(2024) 12 GUJ CK 0050

Gujarat High Court

Case No: Criminal Appeal (Against Conviction) No. 1596 of 2018, Criminal Appeal No. 1397, 1442 of 2018

Deepakbhai Bachubhai Prajapati & Anr.	APPELLANT
Vs	
Vs State of Gujarat	RESPONDENT

Date of Decision: Dec. 20, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 207, 209, 235(1), 313, 374
- Indian Penal Code, 1860 - Section 34, 120(b), 201, 300, 302
- Gujarat Police Act, 1951 - Section 135
- Indian Evidence Act, 1872 - Section 25, 26, 27

Hon'ble Judges: Ilesh J. Vora, J; S.V. Pinto, J

Bench: Division Bench

Advocate: M A Bukhari, P P Majmudar, Laxmansinh M Zala, S B Thakkar, Chintan Dave

Final Decision: Allowed

Judgement

S.V. Pinto, J

1. These appeals have been filed by the appellants - original accused under Section 374 of the Code of Criminal Procedure against the judgement and

order dated 07.08.2018 passed by the learned 10th Additional Sessions Judge, Vadodara (here in after referred to as theâ€learned Trial Courtâ€) in

Sessions Case No. 07 of 2015. The appellants - original accused no. 1 - Dipakbhai Bachubhai Prajapati and accused no. 3 - Ganesh @ Ganu @ Ganio

Nilkanth have filed Criminal Appeal No. 1596 of 2018, appellant- original accused no. 4 - Subhas Rajendra @ Umajirav Barokar has filed Criminal

Appeal No. 1397 of 2018 and appellant- original accused no. 2 â€" Abdul @ Munno @ Thumsup Rahemanbhai Shaikh has filed Criminal Appeal no.

1442 of 2018 and all the appeals have arisen out of the same impugned judgement and order and hence, are disposed of by this common judgement.

The appellants are referred to as the accused in the rank and file as they stood in the original case for the sake of convenience, clarity and brevity.

2. The brief facts necessary to decide the appeal are in a nutshell as under:

2. 1 As per the case of the prosecution, the deceased Prahladbhai had loaned some money to the accused no. 1 Deepakbhai to do business of scrap

and as the accused no. 1 did not want to return the amount and he had a doubt that the deceased Prahladbhai had illicit relations with his wife, he

entered into a criminal conspiracy with the other co-accused and on 30.03.2014, called the deceased on his mobile phone, to settle the accounts to his

factory Ambika Stamping situated in Sayajipura Fruit Market, Plot No. 185/268. As per the conspiracy, the accused no. 1 and the deceased were

sitting in the office on the first floor and as the deceased left the office, the accused no. 1 gave the signal by starting the side light of Innova car no.

GJ-06-ES-1717 with a remote and the accused nos. 2 and 3 went into the office and the accused no. 4 stood outside to keep a watch and as the

deceased was getting down the stairs at around 20:30 hours, the accused nos. 3 assaulted him with a baseball stick and the accused no. 1 gave a blow

with an iron scissor and as the deceased fell down the accused nos. 1, 2 and 3 took a cotton and plastic thread and strangulated him. That they put his

dead body in a white plastic bag in the dickey of Hyundai Verna car no. GJ-16-AA-8722 and the accused nos. 1 and 3 wiped the blood in the factory

and the accused nos. 3 and 4 took Activa No. GJ-06-CS-2781 and Samsung mobile phone of the deceased and placed the Activa below Amitnagar

Bridge and the mobile phone a little away from the Activa opposite Purushottamnagar Society and placed a brick over the mobile to hide it. That they

disposed of the dead body near village Taraswa, Taluka Waghodia, District Vadodara and also threw the pant and purse of the deceased on

Waghodia Road. The complaint was filed by Shalin Prahladbhai Shah - the son of the deceased which was registered at Karelibaug Police Station I-

C. R. No. 59 of 2014 under Sections 302, 201, 120(b), 34 of the IPC and Section 135 of the G. P. Act.

2.2 The Investigating Officer drew the necessary panchanamas, recorded the statements of the connected witnesses, collected the muddamaal, sent

the dead body of the deceased for postmortem, sent the Muddamal to the Forensic Science Laboratory, Ahmedabad for analysis, arrested all the

accused and after the FSL analysis reports were received, a chargesheet came to be filed before the Court of the learned Judicial Magistrate First

Class, Vadodara and as the case was exclusively triable by the Sessions Court, Vadodara, a committal order was passed by the learned Chief Judicial

Magistrate under Section 209 of the Code of Criminal Procedure and the case was registered as Sessions Case No. 07 of 2015.

2.3 The accused appeared before the learned Trial Court and it was verified whether the provisions of Section 207 of the Code of Criminal Procedure

was complied with and a charge was framed against the accused at Exh. 16 and the statements of the accused were recorded at Exhs. 17 to 20

respectively. The accused denied all the contents of the charge and the evidence of the prosecution was taken on record. The prosecution examined

48 witnesses and produced 49 documentary evidences in support of their case and after the learned APP filed the closing pursis at Exh. 167, the

statements of the accused under Section 313 of the Code of Criminal Procedure were recorded wherein the accused denied all the evidence of the

prosecution produced on record. The accused refused to step into the witness box or lead evidence and examine witnesses, and after the arguments

of the learned APP as well as the learned Advocates for the accused were heard, the learned Trial Court was pleased to find all the accused guilty

for the offence under Sections 302, 201 and 34 of the IPC and was pleased to acquit the accused under Section 235(1) of the Code of Criminal

Procedure for the offence under Sections 120(b) of the IPC and Section 135 of the G. P. Act. The learned Trial Court was pleased to sentence all the

accused to imprisonment for life and fine of ₹10,000/- (Rupees Ten Thousand) each and in default, simple imprisonment for six months for the offence

under Section 302 read with Section 34 of the IPC and to simple imprisonment for three years and fine of ₹2000/- (Rupees Two Thousand) each and

in default, simple imprisonment for two months for the offence under Section 201 of the IPC.

3. Being aggrieved and dissatisfied with the judgement and order of conviction, the appellants - original accused no. 1 - Dipakbhai Bachubhai Prajapati

and accused no. 3 - Ganesh @ Ganu @ Ganio Nilkanth have filed Criminal Appeal No. 1596 of 2018, appellant- original accused no. 4 - Subhas

Rajendra @ Umajirav Barokar has filed Criminal Appeal No. 1397 of 2018 and appellant- original accused no. 2 â€" Abdul @ Munno @ Thumsup

Rahemanbhai Shaikh has filed Criminal Appeal no. 1442 of 2018.

