

(2024) 07 GUJ CK 0095

Gujarat High Court

Case No: Criminal Appeal (Against Conviction) No. 1547 of 2017, Criminal Appeal No. 920 of 2017

Ramkishore Bharatsinh Yadav

APPELLANT

Vs

Vs State Of Gujarat & Anr.

RESPONDENT

Date of Decision: July 29, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 173, 313, 374(2)
- Indian Penal Code, 1860 - Section 34, 328, 363, 376(2)(f)(g), 379
- Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(v)
- Indian Evidence Act, 1872 - Section 25, 26, 27

Hon'ble Judges: Ilesh J. Vora, J; Vimal K. Vyas, J

Bench: Division Bench

Advocate: Bhavin B Thakar, Maulik J Shelat, Urvashi Mehta, Shivangi M Rana, Shruti Pathak

Final Decision: Allowed

Judgement

Vimal K. Vyas, J

1. The present appeals have been preferred under Section 374(2) of the Code of Criminal Procedure, 1973, at the instance of the appellants-accused and are directed against the judgment and order of conviction and sentence dated 13.06.2017 passed by the learned 3rd Additional Sessions Judge and Special (Atrocity) Judge, Gandhidham-Kachchh, in Special (Atrocity) Cases Nos.7 & 10 of 2012.

2. By the aforesaid judgment and order of conviction and sentence, the learned Sessions Judge found the appellants-accused guilty for the offences punishable under Sections 363 and 376(2)(f)(g) of the Indian Penal Code, and consequently, sentenced them as under :

Section under IPC	Imprisonment	Fine (Amount)	In default of payment of fine
363	Rigorous Imprisonment for five years	2000=00	Simple Imprisonment for two months
376(2) (f)(g)	Rigorous Imprisonment for life	2000=00	Simple Imprisonment for two months

3. The learned Sessions Judge acquitted the appellants-accused for the offences punishable under Sections 328, 379 read with Section 34 of the Indian Penal Code and under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

4. The prosecution's case, in nut-shell, is as follows :

4.1 It is the case of the prosecution that between 21:00 hours on 18.06.2011 and 3:30 hours on 19.06.2011, the accused persons, helping each other and with the intention to commit rape, abducted the minor daughter (i.e. the victim, aged about 3 years) of the complainant Shamliben Somabhai Ganava, aged 40 years, resident of village Timarda, Taluka & District Dahod, from her legal guardianship at the time when the victim minor daughter was sleeping beside her mother.

4.2 It is the case of the prosecution that thereafter, the accused persons took the victim minor girl to a nearby Babul bushes at the Gandhidham Railway Yard, make her unconscious by using Whitener and gang-raped her. It is further the case of the prosecution that the accused had gang-raped the victim minor girl and had also stolen a mobile phone.

4.3 A complaint in this regard came to be lodged by the complainant (PW-5) Shamliben Somabhai Ganava on 19.06.2011 before the Gandhidham Railway Police Station, and on the strength of the complaint, an offence against unknown persons came to be registered vide I-CR No.12 of 2011 under Sections 363 and 376(2)(f)(g) of the Indian Penal Code.

4.4 The investigation was carried out by the Police Sub-Inspector Shri Mukeshbhai Rupabhai Parmar (PW-12), and during the investigation, the scene of offence panchnama, seizure panchnama, etc. were drawn in presence of the panchas and the statements of the witnesses conversant with the incident were recorded. As the case remained undetected, the further investigation was handed over to the Police Inspector Shri Himmatsinh Parbatsinh Chavda (PW-13). During the investigation, the statements of the relevant witnesses were recorded and samples of some of the suspects were collected and sent to the FSL for analysis. Since the samples of the suspects did not match with the samples of the victim, therefore, 'A' summary report was filed under Section 173 of the Code of Criminal Procedure, however, the investigation continued and the same was ultimately handed over to the Deputy Superintendent of Police Shri Jalabhai Devlabhai Katara (PW-17). Meanwhile, the accused, namely Ramkishor Bharatsinh Yadav, was arrested in connection with another offence registered as I-CR No.227 of 2011 registered at the Gandhidham B-Division Police Station and during the investigation, he confessed that he along with another accused Raju @ Raja Madarsingh Parmar, committed the

