

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL APPEAL (AGAINST CONVICTION) NO.2163 of 2019****With****R/CRIMINAL APPEAL NO.2198 of 2019****With****R/CRIMINAL APPEAL NO.2194 of 2019****With****R/CRIMINAL APPEAL NO.2177 of 2019****With****R/CRIMINAL APPEAL NO.2179 of 2019****With****R/CRIMINAL APPEAL NO.2241 of 2019****With****R/CRIMINAL APPEAL NO.2196 of 2019****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE A.S. SUPEHIA****Sd/-****and****HONOURABLE MR. JUSTICE VIMAL K. VYAS****Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

DINUBHAI BOGABHAI SOLANKI**Versus****STATE OF GUJARAT & ORS.**

Appearance:

CRIMINAL APPEAL NO. 2163 of 2019**MR N D NANAVATY, SENIOR ADVOCATE WITH MR PRATIK B BAROT AND MR YASH N NANAVATY for the Appellant - (Accused No.7)**

CRIMINAL APPEAL NO. 2198 of 2019

MR YOGESH S LAKHANI, SENIOR ADVOCATE WITH MR RAHUL R DHOLAKIA for the Appellant - (**Accused No.4**)

CRIMINAL APPEAL NO. 2194 of 2019

MR J M PANCHAL, SENIOR ADVOCATE WITH MR K J PANCHAL WITH MR NIYANT BHIMANI WITH MR P B KHANDHERIA for the Appellant (**Accused No.1**)

CRIMINAL APPEAL NO. 2177 of 2019

MR VIRAT G. POPAT WITH MR JAGJITSINH K VAGHELA for the Appellant (**Accused No.5**)

CRIMINAL APPEAL NO.2179 of 2019

MR VIRAT G. POPAT for the Appellant (**Accused No.3**)

CRIMINAL APPEAL NO. 2241 of 2019

MR ZUBIN F BHARDA WITH MR A A ZABUAWALA for the Appellant - (**Accused No.2**)

CRIMINAL APPEAL NO. 2196 of 2019

MR HARSHIT S TOLIA, SENIOR ADVOCATE WITH MR UTPAL R DAVE WITH MR JEET Y RAJYAGURU WITH MR BIREN J PANCHAL WITH MS RIYA D DANI WITH MR JAINISH DAVE Appellant-(**Accused No.6**)

MR TIRTHRAJ PANDYA, APP for the **Opponent/Respondent-State**

MR RC KODEKAR, CBI RETAINER COUNSEL WITH MR MUKESH G KAPADIYA, SPECIAL PUBLIC PROSECUTOR for the **Respondent-CBI**

MR B B NAIK, SENIOR ADVOCATE WITH MR EKANT G AHUJA for the Opponent/Respondent-Victim (**As Amicus Curiae**)

CORAM:**HONOURABLE MR. JUSTICE A.S. SUPEHIA**

and

HONOURABLE MR. JUSTICE VIMAL K. VYAS

Date : 06/05/2024

CAV COMMON JUDGMENT

(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

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“Satyamev Jayate” – “Truth alone Triumphs”

A Sanskrit text from Munduka Upanishad (800-500 BC) is adorned as a dictum under the Emblem of India.

(1) The instant case will be reminisced as an antithesis to “Satyamev Jayate”. Intriguingly, the assailants chose “*Satyamev*” Complex, opposite “*High Court of Gujarat*” to commit murder of deceased, an “*RTI activist*”, a litigant of PIL’s. He was shot dead on 20.07.2010. The investigation, right from the inception, appears to be an eyewash. *Albeit*, the complainant, a police constable was present few feet away; he immediately on his motorcycle followed / went towards the direction of fleeing assailants, who were on legs; the first Investigating Officer arrived within 55 seconds, and the top Police Officials arrived within twenty minutes at the scene of offence; however, it is appalling and equally astounding that the assailants

were not apprehended, and they '*escaped*' [emphasis added] from the limits of Ahmedabad City. This speaks volumes on the quick response of the police and their efforts to nab the assailants. All efforts are made to see that the truth is buried forever; the perpetrators have succeeded in doing so. Evenly, the trial Court has conducted the trial proceedings with a predetermined notion of conviction.

(2) The captioned appeals filed under section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C.) are directed against the common judgment and order of conviction dated 11.07.2019 passed by Special Judge CBI, Court No.1, Ahmedabad in Special (CBI) Sessions Case No.2 of 2014, No.1 of 2014 and No.3 of 2014, whereby the accused have been convicted for the offence under Section 302 read with Sections 120B and 201 of the Indian Penal Code, 1860 (IPC). The trial Court, after recording that 31 witnesses have given false evidence in favour of the accused during the course of re-trial, has further directed for initiation of proceedings under section 340 of the Cr.P.C. read with Section 193 of the IPC against them.

Brief facts of the captioned appeals are as under:

(3) The ill-fated incident occurred on 20.07.2010 at around 20:40 hrs., wherein Amit Jethwa, who was an RTI activist, was shot dead by two unknown assailants near Satyamev Complex, Opposite High Court of Gujarat, Ahmedabad. After shooting the deceased, both the accused fled away, leaving behind a motorcycle. The first informant is a Head Constable from the Sola High Court Police Station, who was having tea with his friends, and on hearing the shot, he ran towards the place of offence where he saw one person lying on the ground in the pool of blood. On being informed by someone that the assailant had fled towards Vishwas City Road, the first informant, along with other person, rushed towards the Vishwas City on their

bike to search the assailants but in vain, and they had returned to the spot. On his return, he called the Police Inspector, Sola Police station, who reached on the spot. The senior police officials also arrived immediately.

3.1) An F.I.R. bearing No.I-CR-163 of 2010 for the offences punishable under Sections 302 and 114 of the IPC came to be lodged on 20.07.2010. The said complaint has been placed on record (Exh.267) by examining the First Informant, Indrajitsinh Hathisingh Vaghela, as PW-22. The FIR, in the format of Section 154 of the Cr.P.C. registered by (PW-164), Ajitsinh Amarsinh Gamit, is at Exh.692.

3.2) The investigation was transferred from the Sola High Court Police Station to DCB Crime, Ahmedabad on 16.08.2010 and soon, thereafter, the DCB Crime Branch arrested the following accused persons as narrated below:

- (i) A-1, Bhadursinh Dhirubha Vadher, was arrested on 16.08.2010.
- (ii) A-2, Pachanbhai Gopalbhai @ Shivabhai Desai, was arrested on 18.08.2010.
- (iii) A-3, Sanjay Parbatbhai Chauhan, was arrested on 22.08.2010.
- (iv) A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki, was arrested on 07.09.2010.
- (v) A-5, Udaji Kantiji Sonaji Thakore, was arrested on 02.10.2010.
- (vi) A-6, Shailesh Nanalal Pandya, came to be arrested 21.11.2010.

3.3) The first charge-sheet came to be filed on 10.11.2010 bearing C.C. No.320 2010 and two supplementary charge-sheets came to be filed on 18.01.2011.

3.4) However, the father of the victim i.e. Bhikhabhai Kalyanjibhai Jethwa, being dissatisfied with the manner in which the investigation was carried out, approached this Court by filing a writ petition being Special Criminal Application No.1925 of 2010 seeking investigation through independent agency. By an interim order, this Court directed further investigation to be undertaken by the Special Investigation Team (SIT) headed by the Superintendent of Police, Surendranagar and accordingly, Superintendent of Police, Surendranagar, after conducting some investigation, submitted a report on 16.03.2012. However, the father of the victim was not satisfied with the investigation and hence thereafter, the High Court transferred further investigation to the Central Bureau of Investigation (CBI) vide judgment and order dated 25.09.2012 and thereafter, the CBI registered an F.I.R. bearing RC-11(s) 2012 SCU.V/SC-II/CBI/New Delhi on 06.10.2012. Accused no.7-Dinubhai Boghabhai Solanki (A-7) assailed the judgement and order dated 25.09.2012 passed by the Gujarat High Court at Ahmedabad in Special Criminal Application No.1925 of 2010 transferring the investigation to the CBI before the Apex Court. The Apex Court did not interfere with the observations made by the Coordinate Bench of the High Court, however, A-7 was ordered to be released on bail. (**Dinubhai Boghabhai Solanki vs. State of Gujarat**, 2014 (4) S.C.C. 626).

3.5) The CBI investigation found the involvement of A-7, Dinubhai Boghabhai Solanki, Member of Parliament, as a main conspirator, and it is alleged that he had hatched a criminal conspiracy with A-1, Bahadursinh Dhirubha Vadher, Police Constable, and A-4, Pratapbhai

@ Shivabhai Hamirbhai Solanki, (nephew of A-7). It is also alleged that all these three accused further contacted the other accused, in order to execute the conspiracy of eliminating the deceased. A-7, Dinubhai Boghabhai Solanki, came to be arrested on 05.11.2013 and the charge-sheet came to be filed against him on 19.12.2013.

3.6) After committal of the case before the CBI Court following three CBI Sessions Cases were numbered - (1) Special CBI Sessions Case No.2 of 2014; (2) Special CBI Sessions Case No.1 of 2014; and (3) CBI SC No.3 of 2014.

3.7) The charge came to be framed against all the accused on 18.05.2016 at Exh.101.

3.8) After commencement of the trial before the CBI Judge, 195 witnesses were examined, out of which 105 turned hostile and, therefore, a writ petition being Special Criminal Application No.1235 of 2017 was preferred by Bhikhabhai Kalyanjibhai Jethwa, father of the deceased, and after hearing the parties the High Court, vide order dated 29.06.2017, directed re-trial of the case at the earliest. Against the said order, the accused preferred Criminal Appeal Nos.1854 of 2017, 1855 of 2017, 1856 of 2017, 1857 of 2017 before the Apex Court. The Apex Court modified the order passed by the High Court to the extent of re-examination of 26 witnesses. (**Dinubhai Boghabhai Solanki vs. State of Gujarat**, 2018 (11) S.C.C. 129).

3.9) Learned Public Prosecutor submitted an application dated 16.02.2018 for re-examination of 7 additional witnesses and after hearing all the concerned parties, the trial Court granted the application at Exh.1163 vide order dated 23.02.2018. The list of 07 additional witnesses, who were recalled, are narrated as under:

Sr. No.	Name	PW No.	Exh. No.	Page No.
1.	Himmatlal Mohanrai Kundaliya	190	811	4383
2.	Pravinchandra Balakdas Ramanuj	175	729	3963
3.	Ratabhai Dhanabhai Vadher	176	733	4007
4.	Purankumar	183	776	4179
5.	Satishkumar Manilal Chaudhary	192	830	4565
6.	Mukesh Sharma	194	840	4875
7.	Ravirajsinh Dilipsinh Jadeja	182	770	4131

3.10) Pursuant to the order of the Apex Court, the prosecution examined 26 witnesses, out of which 25 witnesses turned hostile and only 01 witness supported the case of the prosecution.

3.11) The respective learned counsels appearing for all the parties are heard at length by us. We shall proceed by recording their submissions. There are seven accused, who have been convicted. Their names are as under:

Numbers and Names	Criminal Appeal
A1 - Bhadursinh Vadher	No.2163/2019
A2 - Pachanbhai Gopalbhai @ Shivabhai Desai	No.2241/2019
A3 - Sanjay Parbatbhai Chauhan	No.2179/2019
A4 - Pratapbhai @ Shivabhai Solanki	No.2198/2019
A5 - Udaji Kantiji Sonaji Thakore	No.2177/2019
A6 - Shailesh Nanalal Pandya	No.2196/2019
A7 - Dinubhai Boghabhai Solanki	No.2163/2019

(4) Submissions on behalf of A-7, Dinubhai Boghabhai Solanki, (in Criminal Appeal No.2163 of 2019) :

4.1) Learned Senior Advocate Mr.N.D.Nanavaty has submitted that the trial Court has convicted A-7 by invoking the provisions of Section 120B of the IPC and conspiracy is held to be proved only on three factors; (i) the deposition of evidence of PW-26, Rambhai Hajabhai Solanki, (ii) the deposition of Advocate, Mr.Anandvardhan

Jayendrakumar Yagnik (Mr.A.J.Yagnik) and his two colleagues (Advocate, Mr.Riddhesh Trivedi and Advocate, Mr.Manoj Shrimali); and finally (iii) the Call Detail Records (CDRs). It is contended that the case of the prosecution against A-7 is primarily premised on the following evidence. The same are referred to by him as under:

(a) While referring to the evidence of PW-26, Rambhai Hajabhai Solanki, (Exh.283), it is submitted that this witness has maintained silence for almost three years, and has not disclosed the involvement of A-7 in the offence before any investigating agency, except the CBI. As per the version of this witness, he was staying at Harmadiya Farm belonging to A-7 with his family, and the conspiracy to murder the deceased was hatched at the Farm. He had overheard the conversation of murdering the deceased when A-7 held a meeting with A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki, and A-1, Bhadursinh Dhirubha Vadher, near the swimming pool of the said Farm. The statement of this witness was recorded thrice, as per his evidence. It is submitted that his evidence reveals that the first statement was recorded at Kodinar Circuit House on 18.01.2013. The second statement under Section 161 of the Cr.P.C. was recorded on 15.05.2013 by the CBI Officer, Shri Mukesh Sharma at Delhi and the third statement under Section 164 of the Cr.P.C. before the Magistrate at Delhi was recorded on 16.05.2013. The first statement was recorded by the CBI at Circuit House, Kodinar and thereafter at Circuit House, Diu, between the gap of one and half months. His statement at Kodinar was not recorded by the Investigating Officer, Shri Mukesh Sharma, and this officer was not present. The Investigating Officer, Shri Mukesh Sharma, was not present even when his statement was recorded at the Circuit House, Diu also. Though, this witness knows father of the deceased, he has admitted that he did not disclose any information of conspiracy to his father

(Bhikhabhai). No Panchnama of the Harmadiya Farm, where the alleged meeting took place between A-1 and other accused, has been drawn.