3.1 The appellants of Criminal Appeal No. 1596 of 2018 have mainly contended that the learned Trial Court has not appreciated the oral and

documentary evidence and the evidence is not sufficient to connect the chain of circumstances to show that within all probability, the offence has been

committed by the appellants. The learned Trial Court has failed to consider that on 31.03.2014, a missing person information was registered at

Karelibaug Police Station and on the same day, at about 12.20 pm, a FIR of murder under section 302 of the IPC was registered in Waghodia Police

Station. No FIR of murder was registered in Karelibaug Police Station but the investigation was carried out by PSI R. N. Valand and hence, the

investigation is bad in law. The dead body of the deceased was found from village Tarasva at 9.00 am and during investigation, it has also come on

record that the deceased had financed an amount of ₹40,00,000/- to one Virendra Pandit, who had administered a threat of murder to the deceased

but the statement of the said Virendra Pandit has not been recorded and he is not shown as an accused. The motive for murder of deceased

Prahladbhai is not proved by the prosecution, and the Medical Officer has admitted that the signs on the body mentioned in the postmortem note are

possible due to failure of cardio respiratory system. No ligature marks were found on the neck of the deceased and the offence is not culpable

homicide as per Section 300 of the IPC. There is no evidence that there was any monetary transaction between the deceased and the appellant no. 1

and the motive is not established. Moreover, the blood of the deceased was not taken and the signs of blood found at the factory, in the Verna car,

dicky of the car and on the hand brake, marks of blood found on the clothes are not proved to be the blood group of the deceased. The applicants have

been wrongly implicated in the offence and hence, the impugned judgement and order of conviction must be quashed and set aside and the appellants

must be acquitted for the offence.

3.2 The appellant of Criminal Appeal No. 1397 of 2018 has mainly contended that the motive of the original accused no. 1 was not to return the

money which was lent by the deceased for business purpose and with a suspicion that the deceased was having illegitimate relationship with the wife

of the original accused no. 1, the criminal conspiracy was hatched and the offence was committed but in the entire evidence, there is no evidence that

there was any monetary transaction between the deceased and the original accused no. 1 and the testimony of the witnesses has not been appreciated

in proper perspective. The prosecution has miserably failed to prove the case beyond reasonable doubts and the findings of the learned Trial Court are

absolutely perverse and unjustified and the applicant is falsely implicated in the present case. That even though the FIR registered at Waghodia Police

Station was more severe, the investigation was carried out by the Karelibaug Police Station. The postmortem report at Exh. 132 does not show any

injury in the interior part of the neck and no specific reason of the death is mentioned in the postmortem report and the Medical Officer during the

cross-examination has admitted that there were no signs of choking. There are no independent witnesses examined before the learned Trial Court and

the relatives of the deceased do not know anything about the business transaction of the deceased with the original accused no.1. The blood group of

the deceased or the accused have not been examined and hence, the blood stains in the Innova car could not have been said to be of the deceased.

The evidence has not been properly appreciated by the learned Trial Court and the impugned judgement and order is required to be quashed and set

aside.

3. 3 The appellant of Criminal Appeal No. 1442 of 2018 has mainly contended that the case of the prosecution rests on circumstantial evidence and

the chain of circumstances produced by the prosecution before the learned Trial Court is not complete and hence, the case of the prosecution is not

proved beyond reasonable doubts. As per the case of the prosecution, no motive for the appellant to commit the murder of the deceased is proved and

the panch witnesses of the recovery panchnama have not identified the appellant as an accused who was the author of the entire discovery process

and hence, the discovery panchnama could not have been said to have been proved by the prosecution as per law. There is no eye witness to the

incident and there is no evidence of â€œlast seen togetherâ€ qua the present appellant. The impugned judgement and order of sentence is against the

weight of evidence and is required to be interfered with and quashed and set aside.

4. We have heard learned Advocate Mr. M. A. Bukhari for the appellants of Criminal Appeal No. 1596 of 2018, learned Advocate Mr. P. P.

Majmudar for the appellant of Criminal Appeal No. 1397 of 2018, learned Advocate Mr. Laxmansinh M. Zala for the appellant of Criminal Appeal

No. 1442 of 2018 and learned APP Mr. Chintan Dave for the respondent State. We have also perused the impugned judgement and order and the

evidence produced by the prosecution before the learned Trial Court.

5. Learned Advocate Mr. M. A. Bukhari for the appellants of Criminal Appeal No. 1596 of 2018 has submitted that there are no eye witnesses to the

incident and the medical evidence does not support the case of the prosecution. There are no internal injuries or ligature marks found on the neck of

the deceased and the injuries found in the postmortem note are due to cardio respiratory failure. The witnesses of the prosecution are relatives of the

deceased and all the panch witnesses have turned hostile and the motive that the deceased Prahladbhai had advanced money to the appellant no. 1 is

not proved. The investigation has not been properly concluded and even though the first FIR was filed at Waghodia Police Station, the case has been

investigated by the PSI of Karelibaug Police Station where only the information of missing persons was filed. Learned Advocate submits that there is

no evidence that the appellant is involved in the offence and the appeal may be allowed.

5.1 Learned Advocate Mr. P. P. Majmudar for the appellant of Criminal Appeal No. 1397 of 2018 has submitted that as per the case of the

prosecution when the other accused were committing the murder, the appellant was keeping a watch outside and thereafter, the appellant only helped

in taking the Activa of the deceased and kept it at Amitnagar Crossroads and hid the mobile phone of the deceased. In fact, the appellant has been

implicated on the basis of the statement of the co-accused and the findings with regards to the same have been observed by the learned Trial Court in

the impugned judgment. The learned Trial Court has observed that after the name of the accused no. 2 was disclosed and he was arrested, the names

of the other co-accused were declared and hence, they were arrested and the charge sheet has been filed against them. That in fact, there is no

evidence to implicate the appellant in the alleged offence and the motive qua the present applicant is not proved as there is no evidence with regard to

the same. The witnesses examined by the prosecution are interested witnesses and relatives of the deceased; and there are no eye witnesses and the

case is based upon circumstantial evidence, but the chain of events is not proved in the present case. Moreover, the criminal conspiracy under Section

34 of the Indian Penal Code is not at all made out as the prosecution has not been able to prove the meeting of minds or any agreement between the

accused prior to commission of the alleged offence. The basic ingredient of prior meeting of minds to commit the offence has not been proved and the

discovery panchnama is also not proved by the Investigating Officer as per the law settled by the Apex Court in the case of Ramanand @ Nandlal

Bharti Vs. State of Uttar Pradesh. Learned Advocate urges this Court to allow the appeal and the impugned judgement and order be quashed and set

aside.