present offence. Therefore, after obtaining the transfer warrant from the concerned court, he was arrested in connection with the present offence and the arrest panchnama in this regard was drawn in presence of the panchas. During the investigation, various pointing out/demonstration panchnamas were also drawn in presence of the panchas. The documentary evidence in the nature of medical certificates, FSL reports, etc. were collected. On completion of the investigation, charge-sheet came to be filed against the accused, namely, Ramkishor Bharatsinh Yadav, before the learned Additional Chief Judicial Magistrate, Gandhidham, under Sections 363, 376(2)(f)(g), 328, 379 read with Section 34 of the Indian Penal Code, which was registered as Criminal Case No.521 of 2012. As the offence was exclusively triable by the Sessions Court, the case was committed to the Sessions Court, Gandhidham, which was registered as Special (Atrocity) Case No.10 of 2012.

4.5 In the meanwhile, the absconding accused Raju @ Raja Madarsingh Parmar was arrested, and after completion of the investigation, charge-sheet came to be filed against him before the Additional Chief Judicial Magistrate, Gandhidham, which was registered as Criminal Case No.1606 of 2012. As the case was exclusively triable by the Sessions Court, the case was committed to the Sessions Court, Gandhidham and the same was registered as Special (Atrocity) Case No.7 of 2012.

5. After passing the order of consolidation of both the cases, the learned Sessions Judge framed the charge at Exh.9 against both the appellants-accused. The charge was read over and explained to both the appellants-accused, who pleaded not guilty to the charge and claimed to be tried.

6. To bring home the charge, the prosecution has examined 17 witnesses and adduced 40 documentary evidence in support of their case, which are as follow :

WITNESSES		
WITNESS	NAME	EXHIBIT
1.	Deposition of Panch-Witness Ganesh Shivprasad	16
2.	Deposition of Panch-Witness Manoj Dayalal	22
3.	Deposition of Panch-Witness Devendrasinh Laxmansinh	24
4.	Deposition of Panch-Witness Bhagwanbhai Hirabhai	26
5.	Deposition of Complainant Shamliben Somabhai	29
6.	Deposition of Witness Tofanbhai Somabhai	31
7.	Deposition of Witness Sherubhai Somabhai	32
8.	Deposition of Witness Hareshbhai Ramchandra	35
9.	Deposition of Panch-Witness Dharmendra Amrutlal	39
10.	Deposition of Witness Dr.Samish Dineshbhai	43
11.	Deposition of Witness Damani Shamsuddin Kabiruddin	48
12.	Deposition of Investigating Officer Mukeshbhai Rupabhai	50
13.	Deposition of Investigating Officer Himatsinh Parbatsinh	60
14.	Deposition of Witness Chandrakant Shantilal	62
15.	Deposition of Panch-Witness Rajesh Amarlal	69
16.	Deposition of Witness Dr.Arvindkumar Surendrakumar	94
17.	Deposition of Investigating Officer Jalabhai Devlabhai	99