(b) While referring to the evidence of PW-193, Raghvendra Dr. Shyamsing Vats, Superintendent of Police, Surendranagar, (I.O. of SIT); he has submitted that there were two charge-sheets filed before he was handed over further investigation and in both the charge-sheets, A-7 was not named and his involvement was not forming the part of the charge-sheets. It is further stated that no evidence was found against A-7. It is submitted that this witness did not come forward to give any information to the Police, despite a proclamation was issued by the Police. It is further stated that PW-26, Rambhai Hajabhai Solanki, did not approach him to give any statement, – either by post or by any other electronic media. Thus, it is urged by learned Senior Advocate Mr.Nanavaty that the evidence of this witness is required to be ignored for upholding the conviction, as recorded by the trial Court, since he is an unreliable witness and is a trumped-up witness by the CBI.

(c) Learned Senior Advocate, Mr.Nanavaty while referring to the deposition of PW-13, Advocate, Mr.A.J.Yagnik (Exh.169), has submitted that the trial Court has placed reliance on his evidence for recording the conviction of A-7. This witness is an advocate practicing since 1995 in the High Court of Gujarat. His father is running an NGO in the name and style as 'Setu' which is at Kodinar. The case of the prosecution is that the deceased met him on 19.07.2010 i.e. a day before the incident in his Advocate Chamber No.307 situated in the High Court of Gujarat, during the recess from 1:45 to 2:30 for 10 to 15 minutes. The deceased informed him that the A-7, was threatening him for the PIL (being SCA No.7690 of 2010) filed by him before the High Court of Gujarat relating to illegal mining at the Gir Sanctuary.

It is further deposed by him that his two juniors – Mr.Riddhesh Trivedi, Advocate and Mr.Manoj Shrimali, Advocate were also introduced by him out of his chamber to the deceased. After coming to know about the incident, he approached the Sola Police Station and got his statement recorded by the Police Inspector, Shri Himmatlal Mohanrai Kundaliya on 22.07.2010 i.e. two days after the incident and thereafter, his second statement was recorded by the CBI on 10.01.2013 under the provisions of Section 161 of the Cr.P.C. In his cross-examination done on behalf of A-7, it is elicited that his statement dated 22.07.2010 was recorded by the Police Inspector, Shri Kundaliya of the Sola Police Station, in which he had specifically referred the name of A-7 as well as A-4 however, the police did not record their names. It is further deposed that on 20.07.2010, he received a phone call of one Advocate, Mr.Premal Nanavati, who has informed him about the incident. It is further admitted by him that he did not inform Advocate, Mr.Premal Nanavati about the conversations between him and the deceased, which has occurred on 19.07.2010. It is also admitted in his cross-examination that in his police statement(s) recorded on 22.07.2010 or 23.07.2010, he has not named his two juniors Mr.Riddhesh Trivedi, Advocate and Mr.Manoj Shrimali, Advocate and for the first time, the statements of his colleagues are recorded by the CBI. It is submitted that the statements of his colleagues can be said to be hearsay, since this witness has admitted that when he met the deceased outside his chamber, no one, except him, has heard the conversation. It is thus contended that the trial Court has misdirected itself on convicting A-7 by placing reliance on the evidence of this witness merely because he is an advocate.

(d) Learned Senior Advocate Mr.Nanavaty has referred to the evidence of PW-2, Mr.Vijaybhai Hirabhai Nangesh, Advocate

(Exh.116), who is also an practicing advocate in the High Court of Gujarat, and he has deposed in his examination-in-chief that he knew the deceased Amit Jethwa since 2003, and he was a close friend and was having family relation with him. He has further stated that the deceased used to stay in the quarter of A-7, Dinubhai Boghabhai Solanki, in 2004 and the deceased has also contested the election against A-7 in the year 2007 and since then, the relationship between two were strained. He has stated that he filed PIL for illegal mining at the Gir Sanctuary in the year 2010, which was filed on behalf of Amit Jethwa. A-7 and A-4 were made parties to that PIL, as per the orders of the Division Bench of the High Court of Gujarat vide order dated 06.07.2010. He has referred to the incident of 20.07.2010 and has deposed that the deceased – Amit Jethwa was present in his office in the night hours between 8:00 to 8:30 and thereafter when this witness was present at his office at about 8:40 to 8:45, he heard noises and accordingly, he rushed out of his office and saw the deceased lying dead and accordingly, he informed the wife of the deceased on the landline, who was staying at Vishwas City. In Para No.7 of the cross-examination, he has admitted that he had not made any allegations in the writ petition (PIL) against A-7. The deposition of this witness does not reconcile with that of PW-13, Advocate, Mr.A.J.Yagnik since the deceased, though was known to this witness since 2003 and was his close friend, however he did not inform him about the threats issued to him by A-7, but instead informed PW-13, Mr.A.J.Yagnik, Advocate. Though, one day prior to the incident, the deceased was present at the office of PW-2, Mr.Vijaybhai Nangesh, Advocate, at 5:00 to 5:30 p.m. and also around at 8:00 to 8:30 p.m. on the day of the incident; he did not inform about the threats issued to him by A-7 and A-4 or anyone. It is submitted that the present witness has not implicated in his evidence any of the accused and his testimony directly impacts the credibility of PW-13, Mr.A.J.Yagnik, Advocate.

(e) Learned Senior Advocate Mr.Nanavaty has submitted that PW-166, Ravi Harikishan Soni, (Exh.698) – (Nodal Officer, BSNL) has produced on record the relevant call details of Mobile No.9426938812, which belonged to the deceased. He has stated that on 19.07.2010, the mobile location of the deceased was shown at Amreli at various other places, but not at Ahemdabad. He has stated that at around 15:11:59, as per the Mobile Tower location, the deceased was present at Amreli - Dhari and on the very same day at about 15:52:37, the mobile tower location of the deceased was at Amreli – Khambha, whereas at 15:51:39, the tower location was shown at Amreli - Pataniya. Thus, from the tower locations, presence of the deceased was shown at Amreli at various places at 15 hrs. on 19.07.2010, which is more than 200 kms. away from Ahmedabad, which creates a serious doubt on the evidence of witness – PW-2, Mr.A.J. Yagnik, Advocate, who has deposed that the deceased was with him on 19.07.2010.

(f) Thereafter, the evidence of (PW-127), Chetanbhai Naranbhai Rathod, (Exh.602), cousin of the deceased, is referred by learned Senior Advocate, Mr.Nanavaty and it is contended that he met the deceased prior to one day of the incident i.e. on 19.07.2010 at Naranpura and he was present with the deceased at Gandhinagar between 2:00 to 5:00 p.m. and he has further admitted that at that time the deceased did not inform him about the threats issued by anyone. It is submitted that if the evidence of this witness is believed then prior to the day of incident on 19.07.2010, the deceased was present at Gandhinagar between 2:00 p.m. to 5:00 p.m., whereas the evidence of the Nodal Officer (PW-166) is believed then the Mobile Tower locations of the deceased show his presence at Amreli at various places. In case the evidence of PW-166 and PW-127 is believed, then presence of the deceased, one day prior to the incident,

at the High Court outside the Advocate Chamber No.307 of Advocate, Mr.A.J.Yagnik, (PW-13) appears to be doubtful. It is thereafter submitted that in any case if the evidence of either of the Nodal Officer or the evidence of cousin of the deceased - Shri Chetanbhai Naranbhai Rathod is believed, then, in both the cases, the evidence of witness - Advocate, Mr.A.J. Yagnik becomes doubtful.

(g) While referring to the evidence of (PW-48), Dharmendragiri Balugiri Goswami (Exh.349), who has been examined twice; first, when the trial was undertaken and thereafter, in the re-examination pursuant to the order passed by the Apex Court, it is submitted that on both the occasions, he has turned hostile. It is submitted that the trial Court has been impressed with the fact that during the trial this witness has privately stated before the trial Judge that his son was kidnapped, however, the said witness has thereafter, not levelled any allegations against anyone, as his son was immediately found at his neighbour's house.

4.2) **Submissions on Motive:**

Learned Senior advocate Mr.Nanavaty has submitted that the prosecution has tried to project that A-7 had the motive to eliminate the deceased, since the alleged illegal activities were highlighted due to various applications filed by the deceased against him. He has submitted that the prosecution and the trial Court has primarily relied on the various applications filed by the deceased against A-7 and also the evidence of the below mentioned witnesses. Reference is made by him to the evidence of following witnesses:

(a) **Evidence of (PW-25), Dhirsinh Karshanbhai Barad (Exh.277);**

This witness is a former Member of the Legislative Assembly (MLA) of the Congress party. It is submitted that from the entire

evidence, it is manifest that he has a political rivalry with A-7 and was also having animosity with him. This witness has also admitted in his evidence that he has contested the election against A-7 on various occasions from 1995 to 2007 and in all the elections, A-7 had won. He has admitted that he is an arch political rival of A-7. It is further admitted by him that during the television (TV) interview, which was taken after the funeral of the deceased, he has specifically named A-7 without any proof. It is further reflected that there were also criminal cases, involving A-7 filed in 2005. It is also admitted by him that deceased - Amit Jethwa used to collect various information under the Right to Information Act, 2005 (for short, 'the RTI Act') and used to supply the same to him. Thus, it is submitted that the trial Court has fell in error in placing reliance on the evidence of this witness.

(b) PW-15, Bhikhabhai Kalyanjibhai Jethwa, (Exh.172) (father of the deceased);

It is submitted that he named A-7 in his deposition and has leveled allegation that A-7 occasionally used to issue threats to his son as his son was revealing the illegal activities carried out by A-7. He has further stated that he had informed the Electronic Media as well as the Print Media alleging that A-7 had committed murder of his son. Such interview has been given immediately after he received the dead body of his son from the hospital, and he has admitted that though the Police Inspector, Shri Kundaliya, Sola Police Station, Ahmedabad, approached him to record his statement, however he refused to talk with him and continued with his interview with the press. He has also stated that PW-25, Dhirsinh Karshanbhai Barad, is a very close friend of him and was present at the funeral process of his son - Amit Jethwa (deceased). It is also admitted by him that there are various other persons also, who were named by the deceased for doing the illegal mining within 5 kms. of the Gir Sanctuary over and

above A-7, and there could be other persons also who would be the enemies of his deceased son. He has also admitted that PW-13, Mr.A.J.Yagnik, Advocate, had informed him to engage another advocate since he was witness in the case.

It is submitted that the evidence of both the witnesses would reveal that A-7 was a political rival of PW-25, Dhirsinh Karshanbhai Barad and father of the deceased (PW-15) and has the motive to falsely drag A-7 and A-4 in the offence as they were having animosity.

4.3) Submissions on Call Detail Records (CDRs):

Learned Senior Advocate, Mr.Nanavaty has submitted that the prosecution has alleged that the Mobile having SIM Card No.9898552518 of A-1, Bhadursinh Vadher, was in fact of Amarsinh Vadher, who is the brother of A-1. It is alleged that A-7 hatched a conspiracy with A-1 and A-4 by calling on this mobile number. It is submitted that Amarsinh Vadher is not examined as a witness. Neither his statement under Section 161 of the Cr.P.C. is recorded. The Mobile phone of A-7 is 9429602727 – BSNL and he interacted with A-1 on 12.04.2010 (one call). It is submitted that in fact, Mobile No.9725702727 (Airtel) is of nephew of A-7 viz. Ghanshyam Solanki, who is not arraigned as a witness. The allegations are that the same was being used by A-7. It is admitted that no CDR is available of Ghanshyam Solanki. Third Mobile No.9824402727 (Idea) is also attributed to A-7. It is alleged that A-7 and Ghanshyam Solanki both have used the same handset. No evidence is produced, which shows that the SIM card of Ghanshyam Solanki was used by A-7 and without any CDR and recovery of the handset, it cannot be proved that the SIM Card of Ghanshaym Solanki has been used by A-7. The Investigating Officer has deposed that Ghanshyam Solanki has denied that his mobile phone was used by A-7. No instrument is recovered

and no CDR is available. The substantial piece of evidence is unreliable; hence, corroborative piece of evidence cannot be considered for conviction. It is further submitted that no transcript of the alleged interactions amongst the accused are available or collected by the Investigating Officer. In support of his submissions, learned Senior Advocate Mr.Nanavaty, has placed reliance on the decision of the Apex Court in the case of **Rajesh and Anr. vs. State of Madhya Pradesh** passed in Criminal Appeal No.793-794 of 2022 dated 21.09.2023, more particularly Paragraph No.34 thereof. Thus, it is stated that there is no tangible link between A-1 and A-7 to establish the case of conspiracy.

4.4) **Essence of submissions on behalf of A-7.**

(a) All possible attempts are made by the victim and the prosecution witness and investigating agency to earn the conviction of A-7. The trial Court has convicted the accused, by invoking the principle of *estoppel* and by placing reliance on the police statements recorded under section 161 of the Cr.P.C. The trial Court has shifted the burden on defense to prove that the Investigating Officer visited the place of conspiracy. All the findings of the trial Court are based on the presumptions. Learned Senior Advocate Mr.Nanavaty, has submitted that in fact the trial Court has held that only on the evidence of PW-26, Rambhai Hajabhai Solanki, the conspiracy cannot be established against A-7 and by considering other evidence, the conspiracy of murdering the deceased is established and ultimately a finding is recorded by the trial Court that the entire conspiracy has been hatched by A-7.

(b) While referring to the decision of the Apex Court in the case of **Dinubhai Boghabhai Solanki vs. State of Gujarat & Ors.**, (2018) 11 S.C.C. 129, more particularly Paragraph No.34 thereof, learned Senior

Advocate Mr.Nanavaty has submitted that the trial Court has in fact convicted the accused in view of the observations and strictures passed against the learned Presiding Judge, who had conducted the earlier trial proceedings. He has submitted that the Presiding Judge felt that he would be stigmatized, if he acquits A-7.