5.2 Learned Advocate Mr. Laxmansinh M. Zala for the appellant of Criminal Appeal No. 1442 of 2018 has submitted that the entire case of the

prosecution is based on circumstantial evidence and the learned Trial Court has convicted the appellant on the basis of the discovery panchnamas

which are not trustworthy and not in accordance with law. The independent panch witnesses have not supported the panchnamas and the prosecution

has examined PW9 - Shabbirbhai Saifuddin Master at Exh. 53 as the case of the prosecution was that the string which was used to commit the

murder was purchased by the present appellant from the shop of the said witness Shabbirbhai, but the witness has turned hostile and has not supported

the case of the prosecution. That even the discovery of the baseball bat is not proved and the panch witness has stated that the police officer had

discovered a baseball bat. The panch witness has not deposed anything about the drawing of the part I of the panchnama or that the appellant had

made any voluntary statement in his presence and the witness has not identified the appellant as the person at whose instance the entire panchnama at

Exh. 80 was drawn. Hence, there is no legal validity of the said panchnama and the same cannot be used against the present appellant to convict him.

PW25 - Satish Natubhai Patel is the panch witness of the discovery panchnama whereby the Verna car no. GJ-16-AA-8722 was discovered at the

instance of the present appellant but it is on record that no procedure was followed by the police at the place where the car was found. The witness

has not deposed that the appellant had made any voluntary statement in his presence and he has not stated anything about the drawing of the

panchnama part I in his presence. Moreover, the witness has not identified the appellant as the person in whose presence the recovery panchnama at

Exh. 85 was drawn and hence, the panchnama cannot be used to convict the present appellant. The mobile phones of the co-accused are recovered

by the Investigating Officer but there are no incriminating circumstances brought on record by the recovery of the mobile phones of the co-accused.

The prosecution has failed to prove the case against the appellant beyond reasonable doubts and the chain of circumstances is not complete and the

basic requirements of Section 27 of the Indian Evidence Act is not fulfilled. Learned Advocate urges this court to consider the facts and

circumstances and acquit the appellant from all the charges levelled against him.

5.3 Learned APP Mr. Chintan Dave for the respondent State has taken this Court through the entire record and evidence of the prosecution on record

and has submitted that the learned Trial Court has appreciated each and every piece of evidence on record. The case of the prosecution is based on

circumstantial evidence and the chain of evidence is proved by the prosecution and the learned Trial Court has appreciated the entire evidence in

correct perspective and there are no merits in the appeals of the appellants and the same must be rejected.

6. Before we proceed to decide the appeal, it would be appropriate to refer to the observations of the Apex Court in Para 5 in the case of Lal Mandi

V. State of West Bengal reported in 1995 Cri LJ 2659 regarding the duty of the appellate Courts in hearing of appeals in conviction matters.

5. To say the least, the approach of the High Court is totally fallacious. In an appeal against conviction, the Appellate Court has the duty to

itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt

has to be given to an accused. It is not correct to suggest that the ""Appellate Court cannot legally interfere with"" the order of conviction

where the trial court has found the evidence as reliable and that it cannot substitute the findings of the Sessions Judge by its own, if it

arrives at a different conclusion on reassessment of the evidence. The observation made in Tota Singh's case, which was an appeal against

acquittal, have been misunderstood and mechanically applied. Though, the powers of an appellate court, while dealing with an appeal

against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal

against an order of acquittal and in an appeal against conviction are distinct and separate. The presumption of innocence of accused

which gets strengthened on his acquittal is not available on his conviction. An appellate court may give every reasonable weight to the

conclusions arrived at by the trial court but it must be remembered that an appellate court is duty bound, in the same way as the trial court,

to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on

the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An Appellate Court fails in the discharge of

one of its essential duties, if it fails to itself appreciate the evidence on the record and arrive at an independent finding based on the

appraisal of such evidence.

7. In light of the above we have perused and analyzed the evidence led by the prosecution on record of the case.

7. 1 PW1 - Shalin Prahladbhai Shah examined at Exh. 29 is the son of the deceased Prahladbhai Shantilal Shah, and the complainant and he has stated

that on 30.03.2014, he had gone to Ahmedabad with his friends and at around 10:45 pm, while they were returning from Ahmedabad, his mother called

him and told him that his father had not returned home. That his father had gone to meet the accused no. 1 earlier and she had called his father on his

mobile phone but the phone was not answered. That he called his fatherâ€™s mobile phone which was unanswered and he called the accused no. 1

who told him that his father had come and he had dinner and left by 10.00 pm on his black Activa. His mother once again called him and told him that

his fatherâ€™s mobile phone was found near Purushottam Nagar Society near Amit Nagar by a driver of luxury bus and he went to Amit Nagar and

at that time, his mother and the accused no. 1 and his wife were also present. A police van was passing by and he stopped the police van and

informed them about the mobile phone of his father which was recovered from the driver of a luxury bus belonging to Gandhi Travels. The driver of

the luxury bus, accused no. 1 and he were taken to Karelibaug Police Station and he had filed the complaint which is produced at Exh. 33. That he

had gone home and brought a photograph of his father and filed a missing persons application which is produced at Exh. 34. On the next morning, he

got a phone call from Karelibaug Police Station and when went to the police station, in the news scroll on the television, there was a flash that an

unidentified dead body was found in Waghodia and his uncles and other relatives went to see the body at Waghodia and the body was identified as the

dead body of his father. That his father had loaned an amount of ₹1,77,00,000/- to the accused no. 1 for partnership and his father had demanded the

amount from the accused no. 1. During the cross-examination by the learned advocate for the accused, the witness has stated that his father was into

financial transactions but he had not given the details to the police. That he had informed the police that his father had given money to the accused no.

1 and his father had also given an amount of ₹40,00,000/- to Virendra @ Pandit Tripathi and the amount was not returned in spite of demanding for

the same.

7.2 PW2 - Maharshi Chandravadan Dasadia examined Exh. 39 is the friend of the complainant who was with the complainant on the day of the

incident and he has fully supported the case of the prosecution and has narrated in detail all the incidents that had occurred while they were returning

from Ahmedabad including the phone call received from the mother of the complainant and the finding of the mobile phone by the luxury bus driver.

The witness was with the complainant throughout on 30.03.2014 and 01.04.2014 and has narrated in detail all the events that had unfolded while he

was in the company of the complainant.

7.3 PW3 - Shantilal Ratanlal Shah examined at Exh. 43 is the father of the deceased who has stated that on 30.03.2014, he was informed by his

daughter-in-law that the deceased has not returned home and he and his wife went to Akota and on the next day, they came to know that the

unidentified body found in Waghodia was that of his son. That he used to give money on interest to the accused no. 1 and he has identified the

accused no. 1 and stated that they had good relations. During the cross-examination, the witness has admitted that he and the accused no. 1 had

financial transactions for ten to twelve years.