DOCUMENTARY EVIDENCE		
SR. NO.	DESCRIPTION OF THE DOCUMENT	EXHIBIT
1	Arrest Panchnama of the accused	17
2	Panchnama of muddamal recovered from the accused	18
3	Panchnama of the scene of offence	23
4	Arrest Panchnama of the accused	25
5	Panchanam of the scene of offence	27
6	Original Complaint	30
7	Panchnama of recovery of black shirt worn by the Accused at the time of commission of the offence	40
8	Receipt of Panchnama of recovery of clothes worn by the victim at the time of the incident	41
9	Yadi of the Police Station for examination of the victim	44
10	Medical examination report of the victim	45
11	Certificate of examination of the victim	46
12	Panch slip put on the sealed bag containing three wooden stem of Muddamal Article No.1	51
13	Panch slip put on the sealed bag containing soil of Muddamal Article No.2	52
14	Panch slip put on the sealed bag containing soil of Muddamal Article No.3	53
15	Panch slip put on the sealed bag containing soil obtained for control sample of Muddamal Article No.4	54
16	Caste Certificate of the Complainant	55
17	Yadi sent to the F.S.L., Rajkot	61
18	Demonstration Panchnama	70
19	Yadi for medical examination of the accused Ramkishorsinh Bharatsinh	95
20	Yadi for having taken medical sample after examining the accused Ramkishorsinh Bharatsinh	96
21	Yadi for medical examination of the accused Raju alias Raja Madarsing	97
22	Yadi for having taken medical sample of the accused Raju alias Raja Madarsing	98
23	Copy of Station Diary Entry No.6/11	102
24	Order for investigation	103
25	F.S.L. Report of mobile van investigation	104
26	Letter returning muddamal to the F.S.L., Rajkot,	105
27	Receipt of the muddamal received by the F.S.L., Rajkot	106
28	Outward Letter sent to the F.S.L., Gandhinagar	107
29	Receipt of the muddamal received by the F.S.L., Gandhinagar	108
30	Muddamal Analysis Report of the F.S.L., Gandhinagar	109
31	Letter returning muddamal to the F.S.L., Rajkot,	110
32	Receipt of the muddamal received by the F.S.L., Rajkot	111
33	Receipt of the muddamal received by the F.S.L., Gandhinagar	112
34	Muddamal Analysis Report of the F.S.L., Rajkot along with the forwarding letter	113
35	Letter of F.S.L., Rajkot, returning muddamal	114
36	Receipt of the muddamal received by the F.S.L., Rajkot	116
37	Muddamal Analysis Report of the F.S.L., Gandhinagar, along with the forwarding letter	117

39	Muddamal Analysis Report of the F.S.L., Rajkot, along with the forwarding letter	118
40	Muddamal Analysis Report of the Serological Department of the F.S.L., Rajkot, along with the forwarding letter	119

7. On completion of the evidence, the learned Sessions Judge explained the incriminating circumstances against both the appellants-accused. The appellants-accused, in their further statement recorded under Section 313 of the Cr.P.C., explained the incriminating circumstances that they are innocent and falsely implicated in the alleged offence.

8. After the completion of the evidence of the prosecution, the defence examined two witnesses, namely, Rameshchandra Nathalal Dave and Nikunjbai Narharibhai Brahmbhatt, vide Exhibits 129 and 135, respectively, in support of their case.

9. On completion of the trial, the learned Sessions Judge found the appellants-accused guilty of the charges levelled against them and sentenced them as stated herein above.

10. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the appellants-accused have preferred the present appeals before this Court.

11. Heard learned advocates Mr.Maulik Shelat and Ms.Urvashi Mehta appearing for the appellants-accused, learned APP Ms.Shruti Pathak for the respondent-State and learned advocate Ms. Shivangi Rana for the respondent No. 2 i.e. original complainant and also threadbare examined the evidence on record as well as the judgment of the trial court.

Submissions on behalf of the Appellant-Accused Ramkishor Bharatsinh Yadav :

12. Learned advocate Mr.Maulik Shelat appearing for the appellant-accused, namely, Ramkishor Bharatsinh Yadav, has submitted that the trial court has erred in convicting and sentencing the accused for the offence punishable under Sections 363 and 376(2)(f)(g) of the Indian Penal Code. Learned advocate Mr.Shelat, while taking this Court to the evidence led by the prosecution, has submitted that the entire case of the prosecution rests upon the circumstantial evidence, as admittedly, no one has witnessed the incident. It is further submitted that all the panch-witnesses have not supported the case of the prosecution and have turned hostile. Therefore, the contents of the scene of offence panchnama, arrest panchnama, seizure panchnama, pointing out panchnama and demonstration panchnama have not been proved. Learned advocate Mr.Shelat has submitted that the trial court, while holding the appellant-accused Ramkishor Bharatsinh Yadav guilty for the alleged offence, has erroneously relied upon the confessional statement made by the accused during the drawing of the pointing out panchanama at Exh.18 and demonstration panchnama at Exh.27, when admittedly, the appellant-accused was in police custody. It is submitted in this regard that as per Section 25 of the Indian Evidence Act, a confession made to a police officer is prohibited and cannot be admitted in evidence. Similarly, Section 26 of the Indian Evidence Act provides that no confession made by any person whilst he is in the custody of a police officer shall be proved against such person, unless it is made in the immediate presence of a Magistrate. It is, therefore, submitted that the trial court has fell in error in placing reliance upon such pointing out and demonstration panchnames. It is further submitted that admittedly no discovery/recovery has been made during the process of the said panchnames. Learned advocate Mr.Shelat, while pointing out to the evidence of the Investigating Officer (PW-13) Shri Himatsinh Parbatsinh and the Police Inspector (PW-17) Shri Jalabhai Devlabhai as well as the Assistant Director, FSL (DW-2) Shri Nikunjbai Narharibhai Brahmbhatt,

