 2 ½ year old child, who had less mobility. Therefore, the accused no.2 might have lifted the child in arms and in such peculiar facts, the possibility of presecne of blood stains on the front portion of clothes, may be from abrasion or laceration, cannot be ruled out. It is pertinent to note that there were moderate number of blood stains mostly on the front portion of the

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shirt and pant of accused no.2. Therefore, finding of blood of "B" group, which is of deceased, on the clothes of accused no.2, is a vital circumstance, which strongly goes against the accused no.2. Moreover, there is no explanation by accused no.2 in this regard.

58. Now we propose to deal with the evidence on the point of kidnapping for ransom, punishable under Section 364A of the Indian Penal Code. The trial Court has held that the prosecution failed to establish the charge of kidnapping for ransom against both the accused. The State as well as the informant has challenged the acquittal on said count by filing separate appeals. The learned Advocate for accused no.2 vehemently argued that the trial court acquitted the accused of said charge, therefore, inherent presumption of innocence has been strengthened. According to him, unless there is perversity in the reasoning and findings of trial Court, the conclusion of acquittal can not be disturbed in appeal. In order to buttress said submission, he relied on the reported judgment in case of **State of Rajasathan .vrs. Shera Ram @ Vishnu Dutta [(2012) 1 SCC 602].** In the said case, the Hon'ble Supreme Court has explained the scope of appeal, against acquittal. It is observed that on limited grounds, the acquittal may be overturned. The presumption of innocence is fortified by acquittal and therefore, unless the judgment of trial Court is contrary to the

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evidence, palpably erroneous or the view could not have been taken by the Court, it cannot be reversed in the appeal. Also reliance is placed on the judgment in case of **Madathil Narayan and others .vrs. State of Kerala and another [(2018) 14 SCC 513],** wherein the very same principle has been reiterated.

To amplify the settled position in the field, we may refer to the decision of Hon'ble Supreme Court in case of **Joginder Singh and another .vrs. State of Haryana [(2010) 15 SCC 407)**, wherein it is ruled that mere fact that a view other than one taken by the trial Court can be legitimately arrived at by the Appellate Court on reappraisal of evidence, cannot constitute a valid and sufficient ground to interfere with the order of acquittal, unless there is perversity.

In the light of this settled position of law, we have examined the evidence on the point of demand for ransom. The term 'ransom' has not been defined in the Code. The term "ransom" means - sum of money demanded or paid for release of a captive. The learned Advocate appearing for the informant initially submitted that it is not necessary for the prosecution to prove from whom the ransom call was received. In this regard, he relied on the reported case of **Balaso Maruti Kale and another .vrs. State of Maharashtra [2002 All MR (Cri) 2627].** He submited that there is

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no straight jacket formula that the demand of ransom has to be made to a person who ultimately pays. In support he relied on the judgment of Hon'ble Supreme Court in case of **Malleshi .vrs. State of Karnataka [2004-EQ (SC) 898].** True, there can be no definite manner/mode in which the demand can be made and to whom it is made. Some time, kidnapper may make the demand to the parents or some time to any other person who is closely connected to the payee. Similarly, the culprit may raise demand by any mode of communication for which there can be no set rules. However, the prosecution has to establish the demand, may be by any mode of communication to any connected person, which should appear to be trustworthy in the facts and circumstances of the case.

59. To establish the case of demand for ransom, the prosecution's case is based on the evidence of P.W.6 Vijay. It is his evidence that he was well acquainted with accused no.2. On the date of occurrence, accused no.2 took his bicycle, which fact has been discussed earlier. Moreover, for some days accused no.2 was also sojourn at his house. In such a background, he stated that he had received a message in English language on his mobile, which was allegedly the demand for ransom. He was quick enough to clarify that he was not knowing English language. He deposed that, he had shown the mobile to the informant, and then to police on

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which the police informed that the said mobile contained a message of demand of Rs. 1 Crore for release of child. This is precisely the evidence led by the prosecution to prove the demand of ransom. Admittedly there is no other evidence to prove the demand for ransom.

60. In present time, electronic evidence assumes great significance, since it carries high value. The aspect of e-evidence and about its proof is elaborately discussed by the Hon'ble Supreme Court in case of **Anwar .vrs. Basheer [2014 (6) All MR (Cri) 951].** It is observed that e-evidence is to be proved by producing original electronic media as primary evidence or its copy as secondary evidence with requisite certification. Mere production of mobile is of no significance. Neither SMS print out, nor CD of contents is produced. Investigating Officer has not taken pains to preserve and prove this sole piece of evidence.