(c) Learned Senior Advocate Mr.Nanavaty, in support of his submissions for the delayed recording of the statement of PW-26, Rambhai Hajabhai Solanki, has placed reliance of the judgment of the Apex Court in the case of **Babuli vs. State of Orissa**, 1974 (3) S.C.C. 562 and in the case of **Shahid Khan vs. State of Rajasthan**, 2016 (4) S.C.C. 96. Learned Senior Advocate, in order to buttress his argument that the prosecution has failed to prove the conspiracy and has placed reliance on the judgment of the Apex Court in the case of **The State through Superintendent of Police, CBI / SIT vs. Nalini and Ors.**, 1999 (5) S.C.C. 253 and in the case of **Praveen @ Sonu vs. State of Haryana**, 2022 (0) A.I.R. (SC) 270. Learned Senior Advocate has submitted that even if without admitting that the motive for committing the murder of the deceased is established, then also the same itself is not a conclusive proof to prove the complicity of the accused in the offence. In support of the submissions, the learned Senior Advocate has placed reliance on the judgment of the Apex Court in the case of **Subramanya vs. State of Karnataka**, 2022 (15) Scale 390. Learned Senior Advocate has placed reliance on the judgment of the Apex Court in the case of **Babubhai Bhimabhai Bokhiria and Anr. vs. State of Gujarat and Ors.**, 2014 (5) S.C.C. 568 and has submitted that no transcript is produced by the prosecution, which would ultimately reveal the conversations between the accused, which can establish the link between the accused. The accused cannot be held guilty of offence on the basis of the call records only. He has further placed reliance on the judgment of the Apex Court in the case of **Rajesh and Anr. vs. The State of**

Madhya Pradesh in Criminal Appeal No.793-794 of 2024, decided on 21.09.2023 and has submitted that in the present case, the Investigating Officers have not even made efforts to examine the persons in whose names the Customer Application Forms (CAFs) were found of the mobile, which, it is alleged that, the accused have been using. Finally, it is submitted that in fact, A-7 is deprived of free and fair investigation and also a fair trial by the trial Court. Thus, it is urged by the learned Senior Advocate that the conviction recorded by the trial Court convicting A-7 for a serious offence of murder may be set aside. He has submitted that the prosecution has failed to bring home the charge and, therefore, the conviction based on the evidence, which is already read before the Court, deserves to be interfered and set aside.

(5) Submissions on behalf of A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki (nephew of A-7) (in Criminal Appeal No.2198/2019)

5.1) Learned Senior Advocate Mr.Lakhani, has submitted that initially the investigation was done by the Police Inspector, Shri Kundaliya of Sola Police Station, Ahmedabad, from 20.07.2010 to 15.08.2010 and thereafter, from 16.08.2010, it was done by Senior Police Inspector, Shri Satishkumar Manilal Chaudhary of DCB Crime Branch. It is submitted that the motive of committing the murder of the deceased is attributed to the A-1, Bhadursinh Dhirubha Vadher, and A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki, since they had purchased one land of Village Alindra for mining in 2007 and because of the RTI activities done by the deceased, the mining become impossible and they have suffered huge loss and they were compelled to sell the land in 2009, however it is submitted that in fact, no loss was caused to A-4 as they have sold the land in profit.

5.2) Learned Senior Advocate, Mr.Lakhani has submitted that as per the deposition of the I.O. Shri Chaudhry, prior to his taking over the investigation, he did not find anything against the accused and as per his investigation the place of conspiracy was Shivalay Complex at Kodinar. He has recovered the motorcycle used in the commission of offence on the very same day when the investigation was handed over to him, and he has arrested A-1, who revealed names of other accused. It is submitted that A-4 was arrested on 07.09.2010 and he is involved in the offence in view of the mobile phone, which has been recovered from PW-151, Jisaan Kalumiya Naqvi (Exh.654), who has turned hostile. It is submitted that there is no documentary evidence to show the use of the said mobile by A-4. Learned Senior Advocate has submitted that the recovery Panchnama of the Mobile (Exh.559) is not proved since both the Panchas (PW-111 and PW-113) have turned hostile. He has submitted that there are no call records with other accused, except A-7, who is the uncle of A-4 and it is natural that both of them would have talked with each other.

5.3) Learned Senior Advocate, Mr.Lakhani has further pointed out that not a single document has been produced to show that Mobile no.9824284384 was used by A-4. The Nodal Officer has also not produced any evidence in this regard and there is no evidence either of the phone number or the handset, which can connect A-4.

5.4) Learned Senior Advocate, Mr.Lakhani, has submitted that as per the case of the prosecution, Mobile No.9824284384 belongs to A-4 however, the prosecution has not collected the CAF from the Cellular Company. He has submitted that there is no investigation done as to whether the instrument belongs to A-4 or the mobile number was in his name. In support of his submission, he has referred to the deposition of PW-33, Vinaben Shantibhai Rawal, (Exh.315), who has turned hostile.

5.5) Learned Senior Advocate, Mr.Lakhani, has further, in order to strengthen his case, referred to the evidence of PW-151, Jisaan Kalumiya Naqvi, (Exh.654), who has turned hostile. He has also referred to the panchnama at Exh.559 of recovery of mobile of A-4, however, it is submitted that panchas PW-111, Mohd. Javed Mohd. Anish Sheikh, and PW-113, Nileshbhai Gulabhai Kiri, have turned hostile.

5.6) While referring to the evidence of the Nodal Officer of Idea Company, PW-179, Shri Bhavik Arvindbhai Joshi, (Exh.740), it is submitted that the Nodal Officer has not referred to any CAF of A-4. It is thus submitted that no reference of CAF of A-4 is forming part of his evidence. He has submitted that the said witness was further recalled and has submitted that the data of call record was manually fed by one employee - Shri Vishal Kadu, who is not examined as a witness.

5.7) In light of the aforesaid submissions, after pointing out the evidence of the relevant witnesses, learned Senior Advocate, Mr.Lakhani, has referred to the observations made by the trial Court in the judgment, wherein the IMEI number of the handset is referred. It is submitted that the trial Court, on presumption and on the basis of the evidence of hostile witnesses – PW-151, Jisaan Kalumiya Naqvi (PW-654) and PW-33, Vinaben Shantibhai Rawal (Exh.315), has concluded that in fact, the said Mobile No.9824284384 was of A-4 and he was in constant touch with A-4. He has submitted that the trial Court has presumed that the CDRs show that from the aforesaid phone number, the calls were made to PW-33, Vinaben Shantibhai Rawal, and it would only be A-4, who has talked to Vinaben, though she has turned hostile and has not supported the case of the prosecution.

5.8) Learned Senior Advocate, Mr.Lakhani, has submitted that it is for the prosecution to point out to the Court that the Mobile number is used by the accused, particularly when the person, who has stated to have produced the mobile has not supported. The panch witnesses of the panchnama of the production of mobile phone have not supported the prosecution. He has further submitted that the prosecution is obliged to point out from the record that either this SIM Card is registered in his name or that it is registered in the name of someone else and by examining someone, the prosecution is under an obligation to prove use of the mobile number. It is submitted that either of both have not come on record and, therefore, the accused can at least say that the prosecution has miserably failed to point out as to whether the phone, rather than the SIM Card, which is inserted into a particular instrument is used by the accused.

5.9) Learned Senior Advocate, Mr.Lakhani has further submitted that as far as the CDRs are concerned, the number, which is alleged to have been used by the accused does not disclose the name. The six SIM Cards appear to have been used in three different instruments and the IMEI numbers of these instruments are different. The CDRs are available from 01.01.2010 to 21.07.2010. The SIM Cards stated to have been used in a particular instrument of which the IMEI number is reflected, which is not the IMEI of the phone, which is stated to have been produced by PW-151, Jisaan Naqvi, and is also mentioned in the panchnama (Exh.559). It is also reflected in the depositions of PW-111 and PW-113, but the CDRs reflect the IMEI number from 01.01.2010 to 03.06.2010, which is different from 02.06.2010 to 13.06.2010 and 14.06.2010 to 21.07.2010 that is third instrument, and the IMEI of these instruments are mentioned in the CDRs details and none of these are matching with the IMEI number mentioned in the panchnama and in the deposition of those two hostile witnesses.

Therefore, it is submitted that in none of the circumstances the authorship and ownership of the possession of the mobile number or instrument is proved on record connecting A-4 with that to a particular number, which is allegedly used for the purpose of talking with A-7, Dinubhai Boghabhai Solanki. He has submitted that for the sake of argument assuming everything against this accused, even if it has been proved that the SIM Card is registered in his name, however from these particular numbers, though nothing is proved as far as the ownership or possession is concerned, since no talk, no conversation has taken place with any of other accused, who are allegedly involved in committing the offence; the accused cannot be convicted for a serious offence of murder on presumption. He has submitted that as far as the ownership of instruments of both the accused are concerned in case of none of the accused, the ownership and authorship of the instruments are proved on record.

5.10) Learned Senior Advocate, Mr.Lakhani, has submitted that it is the case of the prosecution that the accused had the motive to eliminate the deceased. As far as the motive is concerned, the law is settled on the point that motive is not enough to convict and motive is one of the circumstances to complete the chain, to have corroborative effect, hence, motive cannot be considered as the sole basis for the purpose of convicting the accused. Not only that but convicting somebody on motive alone in a most serious offence of murder, which invites capital punishment, it is submitted that as a general principle of law, more accountability is cast upon the prosecution to prove all the links in the chain, particularly when the matter is based on circumstantial evidence.

5.11) Learned Senior Advocate, Mr.Lakhani, has submitted that the allegation of the prosecution is that a huge loss was suffered to the accused and his family, and hence, the accused had eliminated the

deceased keeping the grudge, which is considered as a strong motive against the accused. He has submitted that two aspects are required to be taken into consideration. Firstly, that the deceased has made many RTI applications against many companies, politicians and many other persons, which are not limited to the accused. They were made against numerous persons, individuals, Government officers, companies and, therefore, there are many persons against whom such applications are made by him; and the second aspect is that the line of investigation, which was supposed to be taken by the investigating agency. The investigating agency was under an obligation to investigate the involvement of other persons also, since it has come on record by way of evidence on oath that the deceased had an animosity rather with many other people, and even his father has admitted that the deceased was making many RTI applications against other persons, however no investigation is done in this regard.

5.12) Learned Senior Advocate, Mr.Lakhani, has submitted that at the same time, three facts which have come on record, which are admitted by the family members of the deceased – (1) the deceased was treated as like a son by A-7, Dinubhai Boghabhai Solanki; (2) whenever the deceased came to Ahemdabad, he had stayed at the MLA quarter of A-7; and (3) even Kanyadan of his wife – Alpaben, that is also done by A-7. Learned Senior Advocate, Mr.Lakhani, has submitted that the prosecution is legally obliged to establish genuineness of the applications made by the deceased and merely by saying that they are made by the deceased or are made in the name of the deceased is not enough and it has to come on record, by examining the officers that such applications contain the signatures of the deceased. Learned Senior Advocate, Mr.Lakhani, has submitted that the whole investigation was concentrated on A-7 and his family members, hence no other investigation has taken place with regard to other RTI

applications made by the deceased. Learned Senior Advocate has submitted that in the entire call records or call details, the prosecution has not been able to point out as to from which number A-7 or A-4 had made the phone calls to the deceased.

5.13) Learned Senior Advocate Mr.Lakhani, has submitted that when such crime was committed, the prosecution has to show that the conspiracy has taken place and thereafter to execute that conspiracy the persons were contacted and after contacting them, resources are made available to them, then there is arraignment of facility in hotels etc. and ultimately the crime is executed. It is submitted that in the present case, the place of conspiracy itself is changed from the initial version of the local police. The place of conspiracy has been shifted from Kodinar to Harmadiya Farm, which goes to the root of the matter. However, it is submitted that in the present case, the investigation commenced with the motorcycle, which was found at the scene of offence and no evidence is found, pointing out that how the motorcycle came in the possession of the accused. Finally, it is submitted that most of the witnesses have turned hostile and have not supported the case of the prosecution and, therefore, the conviction recorded by the trial Court is illegal and perverse.

(6) Submissions on behalf of A-1, Bahadursinh Dhirubha Vadher, (Police Constable), (in Criminal Appeal No.2194 of 2019) :

6.1) Learned Senior Advocate Mr.J.M.Panchal, appearing on behalf of A-1 has submitted that the case of the prosecution against the present accused is premised on the circumstantial evidence. He has submitted that as per the case of the prosecution, A-1 along with A-2, A-3, A-5 and A-6 hatched a conspiracy to eliminate Amit Jethwa (deceased), who was an RTI Activists. He has submitted that the role attributed to A-1 is that he contacted A-2, Pachanbhai Gopalbhai @ Shivabhai Desai, who in turn asked A-3 to keep watch on the

deceased, whereas A-5 and A-6 have eliminated the deceased. A-6, Shailesh Nanalal Pandya is the shooter and A-5 has accompanied him.

The circumstances against A-1 as per the findings of the trial Court are as under:

(A) A-1 met with A-4 for hatching a conspiracy at Shivalaya Complex and he met A-4 along with A-7 at Harmadiya Farm of A-7, since he was having independent motive of murdering the deceased;

(B) A-1 met with A-6 - shooter and A-3 at Hotel Akash Palace, Chotila, Dist.Surendranagar;

(C) A-1 met with A-6 and A-2 - Pachanbhai Gopalbhai @ Shivabhai Desai at Hotel Comfort Inn, Diu;

(D) A-1 procured a motorcycle, which was used by A-6 and A-5 in committing the crime;

(E) A-1 procured dummy SIM Cards, bearing No.7698085798 and No.7698085799 for communicating with other accused;

(F) A-1 sent money / payment to A-6 through A-2 Pachanbhai Gopalbhai @ Shivabhai Desai by a courier (Angandiya);

(G) Destroying the mobile and SIM Card at Hiran River at the Gir sanctuary.

