

Bombay High Court

Leena Anil Devastnali vs State Of Maharashtra on 30 September, 2009

Bench: J.N. Patel, Mridula Bhatkar

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 173 OF 2008
ALONGWITH

CONFIRMATION CASE NO.1 OF 2008

Deepti Anil Devasthali and

Leena Anil Devastnali

.. Appellants

Vs.

State of Maharashtra

.. Respondent

Ms. Rohini Salin, Amicus curiae

Convicts/Appellants present in person

Shri Mundargi, Special Prosecutor with

Ms. U. K. Kejriwal and Ms.

S.D. Shinde APPs. For the State

Mr. S.V. Marwadi for the Applicant

in Application No.1 of 2008

CORAM: J. N. Patel &

Mrs. Mridula Bhatkar, JJ.

DATE: 30th September, 2009 P. C . (Mrs. Mridula Bhatkar, J.)

1. Accused NO.1 Deepti Anil Devasthali (daughter of Accused NO.2) and Accused NO.2 Leena Anil Devasthali are convicted by the learned Ad Hoc Sessions Judge, Pune by judgment and order dated 27TH December, 2007 for committing the offence of abduction and murder of one Dr. Deepak

Mahajan alongwith other offences.

They are sentenced to death for the offences of abduction for ransom and murder. Hence this appeal against the conviction filed by both the Accused and the reference for confirmation.

2. As per the case of the prosecution Accused NO.1 Deepti and Accused NO.2 Leena who are related as daughter and mother conspired to abduct Dr. Deepak Mahajan in order to demand ransom and commit his murder. Both the ladies started a detective agency by name Blue Bird Detective Agency having its office at Shaniwar Peth, Near Omkareshwar Temple, Pune. On 11/6/2006 they gave an advertisement in newspaper Sakal that they wanted to employ young, healthy and clever men to work in their detective agency. In response to their advertisement, PW-3 Pravin Dnyaneshwar Kamble, PW-2- Ashok Jagannath Magar, PW-1 Ketan Pramod Kale and Court WITNESS(CW-1) Rahul Abhimanyu Bhosale amongst others have applied and were interviewed by Accused NO.1 and Accused no.

2. Accused NO.1 and Accused NO.2 did not disclose their identity and real names but they represented to be one Joshi Madam and Miss Pradnya Kale. In furtherance of the conspiracy out of these four persons PW-2 Ashok Jagannath Magar had accompanied Accused no.

1 Deepti to Yashwantrao Chavan Memorial Hospital (in short Y.C.M.Hospital) and introduced himself as Yogendra Shirke to Dr. Deepak Mahajan. While visiting Y.C.M.Hospital Accused NO.1 had changed her appearance with Wig, dentures, and spectacles, looking like a character in one Hindi Serial which was aired on the television earlier by name Jassi Jaisi Koi Nahi.

3. In the year 2006 Dr. Deepak Mahajan was working as the Head of Orthopedic Department in Y.C.M.Hospital at Pimpri, Pune. On 29/6/2006, Accused NO.1 WEARING wig, spectacles and dentures had visited YCM Hospital and handed over one envelope to his colleague Dr. Ajay Bajirao Sonawane with message that the said envelope was to be given to Dr. Deepak Mahajan. It was containing a letter from Omkar Charitable Trust requesting Dr. Deepak Mahajan to accept a post of Honorary Surgeon in the hospital proposed to be run by the said Trust on honorarium of Rs.

15,000/- per month. On 30.6.2006 Dr.Deepak Mahajan was contacted in Y.C.M.hospital by Accused NO.1 and PW-2 Ashok Jagannath Magar and who introduced himself as Yogesh Shirke, the signatory of the said letter and they both again handed over copy of a similar letter to Dr.Mahajan. Dr.Mahajan sought time to think over the offer.

4. PW-1 Ketan Pramod Kale and CW-1 Rahul Abhimanyu Bhosale were employed in the Blue Bird Detective Agency by the Accused. They were told that they have to abduct one doctor who was involved in kidney scandal and he was to be interviewed by the Head of their detective agency. On 1/7/2006 the Accused alongwith PW-1 Ketan Kale and C.W-1 Rahul Bhosale searched for a lodging house and booked room no.7 in one lodge named Shantanu Lodge on 2/7/2006. On the previous day i.e. on 1/7/2006 the Accused with the help of P.W.1 Ketan Kale and C.W-1 Rahul Bhosale performed rehearsal of overpowering the doctor as soon as he would enter the room. Accused NO.1 told P.W.1 Ketan Kale and CW-1 Rahul Bhosale how to hold the mouth and legs of Dr.Deepak

Mahajan after the signal was received by them. It is the prosecution's case that the Accused in the course of their preparation had purchased drug by name Thisol Sodium/ Pentathol/Thiopentone from the chemists by name Darpan and Tashiba Medical & General Stores, Nasik. This drug is used to give anesthesia and also to put the animals to sleep in Veterinary hospitals.

5. On 2/7/2009 the Accused persons contacted Dr. Deepak Mahajan and invited him for lunch at Durvankur Hotel, at Pune.

However, the doctor did not accept the invitation for lunch but agreed to have meeting at around 4'O clock. Dr. Mahajan had discussion with his wife Dr. Smita Mahajan about this offer from Omkar Charitable Trust and his meeting with the Trust people. Dr. Deepak Mahajan left home around 3.45 p.m. on an Aactiva scooter and went to Shantanu Lodge. At that time Accused NO.1 Deepti who had changed her identity like Jassi, received him at Shantanu Lodge and brought him to room no.7 where CW-1 Rahul Bhosale and PW-1 Ketan Kale shut his mouth and held him as per their plan. Accused NO.1 Deepti injected drug Thiosol Sodium in the wrist of Dr. Mahajan due to which Dr. Deepak Mahajan became unconscious within a minute in the said room. Accused NO.1 WITH the help of PW-1 Ketan Kale and CW1-RAHUL Bhosale lifted him and put him in her Matiz Car with changed registration number, which she had parked at the gate of the Shantanu Lodge. Dr. Mahajan was kept in sitting position on the back side seat between Ketan Kale and Rahul Bhosale and Accused NO.1 drove her Car towards Karve road, where Accused NO.2 WAS waiting for them. Ketan Kale and Rahul Bhosale were asked to get down from the vehicle and both the Accused along with Dr. Deepak Mahajan drove away.

6. Dr. Smita Mahajan, wife of Deepak Mahajan was worried as her husband was not responding on his phone and some other person spoke to her and threatened in muffled voice that doctor was abducted by them and told her to follow their orders, if she wanted him alive. Dr. Smita Mahajan thereafter contacted Dr. Parag Mahajan, the brother of Dr. Deepak Mahajan and Dr. Deepak's brother in law Mr. Phansalkar who also tried to contact Dr. Deepak Mahajan on his cell. However, they could not. When Dr. Smita Mahajan again contacted the cell phone of Dr. Deepak Mahajan the person on the other end told that they had abducted Dr. Deepak Mahajan and want a sum of RS.25 Lacs . Dr. Smita Mahajan thereafter rushed to Prabhat Road police chowky under Deccan Gymkhana Police station and lodged complaint about missing and abduction of her husband and demand of ransom. P.S.I. Mr. Yadav registered the offence at C.R.No. 386/06 under sections 366,384 of the Indian Penal Code and forwarded it to Deccan Gymkhana police station for further investigation. Police Inspector Shri.V.R.Patil took charge of the investigation and police officer Mr. Agashe from Anti Extortion Cell also tried to find out the details of the phone number 9960224773 which was written on the backside of the letter of Omkar Charitable Trust. On that basis Mr. Agashe could trace P.W.3 Pravin Kamble who had come for the interview in Blue Bird Detective Agency. On the same night police could trace Shantanu Lodge and found that Dr. Deepak Mahajan had visited Shantanu lodge on that day. On 7.7.2006 with the help of PW-3 Pravin Kamble and other clues they laid a trap in front of the office of Blue Bird Detective Agency. On the very day, Accused NO.1 and 2 VISITED their office of Blue Bird agency and they came to be arrested by the police in the morning. Immediately thereafter on the basis of disclosure by Accused NO.2 parts of the body of Deepak Mahajan except the head and hands were recovered by the police under panchanama from different spots at Katraj Ghat

and some parts of the body were found in two plastic bags at Bhosari. The Police in the presence of Panchas prepared an Inquest and Recovery Panchanamas. The parts of Human Body were sent for autopsy to Sasoon Hospital Pune. Thereafter the offence under section 302 of the Indian Penal Code was registered against Accused NO.1 and 2 alongwith offences under Section 366 and 384 of the Indian Penal Code and they were arrested for an offence of murder of Dr. Deepak Mahajan. The police during the course of investigation recovered articles from the room at Uttamnagar under panchanama and also searched the residence of the Accused persons in Shrikrishna Watika, at Dahisar. The police were able to locate Chemist Darpan and Tashiba at Nashik from where the drug sodium thiosol was purchased by the Accused. In the course of investigation, police recorded statements of witnesses and recovered property and Aactiva Scooter. Matiz Car was recovered in the month of September, 2006 i.e. two months after the date of the incident. The police filed chargesheet against Accused NO.1 and Accused NO.2. After committal of the case learned Ad Hoc Additional Sessions Judge, Pune framed charges and tried the Accused. The Accused persons did not engage advocate of their choice. So the learned trial Judge offered and made them aware of the facility of the legal aid service. However, both the ladies refused to avail of legal aid facility. Accordingly the learned trial Judge has maintained the record and finally went on with the trial and examined 46 witnesses. The Accused had cross examined first 12 to 13 witnesses and thereafter they declined to cross examine other witnesses. The learned Trial Judge sentenced both the Accused to death on count of abduction for ransom and murder. The trial court also awarded different punishments for the charges, they were found guilty.

7. When the Criminal appeal filed by the Accused was heard by this Court, the Division Bench found certain lapses in the trial viz. some important witnesses were not cross examined. One Rahul Bhosale deserved to be examined. Therefore, it held that Accused should have been given proper opportunity to defend themselves. The Division Bench remanded the case for recording of evidence and cross examination of material witnesses under section 367 of the Criminal Procedure Code.

8. The learned Sessions Judge, thereafter recalled PW-1, PW-4, PW-6, PW-8, PW-30, PW-32, PW-33, PW-40, PW-43, PW-5 and PW-46 and examined Rahul Bhosale as Court Witness NO.1. Both the Accused, in the second round of the trial, engaged their respective Advocates. Cross examination of the witnesses recalled was taken extensively. Both, the prosecution and the Accused, were given opportunity to cross examine the Court Witness (CW-1) Rahul Bhosale. After recording of evidence and further statement of the Accused under Section 313, the matter was sent to the High Court.

The appeal and the reference thereafter came to be assigned for hearing before our Bench by Hon'ble the Chief Justice.

9. When we took up the appeal and the submission for confirmation of capital punishment it came to our notice that both the Accused have discharged their previous Counsel and while answering question No. 85 of their further statement recorded under Section 313 of the Criminal Procedure Code, they had stated that they wanted to give evidence on oath. However, they did not press for the same before us but insisted that they wanted to argue in person. However, this being an appeal against capital sentence and a confirmation matter, it was our duty to take care that the Accused should be adequately defended through counsel.

So, Ms. Rohini Salian was appointed as amicus curiae to defend them. The Accused, though did not make any grievance about appointment of the amicus curiae, insisted that they be also given opportunity to argue their case in person as it is a matter of their life and death, which was allowed.

10. The Sessions Judge did endeavor to give legal aid to appoint Advocate from the Panel of the legal aid which is brought on record by examining PW-38-Sanjay Kadu. However, the Accused did not want him to represent them in the Court but wanted only his legal advice. The lawyer (PW-38) has stated on oath that he was not in position to give correct legal advice without going through the Court papers and cooperation from the Accused and therefore, some important witnesses were not cross examined in the first round of the Trial and the Accused were not properly defended in the beginning.

11. Evidence tendered by the Prosecution is of a very peculiar nature. The facts and circumstances brought on record of this case reflect on the manner in which investigation was carried out leaving a number of loose ends between the commission of offence and the Accused. In the present case the crime is committed not in a usual/conventional manner, but the crime has been committed by exploring novel and different methods. Peculiar situations have come on record sufficient to mislead everybody.

12. In the present case, the main attack of defence was on the dishonest, shoddy and incomplete investigation by the Police. The defence has highlighted some points to which the prosecution could not give any answer. The lacunae reflecting the quality of the investigation and how far they are fatal to the prosecution is to be examined.

13. Accused Nos. 1 and 2 have been charged for the offence of conspiracy under Section 120-B of the IPC in committing offence viz. of cheating by impersonation under Section, 419 of the IPC, forgery under Sections 564, 468 of the IPC and 471 of the IPC, for causing hurt with intent to commit offence under Section 328 of the IPC, wrongful confinement under Section 342 of the IPC, for extortion and murder under Sections 387, 302 of the IPC and under section 201 of the IPC for causing disappearance of evidence or giving false information to screen offender. Abduction under Section 346-A of the IPC. Causing hurt under Section 328 of the IPC and of murder under section 302 of the IPC are major offences and the evidence is much interlinked with these charges.

Sr. No. Points for determination Findings (1) Does the prosecution prove that the Yes Accused NO.1 and 2 have conspired to abduct Dr. Deepak Mahajan and have abducted in order that he may be murdered or may so disposed of as to be put in danger of being murdered under Section 364-A read with Section 120 (b) of the Indian penal Code.

Does the prosecution prove that the Yes Accused NO.1 and 2 have committed offence of extortion under Section 387-A read with Section 120 (b) of the Indian penal Code.

(2) Does the prosecution prove that the Yes Accused have conspired and have committed an offence of cheating by personation, punishable under Section 419 read with Section 120 (b) of the Indian penal Code.

(3) Does the prosecution prove that the Yes Accused have conspired and have committed forgery for the purpose of cheating and thereby have committed an offence punishable under Section 465/468 read with Section 120 (b) of the Indian penal Code.

(4) Does the prosecution prove that the Yes Accused Nos. 1 and 2 have committed an offence of causing hurt with intent to commit an offence punishable under Section 328 read with Section 120 (b) of the Indian penal Code.

(5) Does the prosecution prove that the Yes Accused Nos. 1 and 2 have conspired and have committed an offence of confining wrongfully Dr. Deepak Mahajan which is punishable under Section 342 read with Section 120 (b) of the Indian penal Code.

(6) Does the prosecution prove that the Yes Accused Nos. 1 and 2 have committed an offence of extortion by putting Dr. Smita Mahajan under the fear of death of Dr. Deepak Mahajan and thereby committed an offence punishable under Section 387 read with Section 120 (b) of the Indian penal Code.

(7) Does the prosecution prove that the No Accused Nos. 1 and 2 have committed an offence of causing disappearance of evidence to screen the offender, punishable under Section 201 read with Section 120

(b) of the Indian penal Code.

(8) Does the prosecution prove that Dr. No Deepak Mahajan was murdered for ransom by accused person?

(9) Does the prosecution prove that the No Accused have committed offence of murder punishable under Section 302 read with Section 120 (b) of the Indian penal Code.

14. On 2ND July, 2006, after 4.00 p.m. Dr. Deepak Mahajan after he left home to attend the meeting with Trustees of Omkar Charitable Trust, his wife Dr. Smita Mahajan learnt that he has been actually abducted and his abductors were demanding ransom of Rs. 25/- lacs. Dr. Smita Mahajan PW-11 gave a first information in respect of Dr. Deepak Mahajan on 2ND July, 2006 at about 21.15 hours (FIR Exh. 58). She was aware that Dr. Mahajan had received an offer from one Omkar Charitable Trust to work as Honourary Orthopedic Surgeon in Sanjivani Hospital run by the said trust. She has stated that in that context the Doctor had left his house at about 4 p.m. to meet the person concerned i.e. trustees of Omkar Charitable Trust. She also gave details that those persons had invited the Doctor for lunch at Hotel Durvankur. However, the Doctor opted to meet them after having his lunch at home. PW-39 Atmacharan Balasaheb Shinde who was attached to Vishram Baug Police Station has stated that he received information on 3.7.2006 about registration of offence under Sections 366 and 364 of the Indian Penal Code at Deccan Police Station of kidnapping Dr. Deepak Mahajan and as per the directions he conducted a surprise check of the lodges situated near Hotel Durvankur. Photographs of Dr. Deepak Mahajan were supplied to them. On the night intervening 2ND and 3rd July, they took search of Shantanu Lodge and on seeing the photograph of

Dr. Deepak Mahajan, Shri Vikas Harischandra Garad (PW-4)-

Manager of Shantanu Lodge had identified the said photographs and informed that in between 4 to 4.30 p.m. on the previous day, Dr. Deepak Mahajan had been to their Lodge to meet Veena Ranade who had booked room no.7. PW-4 Vikas Harischandra Garad has confirmed the visit of PW-39-Atmacharan Shinde at night at about 1 a.m. and also he supplied him the said information. PW-4 Vikas Garad is an important independent witness on the point of visit of Dr. Deepak Mahajan to Shantanu Lodge to meet Ms Veena Ranade. He also mentioned that Dr. Deepak Mahajan came on Activa Scooter of Silver colour and he saw him parking the scooter. He has seen Mrs. Ranade waiting near the main gate of Shantanu Lodge and then she received Dr. Mahajan and took him to Room No.7. He had deposed that one lady who has introduced herself as Pathak Bai came to the Lodge on 1.7.2006 and she enquired about availability of a room and she informed that Mr. & Mrs. Ranade from Mumbai wants the room and she booked Room No.7. PW-4 handed over his visiting card (Exh.34) of Shantanu Lodge, which was subsequently recovered from the Accused. PW-4 Vikas Garad identified Accused NO.1 as Mrs. Veena Ranade and has identified Accused NO.2 as Pathak Bai. He has also given details about the clothes of Dr. Mahajan. He has described that Ms. Ranade and one person of the age group of 30 years had come and he had an opportunity to see that person and Mrs. Veena Ranade. In the cross examination of Vikas Garad, the photograph on the application form i.e. EXH.23 was shown to him and he has identified the photograph of Ketan Kale as the person who had visited on that day as Mr. Ranade, so also he has identified him as the person who used the telephone of Shantanu Lodge and talked with the person on the other end of the telephone and called him at Hotel Durvankur. Thus, the visit of Dr. Deepak Mahajan to Shantanu Lodge is established by the prosecution through the evidence of Dr. Smita Mahajan, Manager of Shantanu Lodge Shri Vikas Garad and PSI Atmacharan Shinde.