The trial Court has criticized said evidence from every possible angle. It is held that the message for ransom is not at all proved. Admittedly the electronic evidence about the text of the ransom message has not been brought on record and proved by the prosecution. Infact it was quite easy for the investigating agency to lead such evidence when police had allegedly seen the ransom

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message and had seized the mobile. In absence of said evidence, it is very difficult to rely on the evidence regarding demand of ransom.

61. The prosecution case is so nebulous, that even by any stretch of imagination it cannot be held that there was demand for ransom. P.W.6 Vijay, is merely an agriculturist and was tilling the field of P.W.1 informant. The prosecution has not explained as to what was the reason for the culprit to send the ransom message in English to an agricultural labour, who was not knowing English language. This witness is silent on the point as to who had sent the said message. We fail to understand that when P.W.6 Vijay was unable to understand English language, what occasioned him to show said particular message to the informant and police. It is a common phenomena that in present time, one receives number of marketing messages on and often. In such a scenario, it is difficult to understand how a person who was not knowing English language had perceived that it was incriminating message and had assiduously shown it to the informant. Therefore, at the threshold, the story as has been projected by the prosecution about the demand of ransom is fishy.

62. It is pertinent to note that the evidence is totally silent on the point of text of so called ransom message. Had it been the

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fact that there was ransom message, then at least the informant would have stated the same in his oral evidence, it being a vital issue. Moreover, there is no evidence of any of the police officer even to the extent that they had read the message of ransom or about its script. Looking the matter from another angle, the things are more worse. It is the prosecution case that the alleged ransom message was received from the mobile of accused no.2. Police have seized the mobile handset of Duos Blue Berry Company from accused no.2, having sim No. 8421509583 of Uninor Company, under panchnama Exh.53.The prosecution has examined P.W.14 – Nodal Officer of Uninor Company. It has come in his evidence that the sim no. 8421509583, was in the name of one Satyajit Male, which was activated on 04.12.2013. Further it has come in his evidence that the said mobile sim was re-activated on 19.11.2014, in the name of one Kailash Dattatraya Bhandavale. The incident took place on 27.02.2014. Thus, as per the record of the telecom company, the said sim was in the name of one Satyajit Male at the relevant time.

In such background, unless nexus of accused no.2 with the said sim card or Satyajit Male is established, the evidence on the point of demand of ransom cannot be accepted. In absence of

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link between the said sim number and accused no.2, it is difficult to rely on the said piece of evidence.

63. To constitute the offence under Section 364A of The Indian Penal Code, it is necessary to prove that not only such kidnapping has taken place but, thereafter, accused threatened to cause death, if the demand is not fulfilled. Though the first part of kidnapping is proved, the later essential ingredient about demand and threat is totally missing. In the circumstances, the conclusion drawn by the trial court that the prosecution had miserably failed to prove the demand of ransom, is irresistible and most probable, therefore, we affirm the same.

64. The State as well as the Informant in their respective appeals have challenged acquittal of accused no.1 from the charge of murder. On the aforementioned parameters we have scrutinized the evidence to find out whether there exists any evidence to clothe accused no.1 with the charge of murder. We may recapitulate that on 27.02.2014, around 6 to 6.30 p.m. the child was transposed in the custody of accused no.2. Within half an hour, accused no.1 contacted the informant and then he was taken to police station and was in police custody. Therefore, apparently he was not physically present when the child was done to death. It has come in

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the evidence of P.W.10 -Dr. Tapadia, that victim might have died between the period of 12 to 24 hours prior to the conducting of postmortem, which was conducted at 8.50 p.m. of 28.02.2014.

The learned Advocate for accused no.2 pointed that rigor mortis had not fully developed, meaning thereby death occurred within 12 hours prior to postmortem examination. For this purpose he took us through the admission given by P.W.10 Dr. Tapadia, that he had not stated in postmortem notes that rigor mortis had fully developed. However, we may note that the doctor has mentioned that rigor mortis was fully set in all the limbs. Rigor mortis begins after 4 hours from the death. At this stage, we find it relevant to advert to the decision of the Hon'ble Supreme Court in case of **Ram Udgar Singh .vrs. State of Bihar [(2004) 10 SCC 443]**, wherein it is observed that the time which is usually 3 to 4 hours may vary according to climate condition. Rigor mortis thus varies with climate and circumstance in which the dead body was kept. Nothing has been brought about to disbelieve the medical officer i.e. the expert's opinion that death occurred within 12 to 24 hours before postmortem.