7.4 PW4 - Krishnaben Prahladbhai Shah examined at Exh.45 is the wife of the deceased and she has stated that on 30.03.2014, her husband had

called her between 7.00 pm to 7:30 pm and told her that he was going to the factory of the accused no. 1 to settle the accounts as the accused no. 1

had telephoned him and called him. Thereafter, as he did not return till 11.00 pm, she called the mobile phone of her husband but it was unanswered

and she called her elder son Shalin and informed him that his father had not returned. She called the accused no. 1 who told her that her husband had

left sometime ago and when she called her husbandâ€™s cell phone, a bus driver picked up the phone and told her that he was at Amit Nagar Circle.

She informed her son Shalin and went to Amit Nagar Circle where she met the accused no. 1 with his wife and her son Shalin and his friend had also

reached Amit Nagar Circle. The mobile phone of her husband was recovered from the bus driver who told them that he found it under a brick on the

footpath and blood stains were found on the mobile phone. Her son Shalin went to the Karelibaug Police Station and on the next day, the dead body of

her husband was found near Waghodia. During the cross-examination, the witness has stated that a few days before the death of her husband, she

had gone along with her husband to the house of one Virendra Pandit, and her husband had loaned a huge amount to Virendra Pandit and she had not

given any evidence of the financial transactions between her husband and the accused no. 1.

7.5 PW5 - Madanlal Purshottamlal Kabra, examined at Exh. 46 and PW6 Rajesh bhai Shantilal Shah examined at Exh. 47 are the relatives of the

deceased who were informed about the deceased not returning home and they had gone to Amit Nagar Circle where the mobile phone and Activa of

the deceased were found.

7.6 PW7 - Jayant Narendrakumar Vyas examined at Exh. 49 is the employee of the deceased and he has stated that on 30.03.2014, he was at the

shop along with the deceased and at between 7:30 pm and 8.00 pm, the deceased received a phone call from the accused no. 1. The deceased told

him that he had to go to settle the accounts with the accused no. 1 and took the diaries, cheque books and cash, and left. At around 11:30 pm, the wife

of the deceased telephoned him and told him that the deceased had not returned. He informed her that the deceased had gone to settle the accounts

with the accused no. 1. That he had gone to Amit Nagar and was at the police station till 04:56 am. That on the next day, the dead body of the

deceased was found and there were financial transactions between the accused no. 1 and the deceased. During the cross-examination by the learned

Advocate for the accused, the witness has stated that he knew some of the financial transactions of the deceased and on 30.03.2014, he and the

deceased had shut the shop around 8:30 pm. That he had received the phone call from the wife of the deceased between 11:30 pm â€" 11:45 pm, and

he did not call the accused no. 1 and did not go to the house or factory of the accused no. 1.

7.7 PW8 - Prakash Madan Lal Shah examined at Exh. 52 is the witness who had gone to the postmortem room in the Primary Health Centre,

Wagodia and had identified the dead body of the deceased.

7.8 PW9 - Shabbirbhai Saifuddin Master examined at Exh. 53 is the owner of My Hardware situated in Sharada Park Apartment No. 1, Opposite

Surya Nagar Bus Stand, Waghodia Road and as per the case of the prosecution, the accused no. 2 - Abdul @ Munna purchased the thread by which

the deceased was strangulated from his shop but the witness has not supported the case of the prosecution and has been declared hostile and during

the cross-examination has admitted that he has no sight since many years.

7.9 PW10 - Ravindra Jayantilal Tadvi examined Exh. 57 is the driver of the luxury bus who found the mobile of the deceased on the footpath below a

brick and as the mobile phone was ringing, he picked it up and spoke to the person and one person came and went to the Karelibaug Police Station

along with that person. During the cross-examination, the witness has admitted that he does not know whom the phone belonged to and he did not

know the person who had come to take the phone.

7.10 PW11 - Hari Singh Bhaiti Singh Bhai Ratha examined Exh. 58 is the Sarpanch of Village Taraswa, Taluka Waghodia, District Vadodara and he

has stated that the police had called him to the outskirts of the village where a dead body was lying in a sack. He could not identify the dead body and

the police had recorded his statement.

7.11 PW12 - Satishbhai Valabhai Parmar examined at Exh. 59 and PW13 - Thakurbhai Paragbhai Patel examined at Exh. 16 are the witnesses who

have seen the dead body of the deceased on the outskirts of village Taraswa.

7.12 PW14 - Surajmal Motilal Khichi examined at Exh. 61 is the registered owner of Innova car No. GJ-06-1717 and he has stated that he had sold

the car to the accused no. 1 about one and a half years ago but the car was not transferred as the bank loan was not paid up.

7.13 PW15 - Krunalbhai Vithalbhai Tadvi examined at Exh. 62 is the registered owner of Bajaj Discover motorcycle No. GJ-06-FR-3215 and he has

stated that the accused no. 4 had taken a loan on his name and had given the down payment and was also paying the installments and using the

vehicle.

7.14 PW-16 - Hardik Vinodbhai Patel, examined at Exh. 65 is the witness who had gone to the factory of the accused no. 1 and had taken the hard

disk of the CCTV camera system which was seized by the police.

7.15 PW17 - Nathubhai Gagjibhai Bharwad examined at Exh. 66 is the registered owner of motorcycle number GJ-06-4784 and he has stated that he

had sold the motorcycle to the accused no. 1.

7.16 PW-18 - Prasannjitsinh Harjendrasinh Kang examined at Exh. 67 is the Manager of Ajanta Hotel and he has produced the register of Ajanta

Guest House at Exh. 68 wherein Entry No. 1337 made on 01.04.2014 shows that the accused no. 1 had checked into the hotel at 9:00 am and left at

12:30 pm. The identity proof given by the accused no. 1 in the Guest House is produced at Exh. 69.

7.17 PW40 - Pravinbhai Bhagubhai Gadhvi examined at Exh. 115 is the Police Inspector, Waghodia Police Station, who had gone to the spot where

the dead body was found after he had received a phone call and he had called Harisingbhai Tersingbhai Rathva, the Sarpanch of Taraswa Village and

had taken his application which is produced at Exh. 116. The inquest panchnama was drawn and the dead body was sent for postmortem and

thereafter, witness Satyanarayan Sunderlal Shah identified the dead body and as the offence was registered with Karelibaug Police Station, the papers

and the muddamal were sent towards Karelibaug Police Station.