15. The Learned Amicus curiae has challenged the identification by Vikas Garad of Accused NO.1 as Veena Ranade as according to Vikas Garad Mrs. Veena Ranade was having Sadhana Cut, protruded dentures and round spectacles and Vikas Garad at any time had no opportunity to see Accused NO.1 in her normal look.

16. PW-11- Dr. Smita Mahajan, in support of her evidence about the offer which the Doctor had received from Omkar Charitable Trust, has produced the letter EXH.28. PW-17-DR.

Ashutosh Vitthalrao Dabare, and PW-29- Dr. Ajay Bajirao Sonawane, the colleagues of deceased Dr. Deepak Mahajan in YCM Hospital, Pimpri, were examined on the point of offer given to deceased Dr. Deepak Mahajan by Omkar Charitable Trust and handing over of letter of Omkar Charitable Trust. PW-17 Dr. Ashutosh Dabare and PW-29 Dr. Ajay Bajirao Sonawane corroborate that people from Omkar Charitable Trust had contacted Dr. Deepak Mahajan in the month of June, 2006 and both of them have stated that one lady looking like Jassi had visited Dr. Deepak Mahajan in YCM Hospital. PW-29 Ajay Sonawane has referred that said lady had handed over one letter to Dr. Deepak Mahajan. Dr. Ashutosh Dabare mentioned that on 30.6.2006 one lady looking like Jassi had come along with one male person and they had meeting with Dr. Mahajan.

17. PW-11 Dr. Smita has further deposed when she tried to contact her husband Dr. Deepak Mahajan from her mobile No. 9822018863 on his mobile No. 9422511574 he did not reply for a longtime and after some time some person replied and disclosed that they had abducted Dr. Deepak Mahajan and there was threat that if she wanted Dr. Deepak Mahajan alive, then she should act as per their directions. After this call she contacted her relative and, alongwith her relative went to Prabhat Road Police Chowky and lodged the complaint about missing of her husband.

Thereafter again, when Dr. Smita Mahajan and Dr. Parag Mahajan-

brother of the Dr. Deepak Mahajan, contacted on the Cell of Dr. Deepak Mahajan, the threats were repeated. All these facts are incorporated in the FIR which is marked as Exhibit-58. Accordingly the offence of abduction under Section 366 read with Section 34 of the Indian Penal Code was registered. Dr. Smita Mahajan has deposed that during the night when she was at the Police station, she received phone calls demanding RS.25 lakhs ransom.

18. PW-43, Uttam Yadav who was attached to Prabhat Road Police Chowki has corroborated the evidence of Dr. smita Mahajan and has stated in his evidence that the complainant (Dr.

Smita Mahajan) has lodged the complaint of kidnapping of Dr. Mahajan in the late evening of 2.7.2006. He corroborates that the complainant had called on the Cell No. from Police Station and he could hear threats as the phone was kept on loud speaker. Thus the prosecution has established the fact of abduction of Dr. Deepak Mahajan under the pretext of giving him Honourary Post of Orthopedic Surgeon in the Hospital run by them, by the persons who were related to Omkar Charitable Trust. It was also established that the Dr. Depeak Mahajan had visited Shantanu Lodge around 4 to 4.30 on Activa Scooter and the couple who introduced themselves as Ms. Veena Ranade and Mr. Ranade had received the Doctor and took him to room No. 7 of the Lodge. All these facts are established by the prosecution. Nothing was brought in the cross examination of PW-11 Dr. Smita Mahajan and also PW-4 Mr. Vikas Garad to show that their evidence on this aspect cannot be accepted.

19. As per the evidence of Dr. Smita Mahjan and PW-43 Atmacharan Shinde, the complainant Dr. Smita contacted on the Cell No. 9422511574 of Dr. Deepak Mahajan on the night intervening 2ND and 3rd July 2007 and that the person on the other end told that Activa Scooter of Dr. Mahajan was kept near Shivaji Nagar ST stand, whereas the keys were kept on the electric meter at the house situate near Tambdi Jogeshwari, Budhwar Peth, Pune i.e. the house of the father of Dr. Deepak Mahajan. Pursuant to this, the Scooter was found at Shivaji Nagar. Thus the prosecution has proved that somebody has informed that somebody has abducted Mr. Mahajan and his scooter was taken from Shantano Lodge and was left at Shivanagar by those persons, and the person who informed about the key was aware that the said house was at Budhwar Peth Pune. PW-31- Shridhar Dattatraya Mahajan is the father of Dr. Deepak Mahajan and he has deposed that it is his residential address.

20. Thus, in view of the above discussion, the fact of abduction is proved by the prosecution. However, it is necessary for the prosecution to prove further as to whether Dr. Deepak Mahajan was abducted by Accused NO.1 and 2.

21. The Prosecution has tendered evidence on calls made immediately after the abduction. There are Exh.88- i.e. call details of Cell No. 9422511574 (Cell Phone of Dr. Deepak Mahajan) and call details EXH.130-1 9960224773 (Cell No. in the name of Rui Raj Mathur). Call details of Cell No. 9422511574 are proved through PW-14 Shailaja S. Kulkarni, Divisional Engineer of BSNL (Exh.88) and call details of Cell No. 9960224773 were proved by PW-25 Vijay Eknath Shinde- Nodal Officer of Bharti Airtel Ltd. (EXH.130-1). Dr. Smita Mahajan, in her evidence has stated that she went on calling her husband Dr. Deepak Mahajan- after she realized that he has not come back on the time given by him. Her phone was attended not by Dr. Deepak Mahajan but it was attended by some other persons. Call details of Cell No. 9422511574 discloses incoming calls from Cell No. 9822018863 (Cell of Dr. Smita Mahajan) which corroborates the call details (EXH.190) of Cell No.9822018863.

22. IMEI (International Mobile Equipment Identification) No. is given to a particular handset. Exh. 88 discloses that the call received on 2.7.2006 at 17.44 hours on Cell phone 9422511574 of Dr. Deepak Mahajan was from the residential phone No. 02025454699 of Dr. Deepak Mahajan and the said call was made by Arjun-Son of Dr. Deepak Mahajan. It was attended on the Nokia handset of Dr. Deepak Mahajan having IMEI No. 35253600483225. However, after one minute i.e. at 17.45 Dr. Smita Mahajan contacted Dr. Deepak Mahajan from her Cell No. and it was attended by another person who disclosed that Dr. Deepak Mahajan was in their custody and IMEI No. was changed as 351130741540560.

23. Letter EXH.28 was the first lead in the hands of the Police. The letter EXH.28 produced by Dr. Smita, wife of the deceased was the master key which opened the first door of the investigation. Cell Phone No. 9960224773 written on the rear side of EXH.28 was the first lead the police found. Production of the said letter by Dr. Smita Mahajan on 2ND July, 2006 was challenged by the defence.

24. It was argued that EXH.-28 is not proved as none of the witnesses has stated about its authorship. As per section 61 of the evidence Act, the document may be proved either by primary or by secondary evidence. If the document itself is produced for the inspection of the Court, it is a primary evidence.

In the present case Exh. 28 produced by the prosecution and PW-2 Ashok Jagannath Magar has stated about the contents of the said letter. He deposed that Accused NO.1 has told him that a letter of Omkar Charitable Trust was to be handed over to Dr. Deepak Mahajan in YCM Hospital and she also explained him that letter was pertaining to appointment of Dr. Deepak Mahajan in Sanjavani Hospital run by Omkar Charitable Trust. He has further deposed that he had gone through the contents of the letter and the name of one Yogendra Shirke as trustee was appearing on the letter. He has admitted that Accused NO.1 introduced him as Yogendra Shirke and she took that letter from him and handed it over to Dr. Deepak Mahajan. Further, the said letter EXH.28 was shown to him and he deposed that signature of Yogendra Shirke was not made by him.

Section 60 is about direct oral evidence. PW-2 has seen and read that document and has used the document and therefore, he is competent witness to prove the said document. Section 67 is in respect of proof of the signature and handwriting of the person alleged to have signed or written the

documents produced. However, in this case, the prosecution has proved the contents of the document and not the handwriting and the signatory of the document. Thus, in the present case, who signed that document as Yogendra Shirke though is not proved, the contents of the documents are proved as the said letter is produced before the Court by PW-2 WHO was aware of the contents of the letter as he himself had read it, and he was asked to introduce himself as a signatory of the said letter. The prosecution has tendered the evidence of PW-26 Sukdeo Nana Gaikwad who was working as Inspector in Public Trust Registration Office. He has deposed that there was no person by name Yogendra Shirke as Trustee of Omkar Charitable Trust, Mumbai, though he found that Omkar Charitable Trust was registered under Bombay Public Trust Act at the address Shivaji Park Mumbai and the names of the trustees of the Omkar Charitable Trust were Mr. and Mrs. Vaze and one Mahadeo Katre. Thus, EXH.28 is a forged letter with bogus contents, used by the Accused.

25. It was argued that Uttam Krishna Yadav (PW-43) did not mention about the letter EXH.28 in EXH.193 Yadi (list) dated 2.7.2006 and the said letter was also not sent to the handwriting expert. PW-11 (Dr. Smita Mahajan) has stated in her evidence that she has produced the letter EXH.28 to the police not at the time of giving the FIR as she did not bring that letter when she gave the FIR but she produced it one hour later. The omission to record in her supplementary statement to that effect is not put to her or the police officer who recorded the supplementary statement.

Hence, no opportunity was given to the witness to explain the circumstance.

26. Accused No. 1 pointed out a mistake at the time of the recording of the evidence. On Page No. 493 i.e. Cross examination of PW-43- Uttam Krishna Yadav, in para 29, initially a sentence was typed as " she has produced that letter after about one year from lodging the complaint" (emphasis placed). This evidence was recorded by the Sessions Judge, Pune on 29.12.2008, of which the Accused applied for certified copy and the certified copy of the said evidence was supplied to the Accused on 7 th January, 2009, which shows the word as "year". However, in the paper book, the word "year" is scored off and "hour" is written. The learned Judge has put her initial after correcting the word. Hence, it is evident that the correction in the evidence was carried out after 7th January, 2009. The Accused, by pointing out these two documents, has submitted that the Sessions Judge has wrongly made correction as "hour" instead of "year" at the instance of the prosecution, because the said letter EXH.28, in fact, was not submitted by the wife of the deceased, Dr. Smita Mahajan. After she gave the F.I.R. and letter EXH.28 was deliberately suppressed and kept back by PW-11 Dr. Smita Mahajan from the police. The Accused NO.1, in the course of her argument, pointed out that Exh.

193 Yadi (list) dated 2.7.2006 was prepared by the Police person Uttam Krishna Yadav (PW-43) while sending FIR. However in that Yadi (EXH.193), there is no mention of EXH.28.

27. Further, the said letter was never sent to the handwriting expert though it bears the signature of Yogendra Shirke- the alleged Director of Omkar Charitable Trust. The PW-11-

has not deposed that her supplementary statement was recorded when she handed over the letter of Omkar Charitable Trust. On the back side of the said letter Cell No. 9960224773 was written and the

said number, as per the case of the prosecution, was of Rui Raj Mathur and on the basis of that Cell Number, prosecution claimed to trace Cell No. of one Shri Vikrant Ghone who is relative of PW No.3- Mr. Pravin Dnyanehar Kamble from whose Cell No. he has phoned to Cell No. of Accused NO.1. Thus, letter Exh. 28 is very important. However, this letter was not sent to handwriting expert.

The two letters having signature of Yogendra Shirke were available with the prosecution, one is dated 23.6.2006 and another is of 30.6.2006 (EXH.28). The prosecution opted to send the first letter i.e. letter dated 23.6.2006 as the signature appearing on both the documents were of one and the same person i.e. Yogendra Shirke. The prosecution kept back the letter EXH.28 on which the material Cell No. was written.

28. Secondly, it appears that Learned Sessions Judge has corrected the evidence definitely after 7th January, 2009. However, it cannot be said that it is done at the instance of the prosecution, as the learned Judge who records the evidence is supposed to correct the typographical, arithmetical or spelling mistakes after recording of the evidence, preferably immediately before signing the record. If it is not done so then after pointing out the said mistake to both the parties evidence is to be corrected. If the mistake is innocuous, after comparing the evidence recorded in vernacular language i.e. in Marathi, the learned Judge can correct that particular innocuous and obvious mistake. The record in vernacular language i.e. in Marathi is always considered as authentic. We, therefore, perused Marathi record to compare whether the said word is "hour" or "year". We found that in Marathi the word "hour" was recorded. Hence there is no doubt that it was sent not after a year, but after an hour and no fault can be attributed to the learned Sessions Judge. The Accused have unnecessarily tried to capitalize this circumstance in their favour. We cannot nullify EXH.28 which is most formidable incriminating evidence.

29. Cell No. 9960224773 of Rui Raj Mathur- Letter from C.P. to Airtel Cellular (EXH.185). How P. I. Barge was sent to Dahisar on 5th July, 2006 when P. I. Balkrishna Bhikaji Agashe (PW- 40) has admitted that he received call details of Cell No. 9821486650-CELL No. of Deepti- ACCUSED-NO.1 on 6th July, 2006. Details of Other Cell No. i.e. 9890565992 of Deepti were received on 5th July, 2006. There were three calls - one of 36 Seconds, and two of 15 seconds each from the cell No. 9821486650 on Cell No. 9890060496- Cell of Vikrant Ghone and as per the admissions given by Mr. Agashe (PW-40) there were several calls of longer duration from Cell No. 9821486650 of Deepti as per the call details. Learned Amicus Curie Ms. Salian has argued that though it was admitted that there was no contact between Cell No. 9821486650 (Deepti) and Cell No. 9890060496 (Vikrant Ghone) for a period of 8 days prior to 6th July, 2006, why the Police suspected Vikrant Ghone ? Learned Special prosecutor Mr. Mundargi, in reply, has submitted that Police have collected all the call details urgently and then they verified income/outgoing calls and used the process of elimination.

However, out of those calls, the call details of Phone No. of Vikrant Ghone was the relevant and material evidence as PW-3 Dnyaneshwar Kamble was found on the phone No. of Vikrant Ghone, PW-3 corroborates the same and he was the one who first disclosed to the police about the connection of Blue Bird Detective Agency and the Accused. The defence could not demolish the evidence of PW-3.

30. The prosecution has produced clinching evidence which the defence could not shatter on the point of phone calls. It is earlier discussed that SIM Card having Cell No. 9960224773 was purchased in the name of Rui Raj Mathur. PW-15- Bhavarlal Kojaram Mali who was seller of SIM card and recharge voucher for Airtel has deposed and confirmed that he had sold a charger of Alkatel mobile and on the next day two ladies have asked for Nokia handset and they have purchased SIM Card by filling the application form (Exh.98) in the name of Rui Raj Mathur and driving licence (EXH.98/2) and photograph were given by them. On the basis of copy of the driving licence and photograph, the SIM card which was initially not activated, was subsequently activated. PW-25 Vijay Eknath Dhinde- from Bharti Airtel has proved Ex. 98 i.e. mobile enrollment form filled in by Rui Raj Mathur wherein residential address was given as 80-90, MG Road, Yeotmal. He corroborated that the form was submitted to retailer Mahavir Photoshop which was run by PW-25 Bhawarlal Kojaram Mali. He corroborates Cell No. 9960224773 and that the SIM card was activated on 26.5.2006(Call Details EXH.130). The Prosecution has examined PW-35 Sudhakar Pillewar. Prosecution witness PW-35 who was working as Head clerk at RTO Yeotmal proved that no such driving licence was issued in the name of Rui Raj Mathur on 10.1.2006 and the address has also appeared to be wrong. He also confirmed that the validity period shown on the licence of two years is found wrong as the validity is always for a period of five years or till the age of 50 years. With this evidence the prosecution could successfully prove that the said licence in the name of Rui Raj Mathur was false and that the SIM card was obtained on the fake identity.

31. Learned Amicus curiae Ms. Rohini Salian has submitted that the evidence of Mr. Agashe (PW-40) that they have intercepted Cell 9821486650 or any other Cell numbers which are involved in this matter is incorrect because for keeping phones under observation one needs requisite permission of the Government under Section 5 of the Indian Posts and Telegraphic Act. It was further argued that the statement of Vikant Ghone is not recorded.

Police have arbitrarily connected Kamble, Vikrant Ghone and Cell No. of Rui Raj Mathur (9960224773). Cell No. in the Advertisement of Blue Bird Agency was 9821486650. Call details at Exhs. 127, 128 and 130 are suspicious. Exh.88 shows transfer of Phone No. of Dr. Mahajan- 9422511574 to IMEI No. 351307415405600 Mobile Handset of Deepti Devasthali. The evidence of Tower location though was available to the Police, if is not brought on record why locations were so frequently changed while 14 calls were made from 9890565992 to 9821486650. Original Papers of Cell No. 9821486650 are not produced. The documents EXH.127/2 i.e. BPL Mobile Application Form and EXH.127/3- Outgoing calls - all are false and fabricated. Sanjay Kamble- PW 24 (Nodal Officer- on BPL Mobile) is not a witness on facts and he does not know anything.

The entries made in Exh.88 at Serial NO.111- dated 1ST July, 2006 of Cell No. Dr. Mahajan - 9422511574 and the IMEI No. do not match. When Dr. Smita Mahajan, in her evidence has deposed that Dr. Deepak Mahajan was having only one handset, then how call details of his Cell No. 9422511574 disclose different IMEI Nos.

showing use of more than one handset by changing SIM cards.