6.2) Submissions on the circumstance of Motive:

a) *Apropos* the circumstance No.1, learned Senior Advocate, Mr.Panchal, has submitted that the case of the prosecution is that since the deceased, who was an RTI activist, filed various RTI applications against the present A-1 and A-5 and he was compelled to sell the land by facing loss; the prosecution has alleged that he had

the motive to commit the murder of the deceased, and the present accused has aided him.

b) He has submitted that in fact, the evidence reveals that no RTI application has been filed by the deceased against the present accused, seeking information about the land in question. It is submitted that the land at Alidar Village was purchased in partnership of Mansinh Vadher relative of the accused No.1 for the sale consideration of Rs.18,00,000/-. It is submitted that Pratapsinh Vala (PW-133) has turned hostile and Mansinh Vadher is not examined as a witness. Thereafter, the said land was brought by the PW-134, Sanjaybhai Babubhai Parmar, (Exh.617), who has turned hostile. He has also referred to the land of Pichhawa Village, which comes in within 5 kms of radius for reserved forest land and subsequently, the lease was cancelled. He has deposed that this land of Alidar village in fact purchased for mining activity, however, since it was opposed by the deceased and he was filing various application, the mining lease was not obtained. He is also declared hostile. Thereafter, the said land was bought by PW-134, Sanjaybhai Babubhai Parmar (Exh.617), who has also turned hostile.

c) He has referred to the evidence of PW-135, Ajaybhai Babubhai Parmar, (Exh.619), He has deposed that he has sold the land to Mansinh Vadher and Gopalbhai Pratapbhai Vala in the year 2007 and thereafter, after partitioning of the land, he again repurchased part of the land from Mansinh Vadher. He has not supported the case of the prosecution and has been declared hostile. The prosecution did not collect the original document of sale of land or any other documents which in fact, would reveal that A-1 has ever purchased the land in the prohibited area of the Gir Sanctuary. He has submitted that on the contrary, A-1 produced the relevant sale deed at Exh.1690 dated 05.02.2007, which shows that the said land was purchased for an

amount of Rs.1,61,000/- by his relatives – Pratap Gopalbhai Vala and Mansinh Dhirubhai Vadher and the said document is never questioned and is admissible in evidence. Thus, it is submitted that even if the case of the prosecution is taken as it is, it is proved that the land was not sold in loss but in profit.

d) It is submitted that the sale deed of the said land at Exh.1691 dated 10.08.2009 shows that Mansinh sold his share of land by a sale consideration of Rs.2,00,000/- to Sanjaybhai Babubhai Parmar, PW-134. Thus, it is submitted that the motive, which is alleged by the prosecution is disproved since no loss is faced by the relatives of A-1 and the prosecution has miserably failed to prove that A-1 has ever held the land at the Gir Sanctuary area. While referring to the findings of the trial Court, he has submitted that the trial Court has admitted that the motive alleged by the prosecution of loss of profit to commit the murder of the deceased is not proved.

e) Learned Senior Advocate Mr.Panchal, has referred to the deposition of the Investigating Officer, PW-185, Rotash Singh Shree Mayaram, CBI Officer (Exh.781) and has submitted that as per his investigation, the deceased had only filed an application against A-7 and no RTI application has been filed against A-1 or his family members by the deceased. He has referred to PW-186, Anurag Sinha Anujkumar, Investigating Officer of CBI (Exh.783) and has submitted that in his investigation, it is revealed that no RTI application has been filed by the deceased against A-1, except A-7. Further, no Panchnama of land, which is alleged to have been purchased by his relatives in the Gir Sanctuary area, is prepared, which would show that the said land was suitable for mining. It is submitted that mere allegations of mining are made and no evidence is produced pointing out the type of land and hence, it is submitted that such circumstance of motive is disproved.

f) Learned Senior Advocate Mr.Panchal has referred to the deposition of PW-127, Chetanbhai Naranbhai Rathod (Exh.602), who is the cousin of Amit Jethwa (the deceased), who has admitted that there were many applications filed under the RTI by the deceased against various persons, however he has submitted that he has not referred to any application having been filed by the deceased against A-1. It is further submitted that no PIL has also been filed against A-1.

6.3) Circumstance of conspiracy hatched at Harmadiya Farm:

a) A-7 is not related with A-1 in any manner, against whom the conspiracy has been alleged and who was the Member of Parliament. He has submitted that the present accused (A-1) was a Police Constable and there is no reason for A-7 to join him in the conspiracy for committing the murder of the deceased.

b) While pointing out the deposition of PW-187, the Judicial Magistrate, First Class, Shri Ajay Rijpalsing Garg (at Exh.788), who has recorded the statement under section 164 of the Cr.P.C. of PW-26, Rambhai Hajabhai Solanki, it is contended that he has referred presence of A-1 at Harmadiya Farm, however his statement is not recorded on oath and hence, there is non-compliance of the provisions of Section 164(5) of the Cr.P.C. and thus, it is submitted that the statement under Section 164 of the Cr.P.C. can be a corroborative piece of evidence provided its legally recorded. Thus, it is submitted that such second circumstance of conspiracy at the Harmadiya Farm hatched with A-7 does not get proved by evidence.

6.4) Circumstance of meeting at Shivalay Complex at Kodinar:

a) For proving the circumstance that A-1 had held a meeting at Shivalay Complex at Kodinar, a discovery or pointing out Panchnama (Exh.521) was prepared in presence of the following panchas.

(1) PW-91, Valibhai Usmanbhai Shama, (Exh.519) has been declared as hostile witness; and

(2) Chetanbhai Bhikhubhai Rathod, he is not examined as a witness.

It is submitted that such pointing out panchnama as well the alleged confessional statement made by the accused has to be proved as per the provisions of Section 27 of the Evidence Act by incorporating the exact words either by the panchas or by the Investigating Officer, however nothing is done in this regard, and hence such panchnama cannot be considered as evidence against the A-1. It is also submitted that this evidence does not show that A-4, with whom the accused has held the meeting at Shivalay Complex, belongs to A-4, as no documentary evidence in this regard is produced. It is submitted that no witness has been examined, which would show that A-1 used to visit the office of A-4 at the Shivalay Complex at Kodinar.

6.5) Circumstance of meetings at Hotel Akash Palace, Chotila and Hotel Comfort Inn, Diu on 09.07.2010 and 10.07.2010 with A-1, A-6 and A-3.

a) Learned Senior Advocate Mr.Panchal, has submitted that in order to prove the said circumstance, the prosecution has examined PW-4, Rameshbhai Danabhai Chawda, (Exh.129), the employee of the Hotel Aakash Palace, however he has turned hostile and has not supported the case of the prosecution. The second witness of PW-177, Ajaybhai Nandlal Medha, (Exh.738), who is the owner of the Hotel Aakash Palace, has also turned hostile and has not supported the case of the prosecution. It is submitted that no Register of Hotel Aakash Palace has been produced and no panchnama, pointing out the scene of offence, has been carried out.

b) While referring to the evidence of PW-4, Rameshbhai Danabhai Chawda (Exh.129), it is submitted that in fact, a suggestion has been put to him that A-1 had stayed at Hotel Akash Palace, Chotila on 09.07.2010 and his presence is sought to be shown, however simultaneously, it is submitted by learned Senior Advocate Mr.Panchal, that the case of the prosecution is that A-1 was also present on the very days on 09.07.2010 and 10.07.2010 at Hotel Comfort Inn, Diu, which is not possible as the distance between the two hotels is approximately 200 Kms.

c) Learned Senior Advocate Mr.Panchal has submitted that for proving this circumstance the panchnama (Exh.515) has been prepared on the basis of the pointing out the place by A-1. It is submitted that distance between Hotel Aakash Palace and Hotel Comfort Inn is about 200 Kms. and it is impossible that A-1 was present at both the places at a time. Learned Senior Advocate Mr.Panchal has submitted that regarding the said panchnama, two panch witnesses have been examined by the prosecution, in order to prove the same. The first Panch Witness (PW-89), Jayantibhai Laljibhai Parmar, (Exh.514), has turned hostile, and the second Panch Witness (PW-92), Navalpari Manpari Goswami (Exh.527), has also turned hostile. Learned Senior Advocate has further referred to the deposition of the Manager of Hotel Comfort (PW-139), Jivabhai Babubhai Kamliya, (Exh.640). He has also turned hostile.

d) Learned Senior Advocate Mr.Panchal, has submitted that the prosecution has further examined PW-48, Dharmendragiri Balugiri Goswami, (Exh.349), who is the owner of Hotel Comfort-Inn, twice by the prosecution – one before the order passed by the Apex Court and for the second time, after the order was passed. On both the occasions, he has been declared hostile. This witness refers to his son having been kidnapped during the trial. He has submitted that in fact,

after two years, the complaint was filed by this witness alleging the kidnap of his son, after the judgment and order passed by the trial Court, however the present A-1 is not arraigned as an accused in the complaint. It is submitted that the circumstance of meeting at the Hotel Comfort Inn is not proved, as the witnesses have turned hostile. He has submitted that the trial Court, in order to prove this conspiracy, has merely placed reliance on the police statement for proving the circumstance and there is no legal evidence or link proved, which would show that A-1 has held meeting with A-6 and A-2 at Hotel Comfort Inn, Diu.

6.6) Circumstance of use of Swift car-Registration No.GJ-11-S-6873.

a) Learned Senior Advocate Mr.Panchal, has submitted that A-1 was arrested on 16.08.2010 and during his remand, the panchnama at Exh.520, was prepared which was a NIL panchnama, wherein the reference of vehicle is there. It is submitted that thereafter, the Swift Car, having registration No.GJ-11-S-6873, was seized and the panchnama dated 23.08.2010 at Exh.436 was prepared and the said panchnama revealed that the said car belongs to brother of A-1 i.e. Amarsinh Vadher. By the very same panchnama, Mobile No.9898552518 was also seized, the same also belongs to the brother of A-1 i.e. Amarsinh Vadher. He has submitted that PW-70, who is the panch of the said panchnama, (Exh.435), has turned hostile. He has submitted that in support of the case of the prosecution, the Court witness No.1, RTO Officer, Shri Yashpalsinh Survaya, was examined at Exh.1226, who has deposed that the said car belongs to the brother of A-1, Amarsinh Vadher. Thus, learned Senior Advocate Mr.Panchal, has submitted that undoubtedly, the car and the mobile number belonged to the brother of A-1, Amarsinh Vadher, however he is not examined as a witness and there is no incriminating substance found from the car and there is no connection between the car and offence,

as no evidence has been procured by the investigating agency showing that the said car was in fact used for the commission of offence.

6.7) Circumstance of Motorcycle (Bajaj Discover motorcycle):

a) It is the case of the prosecution that A-1 has procured the motorcycle for commission of the offence, which was used by (the shooter) A-6, Shailesh Nanalal Pandya. In order to support the evidence in this regard, the prosecution has examined PW-34, Ghanshyambhai Jethabhai Soni, (Exh.316), who was the original owner of the motorcycle bearing registration No.GJ-01-EL-5708, which was stolen on 22.04.2007 and he filed a complaint on 25.04.2007. The F.I.R. is exhibited as Exh.317, which is registered at Dholka Police Station against unknown person. Further, it is submitted by learned Senior Advocate Mr.Panchal that the prosecution has alleged that the said motorcycle came in possession of one Bhupendrabhai Mahaveersinh Rana, who has passed away on 02.05.2010, and the said motorcycle was given to PW-41, Samir Hajirasul Vora (Ghanchi) (Exh.338). He has been examined twice and on both the occasions, he has not supported the case of the prosecution. It is alleged that PW-41, Samir Hajirasul Vora (Ghanchi), gave the motorcycle further to his nephew PW-39, Suleman @ Salmanbhai Jahangirbhai, who has been examined at Exh.336, however, he has turned hostile.

b) It is further submitted that PW-39 along with PW-40, Valibhai Mohammad @ Muko, gave the motorcycle to A-1. PW-40, Vallibhai Mohammad Aalibhai, who is examined at Exh.337. He is also declared hostile. He is re-examined again by the order passed by the Apex Court at Exh.1133 and again he has turned hostile.

c) Learned Senior Advocate Mr.Panchal has submitted that there is no evidence, which has surfaced on record that would show or

prove that A-1 gave the motorcycle to A-3, Sanjay Parbatbhai Chauhan. It is the case of the prosecution that A-3, Sanjay Parbatbhai Chauhan, gave the motorcycle for repairing at Shiv Service Point Auto Garage, Una. In support of such evidence, the prosecution has examined two witnesses of Shiv Service Point. First witness, PW-157, Bharatbhai Kadubhai Dodiya (Exh.663), who is the mechanic of Shiv Service Point, he has turned hostile. The second witness, PW-158, Miteshbhai Mansukhbhai Patel (Exh.664), who is the owner of Shiv Service Point; he has also turned hostile. Learned Senior Advocate Mr.Panchal has submitted that the prosecution has alleged that A-3 gave the motorcycle to A-6, Shailesh Nanalal Pandya, who is the shooter. However, there is no evidence to establish the link that in fact, A-3 gave the motorcycle to A-6.

d) It is submitted that the prosecution has alleged that A-6 was using the motorcycle and in support of their case, three witnesses are examined :-

(1) PW-35, Dharmeshbhai Jagdishbhai Prajapati (Exh.319). He is also re-examined, after the judgment of the Apex Court. On both the occasions, he has turned hostile.

(2) PW-54, Yogesh Dashrathbhai Pandya, (Exh.371), who is the cousin brother of A-6, Shailesh Nanalal Pandya, and has been examined twice, and on both the occasions he has turned hostile.

(3) PW-155, Mahadevji Somaji Thakor, (Exh.659), who is the relative of A-5, Udaji Kantiji Soneji Thakor, and has been examined twice. On both the occasions, he has turned hostile.