has submitted that it reveals from the evidence of these witnesses that the samples of the victim did not match with the samples of the various suspects and samples of the appellants-accused have not been sent to the FSL for forensic examination. It is submitted that there is no evidence on record which could prove that the appellant-accused was present at the scene of offence when the alleged incident had happened and the finding of guilt of the appellant-accused as recorded by the trial court is based upon conjectures and surmises and, therefore, not sustainable in law. Thus, learned advocate Mr.Shelat appearing for the appellant-accused submitted that the trial court has not appreciated the evidence adduced by the prosecution in its true perspective while convicting the appellant-accused. Hence, it is prayed that the appeal may be allowed and the impugned judgment and order of conviction & sentence passed by the trial court may be quashed and set-aside and the appellant-accused may be acquitted from the charges levelled against him.

Submissions on behalf of the Appellant-Accused Raju @ Raja Madarsingh Parmar :

13. Learned advocate Ms.Urvashi Mehta appearing for the appellant-accused Raju @ Raja Madarsingh Parmar has adopted the arguments advanced by learned advocate Mr.Maulik Shelat. Ms.Mehta, in addition to the arguments advanced by learned advocate Mr.Shelat, has referred to the evidence of the defence witness (DW-2) Shri Nikunjbai Narharibhai Brahmbhatt, Assistant Director, FSL, Gandhinagar, and has submitted that in his evidence at Exh.135, this witness has stated that the samples collected from the appellant-accused were not sent by the Investigating Officer to the FSL for matching with the biological samples of the victim and, therefore, no analysis report regarding the same could have been submitted. Thus, she has submitted that there is no evidence on record to connect the appellant-accused, namely, Raju @ Raja Madarsingh Parmar with the alleged offence and the trial court has convicted the appellant-accused only on the basis of the confessional statement of accused Ramkishor Bharatsinh Yadav said to have been made at the time of pointing out and demonstration panchnamas, which is not admissible in law since the appellant-accused was in police custody at that time. She, therefore, urged that the conviction cannot be sustained. Hence, she has prayed that the appeal may be allowed and the impugned judgment and order of conviction & sentence passed by the trial court may be quashed and set-aside and the appellant-accused may be acquitted from the charges levelled against him.

Submissions on behalf of the Respondent - State :

14. Vehemently opposing the present appeals, learned APP Ms.Shruti Pathak appearing for the respondent - State has submitted that the appeals are not required to be entertained since the trial court, after properly appreciating both the ocular as well as documentary evidence, has precisely convicted both the appellants-accused for a serious offence of gang-rape. Learned APP, while referring to the evidence of the complainant (PW-5) Shamliben Somabhai Ganava, who is the mother of the victim, Medical Officer (PW-10) Dr.Samish Dineshbhai as well as the Investigating Officers, namely, Police Sub-Inspector (PW-12) Mukeshbhai Rupabhai Parmar, Police Inspector (PW-13) Himmatsinh Parbatsinh Chavda and Deputy Superintendent of Police (PW-17) Jalabhai Devlabhai Katara, has submitted that the evidence of these witnesses clearly establishes the complicity of the appellants-accused in the alleged offence. Thus, she has urged that the present appeals do not require any interference by this Court and the same may be dismissed and the judgment and order of conviction & sentence recorded by the trial court may be upheld.