Why Police have not taken out the call details of Phone No. of Dr. Smita Mahajan. It was argued by the Accused NO.1 that even Page Nos. 2 and 3 of Exh. 88 disclose that at the same time, there are calls to two cell Numbers. Thus, there was use of SIM Card of Cell No. 9422511574 of Dr. Deepak Mahajan on different handset having changed IMEI NOS.351307415405600. It was submitted that the entire episode very suspicious. It is further argued by Ms. Salian that, the claim of the Police that they could trace Vikrant Ghone, Pravin Kamble and then Accused on the basis of call details of 9960224773 is false and she prayed that the Court may discard this evidence .

32. PW-40- Balkrishna Bhikaji Agashe has said that Complainant Dr. Smita Mahajan had phoned him and informed that Cell No. 9960224773 was of one Ms. Joshi. Accused NO.1 has raised question how Dr. Smita Mahajan knew the name of Joshi when she has not stated in her evidence that her husband has ever mentioned the name of the lady as Joshi from Omkar Charitable Trust. Accused No. 1 indicated that if Dr. Smita Mahajan said so then on the basis of this discrepancy, Smita Mahajan herself was involved and knew the names of the persons who abducted Dr. Deepak Mahajan because there was no reason for PW-40 Balkrishna Bhikaji Agashe to state that Cell NO.9960224773 belonged to Ms. Joshi. Dr. Smita Mahajan had not claimed in her evidence that she knew such name as Ms. Joshi. It is PW-40 Balkrishna Bhikaji Agashe who has put that name in the mouth of Dr. Smita Mahajan. Thus it can only be said that PW-40 Agashe, on the basis of his investigation, call details and information had formed the opinion that it was a phone number of Ms. Joshi and therefore, at the time of giving evidence, he has deposed that the said phone number belonged to Ms. Joshi. Evidence on the point of IMEI Nos., SIM Card and change of those numbers the Call details, exhibits of respective witnesses is explained by the prosecution with the help of charts. Hence, the submissions of the Ms. Salian and Accused NO.1 cannot be accepted.

33. Learned Trial Judge has dealt with all the telephone Nos. and has properly analyzed the evidence on the Cell numbers of the deceased, Dr. Smita Mahajan, and of three SIM cards and two mobile handsets used by the Accused at the time of commission of the offence. Manipulation and fabrication of the call details is the main line of defence adopted by the Accused, which is not accepted by us as the accuracy found after tallying incoming /outgoing calls, IMEI Nos. disclosing use of particular handset.

34. Learned Prosecutor Mrs. Kejriwal has produced separate charts showing connections of the phone numbers.

Through the evidence of PW-40- Balkrishna Bhikaji Agashe and PW-25- Vijay Eknath Shinde, the prosecution could bring on record that the Cell No. 9960224773 stands in the name of Rui Raj Mathur on Yaotmal address. Exh. 130/1 is the call details of Cell No. 9960224773 and ownership of SIM of Cell no. 9960224773. Exh.

129/2 is enrollment form of Airtel Cell No. 9890565992. Two Mobile phones of Bharti Airtel belongs to Accused NO.1. The investigating officer has sent letter to this mobile Company i.e. Bharti Airtel and call details of these phones were furnished accordingly.

35. The ownership of the Mobile handsets is denied and challenged by the Accused. One handset of Alkatel Company was found in the purse of Accused No. 1, having its IMEI No. 351307415405600 and another one was found in the Matiz Car of the Accused. It was of Saffron Colour of Nokia Company having IMEI No. 351486609417510. Purse was neither sealed nor seized under the Panchanama. Recovery of handsets in the Matiz Car is mentioned in the Panchanama. If a person is not found in physical possession of a particular article, then it cannot always be contended that said article does belong to that person. If an article carries any identification mark and the link between that identification mark and the identity of the person is associated then it can be said that article belongs to that person. Purchase of handsets, if proved, by the prosecution in the name of Accused NO.1, it can safely be said that two handsets belong to Accused No. 1

36. Three handsets and four SIM cards are relevant articles and police have produced consistent evidence to show the ownership of the Cell No. and the handsets through representatives of the mobile Companies i.e. PW-24 Sanjay Dagdu Kamble of BPL Mobile, PW-25- Vijay Eknath Shinde of Bharti Airtel and PW-41 Sachin Shinde of Idea Cellular Company. Accused NO.1 WAS having two handsets one Alkatel and other Nokia. They are seized and produced before the Court. Their IMEI Nos. are as follows:

	Name of subscriber	Mobile No.	IMEI No.
1.	Deepti Anil Devasthali	9890565992	351486609417510
	(Accused No. 1)		
2.	Deepti Anil Devasthali	9821486650	3151307415405600
	(Accused No. 1)		
3.	Rui Raj Mathur	9960224773	351486609417510

Dr. Deepak Mahajan was having handset of Nokia with IMEI No. 35253600483225 and SIM of Airtel, Mobile No. 9422511574.

37. Call details of Cell phone of Dr. Deepak Mahajan Exh.-88 are proved through PW-14 Shaileja Kulkarni. In the entire episode, the evidence of call details has played a crucial role.

Rather this evidence is connecting the Cell Numbers of Dr. Deepak Mahajan, Dr. Smita Mahajan and Accused by use of different handsets, change of handsets and SIM Cards. Two handsets of Accused NO.1 and use of three SIM cards by Accused NO.1, so also use of SIM Card of Dr. Deepak Mahajan in the handset owned by Accused NO.1 unmistakably establishes the nexus of the Accused with the offence. It reveals that Accused No. 1 and 2 WERE constantly in touch with Dr. SMITA-PW-11 after 4.30 p.m. on 2.7.2006. If the prosecution establishes the missing of the person and thereafter demand of ransom amount through a particular Mobile phone which is owned by the Accused, then it invariably connects the Accused with the missing person. It is always within the knowledge of the Accused first and then known to the family members of the person missing.

38. The police have issued letters to the concerned telephone/Mobile companies i.e. Airtel, BPL and BSNL for the supply of the call details in respect of Cell Nos. of the Accused and also Dr. Deepak Mahajan and pursuant to these letters, information was supplied and also the information of the subscription form and the call details was furnished. However, the statement giving call details of incoming and outgoing calls of a particular Cell Phone are electronically printed. So, the possibility of manipulation by human being is overruled. The Accused had pointed out in the course of the argument that all these statements were given on the date which is much after the date of the forwarding letter by the Company and so, it was submitted that the dates appearing on these statements are after the date of the forwarding letter and no explanation is tendered by the witnesses/representatives of the respective telephone companies, then it is to be presumed that these call details supplied by the company were replaced by the police and the fabricated call details were attached and produced.

The discrepancy is shown in the dates appearing on the call details and the dates of forwarding letter. For example, forwarding letters of Airtel Company is marked as Exh 129 and the Call details of Cell NO.9890565992 is marked as Exh. 129/4. Forwarding letter is dated 19.6.2006 and at the foot of the statement of the calls details (EXH.129/4) the date is appearing 9/27/2006 (27.9.2006).

Though this fact is true, it can only be said that the company has forwarded the call details along with the letter which was prepared earlier or the company has sent this forwarding letter and independently further provided these call details. The submission of the Accused that the dates at the foot of the statements of the call details are not in consonance with the dates of the forwarding letter as they are beyond the dates of the forwarding letter and so they are fabricated is too technical and incorrect so cannot be accepted. The details in respect of Cell numbers, IMEI Nos. and call details are established through cogent and consistent oral evidence, hence we hold that these call details are genuine and authentic. When two contradictory circumstances are pointed out and it is evident that they cannot coexist but one negates the other, then it is not always a case to apply the principle mechanically that when two inferences are possible then one favourable to the Accused be adopted. The Court needs to examine on the basis of other independent evidence how such circumstance can exist otherwise. Court should not go by fallacious logic or take a narrow approach while applying the above principle. Two plus two is four is a simple arithmetical calculation. However, other calculation viz. one plus three is also four and five minus one is also four are to be taken into account while appreciating evidence if such other evidence is available.

39. The submissions advanced by Accused NO.1 and Ld.

amicus curiae Ms. Rohini Salian about the non finding of the exact tower location on IMEI No. 35130741540560. Sometime it appears as 600 or some times appears as 5608 is minor electronic error as other digits are same and call details, if tallied are correct. The defence, while assailing the said evidence raised perfunctory points which were explained by the prosecution. Learned Trial Judge has scrutinised this evidence in depth and we do not find any fault or illegality in it. The prosecution could explain all the call details and also could successfully prove the same. The evidence on the point of Phones and call details can be summarised as follows.

Relevant Witnesses on Call details.

Exh.	Name of the	Role of the witnesses
	Nos. witnesses	
PW-14 88	Shailaja S. Kulkarni	Divisional Engineer, BSNL
PW-24 127-3	Sanjay D.	Senior Executive BPL Mobile
PW-25 129	Kamble Vijay E. Shinde ig	Nodal Officer Bharti Airtel Ltd. Letter from Airtel regarding information of Mobile No. 9890565992 (Deepti Devasthali Nashik Address) SIM Card activated on 16.10.2004 Airtel Prepaid Enrollment form
129-2		
129-4		of Deeptia Devasthali Call Details report of Mobile
98		No. 9890565992 of A-1 (Nashik address) Airtel Prepaid Enrollment form

130-1

of Ruiraj Mathur- Yavatmal address, SIM
card activated on 26.5.2006
Call details report of Mobile no.
9960224773 of Rui Raj Mathur

PW-41 190

Sachin M.
shinde

(Yavatmal address)
Working with IDEA Cellular Co.
call details of Mobile No.
9822018863 of Dr. Smita Mahajan

Exh. Name of the
Nos. witnesses

Role of the witnesses

PW-15 98

Bhavarlal K.

Selling SIM Card Vouchers/ Mali
Recharge vouchers/ accessories
of mobile, in 2006 was selling

Airtel Co. SIM card.

Enrollment Form in the name of Ruiraj
Mathur.

PW-11

Dr. Smita
Mahajan

Wife of deceased-complainant.
After Dr. Deepak Mahajan was
abducted, calls made and
received on her mobile No.

Accused NO.1 had used the Mobile/SIM No. 9960224773 (Rui Raj Mathur)

(i) Call details of Mobile /SIM No 9890565992 (Accused -1 Nashik address) EXH.129-4 - Call details for the period April, 2006 to 4th July, 2006

(ii) Call Details of Mobile /SIM No. 9960224773-RUI Raj Mathur, EXH.130-1 Cal details for the period from 1.6.2006 to 2.7.2006, it shows that for the said SIM Card the handset used is having IMEI No. 3514866094 17510

(iii) Call details report of Mobile/SIM No. 9890565992 (Accused No. 1) for the period from April, 2006 to July, 2006 - EXH.129-4 shows that April, 2006, May, 2006, 24TH June to 30th June, 2006 and 1ST July 2006 to 4th July, 2006, the hand set used for the said SIM card is having IMEI No. 351486609417510 Ransom Demand

(i) The call details Exh.88 at page 2, 4th calls from bottom show that Mobile/SIM NO.9422511574 Dr. Deepak Mahajan was having handset bearing IMEI No. 3525360048 3225.

(ii) At page 2 sr. No. 3 onwards i.e. 2.7.2006 at 17.45, the said SIM Card was now used in handset having IMEI No. 351307415405600, this shows that the handset is changed and Doctor's Moble/SIM Number is used in the changed handset.

(iii) The Call Details of Dr. Deepak Mahajan at Sr. No. 88 shows that various calls were made and received upto 6.7.2006 and the handset which was used was having IMEI No. 351307415405600.

(iv) The above said call details show that the Dr. Deepak Mahajan was in the custody of the person i.e. Accused who was using handset having IMEI No. 351307415405600.

(v) EXH.129-4 (Mobile/ SIM No. 9890565992 of Accused NO.1) the call details of 12.6.2006 show that the said handset having IMEI No. 351307415405600 was used by Accused NO.1 for Mobile No. 9890565992 clearly reveals that handset having IMEI No. 351307415405600 was also used by Accused NO.1 much prior to the incident.

(vi) Call details Ex.130-1 of Mobile SIM Card No. 9960224773 of Rui Raj Mathur for the period 1.7.2006 and 2.7.2006 shows that calls were made to deceased Dr. Deepak Mahajan on his mobile number by using the same handset having IMEI No. 351307415405600.

(vii) This clearly indicates that the calls made from Mobile/SIM Card No. 9960224773 (Rui Raj Mathur) to Dr. Deepak Mahajan on 1.7.2006 and 2.7.2006 was in use by Accused NO.1 only and none else as the SIM Card which stands in the name of RUI Raj Mathur was also used in the handset having IMEI No. 351307415405600 on 1.6.2006 and 2.6.2006 as the call details of Mobile No.

9890565992 at EXH.129-4 for the period April, 2006 to 4.7.2006 shows that the handset n use was having IMEI No. 351486609417510.

(viii) Ex. 190 the call details of Dr. Smita Mahajan Shows various calls received to Dr. Deepak Mahajan on 2.7.2006 and tallies with Exh. 88 i.e. Call details of Dr. Deepak Mahajan.

40. The SIM having Cell No. 9960224773 which stands in the name of Rui Raj Mathur was found with Accused NO.1. There was no reason to hold SIM card of any other person by name Rui Raj Mathur and make use of said said SIM Card in the handset of Accused NO.1. This circumstance establishes that Rui Raj was none but a fictitious name on which a SIM card was acquired by Accused NO.1 by furnishing false information to the Mobile Company.

41. On seizure of the register of Shantanu lodge (Article/Exh.35), Accused NO.1 in the course of argument was successful in raising doubt. As per the case of the prosecution, the evidence given by PW-16- Namdeo Narayan Kunjer-Panch and PW-4 Vikas Garad- Manager of Shantanu Lodge about seizure of Register of Shantanu lodge on 4.7.2006 under the Panchanama EXH.12. The entry appearing at Serial NO.16 disclosing signature of Meena Joshi of Room No.7 on 2ND July was marked and was proved by PW-4.

It is the case of the Investigating officer PW-46 that the police seized the said register of Shantanu lodge showing the entry of booking room No.7 by alleged Meena Joshi of 2ND July, 2007. The Police could trace Shantanu Lodge and room No.7 which is the place from where Dr. Deepak Mahajan was abducted in the night intervening 2ND and 3rd July, 2006. How the police could reach Shantanu Lodge without any specific information was explained by the learned counsel for the prosecution that the orders of search of the lodges and Hotel at random were given and pursuant to this direction, the police took search in the Hotels and lodges near Hotel Durvankur where Dr. Mahajan was invited for the lunch. After getting trace of Shantanu lodge and information from Mr. Vikas Garad, the said register was seized on 4th July, 2006. When the register was seized on 4th July, then obviously, no entires of the future date i.e entries after 4th July, 2006 could appear in the said register. However, though the witnesses have signed at the end of the page at the time of panchanama, on the next page the entires are appearing upto 6th July, 2006. The entires of 5th and 6th July, 2006 are appearing. Thus, the submissions were made by the defence that under this circumstance, the seizure of the register at Shantanu Lodge is false and the register is bogus and the police have planted this register against the Accused. This argument is definitely based on sound logic and it is to be accepted that the said seizure was not taken on 4th th July, 2006 and the claim of the police of the seizure of the register on that day is false. However, it will not nullify the register itself and the entires appearing therein due to other evidence adduced by the witnesses.

42. In experts evidence, the prosecution has relied on the evidence of the hand writing expert PW-30 Deepak Uttamrao Pandit. The signature of Yogendra Shirke appearing on the letter dated 23.6.2006 on the letter head of Omkar Charitable Trust was a questioned document (and the letter EXH.28) and the entry appearing in the register of Shantau lodge of Veena Ranade appearing of the said register were disputed documents. Along with these documents the specimen of the natural handwriting of the Accused Nos. 1 and 2 WERE sent to the handwriting expert for comparison.

Entry in the Shantano lodge register marked as Ex.Q-1 Signature of Veena Ranade in the said register is marked as Ex.Q-2 Signature of Yogendra Shirke was marked as Ex. Q-3.

The opinion of the handwriting expert which is marked as EXH.145 discloses that Q-1 WAS in the handwriting of B-1 to B-6 i.e. Accused.

The handwriting expert could not opine about Article Q-2 and Q-3 i.e. signature of Signature of Veena Ranade and signature of Yogendra Shirke. Hence, the evidence about EXH.Q-2 and Exh. Q-3 is negative.

43. The document which was sent as a natural handwriting is a portion of the confessional statement of Accused no. 2. The police need to send the natural handwriting so also the specimen handwriting. The specimen handwriting is always collected in the presence of Panchas. However, the natural handwriting is the handwriting on the document which the Accused has earlier written/signed. Sending confessional statement of the Accused NO.2 as a natural handwriting is callous on the part of the police. Such statement is inadmissible under Section 25 of the Evidence Act.To make the use of the confessional statement as a natural handwriting is to be strictly avoided. It leads to create bias against the Accused in the mind of the handwriting expert, which may tend to give opinion against the Accused. In this back ground alone, we discard the evidence of the handwriting expert.

44. Section 73 of the Evidence Act enables the Court to compare the handwriting. The handwriting on the register of Shantanu lodge and the specimen handwriting appear different with naked eye and therefore Section 73 of the Evidence Act is not helpful to the prosecution. The fact of handwriting in the lodge register i.e. the entry marked Exh. 30 is independently proved by PW-4 Vikas Garad. Entry at Sr. NO.16 dated 7.6.2006 in the register is identified by PW-4 as that of Mrs. Veena Ranade-

Accused NO.1 WHO was present in the Court. He deposed about wearing a wig of shoulder cut with hair on the forehead and use of upper dentures of protruded teeth outside lips by Accused NO.1.

45. PW-1 Ketan Kale has deposed that he has acted as husband of Joshi Madam who has taken name as Veena Ranade and has filed in the register of the Lodge. CW-1 Rahul Bhosale corroborates the booking room at Shantanu Lodge and thus, the fact of booking room in Shantanu lodge and making the entry by name Veena Ranade is independently proved by the other witness. The entry in the register is a contemporaneous documentary evidence which corroborates the ocular evidence.