Thus, it is submitted that in absence of any evidence, more particularly three witnesses having being turned hostile, it cannot be

said that the motorcycle was used by A-6 for commission of the offence.

e) Learned Senior Advocate Mr.Panchal, has submitted that when the motorcycle was recovered from the scene of offence, the registration number is further changed and it was recovered with the Registration number bearing No.GJ-01-DQ-2482. He has referred to the scene of offence Panchnama at Exh.374, wherein number of motorcycle is mentioned as GJ-01-DQ-2482. He has also referred to the complaint at Page Nos.31-32 of the compilation of documents. While referring to the charge at Exh.101, he has submitted that in fact, there is no charge that A-1 has used the motorcycle or A-6 has changed the number of motorcycle.

f) While referring to the findings of the trial Court in the judgment, it is submitted that the trial Court, on a presumption, has held that number of the motorcycle has been changed by the accused at some place, though the trial Court has recorded that there is no evidence that one of the dead persons - Bhupendra has changed the number of the motorcycle. It is submitted that the trial Court, though has recorded that there is no evidence or proof that the number plate of the motorcycle has been changed by A-1, however, simultaneously, it is held that someone at somewhere has changed the registration number. It is submitted that the prosecution has even failed to produce any evidence or any witness, which would show that the motorcycle was used at a particular place and the same was handed over to A-1. It is submitted that no one has seen A-1 in possession of the motorcycle or he was driving the same. Similarly, he has submitted that there is no link established by any of the witness or the evidence suggesting that A-1 had procured the motorcycle and thereafter the said motorcycle was handed over to another accused i.e.

A-3. It is further submitted that though the link for proving such circumstance is not established by any evidence, the trial Court has held that the prosecution has proved the circumstance of using the motorcycle by placing reliance only on the police statement recorded under Section 161 of the Cr.P.C.

6.8) Circumstance of Dummy SIM Card :

As per the case of the prosecution, the following numbers are used by the accused for contacting each other:

- 1) Mobile No.9898552518 (number of Amarsinh Vadher, brother of A-1);
- 2) Second Mobile No.7698085798 (Dummy SIM), which was given by A-3, Sanjay Parbatbhai Chauhan;
- 3) Third Mobile No.7698085799 (Dummy SIM), A-1 was using this sim also.
 - a) Learned Senior advocate Mr.Panchal, has submitted that the basic requirement to prove use of the mobile number is the possession of the handset and the SIM Card by the accused. It is submitted that unless such facts are produced, the CDRs will not help the prosecution for establishing the guilt of the accused. It is submitted that no evidence has been produced or collected by the Investigating Agency, which would suggest that the instruments or SIM Cards were used by A-1.
 - b) Mobile No.9898552518 (Airtel) – The case of the prosecution is that this mobile number was being used in the name of Amarsinh Vadher and it is admitted fact that Amarsinh Vadher has not been examined as a witness. Learned Senior Advocate Mr.Panchal, has

submitted that the mobile is recovered from Amarsinh and not from A-1 and there is no evidence suggesting that the SIM Card was used by A-1. He has referred to the Panchnama of mobile Exh.436. A panch witness - PW-70, Narendra Kanaiyalal Ahirwal, is examined at Exh.435, who has turned hostile. Second time, he is not examined. Another witness is the Nodal Officer of Airtel Company, PW-180, Shyamsundar Keshavprasad Prajapati, (Exh.753). Learned Senior Advocate Mr.Panchal, while referring to his deposition has submitted that he has admitted that the SIM Card is in the name of Amarsinh Vadher and the CAF bears his name. He has referred to the evidence of PW-181, Kshtriya Satiendranath Sing (Exh.760), who is the Circle Nodal Officer of Airtel Company and has produced the CDRs of the number, which belongs to Amarsinh Vadher.

c) Learned Senior Advocate has submitted that there is no charge that this number was used by A-1. It is submitted that the CDRs do not show the name of A-1, and it does not show that he had contacted with the different accused and even if it is shown that from the CDRs, it is revealed that A-1 was in contact with other accused, the same would be of no use to the prosecution as the aforesaid witnesses and the evidence do not in any manner reveal that A-1 was in fact talking or in contact with other accused since Amarsinh Vadher, in whose name the SIM Card belongs, is not examined by the prosecution. Thus, it is submitted that in fact, it would be a contact between 'A' instrument with 'B' instrument and the prosecution was bound to prove by leading cogent evidence, which would suggest that this SIM Card was in possession of A-1 and he was regularly using the same to contact the other accused. It is submitted that in fact Amarsinh Vadher, in whose name the SIM Card belongs, is neither arraigned as an accused nor as a witness and his evidence cannot be used against A-1 and it is not a legal piece of evidence and cannot be permitted to be used by generalization.

6.9) Circumstance of Common link for Dummy SIM Cards-

- 1) Mobile No.7698085798
- 2) Mobile No.7698085799

a) Learned Senior Advocate Mr.Panchal has submitted that the prosecution has alleged that A-1 contacted PW-132, Kripalsinh Govindbhai Parmar (Exh.615), to obtain the SIM Card, however, he has turned hostile, hence the first link is broken. It is alleged that PW-132, Kripalsinh Govindbhai Parmar is the relative of A-1. As per the case of the prosecution, PW-132, Kripalsinh, has further contacted Kanu @ Shaymji Bhatt, a Valveman of Keshod Nagarpalika, who had already died and hence, the second link is also broken. It is the case of the prosecution that Kanubhai purchased two SIM Cards from PW-143, Bavanbhai Siyabhai Muchhad, who is examined at Exh.646, who is the dealer of shop owner of Sundram Mobile Gallery, he has turned hostile. The prosecution has alleged that PW-143, Bavanbhai, procured the said two SIM Cards from PW-153, Ashishbhai Ranchhodbhai Kotadiya of Ravi Air Communication, who is the main distributor of Idea SIM Card Company, who is examined at Exh.657. He has been examined twice. On both the occasions, he has turned hostile. It is thus submitted that again the link is broken, and hence the circumstance that A-1 was in fact using this mobile number or he has procured the same is not proved.

b) He has submitted that it is the case of the prosecution that the deceased - Kanubhai, Valveman of Municipal Corporation, procured the dummy SIM Cards in the name of PW-152, Pranbhai Magabhai Rathod, who is examined at Exh.656, and is the pan-shop owner of Keshod. He has referred to his deposition and has stated that PW-152 has admitted that the election card and the ration card were given to the deceased - Kanubhai for the purpose of borrowing loan and thereafter, Kanubhai has passed away. It is further stated that the

prosecution has alleged that deceased - Kanubhai gave the Dummy SIM Cards to PW-132, Kripalsinh Govindbhai Parmar through someone from the bus stand of Keshod and it was sent to A-1 at Kodinar. It is further stated that no evidence has been collected by the prosecution, which goes to show that anyone was engaged by PW-132, Kripalsinh, to send the SIM Cards to A-1 and there is no link established by any evidence, which would show that such dummy SIM Cards were procured by Kripalsinh and sent to A-1.

c) So far as the SIM Card No.7698085798 is concerned, it is submitted that it is the case of the prosecution that A-1 has given it to A-3, Sanjay Parbatbhai Chauhan, however, there is no evidence, except the bare allegation. Moreover, it is stated that such SIM Card is not recovered and is not found. So far as the another SIM Card bearing No.7698085799 is concerned, learned Senior Advocate Mr.Panchal, has submitted that the prosecution has alleged that the said SIM Card was being used by A-1, however, no documentary evidence in this regard is collected, which would suggest that the same was used by A-1. It is submitted that the said SIM Card was also not recovered. Learned Senior Advocate Mr.Panchal has submitted that it is the case of the prosecution that A-1 has destroyed it at Hiran River of Gir Forest and a NIL Panchnama at Exh.520 was also drawn, which is also inadmissible in evidence.

d) The CDR of SIM Card No.7698085798 at Exh.743 is produced by PW-179, Nodal Officer, Bhavik Joshi, of Idea Company. While referring to the CDRs and the evidence of this witness, he has submitted that the CDRs reveal that it is in the name of Pranbhai Rathod and not in the name of the accused and there is no evidence, which would show that A-1 is using that SIM. It is submitted that not a single SIM, out of both two SIMs, which are alleged to be dummy SIMs, are connecting A-1 in the crime.

e) For SIM Card No.7698085798, he has submitted that for proving that the said SIM Card was being used by A-1, four witnesses are examined:

1	PW-41	Samir Hajirasul Vora (Ghanchi)	Exh.338
2	PW-33	Vinaben Shantibhai Rawal	Exh.315
3	PW-149	Hurkhan Pathan	Exh.652
4	PW-52	Ishabhai Vora	Exh.367

All the witnesses have turned hostile and have not supported the case of the prosecution. It is submitted that the CDRs are of no value unless the possession or use of the SIM Cards by the accused are established. It is also submitted that no handset or instrument using such SIM Card was recovered by the Investigating Agencies.

6.10) Circumstance of Detail Analysis (DA) Report (Lakshya Software)

a) Lakshya Software (Exh.869) is the DA Report, which is produced by (PW-193), Raghvendra Dr. Shyamsing Vats, Investigating Officer, who is examined at Exh.837, who is the Superintendent of Police, SIT. He has been examined twice. In the first examination before the trial Court, he has not referred to the DAR. It is submitted that after he was recalled, he produced DAR, which was generated from the Lakshya Software. While referring to his deposition, learned Senior Advocate Mr.Panchal, has submitted that this witness has admitted in his deposition, that such software is not authorized - either by the Central Government or by the State Government and it is not an authorized software. It is further submitted that he has admitted that the said software is provided, in order to determine the location of the SIM Cards and no one has certified the said software. It is stated that the data or the software was not sent to the FSL and there is no report of the FSL. It is thus submitted that the trial Court

has heavily placed reliance upon such report, despite there being no certificate issued under section 65B of the Evidence Act, hence, the trial Court should not have treated it as an admissible evidence after exhibiting it. While referring to the provisions of Section 293 of the Cr.P.C., which relates to the acceptance of the report of the scientific expert of the Government, he has submitted that PW-193 is not a scientific expert and the Superintendent of Police is not covered in such list.

b) Learned Senior advocate Mr.Panchal, has submitted that the CDRs reveal the IMEI number of the instrument, however no instrument from the possession of A-1 has been collected by the investigating agency, hence, the IMEI number carries no significance so far this accused is concerned. Learned Senior Advocate Mr.Panchal has further submitted that no transcript has been produced by the Investigating Officer and hence, the trial Court could not have recorded the finding of conversation between the accused only on the basis of the report at Exh.869. It is submitted that it was ultimately a police report, which cannot be simply accepted by the trial Court without the same having been proved by convincing evidence.

c) Learned Senior Advocate Mr.Panchal, has submitted that in case, a certificate under the provision of Section 65B of the Evidence Act is not produced, it was necessary on the part of the Investigating Officer, at least to produce the laptop i.e. the original device in which such report was prepared to drive the authenticity of such report since it is admitted by the Investigating Officer that all the names of the accused are fed by him manually along with the mobile numbers and without any proof or evidence which connects the mobile numbers to the accused.

6.11) Circumstance of money trail:

a) As per the charge (Paragraph No.6), it is the case of the prosecution that A-7, Dinubhai Boghabhai Solanki, gave an amount of Rs.11,00,000/- to A-1, Bahadursinh Dhirubha Vadher. It is alleged that A-1 gave an amount of Rs.11,00,000/- to A-2, Pachanbhai Gopalbhai @ Shivabhai Desai and thereafter, A-2 through Angadiya Firm of Amurtlal Kantilal, through Shri Hirabhai Narsangbhai Rathod (PW-145) examined at Exh.648, and by three transactions disbursed the money.

b) The First Transaction: Rs.25,000/- has been recovered from PW-145, Hirabhai Rathod. A panchnama (Exh.518) is drawn. Panch witness - PW-90, Afzalkhan Latifkhan Pathan (Exh.517), has turned hostile. It is alleged that Rs.3,50,000/- has been recovered from PW-147, Prakash @ Lalabhai Khodabhai Rathod of Shankeshwar (Exh.650), he has been twice examined, however he has turned hostile on both the occasions. Panchnama of Rs.3,50,000/- (Exh.138) is not proved as both the panchas have turned hostile. Learned Senior Advocate Mr.Panchal has submitted that there is no direct evidence to show that A-4 gave any amount to A-1, and also there is no direct, indirect or circumstantial evidence to prove that A-7 gave any amount to A-1 and the links are missing.

c) Learned Senior Advocate Mr.Panchal has submitted that it is the case of the prosecution that A-1 gave an amount of Rs.11,00,000/- to A-2, Pachanbhai Gopalbhai @ Shivabhai Desai. For proving this allegation the prosecution has examined PW-32, Manojbhai Haribhai Jadav (Exh.314), however he has turned hostile. As per the case of the prosecution, this witness saw one bag of money being given by A-1 to A-2 in Sasan Gir, however he has also turned hostile. Exh.520 pointing out Panchnama, was drawn to show that A-

1 threw the SIM Card at Hiran River. It is the case of the prosecution that A-1 at Sasan Gir, has given money to A-2. The A-2, Pachanbhai Gopalbhai @ Shivabhai Desai, in the first transaction, has given an amount of Rs.6,00,000/- to PW-145, Hirabhai Rathod at Rajkot, the Manager of Amurtlal Kantilal Aagandiya Pedhi of Jasdan and PW-145 has given the said amount to PW-141, Dineshbhai Ambalal Patel, (Exh.642), co-employee of Amrutlal Aagandiya Pedhi. The entry (voucher) at Exh.731 is seized by the police at Rajkot. According to the entry, the sender is one Vijaybhai and receiver is one S.N.Rabari at Rajkot. Seizure Panchnama of this entry is Exh.553. Panchas PW-108, Alpeshbhai Pravinbhai Patel, (Exh.552) and (PW-109), Pareshkumar Babulal Patel (Exh.554) have turned hostile.