65. Be that as it may, the death of child occurred in the night intervening 27.02.2014 and 28.02.2014. The accused no.1

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was in the company of informant from 7 to 7.30 p.m. of 27.02.2014 and then was in police custody. Therefore, his physical presence at the time of actual death of the child is next to impossible. Then the question remains, whether he can be fastened with the liability with the aid of principle of joint liability. In earlier part of the judgment, we have held that the prosecution has proved the conspiracy only to the extent of kidnapping. Accused no.1 had no reason to call the informant, and disclose that the child was taken away, if he was a conspirator to commit murder. The evidence discloses that there was prior meeting of mind to kidnap, but, most probably, due to differences, the accused no.1 might have withdrawn from the plan, and therefore, the matter was made known to the informant. In the circumstances, accused no.1 cannot be held liable for homicidal death of the child, since he was neither present at the time of death, nor there is evidence of hatching conspiracy to that effect.

66. The learned Addl. Public Prosecutor submitted that, when the fact of kidnapping is proved, then inference that deceased remained in the custody of kidnapper till death can be drawn and accused no.1 cannot be absolved from charge of murder. For this purpose he relied on the reported judgment in case of **Sunder @**

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Sundararajan .vrs. State by Inspector of Police (AIR 2013 SC 777), wherein it is observed as under :

> *"In case of kidnapping for ransom and murder once the deceased has been proved to be kidnapped by accused the onus shifts on the accused to establish how and when the kidnapped person was released from his custody. In absence of any material produced by the accused-appellant, it has to be accepted, that the custody of deceased had remained with the accused-appellant, till he was murdered. The motive/reason for the accused-appellant, for taking the extreme step was that ransom as demanded by him, had not been paid. It cannot therefore, be said that thee is no evidence on record on the basis whereof even the factum of murder at the hands of the accused-appellant does not stand established."*

In the case at hand, the said presumption would apply with full force against accused no.2, but, due to distinct facts has no application to accused no.1. The very circumstance that accused no.1 was consistently in police custody right from one hour after last seen, excludes his culpability in murder. The view expressed by the trial court in this regard is quite probable and plausible one. Therefore, we repel the submission of State and informant in this regard and affirm the conclusions drawn by the trial Court regarding acquittal of accused no.1 from the charge of murder.

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67. So far as the role of accused no.2 is concerned, it has come on record that the child was handed over to him on 27.02.2014, around 6.30 p.m. There is "last seen together" evidence on record on the point which is discussed in the earlier part of the judgment. As per the medical evidence, the death occurred during the night intervening 27.02.2014 and 28.02.2014, when the child was in the custody of accused no.2. Therefore, there cannot be two opinions on the point that the accused no.2 is the author of the crime. The death of the child is by way of strangulation, while in custody of accused no.2. Therefore, the finding of the trial Court that the accused no.2 had caused death of child is irresistible. Since, the defenseless child died due to strangulation, we can hold without hiccup that it is a case of homicidal death. The act of accused no.2 of strangulating the child with string demonstrates the clear intention to cause such bodily injury, with knowledge that it would cause death of the child. The requisite intention to cause death and knowledge are very much present and therefore, the act of accused would constitutes an offence of murder. Therefore, we fully affirm the finding of trial court that prosecution has duly proved that accused no.2 has committed murder of innocent child.

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68. It is argued that there is inordinate delay in lodging of First Information Report, and therefore, there are chances of false implication. To support this contention, the defence relied on reported case of **Thulia Kali .vrs. State of Maharashtra [(1972) 3 SCC 393].** In the said case, the Hon'ble Supreme Court has reiterated the well settled principles regarding importance of prompt lodgment of First Information Report. It is observed that the object of insisting upon prompt lodging of report eliminates the charges of concoction. Delay in lodging FIR often results in embellishment which is a creature of after thought.