46. Opening of Blue Bird Detective Agency and employment in the said agency is another major evidence tendered by the prosecution. Evidence of PW-19 Atmaram Namdeo Ingawale who let out the office premises for Blue Bird Detective Agency has identified the Accused as they have taken office premises from him on rental basis. The set of four witnesses i.e. PW-1-KETAN Pramod Kale, PW-2-ASHOK Jagannath Magar, PW-3-Pravin Dnyaneshwar Kamble and CW-1-RAHUL Abhimanyu Bhosale established the fact that Accused have given advertisement in newspaper Sakal dated 11.6.2006 regarding employment in Blue Bird Detective Agency. Accused have denied the fact of

giving advertisement in Sakal. Cutting of advertisement in Sakal newspaper found in the room at Uttamnagar discloses Phone No. 9821486650 of Deepti- Accused NO.1 as a contact number. In response to this advertisement all the above four witnesses- i.e. PW-1, PW-2, PW-3 and CW-1- have contacted Accused NO.1.

47. The prosecution has tendered evidence about the residence of the Accused at Nashik and also at Krishnawatika Dahisar. PW-34 has acted as Panch in the Panchnama of residence of Accused at Krishnawatika Dahisar. Airtel Prepaid Enrollment Form Exh.-98 discloses their addresses at Yeotmal.

48. EXH.127/3 i.e. mobile No. 9821486650 belongs BPL company. PW-24 Sanjay Dagdu Kamble-Nodal Officer of BPL has proved EXH.127/3, Prepaid Card Form and the call details discloses address of Accused NO.1 at Krishnawatika Dahisar. So, the Accused have two residences, one at Nashik and one at Dahisar ,Mumbai.

49. Temporary residence of the Accused in the first first week of June i.e. from 1.6.2006 to 6.6.2006 was in Hotel Ratna Regency, Pimpri (PW-2 Mansi Sandip Vinod) and another temporary residence was at Uttamnagar, Kondwa which was taken on rental basis for a period of one month in the last week of May, 2006.

PW-5 Maroti Bajirao Gawande is the owner of the Uttamnagar room.

PW-5 has deposed that both ladies have resided in that room for a period of one month in June, 2006. Evidence of these temporary residences and Panchanama of the property recovered from the Krishnawatika-Dahisar residence of the Accused is concrete circumstantial evidence establishing link between the Accused and the commission of offence.

50. Accused No. 1, as per the prosecution, used to change her appearance and looks by wearing wig, dentures of protruded teeth and round black frame spectacles. On the point of change appearance- PW-20- Mansi Sandip Vinod has deposed that Accused NO.1 sometimes used to change her look by using these three articles i.e. wig, denture of protruded teeth, round black frame spectacles. PW-20 is the witness who has seen the Accused in her normal normal look and also in her changed look and there is no reason to discard her evidence.

51. Panchanama Exh.69 was drawn by the Police of the room at Uttamnagar on the same date of arrest i.e. on 7th July, 2006. The said panchanama was proved by PW-12- Preet Chandrakant Babil. PW-12 is B.Com. MBA (Finance) and serving in ICICI Bank in Risk Analysis Department. This PANCH-PW-12 is an independent, educated witness and has given consistent and reliable evidence on the point of Panchanama which was drawn in three parts started at 12.46 on 7.7.2006 and ended at 22.15 Exh. 68,69 & 75.

52. After recording memorandum of panchanama under Section 27 of the Evidence Act, the police went to the room at Uttamnagar where the Accused have resided for a period of one month. In the said Panchanama (Exh.75), many articles were found and list of the articles prepared. In the said

room three wigs, two dentures, round black frame spectacles, beard, mustaches were found. Thus, seizure of these article and description given by the witness Mansi Sandip VINOD(PW-20), PW-4 Vikash Garad and Dr. Ashutosh Dabre (PW-17) corroborate each other and prove the fact that the Accused NO.1 used to change hear appearance and looks with the help of these articles i.e. artificial wig, dentures of protruded teeth and round black frame spectacles.

53. Accused NO.1 has challenged her identification as Jassi by PW-4-Vikas Garad and PW-17 Dr. Ashutosh Vitthalrao Dabare. It was argued that if these witnesses had never seen her in her normal look, then assuming that she had changed her looks and appearance by using different wig, dentures and spectacles, these witnesses cannot identify her when she is in the normal look in the Court. She has submitted that such identification in the Court is tutor by the Police and is to be disbelieved. This argument is very logical and it is to be accepted. If a person was never seen in his/her normal look, then identification of that person in makeup and changed look, disguising the original look, by the person who had no opportunity to see that person earlier in the original look cannot be believed. In this context we notice that the police have shown over enthusiasm in asking the Accused NO.1 to wear the wig and spectacles and put on the dentures and shoot it and prepared a CD, disclosing the goofy look of Accused NO.1 in the character "Jassi". Learned Sessions Judge was also swayed and allowed the identification of Accused NO.1 as Jassi by the witness believing the CD at the time of trial. Article 20(3) of the Constitution of India states that no Accused of any offence shall be compelled to be a witness against himself. Asking the Accused in the police custody to change the makeup for the purpose of making CD amounts to compelling the Accused to give incriminating evidence against herself which is prohibited under Article 20 (3) of the Constitution. It is to be noted that if the Accused is having a peculiar look i.e. lame or having curly hair or squint eye, then for the purpose of identification parade the police have to find out the persons similar to the look of the Accused and among those, the witness is to be asked to identify the person/Accused. In the present case, the Accused was made to put/wear all these accessories to show how she was looking at the time of incident. This may be relevant but it is an evidence illegally collected and inadmissible in law. Suspicion however grave it may be, cannot take place of legal proof.

54. Curiously, through out the evidence, the Investigating officer and all the witnesses have described this changed look of Accused NO.1 as "Jassi" which is explained as the well known fictitious character in the popular contemporary TV serial namely "Jassi Jaisi Koi Nahin". The Accused have objected to the use of this word "Jassi" by the witnesses when deposed and pointed out that it is improved by them in the Court. Though the witnesses have not used the word 'Jassi' at the time of recording their statement and have admitted the improvement, it does not reduce the credibility of the witnesses on the proved fact that Accused NO.1 used to change her looks and appearance with the help of the accessories as mentioned above. The word 'Jassi' was coined by the Police and the Police have described her appearance as Jassi. Wearing a typical wig having hair style which was popularly known as Sadhana Cut, dentures with protruded teeth and round frame black spectacles gives a distinguishable look to a person and that look was very much like the fictitious character "Jassi"

and, therefore, all the witnesses have used this word. However, the fact of the change of the appearance is proved by all the witnesses.

55. While assessing the evidence of the prosecution, on the point of abduction one has to take note of the conduct of the Accused under Section 8 of the Evidence Act. The prosecution has tendered sufficient and reliable evidence through the witnesses on the point of conduct of the Accused and their peculiar modus operandi of using different names, preparing and using forged documents to stage-manage the incidents under disguise.

56. Deceased Dr. Deepak Mahajan was admittedly related to the Accused Nos. 1 and 2. Relationship between the Accused and the deceased is proved by PW-10 Pramod Falgune, who happens to be a real brother of Accused NO.2. He has given evidence that Shridhar Mahajan-father of Dr. Deepak Mahajan was maternal brother of the mother of Accused NO.2. Shridhar Mahajan who is PW-31 has supported PW-10 on the point of relation with Accused Nos. 1 and 2. Thus, Accused NO.1 WAS distantly related to deceased Dr. Deepak Mahajan through Accused NO.2. PW-31 has stated about the visit and meeting of Accused Nos. 1 and 2 WITH deceased Dr. Deepak Mahajan and they both requested him to give one false certificate in respect of cause of death of the mother of Accused NO.2 which was refused by Dr. Deepak Mahajan. That discloses that Dr. Deepak Mahajan has seen Accused NO.1 in her normal look and she was known to deceased. Thus, it is to be safely inferred that previous acquaintance of the Accused NO.1 and the deceased is the reason for Accused NO.1 to change her looks and appearance. Accused NO.1 WANTED to present herself in a goofy look so that her identity should not be revealed.

57. It was argued that if the prosecution witness like Mansi Sandip VINOD(PW-20) and PW-2 Vikas Gard could identify Accused NO.1 in her changed look then Dr. Deepak Mahajan who was related to her should have identified her. This argument is not tenable if the back ground of the said meeting at YCM Hospital and at Shantanu Lodge is taken into account. Dr. Deepak Mahajan was given the offer of an Honorary Post in the Orthopedic department at Sanjivani Hospital run by Omkar Charitable Trust.

He was given the impression that trustees of the said trust were to meet him. Under such circumstances, naturally Dr. Deepak Mahajan believed the information ex-facie and accepted it. One cannot imagine that any distant relative may approach as a person in disguise. Moreover, the deceased is not closely related to Accused NO.1 but was distantly related and was not in constant touch with Accused NO.1. Further the capacity to identify the disguise and to identify the person behind the mask differs from man to man. If a person is very simple and naive, cannot imagine such goofy look and so it is not unnatural for the deceased to accept Accused NO.1 in the manner in which she had presented herself. This disguised personality was one of the means to commit the offence of abduction.

58. Learned Prosecutor has submitted that the opening of Blue Bird Detective Agency was the part of the conspiracy of abduction of Dr. Deepak Mahajan. On the pretext of Blue Bird Agency, the Accused could hire the service of PW-1, PW-2 and CW-1.

Opening of Blue Bird Detective Agency in fact went unchallenged by the defence. There is mere denial of evidence. However, the evidence of the set of four WITNESSES(PW-1,PW-2,PW-3 and C-1) who have applied to Blue Bird Detective Agency is consistent on certain facts that after reading the

advertisement in Sakal of Blue Bird Detective Agency they found Cell Phone No. 9821486650 as contact No. and thereafter on the basis of that advertisement they contacted Accused Nos. 1 and 2. All the four witnesses have identified Accused Nos. 1 and 2 as the persons who were running Blue Bird Detective Agency.

59. Among the set of these four witnesses, evidence of PW-1 and CW-1 can be considered later. Witnesses PW-2 Ashok Jagannath Magar and PW-3 Pravin Dnyaneshwar Kamble have deposed that they had gone to meet these ladies at the office of Blue Bird Detective Agency near Vaibhaveshwar Mandir, Shanivar Peth, Pune and Accused NO.1 has informed them that in Pune City, some medical practitioners were involved in Kidney scandal and they had to catch those Doctors and collect information from them. Both of them have submitted their bio-data and filled up the forms. PW-3 has deposed that Accused NO.1 told him that one Doctor from YCM Hospital was to be contacted for the purpose of giving invitation and some papers were to be handed over to the said Doctor. The presentation of the letter and conversation with the Doctor was practiced. PW-3 has stated that Accused NO.1 applied white colour to her hair and also instructed that he should apply the colour to his hair like a senior person. However, he took objection. At that time, Accused NO.1 convinced him that he was doing the work for the Nation. However, he left the job.

60. PW-2 Ashok Jagannath Magar corroborates all the details in respect of giving invitation and papers to Dr. Deepak Mahajan. However, Accused did not ask him to change his looks.

He has deposed that Accused NO.1 changed her identity/looks by using makeup accessories and was looking like Jassi. He has deposed that he acted as a person by name Yogendra Shirke whose name was appearing as signatory of EXH.28. PW-2 has given details of his meeting along with Accused NO.1 in her goofy looks to deceased Dr. Deepak Mahajan and handing over letter to Dr. Deepak Mahajan on 30th June, 2006.

61. Both the witnesses PW-2 and PW-3 corroborate on the material aspect of advertisement of employment in Blue Bird Detective Agency given by the Accused, the interviews taken by Accused of the candidates and story of Kidney Scandal in respect of Dr. Deepak Mahajan who was working in YCM Hospital so also the change of looks with make-up and and handing over of letter Exh. 28 to the Doctor.

62. PW-2 and PW-3 were cross examined by the Accused Nos. 1 and 2 in person. Nothing damaging was brought in the cross examination of these two witnesses. In this background, the contention of the Accused that the Police have not conducted the TI parade and the identification in the Court is not properly proved, does not hold substance. When the witnesses have enough opportunity to see the Accused Nos. 1 and 2 on different occasions in their normal look and Accused NO.1 in her changed look on certain occasions and they have specifically stated about her distinguishable identity, then identification parade is not necessary.

The fact of identity is proved by the prosecution independently.

The purpose of Test Identification parade is to test the memory and retention capacity of the witnesses and to rule out the possibility of mistaken identity, when the witnesses have seen the Accused only once and had no chance to see them on more occasions prior to the incident or after the incident. This, should ensure the correctness of investigation to eliminate the error of mistaken identity. If correctly identified, it definitely gives assurance to the investigating machinery about the proper direction of the investigation.

63. Learned amicus curiae and the Accused NO.1, both have challenged the evidence of both the eye witnesses (PW1 and CW-1) on various grounds. It was argued that if the case of the prosecution is accepted as it is, then these two witnesses- PW-1 and CW-1 are the accomplice and the evidence of accomplice is not admissible in the absence of corroboration. It is further submitted that the corroboration of one accomplice to the other accomplice is of no use and such evidence is not credit-worthy. Section 133 and illustration of Section 114 of the Evidence Act were referred.

"Illustration of Section 114- That an accomplice is unworthy of credit, unless he is corroborated in material particulars."

"Section 133 : An accomplice shall be a competent witness against an Accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

64. However, before we begin to assess the evidence of PW-1 and CW-1 it is necessary to fix their status; whether they are accomplice or not ? As per their own evidence, they were employed in Blue Bird Detective Agency by both the Accused and they have participated in the actual act of abduction. The deceased was abducted by making him unconscious and they have participated actively and put him in the Matiz Car of the Accused.

65. The learned Trial Judge has discussed the evidence of PW-1 at length as to how he and Accused NO.1 WENT to Shantanu Lodge. Accused NO.2 has booked room No.7 in the Shantanu Lodge. He stated the details of the role played by CW-1 as he was throughout present alongwith PW-1. The incident was to take place on 1ST July, 2006. However the Accused NO.1 could not book the room in the Hotel of their choice and they got the booking in Shantanu lodge on 2ND July, 2006. Dr. Deepak Mahajan was called for lunch. However, he did not accept the invitation for lunch at Durvankur Hotel which was near Shantanu Lodge. PW-1 has deposed about the presence of Accused NO.1 in goofy look like Jassi. He mentions about the phone calls made to Dr. Deepak Mahajan from Shantanu Lodge on 2ND July, 2006. He deposed about the rehearsal taken by the Accused Nos. 1 and 2 of PW-1 and CW-1 of holding legs, hands and mouth of Dr. Deepak Mahajan on the previous day. He says how Accused NO.1 had received the Doctor outside Shantanu Lodge. The Accused were having a Matiz Car of grey colour. He has further deposed that the Doctor was received and brought in the room by Accused NO.1. He came on Aactiva Scooter. PW-1 and CW-1, after receiving signal from Accused NO.1, both caught hold of the Doctor and the Accused NO.1 took out injection and inserted in the hand of Dr. Mahajan. He elaborately described further that when the Doctor resisted, the needle which was inserted in the hand of Dr. Mahajan bent. Dr. Mahajan bit the Accused NO.1 on her wrist so she could not inject the medicine in the body of the Dr . Mahajan. The Accused threw

that bent needle and took out another needle and used another needle for injecting the medicine in the hand/body of the Doctor and thereafter they both lifted the Doctor and put him into the Matiz Car and took him to the corner of Karve Road.

66. While assailing the evidence of PW-1 and CW-1, the prosecution could not answer satisfactorily regarding delay in recording statement of these witnesses. The Accused were arrested on 7.7.2006. Search of Uttamnagar room was carried out on the same day and the file containing of the applications of the candidates who have applied for employment in Blue Bird Detective Agency was recovered. Learned prosecutor has submitted that on the basis of those applications in the file, they could trace PW-1- Ketan Kale, PW-2- Ashok Magar, PW-3 Pravin Kamble and CW-1 Rahul Bhosale. Statement of PW-2 WAS recorded in the last week of July, 2006 and the statement of both PW-1 and CW-1 WERE recorded on 15/9/2006. Thus, nearly two months and one week after the recovery of the file and arrest of the Accused the statement of these witnesses were recorded. The learned prosecutor tried to explain that besides the applications of these two persons there were applications of other candidates also and the Police took time to trace out the other persons. The Police interrogated them and it took time in getting these two candidates. It was further explained that the Police did not look into it and tried to investigate on that line. Thus, even though we accept these explanations, it reveals a gross negligence on the part of the Investigating officer who failed to be alert and prompt. We have to treat it as failure of the investigating officer to study and analyze the evidence in hand diligently. Similarly this throws light on the disapprovable conduct of these two witnesses. They both have admitted that after the incident of abduction and their participation in the said act they came across the news of murder of Dr. Mahajan and arrest of these two ladies and it shows that they realized that they have committed a wrong by getting involved in the commission of the offence. It is the tendency of the human being to stay away from any problematic situation where he is likely to get entangled and will have to face the police. However any good citizen respecting rule of law will come forward and approach the police. It would have appreciated if these persons would have been approached the police of their own and informed them about such participation.

However, it did not happen. Both of them tried to hide themselves.

67. It is required to be mentioned that, in the first round of trial the CW-1 WAS not examined but was examined on the direction given by the High Court. The evidence of CW-1 WAS not available to the Trial Court. Non examination of this witness was also a loophole in the case of the prosecution. While explaining the reason, Mr. Mundergi has pointed out that the Accused have written two letters separately to PW1-KETAN Kale and CW-1 Rahul Bhosale that they should not support the prosecution under the pressure of police. These two letters are not denied by the Accused. It is to be remembered that the conduct of the Accused during the trial should not be mixed up by the Trial Judge under Section 8 as a conduct which is to be taken as an incriminating circumstance and relate it to the commission of offence. However, as the contents in the said letters are admitted by the Accused, it shows the prior acquaintance of the Accused with these two witnesses. Learned Prosecutor has submitted that the evidence of PW-1 Katen Kale along with evidence of PW-3 Pravin Kamble, PW- 2 Ashok Jagannth Magar is sufficient to prove the fact of abduction and therefore to avoid repetition, CW-1 Rahul Bhosale was dropped. Though the explanation of dropping CW-1 is

given, the delay in tracing PW-1 and CW-1 and recording their statements by the police officer discloses lethargy of the Investigating Officer.