7.18 PW42 - Naveenbhai Motibhai, examined at Exh. 124 is the police constable who had brought the blood sample in four sealed covers and handed

them over to PSI Karelibaug Police Station.

7.19 PW-43 - Kanhaiyalal Khatrabhai examined at Exh. 125 is the police constable who had handed over the sealed muddamal to FSL Gandhinagar.

7.20 PW44 - Ramniklal Laljibhai Gondaliya examined at Exh. 127 is the Scientific Officer, FSL Mobile Investigation Van and he has stated that he

was called to Amit Nagar Circle on 30.03.2014 and he had checked the Samsung mobile of the deceased and the Activa of the deceased and found

blood stains on the Samsung mobile and has submitted the report at Exh. 128. The witness was also called to the factory of the accused no. 1 situated

in Sayaji Fruit Market and he had checked the place and found blood stains in the entrance, on pieces of metal scrap, on a piece of sack, on the

staircase on the wall at a height of six feet, on the pant and baseball bat found on the road ahead of Waghodia and on the Waghodia Gola Gamdi

Road, the place where the dead body was found and he has submitted the report at Exh. 129. The witness has also examined the Hyundai car no. GJ-

16-AA-8722 and the Innova car No. GJ-06-ES-1717 and found blood stains in both the cars and has submitted the reports at Exhs. 130 and 131

respectively. Samples of all the blood stains were collected on cotton threads and sealed and control samples were also taken and sealed and handed

over to the Investigating Officer.

7.21 PW45 - Dr Birendra Shrinoga Chaudhary examined at Exh. 132 is the Medical Officer, Primary Health Centre, Rustampura who has conducted

the postmortem on the dead body of the deceased on 31.03.2014 between 12:35 pm and 14:40 pm and has submitted the postmortem note at Exh. 133.

As per column No. 17, the following injuries were found on the dead body.

1. CLW on scalp above forehead size 7 X 7 X bone deep.

2. CLW on scalp metal 8 X 5 X bone deep.

3. CLW on scalp in back in occipital 7 X 4 X bone deep.

4. CLW on scalp in back in occipital 7 X 5 X bone deep.

5. Yellowish parchment ligature mark at the level of thyroid cartilage, encircling the neck, breadth 1.5 cm with knot on back.

Fracture of skull â€" frontal bone, parietal bone and both occipital bone were found and the cause of death was shocked following head (brain) injury

associated with strangulation of neck. The witness has stated that injuries found on the dead body could be caused by the iron scissor and the baseball

bat. During the cross examination, the witness has stated that he has not mentioned the time before which the death had occurred in the postmortem

note and there were no injuries to the larynx, esophagus and trachea.

7.22 PW47 - Devshibhai Ramjibhai Makwana examined at Exh. 140 is the Investigating Officer who has deposed in detail about the entire

investigation, recording of statements of connected witnesses, arresting the accused, seizure of muddamal, drawing of the panchnamas, collecting the

call detail records of all the accused and sending the muddamal to the FSL for analysis.

7.23 PW48 - Rameshbhai Nathabhai Valand examined at Exh. 159 had initially investigated the offence, recorded the statements of witnesses, seized

the muddamal, drew the necessary panchnamas and collected the documents from Waghodia Police Station.

8. The prosecution has produced the panchnama of the place where the dead body of the deceased was found at Exh. 71, inquest panchnama at Exh.

73, panchnama by which the clothes of the deceased were seized at Exh. 76, panchnama by which the dead body of the deceased was identified by

Satyanarayan Sunderlal Shah in the postmortem room of the Primary Health Centre, Waghodia at Exh. 78, panchnama by which the accused no. 2

showed the place of offence, which was on the staircase of Ambika Stamping Factory from where blood stains were found on pieces of metal scrap

near the door, inside the factory on the wall at a height of six feet on step number eight on the staircase, the place where the blood stained black pant

of the deceased and the blood stained baseball bat were thrown and the place where the dead body was thrown and at that place blood stains were

found at Exh. 80, panchnama by which the Innova car no. GJ-06-ES-1717 was recovered from near the house of the accused no. 1 and the keys of

the car was given by the wife of the accused no. 1 and blood stains were found near the handbrake and near the driver seat and a Samsung mobile

phone was recovered at Exh. 83, panchnama by which Verna car No. GJ-16-AA-8722 was recovered from the house of the accused no. 2 and blood

stains were found in the behind dicky and on the floor of the car in the behind seat at Exh. 85, panchama by which the mobile phones of the accused

no. 2 and accused no. 3 were recovered at Exh. 90, panchnama by which the iron scissor used to cut metal was recovered at the instance of the

accused no. 1 from his Ambika Stamping Factory at Exh. 93, panchama by which Bajaj Discover motorcycle no. GJ-06-FR-3215 was seized from

Satishbhai Rajendrabhai Bakorkar at Exh. 95, panchnama by which motorcycle No. GJ-06-HB-4784 was seized from Padmaben Nilkanthbhai Kadam,

the mother of the accused no. 3 at Exh. 97, panchnama by which the blood of the accused was taken during investigation and was produced by Police

Constable Naginbhai Mohanbhai Buckle No. 2582, Karelibaug Police Station and he had collected the same from the Medical Officer at SSC

Hospital, Vadodara at Exh. 100, panchnama by which the hard disk was seized from Ambika Stamping Factory at Exh. 103, panchnama by which the

clothes worn by the accused no. 1 on the day of the incident which had blood stains were seized from his house at the instance of the accused no. 1 at

Exh. 106, panchnama by which the clothes of the accused no. 3 were seized from his house at his instance at Exh. 109, panchnama by which the

mobile phone of the deceased was seized at Exh. 112, panchnama by which the Activa No. GJ-06-CS-2781 of the deceased was seized at Exh. 114,

panchnama by which the clothes of the accused no. 4 worn at the time of the incident were seized from his house at his instance at Exh. 136 and the

panchnama by which the clothes of the accused no. 2 worn at the time of the incident were seized from his house at his instance at Exh. 144.