15. Learned advocate Ms. Shivangi Rana appearing for the respondent No. 2 i.e. original complainant has adopted the arguments advanced by the learned APP Ms. Shruti Pathak and submitted that as the trial Court has after appreciating the evidence both ocular as well as the documentary, rightly convicted the appellants for the heinous crime of gang-rape. Hence, she has urged that the present appeals may be dismissed.

Analysis and Findings :

16. We have heard learned advocates for the respective parties and also threadbare examined the evidence on record as well as the judgment and order of the trial court. It is evident from the record that the prosecution's case rests upon the circumstantial evidence. The law with regard to conviction on the basis of the circumstantial evidence is well-settled. Recently, the Apex Court, in the case of *Raja Naykar vs. State of Chhattisgarh*, reported in (2024) 3 SCC 481, in context of the nature and character of proof of circumstantial evidence, has observed thus :

"16. Undoubtedly, the prosecution case rests on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has very well been crystalized in the judgment of this Court in the case of Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116=1984 INSC 121, wherein this Court held thus :

*"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant v. State of Madhya Pradesh* [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail (Alias) Simmi v. State of Uttar Pradesh* [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and *Ramgopal v. State of Maharashtra* [(1972) 4 SCC 625 : AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in *Hanumant* case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :*

"12. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

153. 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 Sahabroo Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]*

"...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 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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

17. It can thus clearly be seen that it is necessary for the prosecution that the circumstances from which the conclusion of the guilt is to be drawn should be fully established. The Court holds that it is a primary principle that the accused must be and not merely may be proved guilty before a court can convict the accused. It has been held that there is not only a grammatical but a legal distinction between may be proved and must be or should be proved. It has been held that the facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. It has further been held that the circumstances should be such that they exclude every possible hypothesis except the one to be proved. It has been held that 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 probabilities the act must have been done by the accused.

18. It is settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt."

17. In light of the aforesaid guiding principles, we will now examine the evidence led by the prosecution. It appears from the evidence that to prove the case against the appellants-accused, the prosecution has mainly relied upon the evidence of the complainant (PW-5) Shamliben Somabhai Ganava and her son (PW-6) Tofanbhai Somabhai Ganava as well as the medical evidence and the evidence regarding the pointing out/demonstration panchanamas. The complainant (PW-5) Shamliben Somabhai Ganava, in her evidence at Exh.29, has deposed that the incident had taken place in the night hours when she, along with her minor daughter aged about 3 years, i.e. the victim, and her two sons Tofan and Sheru was sleeping outside their hut and at about 3:00 O'clock in the early morning she came to know that her minor daughter, i.e. the victim, who was sleeping beside her, was missing. She, immediately, informed other people, and during their search, the victim girl was found from the Babul bushes in an unconscious and severally injured condition. Therefore, she immediately taken her minor daughter to the Rambaug Hospital for treatment. She has deposed that her minor daughter, i.e. the victim, had sustained serious injuries on her private parts She, therefore, file a complaint in this regard (Exh.30) against unknown persons. She has specifically deposed that even if the accused is shown to her, she cannot identify him. In her cross-examination, she has stated that she has no knowledge as to how and in what manner the incident had taken place. The witness PW-6 Tofanbhai Somabhai, who is the son of the complainant and the brother of the victim, has also deposed on similar lines

and further stated that he does not know who is the culprit. The prosecution has also examined PW-10 Dr.Samish Dineshbhai, Medical Officer, Government Hospital, Gandhidham, and PW-11 Dr.Shamsuddin Kabiruddin Damani, Incharge, Gynaecologist at the G.K.General Hospital, Bhuj. Both these witnesses had examined the victim and found the following external injuries on her body :

“10. Mark of External Injuries (Face, Lips, Breast, etc.) :-

(i) Both upper eyelids swollen

(ii) Left lower eyelid swollen

(iii) Abrasion mark 3 cm. over right chest; Multiple abrasion over chest both sides.

11. Examination of Extend Genitalia :-

(i) Pubic Hairs : Not Develop

(ii) Vulva : Abrasion 2 cm.

(iii) Hymen : Tear

(iv) Fourchette : Tear; post vag. wall tear 2 cm.