We hold the Investigating officer PW-46 responsible for such tardy and loose investigation.

68. Witness CW-1 WAS examined in the second round of the trial when the matter was sent for recording of further evidence. He has corroborated PW-1, in all material particulars except very minor discrepancies like the name of the Accused.

However the identity of Accused NO.1 and Accused 2 can be fixed on the basis of the acts attributed to them by the witnesses which corroborates with the evidence of PW-1. At the time of kidnapping the deceased was given anesthesia and was made to sleep by the Accused. For the purpose of giving general anesthesia, the drug- Thipentone was used. The said drug is available in the market in white powder in the quantity of 500 mg or 1000 mg.

69. To prove the purchase of the drug namely thipentone or Sodium Pentothol/Thisol prosecution has examined five witnesses. PW-7 Vishal Vaswani- Owner of Darpan Medical General Store and and PW8- Jayesh Dilipkumar Magetia owner of Kashiba Medical and General Stores. Thereafter PW-9 Ajit Bhagwan Mandle- Panch witness, PW-28 Milind Somnath Potnis a service Manager in Neon Laboratory and I. O. PW-46 were examined. The Bills pertaining to date 23.4.2006 25.4.2006, 29.4.2006 from PW-8 Jayesh Majethia i.e Exh. 46 to 49 from Kashiba Medical and General Store were proved through panch.

70. Learned Special prosecutor has submitted that Mr. Milind Somnath Potnis- PW-28 has deposed that Neon Laboratory is manufacturing thipentone drug and said drug is used for the purpose of anesthesia and also he has confirmed that batch no. 172134 was supplied to the Distributors at Pune and Mumbai. He has identified the seven bottles of Thipentone injections, two bottles powder and five empty bottles and confirmed the Batch No. 172134 on the labels of those bottles. Ld.

Prosecutor has further submitted that PW-7 has deposed that in June, 2006 he was having the stock of Sodium Pentathol and 19.4.2006 he had sold one vial of Sodium Pentathol to D. A.

Devasthali on the prescription of one Dr. G. Patil and he has also issued the bill accordingly and he has deposed that the said lady is before the Court. Further learned Prosecutor pointed out that PW-8 has given the evidence on the similar lines that he has purchased 25 vials of Sodium Pentathol from Neon Laboratories of Batch 172134 from Neyon and on 13.9.06 Police had come alongiwth Accused NO.1 and he identified Accused NO.1 as the lady who had come on 24.4.2004 and have purchased six vials of thisol sodium of batch no. 172134 alongwith six bottles of distilled water so also on 25.4.2006 and 29.4.2006 both of them have purchased Injection Thisol Sodium 500 gms. from batch no. 172134, seven vials and four vials and so also bottles of distill water. PW-8 has identified the Accused No. 1AND also the bills issued in the name of Deepti Devasthali were proved by them. Ld. Prosecutor has submitted that in the search of the house of the Accused at Krishniwatika, Police has seized a box vials of the injections sodium Pentathol and thus the prosecution has proved that Accused NO.1 has purchased sodium pentathol from Nashik.

Learned counsel Rohini Salian appearing for the Accused has drawn our attention to the cross examination of these two medical shopkeepers PW-7 and PW-8.

71. Accused NO.1 and Accused NO.2 both have cross examined these two witnesses at length. In the cross examination PW-7 has admitted that nearly 40 to 50 persons purchased drug from his shop through the day and he did not recollect that Accused had purchased any drug from his shop on any occasion.

He saw Accused NO.1 only once i.e. on 19.4.06 and thereafter, on 13.9.06 he identified her. He has also admitted the overwriting of the date of the bills EXH.41 and 43. Similarly PW-8 has given admission that prescription of Dr. Patil were used to come regularly to his shop and he knew that Dr. Patil and Dr. Gaikwad were from veterinary hospital. He has also given admission that one or two injections are prescribed for the purpose of one operation by the Doctor and he did not ask the reason for purchase of injection in bulk quantity to the Accused.

72. The Learned Amicus curiae and also Accused no.

1 on the basis of these submissions argued that the prosecution have not examined Dr. Gaikwad or Dr. Patil. Though their statements were recorded it was necessary for the prosecution to show that the prescriptions were false. Identification by both the witnesses of the Accused is also challenged.

73. Medical Bills EXH.41 and 43 show overwriting and alteration in the date. It is not possible for the chemist to remember the face of the person who has visited to his shop only once after four months. The submissions of Accused no. 1 and learned amicus curiae Ms. Rohini Salian on known examination of Dr. Patil and Dr. Gaikwad are convincing. The bills 41, 43 so also Exh. 48 appear manipulated document and there was no reason for these two chemists to remember the face of the Accused in the absence of any special incident. Hence the evidence of the purchase of thisol sodium of PW-7 and PW-8 by the Accused is found not reliable. The prosecution has, therefore, failed on this point of purchase of thisol sodium from PW-7 and PW-8.

74. The learned special prosecutor has successfully connected the articles which were found in the Uttamnagar room during the panchanama of seizure with the use of thipentone by the Accused. Article 22. Exh.69- seven bottles were found in one hand bag of 500 mg. of Neon Laboratory of which two bottles were sealed containing white powder and five bottles were empty having batch No. 172134 manufacturing date October, 2005. PW-34 in the Panchanama EXH.163 dated 11.7.2008 of Krishna Vatika, Dahisar Flat No. 1, a Box of 25 bottles, 12 bottles were used and 13 were containing powder, 15 Bottles of distilled water were found. Exh.

163- Thisol having batch No. 172134 manufacturing date October 2005. The defence could not demolish this concrete circumstantial evidence. Thus seizure of thisol in Uttamnagar and at Krishna Vatika and use of Thisol at the time of commission of offence by the Accused is proved by the prosecution by leading consistent and cogent evidence.

75. We are required to see whether the prosecution has proved that Accused no. 1 and 2 have committed culpable homicide amounting to murder punishable under Section 302 read with Section 34 of the Indian Penal Code ? The exact cause of death could not be given as the whole body was not available for postmortem examination and the parts available were decomposed.

The body parts were cut probably after the death. All these parts may be of one person. Separation of the parts is possible with the knife which was shown i.e. Articles 45/47 recovered from the room hired by the Accused at Uttamnagar. On the characteristic of Thipentone drug and method of its use PW 28-MILIND Somkant Potnis and PW-45-Balasaheb Dagdu Pande both have corroborated that the effect of the drug is based on the quantity of the dose.

It is to be administered Intravenously (IV). Over dose of thipentone affects respiratory system and sudden fall of blood pressure resulting in death. It is important to note that thipentone is the drug which does not leave its trace. This drug, when administered, within 15 to 30 second affects the brain so that the person goes to sleep. Thereafter the drug is distributed/spread in the body and is detoxified in the liver. The drug thipentone has unique characteristic that after a period of some hours it leaves no trace of it in the blood or body. It is to be remembered that the thipentone is a drug mainly used for induction of anaesthesia and it is not a poison. However there is no conclusive proof to accept that Dr. Mahajan died due to the said drug only. It only can be said Dr. Mahajan might have died due to overdose of thipentone.

76. A person can be said to be an accomplice who

actually participates in the commission of offence and shares a

similar intention to do so along with the Accused. If a person is hired for the commission of offence by paying some money and he accepts to commit the crime, then that person is an accomplice.

CW1 and PW-1, as per the case of the prosecution, have actually participated in abducting Dr. Mahajan which is an illegal act. They both helped Accused NO.1 WHEN she injected drug to the deceased Dr. Deepak Mahajan. The act of holding the deceased to enable the Accused to the inject drug is no doubt the participation in the crime or offence. However, these two witnesses cannot be labelled as accomplice in true sense due to another unfolded layer of evidence of their employment in Blue Bird Detective Agency. The Accused have informed them that it being a detective agency, their task was to record the statement of a Doctor involved in Kidney scandal. Such acts are required to be done by the detective agency. Running a detective agency is neither an illegal act, nor an incriminating circumstance, if taken in isolation.

To run a detective agency and to commit offence under the garb of the work of the detective agency is a brilliant devilish idea which was implemented by the Accused. Public advertisement in the newspaper about employment in detective agency and regular office in Pune, has definitely created

confidence in the minds of these witnesses, who believed the story of involvement of the deceased doctor in the kidney scandal and an idea to abduct him for the purpose of recording his statement by the head of the detective agency who was Bombay based was believed to be genuine by them. Therefore, as per the bonafide belief of PW-1 and CW-1 their participation was a part of their duty being the employees of a detective agency. Their evidence fully corroborates with the evidence of many other circumstances. It is not the case that besides the evidence of these two witnesses on the point of abduction, no evidence is tendered by the prosecution. Evidence of PW-4 (Vikas Harischandra Garad) who was the Manager of Shantanu Lodge has identified the photographs of PW-1 on the application forms for employment in Blue Bird Detective Agency. The application forms of these two witnesses were found in the file which was found and seized at the time of Panchanama of Uttamnagar Room. This file contains many application forms of the candidates for employment in Blue Bird Detective Agency, out of which these two application forms, Form- EXH.23 is of PW-1-KETAN Kale and EXH.230 of CW-1 are evident to show that they were really employed in Blue Bird Detective Agency by the Accused. PW-2 Ashok Jagannath Magar and PW-3 Pravin Dayanand Kamble corroborates the evidence of PW-1 and CW-1.

77. Dr. Deeak Mahajan came to Shantanu Lodge on Activa Scooter and said scooter was taken by CW-1 Rahul Bhosale and was kept at Shivajinagar and it was informed telephonically to PW-11 Dr. Smita Mahajan. The said scooter was not found at the first instance to the police but was found subsequently by PW-46-

Investigating Officer-Bharat Patil at the spot which was informed by the Accused to Dr. Smita Mahajan. Evidence of PW-12- Preet Babil Panch of the Panchanama of Uttamnagar room corroborates the details given by PW-1 and CW-1 that the needle was bent so Accused NO.1 threw that bent needle and used other needle to inject drug to Dr.Mahajan. One bent needle and syringe were found and seized at the time of Panchanama at Uttamnagar. The fact of change of appearance and looks is proved by the prosecution through the witnesses and also by seizure of the articles of makeup. Hence, the Sessions Judge was correct in believing PW-1.

The evidence of CW-1 has come before us afresh and we found it unshaken and reliable. Thus the prosecution has established that the Accused Nos. 1 and 2 had conspired to abduct Dr. Deepak Mahajan and had abducted him on 2.7.2006 from Shantanu Lodge and have committed various offences in order to commit abduction.

78. We shall have to consider the offence under varies sections with which the Accused are charged. Section 364-A deals with abducting a person for ransom. The essential ingredients of the section are as follows:

- (i) That the Accused kidnapped or abducted a person; or
- (ii) That the Accused kept such person under his detention;
- (iii) That the Accused threatened to cause death or hurt to such person or caused death or hurt to him;

(iv) That the Accused did commit so to compel

(a) the Government; or

(b) any foreign state; or

(c) Inter government organisation; or

(d) any other person

(v) That the Accused compelled to do or abstain from doing any act or to pay any ransom.

In the present case the prosecution has proved all the ingredients of Section 364-A that Accused NO.1 and 2 have conspired to abduct and have abducted Dr. Deepak Mahajan. While taking Dr. Deepak Mahajan, the Accused Nos 1 and 2 have made him unconscious and kept him under their detention in Room No. 7 of Shantanu Lodge and thereafter in their Matiz car. Further, the Accused have threatened to cause death or hurt to Dr. Deepak Mahajan and they did this to compel Dr. Smita Mahajan to pay ransom of RS.25 Lakhs. Both, Accused NO.1 and Accused NO.2 shared common intention and have planned a sinister design to abduct Dr. Deepak Mahajan. The conspiracy is absolutely evident and proved.

79. On the point of demand of ransom, the prosecution relied on the telephonic conversation which was heard by Dr. Smita and Investigating Officer PW-46 at the police station. In telephonic talk, the person talking on the other end had threatened Dr. Smita. As per their instructions - if she wanted the Doctor alive she should pay RS.25 lacs. It was argued by the defence that as per the evidence of the prosecution witness, the said demand of RS.25/- lacs was neither pressed nor there was actual handing over of the money and thus, in fact there was no intention of demanding ransom while Dr. Deepak Mahajan was abducted and hence the act of the Accused will not fall under Section 364-A of the Criminal Procedure Code. Section 364-A does not require the amount of ransom is to be actually parted with from the complainant to the Accused. It requires only a threat of death or hurt or even reasonable hurt that the person may be put to death or hurt to pay ransom. The Accused, by attending telephone/ Mobile of Dr. Deepak Mahajan gave threats on the same phone to Dr. Smita which confirmed the fact of abduction and also give rise to reasonable apprehension to Dr. Smita that Dr. Mahajan may be put to death or hurt and simultaneously ransom of RS.25/- lacs was demanded with specific threat of killing Dr. Deepak Mahajan.

80. 'Abduction' is defined under Section 362 of the Indian Penal Code. Section 364A is an aggravated form of abduction under which the punishment of death or imprisonment for life so also fine is prescribed. The learned Sessions Judge has sentenced both the Accused to be hanged by neck until they are dead subject to confirmation of the High Court. As we hold both the Accused guilty of Section 364-A we need to hear the Accused on the point of sentence of death.

81. The Accused are also charged under Section 387 of the Indian Penal Code for the commission of offence of extortion which requires putting or attempting to put any person in fear of death or grievous hurt to that person or any other, for which punishment of imprisonment upto 7 years is prescribed. Evidence adduced in respect of Section 365-A and Section 387 is relied for the propose of proving of offence under Section 387 read with 120 (b) of the Indian penal Code. The learned Sessions held the Accused guilt of the same and has awarded sentence of seven years rigorous imprisonment and to pay fine of Rs.10,000/- each, in default rigorous imprisonment for three months. We agree with the said sentence.

82. Under Section 328 of the Indian penal Code, if a person administers to or causes to be taken by the any person any poison or any stupefying, intoxicating or unwholesome drug or other thing with intent to cause hurt to such person, with intent to commit or facilitate commission of an offence or knowing it to be likely that he will thereby cause hurt, the offence is committed. It is to be noted that the offence under this section is complete even if no hurt is caused to the victim. Mere administration of the poison or unwholesome drug or other things is sufficient to bring the offender under this section. Intention to cause hurt to such person to commit or to facilitate to commit an offence or knowledge that hurt will be caused should be present.

Thiopentone/sodium thiol as discussed above is not a poison but it is a drug having effect of paralyzing the function of the brain.

Thiopentone is required to be injected through intravenously. This drug is to be injected slowly and it cannot be given in the muscle and therefore, the administration of this drug itself needs a lot of caution and basic medical knowledge and specialized knowledge of injecting the drug in the vein. If the drug is administered quickly, then it may have adverse effect. The prosecution has brought this through the evidence PW- 28 Shri Milind Potnis and PW-45 Balasaheb Dagdu Pande who have deposed that it can cause a decrease in blood pressure and its may result in respiratory arrest or cardiac arrest and after injecting it affects the brain and nervous system of the body. Hence offence under Section 328 of IPC is proved beyond reasonable doubt. For this offence, the learned Sessions Judge has sentenced the Accused to undergo rigorous imprisonment for seven years and pay fine of Rs.7,000/-

each, and in default awarded further rigorous imprisonment for three months. We agree with the extent of sentence given by the learned Sessions Judge.

83. It is submitted that the prosecution has proved that the Accused have committed the offence of forgery in respect of creating and using fake driving licence in the name of Rui Raj Mathur and thus has committed offence under Section 465 and 468 of the Indian Penal Code. Section 465 is the penal section. For committing offence of forgery a false document i.e. driving licence in the name of Rui Raj Mathur was prepared and used. While committing forgery the Accused Nos. 1 and 2 had intention that the said document would be used for the purpose of cheating. The prosecution could prove that the driving licence which stood in the name of Rui Raj Mathur was used for the purpose of obtaining Mobile SIM card from the Cell Phone Company and thus, the prosecution could establish the offence under Section 465 and 468 of the Indian penal Code. Punishment given by the

learned Sessions Judge of two months rigorous imprisonment and fine of Rs.5000/-, and in default to suffer RI for three months for the offence proved under section 465 read with section 120-B of the IPC and the punishment of five years rigorous imprisonment and fine of Rs.10,000/- in default, 3 months for the offence punishable under Section 468 is appropriate.

84. Offence under Section 419 of IPC - Section 406 of the IPC defines cheating by personation. Offence under Section 429 is completed if person cheats by personation. The Accused Nos.

1 and 2 both have represented themselves with different names.

However, it is to be noted that just to represent oneself by changing name does not constitute offence of personation under section 419 of the IPC but it should be clubbed with cheating. In the present case, there was a cheating by Accused Nos. 1 and 2 as they made efforts to make others believe that they were different entities.

Thus, the offence under Section 419 is also proved by the prosecution. The learned Sessions Judge has punished them to suffer rigorous imprisonment for three years and to pay fine of Rs.

10,000/- each and in default to suffer rigorous imprisonment for three months. We find no need to disturb the finding.

85. Section 342 speaks about wrongful confinement. Dr. Deepak Mahajan was wrongfully confined by the Accused and the said fact was proved through the witnesses. We agree with the punishment given by the learned Sessions Judge which is of one year rigorous imprisonment and fine of Rs.1000/EACH and in default to suffer rigorous imprisonment for one month.

86. The Accused Nos. 1 and 2 have also been charged for the offence punishable under Section 471 of the Indian Penal Code. If the person uses a forged document with knowledge, as genuine, then he commits offence under Section 471 of IPC.