9. It is not in doubt that the case against the accused is based on circumstantial evidence and there are no eye witnesses to the incident. As per the

case of the prosecution, the deceased had left his house in the morning on 30.03.2014 and at around 7:30 pm he telephoned his wife PW4 -

Krishnaben Prahladbhai Shah that he was to go to meet the accused no. 1. The deceased was in his shop along with his employee PW7 -Jayantbhai

Narendrakumar Vyas and they both left the shop together at around 8:30 pm. While the deceased was at the shop, the accused no. 1 had telephoned

and called him between 7:30 pm to 8.00 pm and told him to come to settle the accounts and he left to meet the accused no. 1. As he did not return

home till 11:00 pm, his wife called him on his mobile but the call remained unanswered and she called her son PW1 - Shalin Prahladbhai Shah and

informed him that his father had not returned and that he had gone to meet the accused no. 1. The wife of the deceased PW4 - Krishnaben

Prahladbhai Shah also called the accused no. 1 who told her that her husband had left after having dinner and he was leaving his house to look for her

husband. PW1 - Shalin Prahladbhai Shah called the accused no. 1 who told him that his father had left after dinner sometime ago. The mobile phone

of the deceased was found by PW10 - Ravindra Jayantilal Tadvi the driver of a luxury bus who found the mobile phone on the footpath below a brick

and the Activa number GJ-06-CS-2781 was found in the parking place below the bridge of Amit Nagar Circle, Opposite Kismat Kathiyawadi Hotel.

The dead body of the deceased was found on the next day in the outskirts of Village Taraswa, Taluka Waghodia and the dead body was identified by

PW8 - Prakash Madanlal Shah. The dead body had injuries on the skull and as per the opinion of the Medical Officer, the injuries could be caused by

an iron scissor and a baseball bat. During investigation, blood stains of the blood group of the deceased were found from the Ambika Stamping

Factory from where the scissor with blood was recovered at the instance of the accused no. 1, blood stains were found on the clothes of the accused

no. 1 and blood stains were also found in the Innova car no. GJ-06-ES-1717 belonging to the accused no.1. The accused no. 2 showed the place of

offence which was Ambika Stamping Factory from where blood stains were found, the place where the black pant of the deceased with blood stains

and the baseball bat with blood stains were thrown and the place where the dead body of the deceased was thrown and there were blood stains found

on the ground, blood stains were also found in the Verna car no. GJ-16-ES-1717 belonging to the accused no. 2 and also on the clothes of the accused

no. 2.

10. The law with regard to circumstantial evidence is well settled and as far as circumstantial evidence is concerned the Apex Court in Sharad Birdhi

Chand V. State of Maharashtra reported in 1984 SCC (4) 116 has observed as under :

â€¦â€¦â€¦.It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the

defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain

are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words,

before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not

the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea

which is not accepted by a Court.

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. The State of Madhya Pradesh. 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 and Ramgopal v. State of Maharashtra. It may

be useful to extract what Mahajan, J. has laid down in Hanumant's case (supra):

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 far 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.

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 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 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.

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

11. The question that arises before us is whether the learned Trial Court has appreciated all the circumstances in the evidence in light of the

observations of the Apex Court in the case of Sharad Birdhi Chand (supra) or whether there are any breaks in the chain of evidence to connect the

accused with the crime?

12. We have minutely perused and analyzed the evidence in this case and find that the case of the prosecution rests on the circumstances, whereby,

during investigation the Investigating Officer has recovered the weapons that were used in the offence, namely the iron scissor and baseball bat, the

pant of the deceased stained with blood and blood stains found from Ambika Stamping Factory, Innova car and Verna car which were recovered at

the instance of the accused no. 1 and the accused no. 2 in the presence of the panch witnesses vide the panchnamas under Section 27 of the Indian

Evidence Act.

13. With regard to Section 27 of the Indian Evidence Act, the Apex Court in Bodh Raj @ Bodha and others V. State of Jammu and Kashmir reported

in 2002 (7) SCC 334 in para 18 has observed as under :

18. Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of informations given by the accused while in

custody. The question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Indian

Evidence Act, 1872 (in short the Evidence Act') is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in

police custody which distinctlv relates to the fact discovered is admissible in evidence against the accused, This position was succinctly dealt

with by the this Court in Delhi Admn vs Balakrishan. AIR (1972) SC 3 and Md. Inayatullah v. State of Maharashtra. AIR (1976) SC 483.

The words ""so much of such information"" as relates distinctlv to the fact thereby discovered. are very important and the whole force of the

section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to

which such information is required to relate, The ban as imposed by the preceding sections was presumably inspired by the fear of the

Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If al! that is required to lift

the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that

the persuasive powers of the police will prove equal to the occasion: and that in practice the ban will lose its effect. The object of the

provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences

of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence

leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police

custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who

is subsequently taken in to custody and becomes an accused. after committing a crime meets a police officer or voluntarily goes to him or to

the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact.

in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under

Section 27 if the information did come from a person not in the custody of a police officer or did come from a person not in the custody of a

police officer. The statement which is admissible underSection 27 is the one which is the information leading to discovery Thus, what is

admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. in other words, the exact

information given by the accused while in custody which led to recovery of the articles has to be proved. !t is, therefore, necessary for the

benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact

information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation

by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any

Information obtained from a prisoner. such a discovery is a guarantee that the Information supplied by the prisoner is true. The information

might be confessional or non- inculpatory in nature but if it results in discovery of a fact. it becomes a reliable information. it is now well

settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in Palukuri Kotayya v.

Emperor AIR (1947) PC 67, is the most quoted authority of supporting the interpretation that the ""fact discovered"" envisaged in the section

embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate

distinctly to that effect. [see Stale of Maharashtra v. Dam Gopinath Shirde and Ors, (2000) Crl.L.J 2301. No doubt, the information

permitted to be admitted in evidence is confined to that portion of the information which ""distinctly relates to the fact thereby discovered.''

But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information

admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he

had concealed the articles is not indicative of the information given.

14. On examination of the evidence of the prosecution in light of the above principles of law we find that PW23 - Dipakbhai Bachubhai Jingar is the

panch witness of the panchama produced at Exh. 80 by which the accused no. 2 had shown the place of offence which was in Ambika Stamping

Factory, where blood stains were found, the place from where one black pant with blood stains and three pieces of the baseball bat were recovered

and the place where the dead body was thrown. PW24 - Yakubbhai Hasanbhai Shaikh is the panch witness of the panchnama produced at Exh. 83,

wherein the Investigating Officer had seized Toyota Innova car No. GJ-06-ES-1717 but the witness has not supported the case of the prosecution and

has stated that no car was seized in his presence. PW25 - Satish Natubhai Patel is the panch witness of the panchnama produced that Exh. 85,

wherein the accused no. 2 voluntarily showed the Verna car No. GJ-16-AA-8722, which was parked in front of his house and blood stains were found

in the dicky of the Verna car but witness has not deposed as to whether in his presence the accused no. 2 had voluntarily made a statement that he

was ready to show the car that was used in the offence. PW28 - Gautambhai Hashmukhbhai Shah is the panch witness of the Panchama produced at

Exh. 93 whereby the accused no. 1 had voluntarily showed the place of offence and from that place the iron scissor was recovered, but the witness

has not stated that the accused no. 1 had volunteered to show the place and as per the say of the accused no. 1, they had gone and the iron scissor

was recovered. PW47 - the Investigating Officer - Devshibhai Ramjibhai Makwana has not deposed the exact words uttered by the accused at the

Police Station in the presence of the panch witnesses before going for the recovery of the weapons or the car and the details of the contents of the

panchnama have not come on record. There is no iota of evidence in the deposition of the Investigating Officer that the accused no. 1 or the accused

no. 2 had voluntarily agreed to show the weapons or the car and that the part-I of the panchnama was drawn and thereafter, they all left as per the

say of the accused and went to the place where the weapons and cars were found. The Investigating Officer has merely stated that he had recorded

the statements of the accused and the weapons were seized as per the panchnama.