d) **Second transaction of Rs.3,50,000:** It is contended that it is the case of the prosecution that PW-145, Hirabhai Narsangbhai Rathod (Exh.648) sent an amount of Rs.3,50,000/- to PW-146, Pravinbhai @ Kalabhai Muljibhai Sindhav, (Exh.649) at Morbi, who has been examined twice and on both the occasions, he has turned hostile. It is also alleged that this PW-146, Pravinbhai @ Kalabhai Muljibhai Sindhav, sent amount of Rs.3,50,000/- to PW-147, Prakashbhai @ Lalabhai Khodabhai Rathod at Shankeshwar (Exh.650), who has also been examined twice, and on both occasions, he has turned hostile. The Recovery Panchnama (at Exh.138) panchas have also turned hostile.

e) **Third Transaction of Rs.1,00,000:** Learned Senior Advocate Mr.Panchal has submitted that the prosecution has alleged that PW-145, Hirabhai N. Rathod, sent an amount of Rs.1,00,000/- to PW-140, Dhanjibhai J. Sindhav (Exh.641) from Madhavlal Maganlal Aangadiya at Jasdan. He has been examined twice and on both occasions, he has turned hostile. PW-140 sent money to PW-159, Baldevbhai Natvarlal Joshi at Gandhidham (Exh.665) and he accepted the said amount on

behalf of A-6 as per the case of the prosecution. He is also examined twice, however on both the occasions, he has turned hostile. The invoice or receipt of Rs.1,00,000/- is seized by the Investigating Agency vide a Panchnama (Exh.544) from Jasdan Aagandia. Two Panch witnesses being PW-102, Hiteshbhai Vasudevbbhai Mehta (Exh.543) and PW-103, Pradeepsinh Ramprakashsinh Parmar, (Exh.545) have turned hostile. No amount is recovered from this accused. From Gandhidham, invoice of Rs.1,00,000/- is also seized by the investigating agency, a panchnama is drawn at Exh.590. The two Panch witnesses PW-122, Pravinbhai Chehabhai Rathod, (Exh.589) and PW-123, Navghansinh Nathuji Vaghela (Exh.591) have turned hostile.

f) Learned Senior Advocate Mr.Panchal has submitted that there is no recovery or discovery from any of the accused so far as the amount is concerned, and for giving or passing or receiving of the amount, there is no legal evidence and all the witnesses have turned hostile. While referring to the findings of the trial Court, he has submitted that though the trial Court has recorded that there is no evidence on record to show that as to how the money was collected or disbursed by any of the accused, however the trial Court has convicted the accused by recording that such fact was in their personal knowledge. It is submitted that not a single link of the circumstance, with regard to receipt of money or disbursing of the money is established against A-1.

6.12 Circumstance of presence in Hotels:

a) Learned Senior Advocate Mr.Panchal, has submitted that there is no evidence collected showing that S.N.Rabari or A-6 are the same person. He has submitted that four agencies have investigated in this offence, however no report of the handwriting expert has been called

for. It is submitted that the trial Court has compared the signature of "S.N.Rabari" with the signature of A-6, Shailesh Nanalal Pandya, by invoking the provisions of Section 73 of the Evidence Act and has recorded the finding that A-6 has put his signature as "S.N.Rabari". The trial Court, in order to compare the same, placed reliance on the signature alleged to have been done by A-6 in the Register of Hotel Konark Palace, Ahmedabad. It is submitted that the trial Court has also placed reliance on the photocopy of the election card collected from the hotel and the Register and hence, the same is illegal, as no opinion of the handwriting expert can be found on a xerox copy. It is submitted that at least 36 signatures are required to be obtained as specimen in order to prove that the signature belong to the same person, however the trial Court has not undertaken such exercise. It is submitted that the handwriting is a corroborative piece of evidence and the trial Court was not justified in placing reliance on such evidence, which is inadmissible as the trial Court has no scientific knowledge in this regard. He has placed reliance on Section 45 of the Evidence Act, and also on the judgment of the Apex Court in the case of The State (Delhi Administrator) vs. Pali Ram, (1979) 2 S.C.C. 158, and contended that no exercise, as held by the Apex Court is undertaken by the trial Court and no specimen signature of the accused has been obtained to prove that the signature, which was done in the name of "S.N.Rabari", is in fact of the same person i.e. A-6, Shailesh Nanalal Pandya. He has also referred to the provisions of Section 311(A) of the Cr.P.C. and has submitted that the powers of Magistrate of the trial Court are amply provided in order to collect the specimen signature, however the trial Court has not followed the said procedure. Finally, it is submitted that in fact, no amount is recovered from A-6.

6.13) Identification of accused:

For the next link of identification of A-1, he has submitted that for proving the Test Identification (TI) parade, panchnama at Exh.158, PW-12, Danaji Bhuraji Rajput, the Executive Magistrate, is examined at Exh.155. The panch witness of the TI Parade PW-95, Kunal Ashokbhai Kanojiya, (Exh.529) has turned hostile. The second Panch witness – Aamir Aarif of the TI parade is not examined. Learned Senior Advocate Mr.Panchal has further submitted that the TI parade would only be a corroborative piece of evidence and the same itself cannot be considered fatal for the case of A-1.

6.14 Submissions on the reliance placed by the trial Court on the Police Statement:

a) While referring to the various observations of the trial Court, it is submitted that in order to prove the complicity of the accused in the offence, the trial Court has merely placed reliance on the police statement recorded under the provisions of Section 161 of the Cr.P.C., which is impermissible and perverse. It is submitted that almost all the witnesses, on which the prosecution has placed reliance for establishing the complicity of the accused, have turned hostile and the trial Court has merely done a cut and paste job by incorporating the contradictions in form of the police statement. It is thus submitted that an illegal approach has been adopted by the trial Court for convicting the accused as merely placing reliance on the police statement is not suffice until and unless the learned Public Prosecutor is able to derive something substantial evidence from the deposition of the hostile witnesses in the cross-examination, and such statement cannot be treated as legally permissible evidence. Thus, it is submitted that not a single circumstance or link is established against the present accused and as per the settled legal proposition, in order to convict an accused on the basis of the circumstantial evidence,

each and every link is required to be proved so that it can form a chain, which would indicate the involvement of the accused in the offence. Thus, it is submitted that in absence of such link having been proved by the prosecution, the accused persons cannot be convicted for a serious offence like murder and that too, on the basis of conspiracy. Thus, the inadmissible and irrelevant evidence, which is prohibited under the law, has been freely considered by the trial Court for recording the conviction. Learned Senior Advocate Mr.Panchal, has submitted in this regard that the trial Court has substantially placed reliance on the statement recorded under Section 161 of the Cr.P.C. (of PW-26, Rambhai Hajabhai Solanki) and Section 164 of the Cr.P.C. (of PW-41, Samir Hajirasul Vora (Ghanchi)), in order to convict the accused. He has submitted that such statements solely cannot be considered for convicting the accused. In support of his submissions, he has placed reliance on the judgment of the Apex Court in the case of Somasundram Alias Somu vs. State, 2020 (7) S.C.C. 722.

b) He has submitted that the trial Judge has also relied upon the statement of the witness made before the Executive Magistrate, though the witness has turned hostile from the statement. It is submitted that in the Indian Evidence Act, 1872 there is no provision of holding TI Parade by the Executive Magistrate. He has submitted that the purpose, object and scope of TI parade, is that it is meant for identification, and not for the investigation since the Executive Magistrate is not an Investigating Officer, and TI parade is always held during the course of investigation. He has submitted that anything done during the course of investigation is not forthwith admissible, except as provided under Section 293 of the Cr.P.C. He has submitted that the law has provided only two precepts to refer the statements – the first is that the police can record a statement; and the second, a Judicial Magistrate can record the statement under Section 164 of the Cr.P.C., there again, they are not forthwith admissible.

(7) Submissions on behalf of A-2, Pachanbhai Gopalbhai @ Shivabhai Desai - (Criminal Appeal No.2241 of 2019).

As per the case of the prosecution, the task of finding a shooter was assigned to this accused. It is alleged that the A-7 had paid an amount of Rs.10,75,000/- to A-1. Learned Advocate Mr.Bharda, has submitted that the case of the prosecution is premised on four circumstances against the present accused. The first circumstance is holding the meeting with other accused; the second circumstance is money trail; third circumstance is mobile call records and fourth circumstance is using of two cars.

7.1) First circumstance of meeting with other accused:

a) So far as the first circumstance is concerned, he has submitted that as per the case of the prosecution, a meeting was held at Hotel Konark Palace at Thaltej, Ahmedabad on 09.05.2010 with A-3 and A-6, who is the shooter, with the present accused. He has submitted that the second meeting, as per the case of the prosecution, was held in Hotel Comfort-Inn, Diu with A-1, A-3 and A-6. It is alleged that the third meeting was held at Ahmedabad, again in the Hotel Konark Palace on 15.07.2010 with A-3 and A-6 at Room No.6 of Hotel Konark Palace. In order to establish the identity of the present accused, the TI Parade was held on 28.07.2010, through the witness PW-43, Govindbhai Gotaji Patel, (Exh.342). PW-43 was working at Hotel Konark Palace at Ahemdabad. This witness identifies A-2 in the TI parade, but does not support the version during the trial, hence, he is declared hostile. Learned advocate Mr.Bharda, has further referred to the evidence of PW-87, Tejsinh Lalsinh Chauhan, (Exh.511), who is the Receptionist of the hotel. The seizure of Register is also done by the Investigating Agency and for that PW-48, Dharmendragiri Balugiri Goswami, (Exh.349) is examined. He has also re-examined at Exh.1135. He is the owner of the Hotel Comfort-Inn, Diu. In his TI

Parade, he has identified A-2, however, he has been examined twice and in both the occasions, he has turned hostile. The Executive Magistrate, who has conducted the TI Parade, PW-12, Danaji Bhuraji Rajput is examined at Exh.155. It is submitted by learned advocate Mr.Bharda, that the TI Parade can only be relied upon for the purpose of corroboration and in the present case, none of the witnesses have supported the case of the prosecution, and have in fact turned hostile and have refused to identify the accused during the trial proceedings before the trial Court. The Panchas of the TI Parade have also turned hostile. The first Panch of the TI Parade is PW-94, Zaheer Ismailbhai Memon, (Exh.526) has turned hostile and has not been re-examined. The Second Panch PW-96, Aarif Jamalbhai Mansuri, (Exh.530) has also turned hostile.

b) Learned advocate Mr.Bharda, has submitted that the trial Court has only considered the deposition of the Executive Magistrate and held the TI Parade legal, *albeit* the accused were not identified by the witnesses. Thus, it is submitted that the first circumstance, which has been held against the present accused of meeting with the other accused in the hotels, is not proved by any convincing evidence and the same is not supported - either by the owner or the employee of the hotels. It is submitted that even the TI Parade is also not supported and hence, the trial Court has fell in error in convicting the present accused for serious offence like murder on such inadmissible evidence.

7.2) The second circumstance of money trail :

It is submitted that the prosecution has not proved that the present accused has gained anything in the entire transaction of Rs.10,75,000/-. Learned advocate Mr.Bharda, has submitted that as per the case of the prosecution, he has acted as a conduit, however it

is unable to prove any gain received by the accused. It is submitted that no witness has supported the version that the present accused has received any money from A-1 or any other accused or he has disbursed the entire amount, which was given to him to other accused.

7.3) The circumstance of mobile call records :

a) It is submitted by learned advocate Mr.Bharda that as per the case of the prosecution, six mobile numbers are alleged to have been used by A-2 in order to contact with other accused. The CAF of the SIM Cards Exh.632 is in the name of Vishnu Shivabhai Patel and Exh.633 is the letter of the Nodal Officer. The first Mobile No.9879197888 belongs to one Vishnubhai, who is neither cited as witness nor his statement was recorded. The second Mobile No.9099550616, which is alleged to have been used by A-2, is in the name of one Gitaben Sattani, as per the CAF, who is also not cited as a witness. Another mobile No.9712493559, (SIM Card) is recovered at the time of arrest from A-2, the same is in the name of one Chamanbhai Boghabhai Bavaliya, however, he is also not cited as a witness.

b) It is submitted that no investigation is done with regard to recovery of the handset and the call records are for the period from 11.08.2010 to 18.08.2010. While referring to the Arrest Panchnama at Exh.534, he has submitted that the Panchas have turned hostile. PW-97, Altafhussain Abbidali Ansari, (Exh.533) has turned hostile and the second Panch – PW-98, Tanveerkhan Latifkhan Pathan, (Exh.535) has also turned hostile. Thus, it is submitted that the arrest and recovery of mobile is also not proved since the Panchas have turned hostile.

c) Another Mobile No.9824591612 – as per the CAF belongs to Dhanuben Kalubhai Kodaidya, who is not cited as a witness. Mobile No.9998510430 is in the name of Dharmesh Ramaji Chauhan. He is also not cited as a witness. With regard to the last mobile No.9998044163, it is submitted that no call details and no investigation is done in this regard. Learned Advocate Mr.Bharda, has submitted that in fact, the Investigating Officer has not even tried to investigate about any permanent number having been used by A-2. It is submitted that the prosecution, in order to prove that A-2 was calling from these numbers, has examined four witnesses – (i) PW-36, Jagdishbhai Motibhai Sindhav, (Exh.320), who is the relative of A-2, and has turned hostile. It is alleged that the prosecution has tried to prove that A-2 was using mobile Nos.9998510430, 9924591612 and 9099550616 to contact his relative i.e. PW-36, however he has turned hostile. The second witness – PW-148, Manojbhai @ Munnabhai Haribhai Sattani, (Exh.651), who is the ex-employee of Amrutbhai Kantilal Aangadiya. It is alleged that A-2 was using four numbers being Nos.982459612, 9998510430, 9879197888 and 9099550616 to contact him, however he has not supported the case of the prosecution. The third witness – PW-38, Ranchhodbhai Nathabhai Desai, (Exh.326) is examined for proving that A-2 was using the said mobile numbers to contact him, however he has also turned hostile. The last witness – PW-32, Manojbhai Haribhai Jadhav, driver of the car, who has accompanied A-2, is examined at Exh.314. It is alleged that he was using mobile No.942708568, however he has also not supported the case of the prosecution. It is submitted that all the aforesaid witnesses have turned hostile and in order to convict A-2, the trial Court has believed the circumstance as proved, only on the statements recorded by the Investigating Officer under the provisions of Section 161 of the Cr.P.C. He has referred to the judgment of the trial Court and has submitted that in fact, the trial Court has

observed that since no explanation has been tendered by the accused in their further statement recorded under section 313 of the Cr.P.C., such non-explanation goes against the accused since, as per the provisions of Section 106 of the Evidence Act, it was necessary for A-2 to reveal his mobile numbers and hence, adverse inference is required to be drawn on such statement. The trial Court has observed that A-2 was under an obligation to disclose his correct number and since, he has not disclosed the same, an adverse inference is drawn to convict him. Thus, it is submitted that the trial Court has shifted the burden on A-2 to prove his innocence, which is impermissible and illegal and against the law.