(v) Perineum : Tear (Rectum mucosa tear anterior 2 cm.)

(vi) Cervix : Normal

(vii) Venereal disease, if any : No”

18. The necessary samples of the victim had also been collected and handed over to the police for forensic examination. Both these witnesses, after the examination of the victim, have specifically opined that the possibility of intercourse cannot be ruled out.

19. It is the case of the prosecution that the appellants-accused were in the habit of inhaling/sniffing Whitener for intoxication and prior to committing the alleged offence, they had purchased the Whitener from one Ishwar General Store owned by one Hareshbhai Ramchand Korani. To prove this fact, the prosecution has relied upon the pointing out panchnama (Exh.18) and the evidence of the shop owner. The panch witness Ganesh Shivprasad Jaiswal (PW-1) has not supported the case of the prosecution and has turned hostile. The shop owner Hareshbhai

Ramchand Korani has also not supported the case of the prosecution and has turned hostile. It is elicited from his evidence that he is not knowing the accused.

20. The prosecution, in order to prove the guilt of the appellants-accused, has heavily relied upon the evidence regarding the demonstration panchnama at Exh.27. It is the case of the prosecution that the appellant-accused Ramkishor Bharatsinh Yadav, in presence of the panchas, made a confessional statement that he and his friend Raju @ Raja Madarsingh Parmar had committed the offence and had also demonstrated how, at which place and in what manner they both had committed the offence. To prove this panchnama at Exh.27, the prosecution has examined the panch-witness Bhagwanbhai Hirabhai (PW-4) and Rajesh Amaral (PW-15) vide Exhibits 26 and 69, respectively. Both these panch-witnesses have not supported the case of the prosecution and have turned hostile.

21. At this juncture, it is noteworthy that at the time of drawing of the pointing out panchnama at Exh.18 as well as the confessional/demonstration panchnama at Exh.27, the appellant-accused Ramkishor Bharatsinh Yadav was in police custody and nothing had been discovered or recovered during the process of the said panchanamas. In such circumstances, the provisions of Sections 25 to 27 of the Indian Evidence Act are required to be looked into. Section 25 provides that no confession made to a police officer shall be proved as against a person accused of any offence, whereas Section 26 provides that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Section 27 provides that when any fact is deposited to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. The Supreme Court has, in the recent judgment in the case of Perumal Raja @ Perumal vs. State, Rep. by Inspector of Police, reported in AIR 2024 SC 460, observed thus :

"19. The prosecution's case, in the absence of eye witnesses, is based upon circumstantial evidence. As per Section 25 of the Indian Evidence Act, 1872, a confession made to a police officer is prohibited and cannot be admitted in evidence. Section 26 of the Evidence Act provides that no confession made by any person whilst he is in the custody of a police officer shall be proved against such person, unless it is made in the immediate presence of a Magistrate. Section 27 of the Evidence Act is an exception to Sections 25 and 26 of the Evidence Act. It makes that part of the statement which distinctly leads to discovery of a fact in consequence of the information received from a person accused of an offence, to the extent it distinctly relates to the fact thereby discovered, admissible in evidence against the accused. The fact which is discovered as a consequence of the information given is admissible in evidence. Further, the fact discovered must lead to recovery of a physical object and only that information which distinctly relates to that discovery can be proved. Section 27 of the Evidence Act is based on the doctrine of confirmation by subsequent events - a fact is actually discovered in consequence of the information given, which results in recovery of a physical object. The facts discovered and the recovery is an assurance that the information given by a person accused of the offence can be relied."

22. It is an admitted fact that at the time of making confessional statement during the process of pointing out and demonstration panchnames, the appellant-accused was admittedly in the police custody. Moreover, considering the fact that nothing had been discovered or recovered through these panchanamas, we are of the opinion that the trial court, in considering these evidence for convicting the appellants-accused, has fell in error, since the same is inadmissible.