15. The Apex Court in Ramanand @ Nandlal Bharti V. the State of Uttar Pradesh passed in Criminal Appeal No. 64 - 65 of 2022 in para 56 has

observed as under :

56. The requirement of law that needs to be fulfilled before accepting the evidence of discovery is that by proving the contents of the

panchnama. The Investigating Officer in his deposition is obliged in law to prove the contents of the panchnama and it is only if the

Investigating Officer has successfully proved the contents of the discovery panchnama in accordance with law, then in that case the

prosecution may be justified in relying upon such evidence and the trial court may also accept the evidence. In the present case, what we

have noticed from the oral evidence of the Investigating Officer, PW-7, Yogendra Singh is that he has not proved the contents of the

discovery panchnama and all that he has deposed is that as the accused expressed his willingness to point out the weapon of offence the

same was discovered under a panchnama. We have minutely gone through this part of the evidence of the Investigating Officer and are

convinced that by no stretch of imagination it could be said that the Investigating Officer has proved the contents of the discovery

panchnama (Exh.5). There is a reason why we are laying emphasis on proving the contents of the panchnama at the end of the Investigating

Officer, more particularly when the independent panch witnesses though examined yet have not said a word about such discovery or turned

hostile and have not supported the prosecution. In order to enable the Court to safely rely upon the evidence of the Investigating Officer, it

is necessary that the exact words attributed to an accused, as statement made by him, be brought on record and for this purpose the

Investigating Officer is obliged to depose in his evidence the exact statement and not by merely saying that a discovery panchnama of

weapon of offence was drawn as the accused was willing to take it out from a particular place.

16. In light of the above settled principles of law with regard to acceptance of the evidence of discovery of weapons or incriminating blood stains from

the vehicles, we find that the panch witnesses have not fully supported the case of the prosecution and have not stated the exact words uttered by the

accused in the preliminary panchnama and the panch witnesses have not deposed about the entire fact as to how they had left the police station and

gone to the place and recovered the incriminating articles as per the say of the accused and also the evidence of the Investigating Officer which does

not prove the contents of the panchama, the evidence of recovery of the iron scissor and pieces of the baseball bat, black pant with blood stains, blood

stains at the Ambika Stamping Factory, blood stains in Innova car No. GJ-06-ES-1717 and Verna car No. GJ-16-AA-8722 cannot be treated as legal

evidence as there are various legal infirmities in the same and the contents of the panchnamas are not proved by the panch witnesses or the

Investigating Officer.

17. Even otherwise, the prosecution has not produced any documentary evidence to prove that the accused no. 1 was the owner and in possession of

Ambika Stamping Factory and was the registered owner of Innova car No. GJ-06-ES-1717 and that the accused no. 2 was the registered owner of

Verna car no. GJ-16-AA-8722. In the further statement of the accused no. 1, he has denied that he was the owner of Ambika Stamping Factory and

one Hemant Bhalchandra Vedana was the owner and occupier of Ambika Stamping Factory. The prosecution has examined PW14 - Surajmal Motilal

Khichi who, as per the case of the prosecution, is the registered owner of Innova car No. GJ-06-ES-1717 and he has stated that he had sold the car to

the accused no. 1 but no documentary evidence is produced to prove that the car was sold to the accused no.1. The Investigating Officer has seized in

all four vehicles during investigation namely one Innova car, one Verna car and two motorcycles during investigation but the RC books of none of the

vehicles have been produced on record and there are no documentary evidences to prove that the accused were the registered owners of the

vehicles.

18. One of the arguments advanced by the learned advocate for the accused is that there are no documentary evidences produced by the prosecution

on record to prove the motive which was that the deceased had loaned a huge amount of money to the accused no. 1 and the deceased was

demanding the amount and the accused no. 1 did not want to pay the amount, hence he, along with the other co-accused committed the murder of the

deceased. In the evidence of the prosecution, the complainant who is the son of the deceased, the wife of the deceased, the father of the deceased

and the employee of the deceased have all stated that the deceased had loaned some amount to the accused no. 1. The son of the deceased has

stated that an amount of ₹1,77,00,000/- was loaned to the accused no. 1 but there is no evidence as to when, where and how the huge amount of

₹1,77,00,000/- was given by the deceased to the accused no. 1. If as per the case of the prosecution, a huge amount of ₹1,77,00,000/- was in fact

loaned by the deceased, there would be documentary evidence to show this huge amount of financial transaction which would be reflected even in the

books of accounts of the deceased. The complainant or any witness has not produced any documentary evidences on record and from the oral

evidence of the witnesses who are the family members and employee of the deceased, whether it can be said that the motive is proved? Admittedly,

the case of the prosecution rests on circumstantial evidence and there are no eye witnesses to the incident and hence, as per the settled principles of

criminal jurisprudence, the motive assumes greater importance. In the instance case, there is no iota of evidence to prove the motive and if the murder

of the deceased has been committed due to financial transactions, the same would be in black and while and in the possession of the complainant and

family members of the deceased as admittedly he was a business man but no such evidence is produced on record and hence, we are of the

considered opinion that the motive is not proved by the prosecution beyond reasonable doubts.

19. The appellants have been convicted and sentenced for the offence under Section 302 read with Section 34 of the IPC which reads as under:

Section 34 : Acts done by several persons in furtherance of common intention:

When a criminal act is done by several persons in furtherance of the common intention of all, each such person is liable for that act in the

same manner as if it were done by him alone.

20. To prove the offence under Section 34 of the Indian Penal Code, the prosecution has to prove that there was a common intention in the sense of a

prearranged plan between the persons and the persons who are held to be liable have participated in some manner in the act, constituting the offence.

The condition precedent which is required to be satisfied to attract Section 34 of the Indian Penal Code is that the act must have been done by more

than one person and the said persons must have shared a common intention either by omission or commission in effectuating the crime. Moreover, the

common intention must be anterior in point of time to the commission of the crime, which means a prearranged plan. When there is neither pre-

concert nor meeting of minds, Section 34 of the Indian Penal Code is not attracted.