Driving licence in the name of Rui Raj Mathur was forged document and by producing that document Mobile SIM Card was obtained by the Accused. Thus, it was used as genuine. So also the Accused have prepared a letter EXH.28 in the name of Omkar Charitable Trust giving the offer of job to Dr. Deepak Mahajan for the post of orthopedic surgeon. There was no such offer in reality for Dr. Deepak Mahajan to join as Head in the Orthopedic department in Sanjivani Hospital run by Omkar Charitable Trust. However, this particular offer was faked by creating /forging a false letter. The said fake letter was used as a bait to lure Dr. Deepak Mahajan who was made to believe that forged document as genuine and became prey to the sinister design of the Accused. The Sessions Judge rightly convicted the Accused Nos. 1 and 2 for the offence punishable under Section 471 read with Section 120-B of the IPC and sentenced to undergo rigorous imprisonment for three years and to fine of Rs.3000/- each, in default to suffer further IR for three months. We concur with the finding and the punishment awarded by the learned Sessions Judge.

87. There is no eye witness to the fact of murder of Dr. Deepak Mahajan. The case of the prosecution is based only on the following circumstantial evidence, direct and indirect, which can be summarised as under:

i. Last seen together ii. Discovery of body parts at the instance of Accused NO.2 iii. (a) Room at Uttamnagar

(b) Panchanama of Uttamnagar Room and the articles/weapons found therein.

iv. DNA (para 90, 91 and 92) v. Discovery of Matiz Car vi. Arrest Panchanama vii. Case diary (-)

88. To destroy the case of the prosecution on the point of identification of the body of Dr. Deepak Mahajan, the defence has pointed out the circumstances / loopholes in the case of the prosecutions which can be sumamrised as follows.

POINTS RAISED BY DEFENCE

- | | |
|-----|---|
| (1) | Identification of the body in absence of head and hands |
| (2) | Specious DNA |
| (3) | Cause of death not established |
| (4) | Planting of shirt of Dr. Mahajan |
| (5) | Challenge to discovery Panchanama |
| (6) | Blood group of Dr. Deepak Mahajan is not brought on record. |
| (7) | Forensic Panchanama of Room at Uttamnagar not done. |
| (8) | Purse Panchanama. |

(9) Delay in finding Matiz Car of more than two

months
(10) Unsolved mystery of five days.

89. In the present case there is no eye witness. The theory of last seen together was pressed into service by the learned special prosecutor. Ld. Counsel Mr. Mundargi has argued that Doctor Deepak Mahajan was seen last in the company of Accused Nos. 1 and 2. PW-1 and C-1 are the witnesses on this vital point. To establish the offence of murder, the prosecution has heavily relied on the 'last seen together' theory and contended that in the absence of any explanation as to when the Accused left the company of Dr. Mahajan, Section 106 of the Indian Penal Code is to be invoked.

90. It is the defence of the Accused that these two witnesses PW-1 and CW-1 have committed murder with the help of Ratansingh and were involved in the murder of Dr. Deepak Mahajan. The other defence was also suggested at the most it can be said that these two Accused ladies abducted the deceased Doctor and handed him over to other persons namely Ratansingh, Bismilla and Ganu who might have killed the Doctor and cut the body of the Doctor into parts. Thirdly, at the time of recording further statement under Section 313, while answering Question No. 87, Accused NO.2 answered that one Jayashree Vipradas and Sadanand Kenge have committed murder and fourthly through the arguments names of Dr. Smita and Parag Mahajan were suggested as the culprits. Thus the explanation given by the defence appears to be inconsistent and imaginary. In this back ground and considering the proof of the other circumstantial evidence we assess how far the prosecution can get the benefit of under Section 106 of the Evidence Act.

91. Section 106 states that "when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him". Section 106 cannot be freely applied to the Accused in the criminal trial. The Accused may be covered under the phrase "any person". However the applicability of the section is restricted by the basic principle of criminal jurisprudence that the burden on the prosecution to prove the facts never shifts. In fact, the real culprit knows the fact about the commission of offence, yet, Section 106 cannot be applied to the Accused because there is every possibility of false implication of the person, either by the complainant or by the police. To hold the innocent guilty is a serious miscarriage of justice. Therefore, the Accused is always insulated with the right to silence. Disclosure of the subsequent facts within the knowledge of the Accused thereafter takes colour of the confession which is barred under section 25 of the Evidence Act.

92. On the point of "last seen together, the prosecution has relied on the case of State of Rajasthan Vs. Kashi Ram Vs. (2006 12 SCC 254) in which it is observed that:

"19. Before adverting to the decisions relied upon by the counsel for the State, we may observe that whether an inference ought to be drawn under Section 106 Evidence Act

is a question which must be determined by reference to proved. It is ultimately a matter of appreciation of evidence and, therefore, each case must rest on its own facts"

"In a case resting on circumstantial evidence if the Accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the Accused does not throw any light upon facts which are especially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principles has been succinctly stated in Naina Mohd.(AIR 1960 Mad. 218:1960 Cri. LJ 620:

93. The provisions of Section 106 of the Evidence act itself are unambiguous and categoric and lay down that when any fact is specially within the knowledge of a person, the burden of proving that fact is upon the him. Thus, if a person is last seen with the deceased, then it is expected that he should offer an explanation as to how and when he parted company with the deceased. If he does so, he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. Even if the Accused fails to discharge any burden under section 106, it is not a principal or major burden, but its just an additional circumstance against the Accused. It cannot be replaced for missing chain of the prosecution.

94. In the decision rendered by the Hon'ble Supreme Court in the case of Sucha Singh Vs. State of Punjab, (2001 SCC (Cri.) 717), it was observed in para 15 of the judgment as under:

"15. The abductors alone could tell the court as to what happened to the deceased after they were abducted.

When the abductors withheld that information from the Court there is every justification for drawing the inference in the light of all the preceding and succeeding circumstances adverted to above that the abductors are the murderers of the deceased."

(Referred (2000) 8 SCC 382 State W..B. Vs. Mir Mohd. Omar)/ 31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the Accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty."

95. Prosecution has further placed reliance on the ratio laid down in the case of State of Maharashtra Vs. Suresh, reported in (200) 1 Supreme Court Cases 471, in which the Supreme Court, while discussing the value of evidence tendered under section 27 of the Indian Evidence Act have observed that:

"We too countenance three possibilities when an Accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And third is that he would have been told by another person that it was concealed there. But if the Accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities, the criminal court can presume that it was concealed by the Accused himself. This is because the Accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well justified course to be adopted by the criminal Court that the concealment was made by himself. Such an interpretation is not consistent with the principle embodied in Section 27 of the Evidence Act.

In the case of State of Maharashtra Vs. Suresh (Supra) the Accused had raped and murdered four years old girl child and the mangled body of the child was dumped in the field. The Accused and victim were last seen together by three prosecution witnesses.

The body of child was recovered from the cotton field in pursuance of the information given by the Accused. In the medical examination of the Accused the injuries consistent with the theory of the rape were found on the private parts of the Accused. In the present case there was a gap of five days between the incident of abduction of Dr. Deepak Mahajan and discovery of the parts of male body and the identification of the body was seriously in dispute for want of head of the body. Thus the ratio laid down by the Supreme Court in the cases of Sucha Singh and State of Maharashtra Vs. Suresh cannot be applied to the present case which is distinguishable due to unusual circumstantial evidence and the passive and shoddy investigation.

96. In the case of Hatti Singh Vs. State of Harayana reported in 2008 (3) SCC (Cri.) 246, the Hon'ble Supreme Court observed that:

"The evidence of last seen by itself apart from having not been proved in this case cannot be of much significance. It may provide for a link in the chain but unless the time gap between the deceased of having been last seen in the company of the Accused person and the murder is proximate, it is difficult to prove the guilt of the Accused only on that basis."

97. In the present case as per the prosecution discovery of the body parts in pieces at the instance of Accused NO.2 is an authentic nexus between offence of murder and the Accused.

In the postmortem report, Dr. Milind Sharad Wable (PW- 36) has opined that it was male body and the parts of the body may be of one male human body. The death was two to five days prior to the postmortem. Finding of body in one piece is a normal circumstance in the cases of murder though the murder itself is abnormal. In this case, the body was found in parts wrapped in six similar/identical blue plastic bags. If the body parts would have been found scattered at different places and not in the packed or wrapped condition, then it would have been inferred that some stray animals or birds have taken away some parts of the body and eaten and so the body was found in pieces. However, in this case, it is to be concluded that it was an act of human being.

Finding of four packets at Katraj Ghat and then finding of two packets at a long distance i.e. at Bhosari is also another important consideration. These two places Katrajghat and Bhosari are away from the residential area of Pune city.

98. PW-12 Preet Babil is examined for the discovery of the body parts. (Panchanama under Section 27 of the Evidence Act).

Defence could not demolish his evidence. This Panchanama is proved and we have no hesitation to hold that body parts were found consequent to the information given by Accused NO.2.

Normally while investigating the murder, if the victim and Accused are last seen together and thereafter the body is found at the instance of the Accused, then the prosecution is successful in proving the murder and the Accused at whose instance the body is found can be held guilty for the offence of murder of the said victim.

However, in the present case, there are some abnormal circumstances which constrain us to question the case of the prosecution on the point of murder. The fact of last seen together and the discovery of body parts are two circumstances necessary to be joined with the circumstance i.e. identification of the body.

Identification of the body can be proved by various ways. The most natural and common is by face. It may also be with the help of marks on the body or due to the peculiarity of the limbs or if the body is de-composed, then on the basis of forensic evidence.

99. As per Section 27 of the Indian Evidence Act, the information given by the Accused is made admissible only for the limited purpose. The total ban on accepting confession is partially lifted under this section, if the fact is actually discovered in consequence of the information given by the Accused and it affords some guarantee of truth of that part only. Rest of the information is always inadmissible. The statement of the Accused NO.2 that "I will show the place where the body parts were lying" is the only admissible portion in the memorandum panchanama. Parts are of the body of Deepak Mahajan should have been proved through other independent evidence. Further details will amount to confessional statement and admissibility of it is strictly barred under Section 25 of the Evidence Act.

100. The fact of keeping certain object at a particular spot is always within the exclusive knowledge of the Accused because it is the tendency of the criminal to hide the object used in crime and therefore it is known to the Accused only and the Accused only can point out the place where the object is kept.

Therefore, in the absence of discovery of any object, the statement can not be considered as memo under Section 27 of the Evidence Act and hence the mere pointing of the spot is not admissible.

Therefore, when the body parts are found one cannot jump to the conclusion that these body parts are of Dr. Deepak Mahajan because the body parts are found after the information given by Accused NO.2. Such degree of evidence is not sufficient to satisfy the legal mind. The degree of standard of proof required to prove the identification of the body is always high. Drawing inference on the basis of conjectures and surmises.

101. On the point of identification of dead body reliance is placed on Kesav Vs. State of Maharashtra, reported in 2008 (3) LJ Soft. (SC) 91 in which the Supreme Court observed and held as follows:

"All parts of the dead body including small intestine were missing. The dead body was lying in an open field at least for four days. How apparels and clothes purported to be belonging to deceased had been found near the dead body separately is beyond any comprehension. If he was killed by using a hard and blunt substance on his head as it appears from the postmortem report, portion of the clothes of the deceased would still be found over the skeleton and not at a distance from it. If the body was eaten away by vultures or other animals the garments would have also been found in torn conditions and beyond recognition. In this situation the evidence that the garments have been recognized by the mother and wife of the deceased for the purpose of identification of the dead body to be that of deceased cannot be accepted."

102. The Accused stayed in the rented room at

Uttamnagar- Warje Malwadi and it was established by concrete

evidence of the landlord PW 5 -Maroti Bajirao Gawande who let out the said room at Uttamnagar. PW-6 Sharda Takbhate was the neighbour and she is examined on this point. She has stated about the residence of Accused nos. 1 and 2 in the said room at Uttamnagar, their Matiz Car and foul smell emanating from the said room in the first week of July, 2007. The defence has pointed out a material omission in the evidence of PW-6 that she has admitted that she did not state to the police at the time of recording her statement that she has seen the Accused Nos. 1 and 2 removing very heavy article wrapped in blue plastic cover from their Car and then after some time keeping small packets in blue plastic bags in their car. The prosecution on the basis of

this evidence wanted to create indirect circumstance showing connection between the use of blue plastic bags and Accused taking out heavy article from the Car to their house and after two days taking out something in the blue packets. However, this evidence is not believable. Evidence of PW-6 Mrs. Sharda Takbhate did not disclose any relevant reliable fact throwing light on the point of murder or bringing of Dr. Deepak Mahajan at Uttamnagar. No reliable evidence is tendered by the prosecution to show that the said room was used for killing Dr. Deepak Mahajan. The Room of Uttamnagar was sealed and Panchanama was carried out and in the said Panchanama (Exh. 69/75) many articles were found.

103. The relevant articles i.e. Full pant(Court ARTICLE-29, blood stained Blue Shirt (Court Article-30), Pair of socks(Court ARTICLE-31) Black leather belt (Court Article 32), Spectacles (Court ARTICLE-23). Knife-Article 45, Blade of Spade-Article 46, Knife-E3 Article 47, human hair-Article 41, pieces of cloth- Article 17, blood stained Kurta-Article 50, Blood stained Salwar-Article 53, Latex Hand gloves Article 40 and Article 16 underwear were found in the room of Uttamnagar and they were sent for the Chemical Analysis (CA).

It was pointed by the Learned Special Prosecutor that in the Panchanama of Uttamnagar room one piece of blue colour cloth (EXH.51) having design of the triangles was found and three pieces of blue colour cloth having design of triangles were found with the body parts. Learned prosecutor tried to connect these three pieces of cloth and one piece of cloth and has argued that as the as these four pieces of cloth are of one and the same cloth, this is an incriminating circumstance against the accused. While appreciating this evidence, we found that the said pieces of cloth were not before the Court and they all were not sent to C.A.

The police should have done forensic Panchanama of the three pieces of cloth and one piece of cloth showing that they are the pieces of one and the same cloth. Three pieces and one piece of cloth, all should have been sent to the C.A. No evidence of Panch PW-12 Preet Babil was tendered on the point that Article 51 (one piece of cloth) and other three pieces of cloth were matching and they are of one and the same cloth. Moreover, the result of all these articles which were sent to C.A. though was "

human blood detected", the opinion about the blood group was inconclusive. Though leads were available to the police, they could not exploit the same properly by taking investigation to the logical end. The Prosecution has failed to bring on record even the blood group of the deceased and the blood group of Accused NO.2.

If the evidence in respect of the blood group of the Accused and the blood group of the deceased is not produced, in that event possibility of Accused and the deceased having same blood group is not overruled. Finding blood stains on the clothes of a female is not abnormal. However, finding blood stains on the articles which were identified by the PW-11- wife of the deceased as that of the deceased is not a normal but an incriminating circumstance.

Article 46, Green Knife of uneven pointed edge of blade was found and if anything is cut with that blade then because of the design of the edge the cut will not be smooth but it may be zigzag.

104. Rabbits play interesting role in the entire episode.

Accused have admitted that they are fond of rabbits and they had kept rabbits in their house at Uttamnagar. In the panchanama, two rabbits and cage were found in the room at Uttamnagar. . The Accused on complaint of foul smell by PW-6 Sharda Takbhate told her that due to the rabbits there was a foul smell in the room and they would clean it. The prosecution, on the basis of evidence of Mrs. Takbhate-PW6, tried to tender indirect evidence on the point of place of killing and dismembering the body part of the deceased. However, this effort of the prosecution is weak and imaginary and only suggestive. The Investigating officer in fact should have summoned Forensic experts for scientific examination of the said room which could have corroborated the prosecution case that deceased was done to death and his body was dismembered in the room. We find that except the recovery and seizure of the articles and statement of PW- 6, no efforts were taken by the Investigating officer to establish the spot of the murder.

105. Murder of Dr. Deepak Mahajan is seriously challenged by the defence on the ground that prosecution has failed to prove the death of Dr. Mahajan . The fact that some body parts were sent for the postmortem examination on 7.7.2006 at 10 p.m. to the Sasoon Hospital Pune and Dr. Milind Sharad Wagale has conducted postmortem on those body parts on 8.7.2006 is not denied by the defence. However, the head and the hands of the body were not found and therefore the identification of the said parts of the body was challenged. In support of their case of last seen together, prosecution could not solve a mystery of five days as to what happened to Dr. Deepak Mahajan after he was abducted. When and where he was killed ? On going through the case diary we find the officers concerned in the investigation have not focused on these important aspect and no evidence is brought on record.

It only demonstrates improper and ineffective investigation on behalf of the State on this crucial aspect.

106. In the background of this challenge, the evidence of Dr. Milind Sharad Vable, PW-36 who conducted autopsy is to be looked into. He has mentioned that the body was brought in six packets. He observed that maggots were present on the body. The cut ends of the bone showed sharp zigzag edges at places. The heart was cut at the base of aorta. The right leg, left leg and feet were dismembered. Blood was not found. It is to be noted that cutting of the body in pieces cannot prove the murder, unless the cutting of body was proved to be antemortem. The Doctor has opined that the parts were cut probably after death. He has opined that exact cause of death cannot be given. It was mentioned that the parts apparently might be of one person and as the male organs were found, it is to be inferred that it was a male body. A person might have died a natural death and subsequently the body could have been cut into the parts. The cause of death could not be determined as the heart was empty and the body was decomposed. Thipentone does not leave any mark or characteristics. That is already discussed. But this does not lead us to hold conclusively that Dr. Deepak Mahajan died due to Thisol Sodium/Thipentone. Through evidence of Dr. Wable,

prosecution has established that the said body parts were of male person and they were apparently of one person and the time of the death was approximately two to five days before the postmortem examination.

So it may be between 3rd to 6th July, 2006. The opinion of Dr. Wable is found consistent with the case of the prosecution on the point of approximate period of death of Dr. Mahajan though it does not prove conclusively the identification of the body.