69. What constitutes delay in lodgment of First Information Report, is a matter of fact. In case at hand, the informant learnt around 7 p.m. that his daughter was kidnapped. Initially some misleading information was given by accused no.1 and therefore, he was thoroughly interrogated, and then FIR (Exh.41), was lodged at 9.30 p.m. In the situation, time gap of 2 to 2 ½ hours can hardly be termed as delay in lodging the First Information Report. Pertinent to note that name of accused no.2 was disclosed in First Information Report itself. One can understand the plight of a father whose beloved daughter was kidnapped. The misery was added by irrational responses given by accused no.1, therefore, in our opinion

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the time gap of 2 to 2 ½ hours cannot be termed as inordinate delay in lodging FIR.

70. The trial Court has convicted both the accused for commission of offence of causing disappearance of evidence, which is punishable under Section 201 of the Indian Penal Code. So far as the accused no.2 is concerned, the finding of guilt in that regard is well justified. It has come on record that accused no.2 had not only buried the dead body, but, had concealed the clothes of the child beneath garbage, therefore, it shows that the accused no.2 had caused the evidence to disappear, to screen the offence. However, as regards accused no.1 is concerned, we find that without any material, the trial Court has convicted accused no.1 for said offence. The evidence discloses that accused no.1 had only shown the place where he had handed over the child to the accused no.2. While inspecting the place, the police found two bicycles and a sandal of child lying on the spot. It is not the case that accused no.1 had concealed these things so as to screen the offence. Therefore, in our opinion the trial Court erred in convicting the accused no.1 for the offence punishable under Section 201 of the Indian Penal Code, which is required to be reversed.

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71. In every criminal case, court should search for motive. Always motive is hidden in the mind of the culprit. Therefore, it is very difficult to prove. In the earlier part of judgment we have held that the prosecution has failed to prove the demand for ransom. Though there is no evidence on the point of demand of ransom, but, there could be hardly any other reason for the accused. The intention might be to raise demand but, out of fear, the plan was abandoned in half way. The mindset of culprit cannot be unrevealed. Therefore, definite motive has not come on record. We may add that proof of motive is not sine-qua-non to prove the guit, if other evidence is of conclusive nature.

72. In that view of the matter, after considering the material placed on record, we are of the considered view that the prosecution has proved beyond reasonable doubt, the following :

1) Homicidal death.
2) Acquaintance of accused with each other;
3) Entrustment of Child with accused no.1.
4) Both the accused were last seen together with the child.
5) Child died while in exclusive custody of accused no.2.
6) Time gap between last sighting of the deceased in the company of the accused and the death of child, is very

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short.

7) Dead body was recovered at the instance of accused no.2.

8) Recovery of incriminating material at the instance of the accused no.1.

9) Recovery of incriminating material at the instance of the accused no.2.

10) Seizure of blood stained clothes of accused no.2.

11) Finding of blood of “B” group of deceased on the clothes of accused no.2.

12) False and misleading explanation by accused no.1.

73. We have tested the prosecution evidence in the background of legal principles and found that the prosecution has unerringly established the chain of circumstance to prove that accused no.2 has caused death of innocent child. Likewise, we hold that both the accused hatched conspiracy to kidnap the child. So also accused no.2 has concealed the evidence to screen the offence. Though there was charge of Section 66A of The Information and Technology Act, 2000 there is no iota of evidence to support said charge. Therefore, we affirm the findings of trial Court in all respect, except finding of guilt of accused no.1 relating to charge under

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Section 201 of the Indian Penal Code.

74. Now, the last aspect remains about the imposition of appropriate sentence. The informant in his appeal prayed for awarding capital punishment. It is argued that the accused killed innocent defenseless child, which is an example of brutality. Therefore, he deserves capital punishment.

75. Imposition of appropriate sentence is a delicate task in criminal cases. It is the responsibility of the Court to appropriately punish the accused in proportion to the atrocities committed by him. No doubt the accused no.2 has killed an innocent child aged 2 ½ years, however, whether such an act of accused constitutes "rarest of rare case" to warrant capital punishment, is a matter for consideration.