23. The prosecution has thereafter examined the Investigating Officers, namely, Police Sub-Inspector (PW-12) Mukeshbhai Rupabhai Parmar at Exh.50, Police Inspector (PW-13) Himmatsinh Parbatsinh Chavda at Exh.60 and Deputy Superintendent of Police (PW-17) Jalabhai Devlabhai Katara at 99. It reveals from the evidence of these witnesses that initially the

investigation was carried out by the Police Sub-Inspector Shri Mukeshbhai Rupabhai Parmar and thereafter it was handed over to the Police Inspector Shri Himmatsinh Parbatsinh Chavda, but the case remained undetected and, therefore, 'A' Summary report as per Section 173 of the Code of Criminal Procedure was submitted. Thereafter, the investigation was handed over to the Deputy Superintendent of Police Shri Jalabhai Devlabhai Katara. In the mean time, the appellant-accused Ramkishor Bharatsinh Yadav came to be arrested in connection with another offence registered as I-CR No.227 of 2011 at the Gandhidham B-Division Police Station, which was being investigated by the Police Inspector Shri D.B.Basiya. It is the case of the prosecution that during the investigation by the Police Inspector Shri Basiya, the appellant-accused Ramkishor Bharatsinh Yadav confessed that he along with Raju @ Raja Madarsingh Parmar, committed the present offence. Therefore, after obtaining the transfer warrant from the concerned court, the appellant-accused Ramkishor Bharatsinh Yadav was arrested in connection with the present offence and the arrest panchnama in this regard was drawn in presence of the panchas. It is also revealed from the evidence of the Deputy Superintendent of Police Shri Jalabhai Devlabhai Katara (PW-17) that both the appellants-accused were subjected to medical examination and Dr.Ar vindkumar Surendrakumar (PW-16) had collected various samples from them. It is elicited from his evidence that the samples of the appellants-accused were not matched with the samples of the victim. It appears from the FSL report Exh.109 that the forensic evidence also do not prove the complicity of the present appellants-accused in the alleged offence.

24. It reveals from the record that the defence has examined the Assistant Director of the FSL, Gandhinagar (DW-2) Shri Nikunjbai Narharibhai Brahmabhatt. It reveals from his evidence that the DNA profile of the samples collected from the appellants-accused were not matching with the DNA profile of the samples of the victim of the present case. It also reveals from his evidence that during this time, the samples of one another accused in connection with I-CR No.9 of 2011 registered with the Gandhidham Police Station were sent to the FSL for forensic examination and the DNA profile of the samples of that accused matched with the DNA profile of the samples of the victim of the present case. In this context, it is noteworthy that though the Investigating Officer Shri Jalabhai Devlabhai Katara (PW-17) came to know that the samples of the accused of I-CR No.9 of 2011 registered with the Gandhidham Railway Police Station match with the samples of the victim of the present case, yet he did not carry out any investigation in that regard. It is shocking that though such fact came on the record, the trial court did not thought it fit to exercise the powers conferred on it by law and has not passed any order to investigate into this aspect. Had it been so, the real culprit of this heinous crime could have been booked and brought before the court of justice. Thus, it appears from the judgment of the trial court that it has misdirected itself by considering the evidence, which is not admissible. It also appears that the trial court, for holding the appellants-accused guilty, has mainly considered two aspects : (i) the confessional statement made by the appellant-accused Ramkishor Bharatsinh Yadav during the process of pointing out and demonstration panchnamas, when admittedly he was in police custody, that he, along with his friend Raju @ Raja Madarsingh Parmar, had committed the present offence; and (ii) the appellant-accused Ramkishor Bharatsinh Yadav was previously convicted for similar type of offence, which in our considered opinion, improper and illegal.

25. From the aforesaid discussion, it is apparently clear that there is no iota of evidence on record which can connect the appellants-accused with the alleged offence.

26. On the overall appreciation of the entire materials on record, we find that the prosecution has failed to prove the case beyond reasonable doubt. In the result, the appeals are allowed. The impugned judgment and order of conviction and sentence dated 13.06.2017 passed by the learned 3rd Additional Sessions Judge and Special (Atrocity) Judge, Gandhidham-Kachchh, in Special (Atrocity) Cases Nos.7 & 10 of 2012, is hereby quashed and set-aside. The appellants-accused are hereby directed to be released forthwith, if not required in any other case. Records and proceedings be sent back to the concerned trial court, forthwith.