107. It was argued that the prosecution could not prove that the body parts recovered by the police in Katraj Ghat and at Bhosari are of Dr. Deepak Mahajan. The submissions are based on the quality of the experts evidence on the point of DNA, a chemical of which human chromosomes are made. The Prosecution has produced the report of the DNA test. For the purpose of DNA test, blood samples of PW-31- Shridhar Mahajan Mrs. Shridhar Mahajan i.e. parents of the deceased were collected. PW-31 has stated accordingly. Thus the controlled blood of parents - PW31 and his wife were collected and sent for DNA test. For the purpose of comparison of the DNA, the prosecution has sent blood stained blue shirt of Dr. Deepak Mahajan which marked as Court Article-30 and the samples of body parts i.e. hair, skin, tissues, left femur, left tibia, right femur, right tibia, right hip bone were sent to the DNA experts.

108. The learned amicus curiae and the Accused NO.1, while assailing the evidence of PW-32- Shrikant Hanumant Lade and PW-33 Dilip Yashwantrao desai who were working in DNA Laboratory Kalina, challenged the competency of DNA experts for want of requisite qualification.

109. PW-33 Dr. Dilip Desai has used STR (Short Tandem Repeats) method for DNA analysis and the "Negative" report which is marked as EXH.274 dated 6.10.2006 is produced before the Court . It is said in the report that "no interpretable profile is possible" In the cross examination, the witnesses PW-32 and PW-33 have admitted at the second round of recording evidence that the Police have sent letter EXH.153 dated 30.10.2006, that the body parts were to be sent to Hyderabad for CDSO Test and though there were specific directions, we fail to understand why the tests were carried out at Kalina Mumbai. The learned counsel for the prosecution gave explanation that the Laboratory at Hyderabad and the experts working there were burdened so heavily that they could not spare time to perform the test on the body parts sent by the police. PW-32 has admitted that he went to Hyderabad.

These samples were forwarded to the Laboratory at Hyderabad on 10.11.2006 by their letter. After receipt of the samples, the technicians of Kalina Lab informed the police that they require controlled blood sample of Shridhar MAHAJAN(PW-21). However, no samples were sent to Hyderabad and the Hyderabad Laboratory refused to carry out the examination of the samples due to the work load. He has also stated that the Hyderabad Laboratory did not communicate any reason in writing. He went to Hyderabad on 13.11.2006. He stayed there from 13.11.2006 to 21.11.2006 and the purpose of the visit to the Hyderabad was training programme of DNA Isolation from bone samples. Kalina Laboratory have received samples from the Hyderabad Laboratory on 24.11.2006 i.e. after the witness completed his training and came back. The Learned Special Prosecutor has argued that the witness Shrikant Hanmant Lade (PW-32) has carried out DNA analysis by using Y-STR (Y-Short

Tandem Repeats) method. He has explained in the evidence that STR method is automatic. In STR method, analysis of DNA profile by using electro phonogram of the exhibits is done and Y-STR method is used if the samples are degraded.

110. PW-32 has admitted that DNA technique is in developing stage. PW-32 has opined that DNA profile of bone samples and DNA profile of Shridhar Mahajan are from same paternal progeny and he on the basis of that has made report that deceased Dr. Deepak Mahajan is the biological son of Shridhar Mahajan. (432/433). In his chief, he has said that he carried out the test of DNA extract from the Blue Shirt of Dr. Deepak Mahajan (Exh.8) and controlled blood samples of Shridhar Mahajan and Charushila Mahajan (father and mother of deceased) by using STR method. He has opined that STR small DNA fragments which are present in every human being are highly individual specific and he has given his opinion on the basis of comparison of these articles with the DNA i.e. Blood stains on the shirts (Exh.8) that they (blood stain on shirts) are of the biological offspring of Mr. and Mrs. Shreedhar Mahajan. In the entire evidence of DNA or CA, the prosecution did not bother to bring the blood group of Dr. Deepak Mahajan.

111. In the cross examination, the defence could successfully bring a number of discrepancies in the evidence of PW-32 and PW-33. In respect of the evidence of PW-32 Shrikant Lade, especially in the background of his admission that though there were specific directions by the police that DNA was to be carried out at Hyderabad and not in their laboratory at Kalina and the seal of the samples was not to be opened at Kalina, the DNA was carried out at Kalina. In the first round when carried out by PW-33-Dilip Yashwantrao Desai- it gave negative result. The DNA test which was finally carried out by PW-32 at Kalina of the samples of the body parts is not found reliable. He has not said anything about the use of Y-STR method and why he did it and how Y-STR method was useful to arrive at the positive conclusion in respect of DNA test of the body parts which were found at Katraj Ghat. We will be committing an error if we accept two conflicting DNA reports particularly when the experts have failed to establish that DNA of the dead body matched with that of father of Dr. Mahajan conclusively.

112. DNA, is considered as a science of precision and accuracy to establish the biological relationship between human beings. We are constrained to observe that how, when and where the samples of blood are sent by the police to the Laboratory and when the analysis was made in what method and when the report was sent should all be brought on record very systematically by the prosecution. These institutions are working as an extended arm of the Police investigation. If so, the communication between the Laboratory and the Police should be in writing. In the present case, the prosecution could not justify why Shrikant Lade went to Hyderabad for training and why the samples of the body parts of Deceased and of the samples of controlled blood of the parents of deceased Dr. Deepak Mahajan sent by the police for DNA test were not tested at Hyderabad. Moreover, if such samples were sent to Hyderabad and again they were sent back to Kalina without performing any test, then why no letter in writing was obtained from the said Laboratory at Hyderabad. Mere statement of the police or Laboratory technicians at Kalina cannot be accepted. DNA tests are to be seriously conducted with optimum care as it provide unshakable and concrete scientific evidence against the Accused.

Moreover no satisfactory explanation is advanced how first DNA test failed and why second DNA was carried out.

113. It was argued by Accused NO.1 that Shridhar Mahajan is having one more son viz. Parag Mahajan and one daughter, so there is possibility that the police might have taken the blood of their other two children and could have planted on the blue shirt and therefore, DNA technician has given report that the DNA of the blood stains on Blue shirt (Exh.8) are of biological offspring of Mr. And Mrs. Shridhar Mahajan (parents of deceased). This argument though not convincing, indicates some possibility. Moreover, the Police have proved the fact of seizure of the Blue shirt from the rented room of the Accused at Uttamnagar and Dr. Smita Mahajan (wife of the deceased) has identified the said shirt as a shirt of her husband and such identification of the shirt of the husband by the wife is sufficient to prove the fact that said shirt belonged to Dr. Mahajan. It is to be mentioned that besides the shirt in the said room at Uttamnagar, police found number of articles at the time of Panchanama (Exh.75-Panchanama of Uttamnagar room) through PW-12- Preet Babil- Panch. Total 96 articles were recovered and out of those articles Yellowish Colour Full pant (Court ARTICLE-29, Blue Shirt (Article-30), Pair of SOCKS(ARTICLE-31) Black leather belt (Article 32), Spectacles (ARTICLE-23) were found and these articles were identified by D.r Smita MAHAJAN(PW-11) wife of the deceased and Shridhar Mahajan (PW-31)-FATHER of the deceased. These articles were found in the room of the Accused. There is cross examination as this score and incriminating circumstance against the Accused remains unchallenged by the defence.

114. The Learned Special Prosecutor on the point of circumstantial evidence has relied on the case of Anant Chintaman Lagu Vs. State of Bombay AIR 1960 SC 5 00 (IV) 47 C-8 5 , in which it is held that :

" Circumstantial evidence in this context means a combination of facts creating of network through which there is no escape for the Accused because the facts taken as a whole do not admit of any inference but of his guilt. To rely upon the findings of the medical man who conducted the postmortem and of the chemical analyzer as decisive of the matter is to render the other evidence entirely fruitless. While the circumstances often speak with unerring certainty, the autopsy and the chemical analysis taken by themselves may be most misleading. No doubt, due weight must be given to the negative findings at such examination. But bearing in mind the difficult task which the man of medicine performs and the limitations under which he works, his failure should not be taken as the end of the cause for good and probative circumstances and irresistible inference on guilt can be drawn."

115. In the case of Anant Chintaman Lagu (Supra) the cause of the death of the deceased Laxmibai, given by Dr. Jhala was due to diabetic Coma. However the said postmortem was conducted not as a medico legal case and the Dr. Has admitted that his opinion might be inaccurate. However, Dr. H. S. Mehta, as an expert has opined that the death was probably due to administration of some unrecognizable poison. While appreciating the circumstance in the case of Anant Chintaman as a guideline for appreciation of circumstantial evidence and especially in the case of death due to poisoning. We must be aware of the fact that in the present case, the circumstance which has

remained unexplained and not proved is the identification of the body itself.

The DNA evidence which is produced by the prosecution is found unreliable and though it was proved that thipentone was administered to the deceased in the absence of the identification of the body and cause of his death in the opinion of Dr. Wable who performed PM, this ruling cannot be of any use to the prosecution.

116. Even if discovery panchanama (though it does not inspire confidence) is accepted, it only proves that some parts of male body were discovered at the instance of Accused NO.2. The important link that the said parts of the dead body were conclusively of Dr. Deepak Mahajan is not established. However, the prosecution could not tender reliable evidence on the point of DNA or any other evidence to draw conclusion that the said body parts were not of any other person but of Dr. Deepak Mahajan. The doubt, howsoever feeble it may be, it destroys the link between the Accused and discovery of the body parts of Dr. Deepak Mahajan. The doubt puts a question mark. In the present case on the point of identification of the body of Dr. Mahajan, the prosecution has not brought any accurate concrete evidence.

117. The Accused were arrested at 12.35 p.m. on 7.7.2006 and immediately five minutes after the arrest the police drew the panchanama- memorandum under Section 27 of the Indian Evidence Act. It is argued by the defence that no such statement could have been made by the Accused soon after their arrest. As per the prosecution case, the Police had apprehended both the Accused on 7.7.2006 at around 10 to 10.30 a.m. Obviously the police have interrogated the Accused with a view to ascertain the involvement of the Accused in the commission of the crime. The Police have power to interrogate the suspects and after verifying the involvement, upon their satisfaction, the police can register the offence against the suspects. There was every possibility that after facing interrogation of the police for two hours, the Accused NO.2, immediately after the arrest has made statement that she would show the places where the body parts were lying.

118. The prosecution though has proved that Thipentone or Thisol Sodium was administered and Dr. Deepak Mahajan was made unconscious and was taken away by the Accused 1 and 2 in their Matiz Car. However, the prosecution is absolutely silent on the vital point as to what happened to the Doctor thereafter. It is the case of the prosecution that Dr. Mahajan was taken to the room at Uttamnagar and in that room these two ladies killed Dr. Deepak Mahajan and dismembered his body. No eye witness is examined by the prosecution to prove this fact. There is no direct or indirect evidence on the point of murder and no efforts have been made by the prosecution to prove these important and crucial aspects of the case, as already observed by us.

119. The prosecution witnesses PW-11 Dr. Smita Mahajan and PW-10 Pramod Prabhakar Falgune-brother of Accused NO.2, both have confirmed that around 12.30 news about the recovery of the body parts of the deceased Doctor at the instance of Accused, was telecasted on T. V. Channels.

120. The Learned Special Prosecutor has submitted that the police have arranged investigation van of the Police with Camera at the spot to collect the evidence and to shoot the recovery. However, that

shooting was defective and they could not shoot and so nothing was seen in that CD. Hence it does not form a part of chargesheet. The submission is very perfunctory and made just to hush up the matter. However, the Learned Special Prosecutor has conceded that such disclosure by the police in respect of their leads, while collecting evidence to Print/Electronic Media adversely affected the quality of investigation and subsequently due to media interference in the investigation, the authenticity of the investigation is questioned and lot of material is used by the Accused in the cross examination to impeach the credibility of the investigating officer and eye witnesses with the help of such premature disclosure and unwarranted publicity. When the investigation is in embryo stage, the police should eschew themselves from any publicity. It is high time for the police officer to understand their responsibility not to approach the media to get cheap and objectionable publicity which makes the criminal justice system not transparent but patchy and hazy. Right to information is wrongly interpreted by the police as right to inform. High degree of secrecy is a must when the investigation is in process. The publication of the matter in the print/electronic media and highhanded telecast and immature comments of the anchors of the TV media may mislead the people as public opinion is bound to be influenced by the manner the case is projected and ultimately affect the sanctity and fairness of the criminal trial. The overzealous efforts made by the prosecution to telecast the investigation i.e. discovery panchanama dilutes the investigation and lends support to the argument of the defence that the police from the beginning were not fair in the investigation.

121. The ownership of the Matiz Car and its recovery is not disputed. The prosecution has also proved through the oral and documentary evidence that Car Bearing NO.MH02-254 stands in the name of Accused NO.1. This car was used for the purpose of taking away the Doctor in unconscious condition. This car was found by the police in the first week of September 2006 when a member of one Cooperative Housing society phoned and informed Police that a Matiz Car parked outside their housing society was unattended since many days. In the Matiz Car Cell Phone handsets of Nokia having IMEI Nos.. 351486609417510 and 35253600483225 were found.

122. It is the case of the prosecution that Accused NO.1 WAS holding a purse and number of articles were found in it on which the prosecution has relied. It was necessary for the investigating officer to seize the said purse under the Panchanama.

If the police were short of time, then the purse could have been sealed by the police and the panchanama of the said purse could have been carried out subsequently. However, unfortunately the police failed to do so. The Learned Special Prosecutor could not give any plausible explanation about this error committed by the police.

It is evident that the police, at the time of investigation have not taken necessary care to prove each step of their investigation before the Court. The Learned Special Counsel Mr. Mundargi has submitted that though he cannot justify the seizure of the purse without panchanama, the articles found in the purse are such that no planting of such articles was possible for the police. We do understand and accept the substance in this submission.

123. In the present case, the articles viz. Alkatel Mobile Handset IMEI No. 35130741540560, Bank pass book in the name of Accused NO.2-DAHISAR address, visiting Card of Ratansing (Blue Bird Agency), visiting Card of Shantanu Lodge, etc. found in the purse of Accused NO.1 are incriminating. All the articles found in the purse are of such nature that planting is difficult. Moreover, the articles found in the room at Uttamnagar, the fact of opening Blue Bird Detective agency and the articles found in the search of the Flat at Krishna Watika, Dahisar of the Accused are intrinsically related to each other and the seizure of those articles is independently established with the help of the panchas. It is to be noted that this is a case in which no witness has turned hostile; all the witnesses have supported the case of the prosecution.

124. Accused NO.1 has argued they were not arrested on 7.7.2006 but both of them were detained in the police custody two to three days earlier and Accused NO.1 WAS beaten up by the police and accordingly she made complaint of the injuries on her person to the Magistrate. She has further submitted that she was sent for medical examination and there medical report was given.

Medical report discloses that there were nearly 13 to 14 injuries of minor abrasion or contusion. Medical certificate discloses that injuries were found on the person of Accused NO1. Learned Special Prosecutor pointed out that the Accused, when the Accused made the complaint of injury to the magistrate, they did not make any grievance that they were confined for two to three days prior to their arrest. He has further submitted that this total silence about their grievance does show that they were never detained prior to their arrest i.e. 7.7.2006. Moreover, no question was put to PW-40- Balkrishna Bhikaji Agashe on the point detention and beating. Thus the submissions of the learned special prosecutor are correct and therefore, we do not find any force in the submissions of the Accused that they were arrested prior to 7.7.2006.

125. While hearing appeal, on the submissions of the Accused on the point of their arrest and interrogations we went through the case diary of Investigating officer. It has already mentioned that the time of the arrest of the Accused is shown as 12.30 p.m. and within five minutes thereafter memorandum under Section 27 of the Evidence Act was recorded and we, therefore, wanted to know at what time and day the police apprehended the Accused. We wanted to know when and how they found CW-1 and PW-1 and other leads. While going through the case diary we realized that the diary was written very casually. Investigating officer has not mentioned the details of the steps taken in investigation.

Police official- PW-40 Balkrishna Bhikaji Agashe who actually apprehended the Accused has filed an affidavit before us that he did not maintain any diary.

126. The Learned Special Prosecutor had submitted that all the police working in Crime branch or DCB CID are not required to maintain the case diary prescribed under Section 172 of the Criminal Procedure Code. He has explained that such exemption to the crime branch police is necessary because utmost secrecy is required to be maintained by Crime Branch during investigation. There is urgency to take quick steps and hence they are excused from maintaining the case diary under Section 172 of the Criminal procedure Code. In support of submissions he has relied on the Maharashtra Police Rules 1999. Chapter 6, Clause 225 (1) and (2) pertains to maintenance of Case

diary under Section 172 of the Criminal Procedure Code. As per the said clause exemption is not given from writing case diary, however the exemption is given in respect of procedure to submit the case diary to the higher officer and their supervision on the Police officers from the crime branch. Accused NO.1, after going through the Maharashtra Police RULES-1999, has rightly pointed out that the said rules never absolve the police officers from crime branch of their duty to write and maintain the case diary under Section 172 of the Criminal Procedure Code.

127. Section 172 (1) of the Criminal Procedure Code reads as under:

"S.172. Diary of proceeding in investigation. - (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation."

Section 172 (1) starts with the words "every police officer making an investigation". Sub Section 2 and 3 of Section 172 is in respect of limited use of the diary by the police Officer. The submissions of Accused NO.1 are absolutely correct and it is mandatory for all the police officer irrespective of their assignment in any branch to maintain case diary as prescribed under Section 172 of the Criminal Procedure Code.

128. On the point of maintenance of case diary, we rely on the case of Bhagwant Singh Vs. Commissioner of Police, Delhi, reported in 1983 Cri. L. J. 1081, in which the Hon'ble Supreme Court has observed as under:

" The haphazard maintenance of a police case diary not only does no credit to those responsible for maintaining it but defeats the very purpose for which it is required to be maintained. The entries in the police case diary should be made with promptness, in sufficient detail, mentioning all significant facts in careful chronological order and with complete objectivity."