76. Recently this Court, in reported case of **State of Maharashtra .vrs. Rajesh Dhannalal Daware [2016 (2) Crimes (HC) 592],** has elaborately dealt with the aspect of imposing death penalty in paragraph no.95 of its judgment. The same reads as under :

> *"The law as to in what circumstances death penalty would be warranted or not, has been succinctly laid down by the*

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Constitution Benches of the Hon'ble Supreme Court in the cases of Jagmohan Singh .vs. State of Uttar Pradesh reported in 1973 (1) SCC 20, Bachan Singh .vs. State of Punjab reported in 1980 (2) SCC 684 and also of the Bench of three Hon'ble Judges in the case of Macchi Singh and Others .vs. State of Punjab reported in 1983 (3) SCC 470. Since then, there are various judicial pronouncements by the highest Court of the Country, further explaining the legal position. Recently, in the case of Shabnam, the Hon'ble Supreme Court have again reiterated the legal position. It will be appropriate to reproduce paragraph nos. 24 and 25 of the said Judgment. They are thus :

"24. We would not lumber the discussion by tracing the entire death penalty jurisprudence as it has evolved in India, but only limit the exercise to cull out the determinants which would weigh large in our mind to award appropriate sentence while balancing the mitigating and aggravating circumstances. We are mindful of the principles laid down by this Court in Jagmohan Singh v. State of U.P., (1973) 1 SCC 20 : 1973 SCC (Cri) 169; Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580 and Macchi Singh v. State of Punjab, (1983) 3 SCC 470: 1983 SCC (Cri) 681, as followed by this Court up to the present. The aforesaid decisions indicate that the most significant aspect of sentencing policy in Indian criminal jurisprudence regarding award of death penalty is that life sentence is a rule and death sentence is an exception only to be awarded in "the rarest of rare cases". Death sentence must be imposed only when

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> *life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and 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. The circumstances which should or should not be taken into account, and the circumstances which should be taken into account along with other circumstances, as well as the circumstances which may, by themselves, be sufficient, in the exercise of the discretion regarding sentence cannot be exhaustively enumerated."*

It could further be seen that the Hon'ble Supreme Court in its various decisions has culled out various aggravating and mitigating circumstances. The principles have been laid down by the Hon'ble Supreme Court, requiring the Court to apply the test to determine, if it was the 'rarest of the rare' case for imposition of death sentence. The Court must come to the conclusion that imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice. It has further been held that the death sentence should be imposed when the option to impose sentence of imprisonment for life cannot be consciously exercised having regard to the nature and circumstances of the crime and all relevant circumstances. It has

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been further laid down that the Court should take into consideration the method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

77. Keeping in view the above settled principles, the case in hand is to be decided on its own facts to see whether it falls in the category of rarest of rare case to attract capital punishment. We have briefly recapitulated the entire episode. Besides death of a child, there is nothing uncommon to turn it as a most heinous or rare case. One must remember that the accused was just 19 years of age at the time of commission of crime who has no anticidents. There was no previous enmity between accused no.2 and informant. There are no circumstances to indicate that life imprisonment can be construed as inadequate punishment. We do not find any reason to believe that the accused cannot be reformed. There is no material to hold that it is a crime of extreme brutality and would shatter social fabric.

78. Considering all these circumstances, we are of the view that the case in hand does not fall in the exceptional category of rarest of rare case. The alternative punishment imposed by the trial

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court is of life imprisonment, which is well justified. As regards the rest of the sentence is concerned, they appear to be in proportion to the act committed by the respective accused, and does not call for interference.

In view of the above discussion, we hold that the appeals filed by accused no.2, State and informant are devoid of any merit. The appeal of accused no.1 deserves to be partially allowed only to the extent of setting aside his conviction and sentence punishable under Section 201 of the Indian Penal Code. Hence, we pass the following order.

ORDER

(1) Criminal Appeal No. 171/2017 filed by Accused no.2 - Akshay Kailash Purohit, stands dismissed.

(2) Criminal Appeal No. 409/2017 filed by State of Maharashtra and Criminal Appeal No.410/2017 filed by informant-Sagar Bagani, also stand dismissed.

(3) Criminal Appeal No. 220/2016 filed by accused No.1-Akshay Datta Pachange, is partly allowed to the extent of quashing of sentence under Section 201 of the Indian Penal Code. Rest of the sentences

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passed by the Trial Court, are maintained as it is, and to operate accordingly.

(4) The bail bonds of accused No. 1 shall stand canceled. He shall surrender forthwith before the trial Court to serve the remaining part of the sentence.

(5) Muddemal property be dealt with after the appeal period.

(6) The fees of the learned Advocate appointed to represent the appellant – Akshay Kailash Purohit be quantified as per Rules.

JUDGE **JUDGE**

Rgd.

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