7.4) Circumstance of using of two cars :

a) Maruti Swift Car bearing Registration No.GJ-01-KC-8065 : It is submitted that admittedly this car belongs to PW-38, Ranchhodbhai Nathabhai Desai, (Exh.326). This car was recovered from the backyard of one hotel namely Ghardhaba at Gondal Highway. The partner of this hotel – Pankajbhai Mohanbhai Hasodariya has handed over the keys of this car, as per the recovery panchnama Exh.550, however Ranchhodbhai Nathabhai Desai is not examined as a witness. The Panch witness of recovery panchnama (at Exh.550) – PW-107, Gopalbhai Govindbhai Gamara (Exh.551), has turned hostile. Another Panch, PW-106, Hardevsinh Bhagatsinh Rana, (Exh.549) has also turned hostile.

b) The second Car – Maruti Swift bearing registration No.GJ-01-HQ-3922 : The same is produced by Rohit Joshi, who is not examined as a witness. The recovery Panchnama at Exh.131 shows that the said car is produced by Rohit Joshi, however no investigation is done with regard to the real owner of this car. PW-5, Haribhai Dhudabhai Bharwad (Exh.130) has turned hostile. The second panch witness –

PW-174, Gulambhai Rasulbhai Ishaq (Exh.727) has also turned hostile.

c) Finally, learned Advocate Mr.Bharda, has submitted that in fact, the prosecution has miserably failed to prove motive, gain, any connection or relation with the accused. He has submitted that there is no benefit, derived by A-2 and there is no prior enmity with the deceased and the entire implication is on the basis of the statement of the co-accused and the statement recorded by the Investigating Agency under the provisions of Section 161 of the Cr.P.C. It is submitted that only on presumption, the trial Court has convicted the accused.

**(8) Submissions on behalf of A-5, Udaji Kantiji Soneji Thakor -
(in Criminal Appeal No.2177 of 2019)**

As per the case of the prosecution, A-5 was the driver of the Bajaj Discover motorcycle, which was used for the commission of offence and the shooter was the pillion rider i.e. A-6. From the scene of offence, two live cartridges, one empty cartridge, one Tamancha, one Kurta, one liquor bottle and bike are found. Learned Advocate Mr.Virat Popat, has submitted that in order to convict the present accused the prosecution has placed reliance on four circumstances :

- (1) Presence at scene of offence;
- (2) Presence with co-accused i.e. A-6 from 14.07.2010 to 20.07.2010 in two hotels at Ahmedabad – one Hotel Rudra Palace and second at Hotel Konark Palace;
- (3) Call records / call locations, with A-6 as he arrested with two mobiles;
- (4) Recovery of clothes from the bag, which he gave to laundry, in which, fake ID was kept, which was used by

A-6, Shailesh Nanalal Pandya for impersonating himself as 'Shailesh Rabari'.

8.1) Circumstance of Presence at scene of offence :

a) It is submitted that for establishing the presence of the present accused at the scene of offence, the prosecution has examined two eye-witness – (i) PW-14, Rajeshbhai Pethabhai Bharwad (Exh.170), he has also been examined twice (Exh.1034). On both the occasions, he has turned hostile. The second witness – PW-184, Manendrasinh Shriraghunandansinh Kachhava Rajput (Exh.780) has also been examined twice (Exh.1030). Both the eye-witnesses have turned hostile. It is submitted by learned advocate Mr.Popat, that as per the case of the prosecution, there is TI Parade, in which, the A-5 has been identified by PW-184, Manvendra Kachhawa (Exh.259) and in the second TI Parade by PW-14, Rajeshbhai Bharwad, who, as per the case, identified A-5. He has further submitted that thereafter, the Executive Magistrate, PW-20, Surendrasinh Daulatsinh Davar, was examined at Exh.256. He has stated that in his presence, both the aforesaid witnesses have identified A-5, however the Panchas have not supported. Though, the present witnesses have identified in the TI Parade, during the trial proceedings, they have refused to identify A-5 and they have turned hostile before the trial Court. The second eye-witness, Shri Kachhava, is the ATM security guard. He has been examined twice. It is submitted that on both the occasions he has turned hostile.

b) He has also referred to the observations made by the trial Court in the judgment at Page No.653 and has submitted that in fact a presumption of concealing the identity of the present accused by covering his face and concealing the fingerprint has been drawn by the trial Court, though in fact, the fingerprint report does not match.

It is submitted that contrary observation has been made with regard to the identification of the present accused since, in the first part, it is observed by the trial Court that the identification of the accused is proved by the evidence of the hostile witnesses and on the basis of the statement recorded under Section 161 of the Cr.P.C., however simultaneously, the trial Court has observed that this accused has tried to conceal his identity by covering his face. *Apropos* the demonstration Panchnama (Exh.325), it is submitted that it cannot be relied upon as it is hit by the provisions of Section 25 of the Evidence Act.

8.2) Circumstance of mobile number:

Learned advocate Mr.Popat, while referring to the Arrest Panchnama, has submitted that the accused was arrested on 02.10.2010, and the Arrest Panchnama is produced at Exh.568, and it shows that at that time, two mobiles were recovered from the present accused – one Nokia Mobile Model No.6303 having IMEI No.xxxx2399 (last four digit) and the mobile No.9723389358. The second is Nokia Mobile having IMEI No.xxxx2342 (last four digit) and mobile number is 9979376136. It is submitted that the second mobile number does not figure in the Lakshya Software used by the Investigating Officer, Raghvendra Dr. Shyamsing Vats. It is submitted that the Panchas of the arrest panchnama have turned hostile. He has also referred to the evidence of the Nodal Officer, PW-179, Shri Bhavik Arvindbhai Joshi, in order to prove that Mobile No.9723389358 was used by A-5 from 01.06.2010 to 30.09.2010, however the SIM Card is in the name of Shri Prakash Vira Kathar, as per the evidence of the Nodal Officer. He has referred to the deposition of this witness and also call records and has submitted that the call records, which are produced, are of IMEI 2390 instead of IMEI 2399. He has referred to the deposition of the Nodal Officer and submitted that he has

admitted that a mistake has been committed while giving earlier CDRs and new CDRs, after correcting the same has been produced at Exh.1343, and such corrected data, has been manually fed by employee – Shri Vishal Kadu, who is not examined as a witness. It is submitted that the technical data is not infallible and on the contrary, it is doubtful and cannot be relied upon in order to convict the accused.

8.3) Circumstance of staying at Hotel with relative:

a) Learned advocate Mr.Popat, has submitted that in order to establish the link with A-6, shooter, the prosecution has placed reliance on the entries of Register of Hotel Rudra Palace Exh.145 and Exh.147, where it is alleged that he has stayed for two days and the entry of Hotel Konark Palace at Exh.146, where he stayed for one day. It is submitted that the Register contains the name of one “Sanjay Rabari” and not of A-6. As per the case of the prosecution, the identity card, which is recovered is a photocopy, which contained the photo of A-6, but it is in the name of ‘Sanjay Rabari’. He has submitted that after arrest of the accused, the Investigating Officer has drawn the discovery panchnama Exh.578 (dated 04.10.2010) at Bhairavnath Laundry, where one bag is found and from which, a photocopy of the ID and clothes have been found. It is submitted that all the articles, which are found are mentioned in the discovery panchnama, and the case of the prosecution is that the same belongs to A-5. It is submitted that the panchas of the said panchnama have turned hostile and have not supported the case of the prosecution. In order to establish the evidence against the present accused, it is submitted that the laundry owner PW-7, Rameshbhai Pyareji Vachheta (Exh.141), has identified the present accused in the TI Parade, but he has turned hostile in the trial Court and has not supported the TI Parade panchnama Exh.259. Thus, it is submitted that no link is

established between A-5 and A-6 and the said A-6 is sought to be connected with the present accused only on the basis of the articles of staying at Hotel Rudra Palace. The discovery of kurta-shirt panchnama at Exh.400 is not proved since, the Panchas have turned hostile.

b) Learned advocate Mr.Popat, has submitted that the prosecution has examined PW-9, Vikrambhai Krushnalal Naik (Exh.144), who is the employee of Hotel Rudra Palace to show that the accused had stayed at Hotel Rudra Palace, Thaltej. It is submitted that though in the TI Parade, he has identified the accused, but in the Court, he has not supported the case of the prosecution and he was not even declared hostile. He has submitted that this witness has produced the Register of the said hotel and Entry No.1389, which is recorded on 14.07.2010 in the Register and there is a second Entry No.1402 at Exh.145 in the original register, which shows that the entry dated 16.07.2010 showing that A-6 had stayed there. At this stage, he has referred to the observations made by the trial Court and has submitted that in fact, the trial Court has incorrectly recorded that A-5 and A-6 had stayed in the said hotel on 19.07.2010, however, the document at Exh.145, which is the Register does not mention the date of 19.07.2010 and the same only refers to two dates i.e. on 14.07.2010 and 16.07.2010. Thus, it is submitted that the said observations by the trial Court are factually incorrect.

c) He has referred to the trial Court judgment and has submitted that the trial Court has presumed that the fingerprints are concealed by A-5 and A-6 and it is observed that the inference is drawn by the trial Court that A-5 had received Rs.1,00,000/-, however there is no evidence, which would show that the accused has received such money from any of the other accused. He has also referred to the observations made by the trial Court, wherein the trial Court while

taking recourse to Section 134 of the Evidence Act has relied upon the statements of the hostile witnesses and has recorded that no further corroboration is required. It is further submitted that in fact, incorrect statement has been recorded by the trial Court that identification of A-5 and A-6 was made by the hostile witness – PW-14, Rajeshbhai Pethabhai Bharwad (Exh.170) by taking recourse of Section 134 of the Evidence Act.

d) Finally, learned advocate Mr.Popat, has contended that there is no tangible evidence and the trial Court has placed reliance on the entire police statement recorded under Section 161 of the Cr.P.C. and the Panchnama, which are not proved has been placed reliance and there are also erroneous observations with regard to the identification of the accused.

(9) Submissions on behalf of A-3, Sanjay Parbatbhai Chauhan, (in Criminal Appeal No.2179 of 2019):

It is submitted by the learned advocate Mr.Virat Popat, that as per the case of the prosecution, the role attributed to the present accused is of doing recce of the deceased. The prosecution has also placed reliance on the call details as well as the IMEI number of the mobile handset recovered from the accused. It is further alleged by the prosecution that he was the informant of A-1, Bhadursinh Vadher. Learned advocate Mr.Popat, has submitted that the prosecution has tried to establish that this accused has stayed in three hotels.

(i) At Hotel Kornak on 09.05.2010 along with A-2, Pachanbhai Gopalbhai @ Shivabhai Desai;

(ii) At Hotel Comfort-Inn, Diu with A-1, somewhere in March, 2010;

(iii) At Hotel Akash Palace, Chotila on 09.07.2010 with A-1.

(i) So far as the stay at the first place as aforesaid - Hotel Konark is concerned, he has submitted that the prosecution has placed reliance on the identity card, which was recovered from Hotel Konark. The TI Parade was also conducted and PW-43, Govindbhai Gotaji Patel (Exh.342), who is the employee of Hotel Konark Palace is arraigned as a witness and he is examined at Exh.342. He has produced the register at Exh.146 and Entry No.3126 for showing that A-3 stayed with A-2 on 09.05.2010. He has submitted that though, he has recognized the present accused in the TI Parade at Exh.161, however he has turned hostile and has refused to identify this accused before the trial Court. Thus, it is submitted that even if it is assumed that the present accused stayed with other accused at Hotel Konark, the same cannot be held against the accused for proving the conspiracy unless there is further corroborative piece of evidence.

(ii) So far as staying in Hotel Comfort-Inn, Diu is concerned, somewhere in March, 2010, learned advocate Mr.Popat has submitted that the prosecution has placed reliance on the evidence of PW-41, Samir Hajirasul Vora (Ghanchi), (Exh.338), whose statement under Section 164 of the Cr.P.C is recorded, however, he has not supported the case of the prosecution and he has turned hostile.

(iii) With regard to stay in Hotel Akash Palace is concerned, he has submitted that the prosecution has examined two witnesses, PW-177, Ajaybhai Nandlal Medha (Exh.738) and PW-4, Rameshbhai Danabhai Chawda (Exh.129). Both of them have turned hostile and the trial Court has placed reliance only on the police statement recorded under Section 161 of the Cr.P.C., in order to hold the conviction on the basis of their evidence. No TI Parade was held through these witnesses. It is further submitted that no register or documentary evidence has been collected by the Investigating Agency from the Hotel Akash Palace.