The prosecution has also relied on the case of Zahiruddin Vs. Emperor, reported in AIR (34) 1947 PC 75, in which it is held that:

"(9) The objection to the conviction founded on the failure of the police witnesses to keep a diary as required by Section 172(1), Criminal P. C., may be conveniently disposed of at this stage. It was contended by learned counsel for the appellant that the evidence of the officers was inadmissible. This contention was not supported by reference to the statute or to authority, nor was it the view taken by the Magistrate. In the opinion of their Lordships, a contravention of Section 172, lays the evidence of the police officers open to adverse criticism and may diminish its value, but it does not have the effect of making that evidence inadmissible."

129. In view of the fact that PW-40-Balkrishna Bhikaji Agashe did not maintain case diary and for want of evidence the prosecution has failed to bring on record what the police did on arresting the accused person from the office of Blue Bird Detective Agency at or about 10 a.m. to 10.30 a.m. on 7.7.2006 till they came to be formally arrested by PW-43 Uttam Yadav-PSI of Deccan Police station. This is indicative of the fact that the prosecution has no explanation to offer for the delay in showing formal arrest of the accused persons and cast a shadow on the drawing of memorandum under Section 27 of the Evidence Act and the consequential recoveries of the parts of human body and further search and seizures.

130. Accused- 2 WAS sent to Forensic Laboratory, Bangalore for Narco analysis, 10 to 12 days after her arrest. Brain mapping test was carried out. The Police record shows the transcript of the questions (Exhs. 304, 305 and 306) put by one Dr. Malini who is specialized in conducting narco test and answers given to her by Accused NO.2 during the narco test. The prosecution has filed an application EXH.247 on 30.9.2006 that they do not want to rely on narco test of Accused NO.2. However, the Accused have said that the report of narco test be considered along with the report of Dr. Malini of Forensic Laboratory, Bangalore.

131. On the point of reliability and admissibility of narco test, the Learned Trial Judge has committed an error. Though the learned trial Judge has mentioned in the judgment that the prosecution did not rely on the narco test, the Learned Judge has considered the evidence given by PW-46-Investigating Officer on this point. Learned Trial Judge ought not to have relied upon or referred any evidence tendered by PW-46 on narco test conducted by Dr. Malini. The contents of a written opinion given by the expert are required to be proved by the proving the said document. That can be done by direct oral evidence of the author of the document. Hence, the evidence on the narco test was not admissible except through Dr. Malini who has conducted the narco test. We find that in the examination in chief, the Learned Prosecutor put a number of questions to the Investigating officer PW-46, and the investigating officer went on deposing the contents and the outcome of the narco test in detail. Such evidence ought not to have been recorded by the learned Trial Judge. It is the duty of the trial court to record only the admissible evidence as per the principles laid down under the Indian Evidence Act.

132. It is clear that the prosecution did not want to rely on the narco test as the prosecution found that the said evidence is not going to help them. The Accused wanted to rely on the CD of narco test and the evidence on the narco test, in the sessions Court and also at the time of hearing of the appeal. It is the duty of the prosecution to produce the chargesheet consisting of the record of their entire investigation. However, whether to rely on a particular piece of evidence or not is the discretion of the prosecution and this liberty is given to the prosecutor as the prosecutor navigates the case of the prosecution and is aware which evidence is helpful to build up the case and which witness may dilute the case of the prosecution. The evidence collected by the Investigating officer is to be properly arranged and then to be presented in the Court. While doing so, the prosecutor has to decide the sequence in which the witnesses are to be examined. The prosecutor may objectively delete any witness to keep back irrelevant or inadmissible evidence collected by the police. The prosecution enjoys the privilege to be selective to produce such evidence to reveal the truth of the case. In the present case the police have formed an opinion that the evidence of narco analysis is of

no worth due to the falsity involved in it. If at all the defence wanted to rely on it, the defence could have examined Dr. Malini. However, that was not done and, therefore, we cannot consider any such evidence. The learned Trial Judge should not have recorded that evidence and should have refrained himself from discussing the said evidence. We would like to mention that whether the narco test gives only a lead to the police for the investigation or is substantive evidence admissible in the trial is the issue pending before the Supreme Court. We do not express any opinion on this issue as the Supreme Court is in seisin of that matter.

133. The Learned Trial Judge has considered that the demand of ransom amount of Rs. 25 lakhs was the motive for abduction. Accused NO.1 argued that it was not so. That, she argued, can be seen from the fact that during the conversation with Dr. Smita Mahajan the culprits did not tell her where and how the money was to be handed over. There was no repetition of the demand. Hence, in the absence of proof of motive, it was argued that the edifice of the story of murder is without any foundation.

It is expected from the prosecution to bring the motive on record to prove the offence. However, failure of the prosecution to establish the motive will not destroy the entire case of the prosecution. On certain occasions, prosecution experiences an impasse as motive is so deep or mercurious to detect and collect. Under such circumstances, if offence of murder is proved with other evidence, then absence of motive in the case will not be fatal to the case of the prosecution. In the case of Manikumar Thapa Vs. State of Sikkim, reported in (2002) 7 Supreme Court Cases 157, when motive was absent and corpus was also not found, the Supreme Court has taken a following view:

"Assuming that this evidence is insufficient to establish the motive for murder even then if the prosecution is able to establish beyond all reasonable doubt from other circumstantial evidence that it is the Accused (including the appellant) alone who could have committed the murder, the absence of motive will not hamper a safe conviction."

It is the prosecution's case that the demand of money was verbally made by the Accused to PW-11, pursuant to Dr. Deepak Mahajan's abduction. Hence demand of ransom was expressed. From such expression, the intention can be gathered. Subsequently change in the intention may be possible. In such a case the proof of such motive cannot be brought on record. This would not be fatal to the prosecution. At this state we may note that though the conversation with the complainant and the suspects took place in the presence of Police officers they failed to record the same, which could have helped the prosecution in identifying the suspects as accused before the Court.

134. The above discussion takes us to the final conclusion, the heinous crime has been committed but when there is no satisfactory proof of the guilt we have to take safe approach and we are constrained to give benefit of doubt to the Accused. We have no hesitation to conclude that the appellants/accused are guilty of having committed offence under Sections 364-A, 419, 465, 468, 328, 342 and 187 read with 120(B) of the Indian penal Code. The finding of the Trial Court is not disturbed in respect of extent of punishment, except under Section 364-A of the Indian Penal Code. In so far as the charges of having committed offence under sections 302 and 201 read with Section

120(B) of the IPC are concerned, the prosecution having failed to establish their guilt beyond reasonable doubt, the Accused are entitled to be acquitted of the said charges and to this extent the findings of the Trial Court are quashed and set aside.

On 30 th September, 2009

135. After pronouncing our judgment we have called upon the prosecution and the appellants to address us on the point of sentences particularly in respect of offence under Section 364-A read with Section 120-B of the IPC, wherein the Trial Court has imposed capital punishment and has submitted the matter to the High Court for confirmation.

136. The learned Special Public Prosecutor submitted that in view of the fact that this Court has acquitted the appellants of the charge of having committed murder and causing disappearance of evidence, the State do not want to press capital sentence in so far as offence under Section 364 A is concerned and as sentence for life is the minimum punishment that would meet ends of justice.

The learned Special Public Prosecutor submitted that the discretion used by the trial Court in case of imposing punishment on various other counts does not appear to be unreasonable and that the learned trial Court has kept in mind the principal of proportionality while imposing the punishment and, therefore, it does not call for any interference particularly when this Court in appeal has upheld the conviction of the appellants by holding them guilty of such charges.

137. Mrs. Leena Devasthali and Ms. Deepti Devasthali submitted that they not only want but insist for capital punishment being imposed on them by sentencing them to death and say they should be punished with death. For taking such a stand this Court made a specific query from them as they are appearing in person as to why they are insisting that they should be punished with death as the Court want to understand whether this submission is made because the Court has partly allowed their appeal or otherwise.

Amongst the appellants Ms. Deepti Devasthali (original accused no. 1) stated that if death sentence is awarded their appeal before the Supreme Court will be taken up on priority otherwise they will be required to languish in jail and it is uncertain when the Supreme Court will take up their appeal for hearing and by the time their appeal is taken up for hearing and in case they are acquitted they will come out as free citizens by actually undergoing the sentence of life imprisonment.

138. In our view, this cannot be the basis for imposing extreme penalty of death. Therefore, such a contention cannot be accepted.

139. On going through the judgment of the trial Court, what we find is that the trial Court while justifying imposing of capital punishment on both the counts i.e. under section 364-A and 302 of the IPC read with Section 120 B, has taken into consideration decisions of the Supreme Court on the issue, viz., Mohan and others vs. State of Tamilnadu, reported in 1998 (5) Supreme Court Cases 336, Machchisingh vs. State of Punjab, reported in 1983 Supreme Court Cases (Cri.) 681, Bachan Singh vs. State of Punjab reported in 1980 Supreme Court 898, Renuka @ Rinku and another vs. State of

Maharashtra reported in A.I.R. 2006 and Daya Nand Bisto vs. State of Orissa reported in 2003 (5) Supreme Court Cases page 74 which reveal that the trial Court was well conversant in respect of the guidelines in order to take a decision as to whether in the given facts and circumstances of the case, death sentence deserves to be imposed or not? What we find from the reasoning given by the trial Court is that though the trial Court was conscious of the fact that death sentence in murder case is permissible in rarest of rare cases and only for special reasons, it has erred in ascertaining the existence of special reasons in that context and has given undue importance to matters which do not require consideration for the said purpose, particularly when it has taken into consideration family background of the deceased and observed that one can understand the pain and agony of the father that he has to perform the last rites of his son who was brought up as a doctor and he was killed mercilessly while he was leading well to do life apart from being blessed with two young children left behind as orphans.

140. Further, it laid unnecessary emphasis on the evidence of PW-12 Prabhakar Phalgune, brother of accused Leena, who in his evidence rather attacked the character of his sister and that she was a problematic child and on one occasion both the accused have approached Dr. Deepak Mahajan to give certificate that Maltibai's (i.e. mother of accused no. 2) death was un-natural to bring him and their other sister Jayashri in trouble and also erred in taking into consideration the evidence of the Investigating Officer PW-46 that the appellants-accused have adopted the same modus operandi in committing the crime like Jassi and Sardarji in Crime No. 630/2006 registered with Deccan Police Station. In our view this was not germane for taking into consideration whether the accused deserve to be sentenced to death.

141. The Trial Court should understand that Section 302, I.P.C. casts a heavy duty on the Court to choose between death and imprisonment for life. When the Court is called upon to choose between the convict's cry 'I want to live' and the prosecutor's demand 'he deserves to die' it goes without saying that the Court must show a high degree of concern and sensitiveness in the choice of sentence. In the justice delivery system several difficult decisions are left to the presiding officers, sometimes without providing the scales or the weights for the same. In cases of murder, however, since the choice is between capital punishment and life imprisonment the legislature has provided a guideline in the form of sub-sec (3) of S. 354. This provision makes it obligatory in cases of conviction for an offence punishable with death or with imprisonment for life or for a term of years to assign reasons in support of the sentence awarded to the convict and further ordains that in case the judge awards the death penalty, "special reasons"

for such sentence shall be stated in the judgment. When it casts a duty on the judge to state reasons, it follows that he is under a legal obligation to explain his choice of the sentence. It may seem trite to say so, but the existence of the 'special reasons clause' in S.

354(3), Cr.P.C. implies that the Court can in fit cases impose the extreme penalty of death which negatives the plea that there never can be a valid reason to visit an offender with the death penalty, no matter how cruel, gruesome or shocking the crime may be. In order that the sentences may be properly graded to fit the degree of gravity of each case, it is necessary that the maximum sentence prescribed by law should be reserved for the rarest of rare cases which are of an exceptional nature.

Unless the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the Court should ordinarily impose the lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only. (Alauddin Mian v.

State of Bihar, AIR 1989 SC 1456).

142. In our opinion, the learned Special Public Prosecutor, has been quite fair while submitting that as this Court has acquitted the appellants-accused of the charge of committing murder of Dr. Mahajan by extending benefit of doubt, the State does not insist for capital punishment for the offence under Section 364 A of IPC.

143. Section 364-A has been inserted by Section 2 of Amending Act 42 of 1993 providing severe punishments in cases of kidnapping or abduction for ransom which says that whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct given rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or and other person to do or abstain from doing any act or to pay a ransom as demanded by the accused. The later part of Section 364 - A came to be inserted by section (2) of the Amending Act 42 of 1995 which lay emphasis on "any foreign State or international inter-governmental organisation" which is indicative of the fact that the Legislature has taken cognizance of activities like kidnapping or abduction being made a serious offence on par with other offences under the Indian Penal Code which are punishable with death or imprisonment for life as it was noticed that kidnappings and abductions are at times done of certain persons in order to compel the government or foreign State by involving inter-governmental organisations apart from any other persons either by terrorist organisation or organised crime syndicate and in such cases death sentence may be justified, otherwise imprisonment for life sufficiently meets the ends of justice. As in the earlier section i.e. Section 364 what is contemplated is the person charged with the offence had the intention at the time of kidnapping or abducting that the person kidnapped or abducted will be killed or may be so disposed of as to be put in danger of being murdered and which provides for imposition of punishment of imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

144. In the facts and circumstances of the present case as the accused-appellants have been charged with the offence under Section 364 A and this Court has upheld the finding of the trial Court on this count, imprisonment for life would meet the ends of justice.

145. In so far as the sentence imposed by the trial Court on finding the appellants-accused guilty of the other charges is concerned, we find no reason to interfere as the trial Court has taken into consideration the principles of proportionality and imposed sentence of imprisonment with appropriate variation in the period of imprisonment and fine. Hence, we have no hesitation to pronounce the following sentences for the offences for which we have held the appellants-accused guilty and they stand convicted for.

Hence we proceed to pass the following order:

1. Accused NO.1 Deepti Anil Devasthali and Accused NO.2 Leena Anil Devasthali are held guilty of the offence punishable under Section 364-A read with Section 120-B of the Indian Penal Code and they are sentenced to imprisonment for life and to pay fine of Rs.10,000/- (Rs. Ten thousand) each, in default to suffer imprisonment for three months.
2. Accused NO.1 Deepti Anil Devasthali and Accused NO.2 Leena Anil Devasthali are held guilty of the offence punishable under Section 387 read with Section 120-B of the Indian Penal Code and they are sentenced to undergo rigorous imprisonment for seven years to pay fine of Rs.10,000/- (Rs. Ten thousand) each, in default to suffer imprisonment for three months.
3. Accused NO.1 Deepti Anil Devasthali and Accused NO.2 Leena Anil Devasthali are held guilty of the offence punishable under Section 419 read with Section 120-B of the Indian Penal Code and they are sentenced to undergo rigorous imprisonment for three years to pay fine of Rs.10,000/- (Rs. Ten thousand) each, in default to suffer imprisonment for three months.
4. Accused NO.1 Deepti Anil Devasthali and Accused NO.2 Leena Anil Devasthali are held guilty of the offence punishable under Section 465 read with Section 120-B of the Indian Penal Code and they are sentenced to undergo rigorous imprisonment for two years to pay fine of Rs.5,000/- (Rs. Five thousand) each, in default to suffer imprisonment for three months.
5. Accused NO.1 Deepti Anil Devasthali and Accused NO.2 Leena Anil Devasthali are held guilty of the offence punishable under Section 468 read with Section 120-B of the Indian Penal Code and they are sentenced to undergo rigorous imprisonment for five years to pay fine of Rs.10,000/- (Rs. Ten thousand) each, in default to suffer imprisonment for three months.
6. Accused NO.1 Deepti Anil Devasthali and Accused NO.2 Leena Anil Devasthali are held guilty of the offence punishable under Section 471 read with Section 120-B of the Indian Penal Code and they are sentenced to undergo rigorous imprisonment for three years to pay fine of Rs.3,000/- (Rs. Three thousand) each, in default to suffer imprisonment for three months.
7. Accused NO.1 Deepti Anil Devasthali and Accused NO.2 Leena Anil Devasthali are held guilty of the offence punishable under Section 328 read with Section 120-B of the Indian Penal Code and they are sentenced to undergo rigorous imprisonment for seven years to pay fine of Rs.10,000/- (Rs. Ten thousand) each, in default to suffer imprisonment for one months.
8. Accused NO.1 Deepti Anil Devasthali and Accused NO.2 Leena Anil Devasthali are held guilty of the offence punishable under Section 342 read with Section 120-B of the Indian Penal Code and they are sentenced to undergo rigorous imprisonment for one years to pay fine of Rs.1,000/- (Rs. One thousand) each, in default to suffer imprisonment for one months.
9. Substantive sentences awarded to both the accused shall run concurrently.

10. If fine amount is paid, then the amount be paid to the children of the deceased, viz. Arjun Deepak Mahajn and Rashmi Deepak Mahajan.

11. Accused NO.1 Deepti Anil Devasthali and Accused NO.2 Leena Anil Devasthali are held not guilty of the offences punishable under Section 302 read with Section 120-B and Section 201 read with Section 120-B of the Indian Penal Code and both of them are acquitted for the same.

12. Accused NO.1 Deepti Anil Devasthali and Accused NO.2 Leena Anil Devasthali, both are in jail since 7.7.2006 and they are entitled for set off under Section 428 of the Criminal Procedure Code.

13. The Appeal is partly allowed.

14. The submission for confirmation of capital sentence by the Trial Court i.e. Confirmation Case No. 1 of 2008 is dismissed.

15. The Muddemal seized in the case be disposed of in terms of the order passed by Trial Court after the period of appeal is over.

16. The convicts be lodged in Yerwada Central Prison after 9 th October, 2009.

17. Certified copy of the judgment and order would be furnished to the appellants on or before 9th October, 2009, free of cost.

18. The appellants who are appearing in person are informed that they have a right to prefer appeal against the judgment and order of the Court to the Supreme Court of India at New Delhi through their Advocate or Superintendent of the Prison.

19. The appellants are also informed that they can take assistance of the Supreme Court Legal Aid Committee for preferring their appeal and represent them before the Hon'ble Supreme Court of India, if they so (MRIDULA BHATKAR, J) (J. N. PATEL, J.

jpc/-