21. The Apex Court in Krishnamurthy @ Gunodu and Others V. State of Karnataka in Criminal Appeal No.288 OF 2022 (Arising out of Special

Leave Petition (Crl.) No. 6893 of 2021) in paras 18 and 19 has observed as under

18. Section 34 IPC makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section

34 to apply there should be common intention between the co-perpetrators, which means that there should be community of purpose and

common design or pre-arranged plan. However, this does not mean that co-perpetrators should have engaged in any discussion, agreement

or valuation. For Section 34 to apply, it is not necessary that the plan should be pre-arranged or hatched for a considerable time before the

criminal act is performed. Common intention can be formed just a minute before the actual act happens. Common intention is necessarily a

psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases,

whether or not there exists a common intention has to be determined by drawing inference from the facts proved. This requires an inquiry

into the antecedents, conduct of the co-participants or perpetrators at the time and after the occurrence. The manner in which the accused

arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co-assailants/perpetrators, object

and purpose behind the occurrence or the attack etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion

whether or not the ingredients of Section 34 IPC are satisfied. We must remember that Section 34 IPC comes into operation against the co-

perpetrators because they have not committed the principal or main act, which is undertaken/performed or is attributed to the main culprit

or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34 IPC is not necessary as the said perpetrator is

himself individually liable for having caused the injury/offence. A person is liable for his own acts. Section 34 or the principle of common

intention is invoked to implicate and fasten joint liability on other co-participants. Further, the expression/term â€œcriminal actâ€ in Section

34 IPC refers to the physical act, which has been done by the co-perpetrators/participants as distinct from the effect, result or consequence.

In other words, expression â€œcriminal actâ€ referred to in Section 34 IPC is different from â€œoffenceâ€. For example, if A and B strike

Lathi at X, the criminal act is of striking lathis, whereas the offence committed may be of murder, culpable homicide or simple or grievous

injuries. The expression â€œcommon intentionâ€ should also not be confused with â€œintentionâ€ or â€œmens reaâ€ as an essential

ingredient of several offences under the IPC. Intention may be an ingredient of an offence and this is a personal matter. For some offences,

mental intention is not a requirement but knowledge is sufficient and constitutes necessary mens rea. Section 34 IPC can be invoked for the

said offence also [refer Afrahim Sheikh and Ors. (supra)]. Common intention is common design or common intent, which is akin to motive or

object. It is the reason or purpose behind doing of all acts by the individual participant forming the criminal act. In some cases, intention,

which is ingredient of the offence, may be identical with the common intention of the co-perpetrators, but this is not mandatory.

19. Section 34 IPC also uses the expression â€œact in furtherance of common intentionâ€. Therefore, in each case when Section 34 is

invoked, it is necessary to examine whether the criminal offence charged was done in furtherance of the common intention of the

participator. If the criminal offence is distinctly remote and unconnected with the common intention, Section 34 would not be applicable.

However, if the criminal offence done or performed was attributable or was primarily connected or was a known or reasonably possible

outcome of the preconcert/contemporaneous engagement or a manifestation of the mutual consent for carrying out common purpose, it will

fall within the scope and ambit of the act done in furtherance of common intention. Thus, the word â€œfurtheranceâ€ propounds a wide

scope but should not be expanded beyond the intent and purpose of the statute. Russell on Crime, (10th edition page 557), while examining

the word â€œfurtheranceâ€ had stated that it refers to â€œthe action of helping forwardâ€ and â€œit indicates some kind of aid or

assistance producing an effect in the futureâ€ and that â€œany act may be regarded as done in furtherance of the ultimate felony if it is a

step intentionally taken for the purpose of effecting that felony.â€ An act which is extraneous to the common intention or is done in

opposition to it and is not required to be done at all for carrying out the common intention, cannot be said to be in furtherance of common

intention [refer judgment of R.P. Sethi J. in Suresh (supra)].

22. With regard to the applicability of Section 34 of the IPC, we have perused the evidence in light of the above referred case of the Apex Court and

find that there is no evidence on record to show any prior meeting of minds of the accused. It is settled law that direct proof of common intention is

seldom available and the intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved

circumstances. In this matter, there is no direct or circumstantial evidence to conclude that there was a plan or meeting of mind of all the accused

persons to commit the offence for which they are convicted with the aid of Section 34 of the IPC. From the record, it does not appear that the learned

Trial Court, to fasten the vicarious liability, has satisfied itself that there was a prior meeting of mind of the accused no. 1 and the other accused. From

the evidence on record, the presence of the accused nos. 3 and 4 at the place of offence and their participation in the commission of the offence is not

clearly made out and there is no evidence to conclude that they have done any act in furtherance of the common intention. As there are no

incriminating material or other corroborative evidence pointing to the participation of the accused in the offence, the conviction of the accused under

Section 34 cannot be sustained.

23. In view of the above discussions, we of the considered opinion that the prosecution has not fully established the circumstances to come to a

conclusion about the guilt and the involvement of the appellants in the offence. The circumstances that are placed on record are not consistent with

the hypothesis of the guilt of the appellant and they do not exclude every possible hypothesis except the one to be proved which is the involvement of

the appellants in the offence. The chain of evidence on record is not complete and it cannot be said that in all human probability, only the appellants

have committed the offence. We are also of the considered opinion that the prosecution has not proved the motive and considering the various legal

infirmities in the evidence of the panch witnesses and Investigating Officer, there is no legal evidence on record to sustain the conviction of the

accused and consequently, the Criminal Appeal No. 1596 of 2018 filed by the appellants â€" original accused no. 1 - Dipakbhai Bachubhai Prajapati

and accused no. 3 - Ganesh @ Ganu @ Ganio Nilkanth, the Criminal Appeal No. 1397 of 2018 filed by the accused no. 4 - Subhas Rajendra @

Umajirav Barokar and Criminal Appeal no. 1442 of 2018 filed by appellant- original accused no. 2 â€" Abdul @ Munno @ Thumsup Rahemanbhai

Shaikh are allowed. The conviction of the appellants in Criminal Appeal No. 1596/2018, Criminal Appeal No. 1397/2018 and Criminal Appeal No.

1442/2018 under Section 302 read with Section 34 of the IPC is set aside. The appellants shall be set at liberty, forthwith if not required to be detained

in connection with any other offences.

24. Bail bonds stand cancelled and fine if any paid by the appellants be refunded. Registry is directed to send the R & P to the learned Trial Court and

to maintain a copy of this judgement in each matter.