9.1) Circumstance of CDRs.

a) Learned advocate Mr.Popat, has submitted that the present accused was arrested on 22.08.2010 by the PW-192, Satishkumar Manilal Chaudhary, Investigating Officer (Exh.830). He has placed reliance on the arrest panchnama at Exh.369. It is submitted that as per the arrest panchnama, one Nokia mobile having IMEI number (last seven digit) – 6784376 having SIM Card No.9824079023 were recovered. He has submitted that so far as this number of 9824079023 is concerned, no investigation is done in this regard to show that the same belongs to him. Learned advocate Mr.Popat, has submitted that in fact, thereafter the investigation has proceeded on the basis of the call records of the mobile No.9824069023, which is in the name of one Mukesh Jethabhai, who is not examined as a witness. He has referred to the CAF at Exh.743 produced by the Nodal Officer in this regard.

b) Learned advocate Mr.Popat, has submitted that the panchas of the arrest panchnama have turned hostile. He has emphatically stated before us that in fact there is no evidence surfacing on record pointing out that the mobile number, which was recorded in the panchnama was incorrect and the trial Court as well as the Investigation Officer have simply stated that the said number was in fact 9824069023. He has submitted that the Investigating Officer has not stated on oath that the mobile, which was recorded in the arrest panchnama is a mistake and is not the correct number and he has not tendered any explanation in this regard. He has also referred to the deposition of the Investigating Officer, PW-192, S.M.Chaudhary, who has simply reproduced No.9824069023 without tendering any explanation to the change in mobile number. Thus, it is submitted that the call records cannot be placed reliance.

c) Learned advocate Mr.Popat, has further submitted that as per case of the prosecution, there are two other numbers also, which are alleged to have been used by this accused being Mobile No.9978995267, which is found to be of one Keyur Vanpariya and another – 7698085798, which is a dummy number, which is said to have been also procured by A-1 and used by A-3 and A-6. He has submitted that as per the CDRs, which are produced on record, the IMEI number of Nokia mobile, which is recovered from the present accused at the time of arrest, does not reflect in such record. He has submitted that both IMEI numbers, which have been referred in the CDRs and which have been referred in the panchnama, are different and Mobile No.7698085798, which is alleged to have been used by the present accused, which is given by A-1, in fact the IMEI number of the mobile does not match with the Nokia mobile alleged to have been recovered from the present accused at the time of arrest.

d) It is submitted that so far as proving the recce alleged to have been done by the present accused; there is no evidence and the prosecution has heavily placed reliance on the call records only, which do not establish the offence under Section 120B of the IPC. He has submitted that there is no eye-witness, who has seen the present accused doing recce of the deceased, hence, the offence under Section 120B of the IPC is not established. It is submitted that through the CDRs at the most, the location of the accused or a person can be established, however even if the location is proved, the same cannot establish that the offence has been committed by the accused by hatching a conspiracy.

e) Learned advocate Mr.Popat has submitted that the Superintendent of Police, Raghvendra Dr. Shyamsing Vats, in his evidence, when he was recalled, has not tendered any explanation

that there is mistake committed in the call records with regard to the Cell I.D. numbers.

(10) Submissions on behalf of A-6, Shailesh Nanalal Pandya (shooter) (in Criminal Appeal No.2196 of 2019) :

10.1) Learned Senior Advocate Mr.Tolia has submitted that the investigation, which commenced immediately, revealed that the incident was witnessed by eight eye-witnesses, who were allegedly present at the scene of offence. Out of them, two eye-witnesses, PW-14, Rajesh Pethabhal Bharwad (Exh.170) and PW-184, Manendrasinh Shriraghunandansinh Kachhava Rajput (Exh.780), were called upon to the TI Parade to identify A-6, who did not support the prosecution case. Besides, this witness has categorically admitted that – (a) at the time of incident, he was at his residence; (b) he was taken in the Police jeep along with the accused, to whom he was supposed to identify, by the Police on the date of the TI Parade; (c) he identified the accused only because they were accompanying him in the Police jeep; (d) he refused to identify any person in the Court, whom he is alleged to have identified in the TI Parade;(e) to save himself from the Police harassment, he had identified the accused in the TI Parade, however, in the Court, he has not identified the accused.

10.2) Further, it is submitted that the motorbike discovered from the scene of offence and 4 wheeler of the deceased were subjected to the report of the fingerprint expert (Exh.674) and as per that report, the finger / palm chance print found on the bike does not match with A-6. It is the prosecution case that the motorbike was handed over by PW-41, Samir Hajirasul Vora (Ghanchi), to A-1 and then to other accused, including A-6, which is not proved as all the concerned witness and panchas have not supported the prosecution case during trial.

10.3) As per the evidence of the first Investigating Officer, PW-190, Himmatlal Mohanrai Kundaliya, (Exh.811), he reached at the scene of offence within few seconds and started the investigation. This Investigating Officer also carried out the panchnama of the scene of offence and seized the articles. He also informed the fingerprint expert to take fingerprint and palm print from the scene of offence. In his presence, the fingerprint expert also attempted to take fingerprint from the firearm. However, there is no fingerprint expert's opinion / report coming on the record even after multiple investigations of different Investigating Officers and agencies.

10.4) The '*kurta*' (long sleeve shirt) allegedly containing one name written on it with the pen "Dasharathbhai" was given to the accused (A-6) by the son of his real uncle namely, PW-54, Yogesh Dashrathbhai Pandya (Exh.371) and (Exh.1090), who has not at all supported the prosecution case on any count. Further, from his evidence, it has been established that the muddamal *kurta* does not belong to his father; he has not given the *kurta* to A-6; after 2006 he has not met A-6; he also denies that A-6 called him through PW-35, Dharmeshbhai Jagdishbhai Prajapati, (Exh.319).

10.5) A-6 came to be arrested on 18.01.2011. Pertinently, – (a) there is no arrest panchnama of the accused; (b) there is no recovery or discovery of any article from the accused connecting him with the crime in question; (c) there is no recovery or discovery of any of the four mobile instruments or four SIM Cards allegedly used by the accused on or around the period of the crime / date of offence; (d) no recovery or discovery of the money, A-6 has allegedly received to commit the crime; and (e) no blood stained or soiled clothes are recovered or discovered / proved in evidence.

10.6) As per the prosecution case, the accused was staying in different hotels in Ahmedabad from 14.07.2010 to 20.07.2010 in the name of "Sanjay Nanjibhai Rabari" (S.N.Rabari), on the basis of one photo identity of the Election Card in the name of said S.N.Rabari. Police have allegedly recovered the photocopy of the said Election Card from two of the hotels – namely (a) Hotel Rudra Palace; and (b) Hotel Konark Palace. However, none of the investigating agency has recovered or discovered original of the said Election Card in the name of 'S.N.Rabari'; not inquired from the Office of Election Commission as to whether the photo contained in the photocopy of the above card is genuine or superimposed by anyone or any other veracity of the said card; no attempt is made to find out whether there is any person called S.N.Rabari and if yes, photograph in the photocopy of the Election Card does match with that person or not; no evidence to support the allegation that the photograph in the said Election Card is forged one / forged by the accused; the said photocopy is not sent for the expert opinion for the face recognition with the accused (which is a common practice of investigation even in the case of CCTV footage); the photocopy is absolutely stale, weak and even the Election Card number is not properly visible, besides very hazy photograph is visible; no charge of forgery or such other offence under the relevant statute (for allegedly forging the Election Card) is levelled against the accused.

10.7) However, the prosecution has made a feeble attempt to connect the accused with the above photocopy of the Election Card through the evidence of the concerned witnesses of the above named two hotels in Ahmedabad, in which also the prosecution has failed, as stated hereinafter. Without prejudice or admitting anything, even if it is believed that the accused has stayed in Ahmedabad as per the allegation in the name of 'S.N.Rabari' and has given the photocopy of

the above Election Card, the same is inadequate to hold the accused guilty of the alleged offence.

10.8) The prosecution has examined PW-9, Vikrambhai Krushnalal Naik (Exh.144), who is serving at Hotel Rudra Palace. The sum and substance of the evidence of PW-9 is that he is illiterate / uneducated and unable to say anything about the hotel register; identifies the copies of the original Register vide (Exh.146) and (Exh.147); this prosecution witness allegedly identified the present accused as a guest staying in Hotel Rudra Palace on 14.07.2010 to 15.07.2010 and 16.07.2010 to 17.07.2010 on the basis of above photocopy of the Election Card in the name of 'S.N.Rabari'; in the cross-examination, he admits that he is unable to recollect the face of the guest as so many guests are coming in the hotel; he is not sure as to whether he was unable to identify anyone during the TI Parade and then he explains that it is possible that he might not have identified (the accused in the TI Parade). He refused to identify anyone in the Court; he repeats that it is possible that he might not have identified anyone in the TI Parade. Pertinently, the Identity Card (Exh.146) is in fact allegedly used when the present accused was staying in another hotel i.e. Hotel Konark Palace and the ID proof (Exh.147) is allegedly used while staying in Hotel Rudra Palace.

10.9) Further, as per the evidence of PW-10, Prakashkumar Chimanlal Bhojak, (Exh.150), the Manager of Hotel Rudra Palace, is not shown the ID proof (Exh.147) and thus it is not proved, and he refused that the accused has given the ID proof (Exh.146), while staying in his hotel. Further, he categorically admits that the photo of the person in the ID proof (Exh.146) is not clearly visible. Further, he states that the CBI recorded the evidence on his own and not by asking the question to this witness.

10.10) Further, as per the evidence of PW-43, Govindbhai Gotaji Patel (Exh.342), working as a waiter of Hotel Konark Palace, he has not supported the prosecution case / declared hostile. The evidence of PW-87, Tejsinh L. Chauhan, (Exh.511), Receptionist of Hotel Konark Palace, also does not point out anything against the accused, as he has produced the original register of his hotel and identified the same.

10.11) Pertinently, the hotel register also contains the thumb impression of the guest. However, the prosecution has not attempted to call for any opinion of the fingerprint expert in this regard qua the accused (i.e. A-6) and did not send the signature / handwriting of that particular guest (S.N.Rabari), again for the handwriting expert's opinion to compare the same with the signature / handwriting / thumb impression of the accused.

10.12) The evidence of PW-7, Rameshbhai P. Vachheta (Exh.141) (Page 317-320), who is running a laundry near the above hotel and allegedly the Police recovered a bag containing clothes of A-5/6, as A-5 had given clothes for washing to him (PW-7). Such bag contains *kurta*, *dhoti*, certain papers etc., out of which he identifies the bag of the clothes and refuses to identify the papers. Further, nothing is pointed out against the present accused as the prosecution has failed to connect the so-called clothes with the accused.

10.13) With regard to money transaction, the investigating agencies have made feeble attempts to bring the evidence of PW-141, Dinesbhai Ambalal Patel (Exh.642)re-examined at Exh.1089), copy of the slip for angadia transaction of Rs.6,00,000/- (Exh.731), evidence of several such other witnesses. Allegedly, in the said transaction, Rs.6,00,000/- is received by the present accused vide receipt (Exh.731). However, as per the evidence of PW-141, named above, he admits in the re-examination (Exh.1089), that the slip (Exh.730) was brought by the

Police in the blank condition and the Police got the signature of this witness and further the content thereof are not written by him. There is neither any recovery nor any discovery of any amount of money from the accused. The said slip contains name of 'S.N.Rabari'. Though the CCTV cameras are installed in the office of that angadiya, no footages are brought on record, since it exonerates the accused.

10.14) Further, no motive is attributed to the present accused. The evidence with regard to be in the company with other accused at different places, has not been proved, as all the witnesses have turned hostile.

10.15) With regard to the use of the mobile by A-6, the details can be narrated as under:

As per the case of the prosecution:

a) SIM Card No.9586171304 purchased in the name of Harendrasinh Nathubha Jadeja. On 16.07.2010 located at Satyamev Complex and on 21.07.2010 located at Rajkot for collecting Rs.6,00,000/- from Rajkot Angadiya.

b) SIM Card No.9099165376- purchased in the name of Sanjaybhai Nanjibhai Rabari. (Vodafone) only used once by Baldev Joshi for collecting Rs.1,00,000/- from Gandhidham Angadiya.

c) SIM Card No.8866284531- purchased in the name of Dineshkumar Prabhudas. (TATA)- used after commission of crime by A-6 to call A-2 on 21.07.2010 located between Ahmedabad and Rajkot.

d) SIM Card No.7698085798- purchased in the name of Pran Manga. (Idea) - A-1 gave this card to A-3 and thereafter A-3 gave this card to A-6.

e) SIM Card No.8141472028- is given in Hotel Rudra Palace and Hotel Konark Palace by A-6 (*suo motu* believed by the Court on the basis of register, without prosecution proving it).

There is no recovery or discovery of any of the phones or SIM Cards from the accused; no evidence that anyone has called or talked with A-6 on any of the above phones; no evidence to suggest that A-6 was having any mobile of such description or brand; no evidence at all to connect A-6 with either phone or SIM Cards in any manner.

10.16) However, the trial Court has convicted the accused on the basis of the comparison of the hazy and unclear photograph contained in the photocopy of the Election Card in the name of 'S.N.Rabari' vis-à-vis the photo of the accused contained in the charge-sheet produced by the investigating agency. Firstly, this was never the case in the charge-sheet, supported by any evidence, as above. Secondly, there is no scientific evidence (face identification / comparison opinion) in this regard. Thirdly, while framing the charge vide Exh.101, no charge is framed in this regard. Fourthly, the prosecution has not advanced this issue before the trial Court in the arguments. Fifthly, and most importantly, the trial Court has not put these circumstances to the present accused, while recording his statement under section 313 of the Cr.P.C. This conclusion has immediately introduced in passing the impugned judgment without confronting the same to the accused. Learned Senior Advocate Mr.Tolia, while placing reliance on the judgment of the Apex Court in the case of Indrakunwar vs. State of Chhattisgarh, 2023 S.C.C. OnLine S.C. 1364 has submitted that the trial Court at various places has recorded conviction on the basis that the accused in their further statement recorded under the provisions of Section 313 of the Cr.P.C. did not explain the circumstance established against them.

10.17) Similarly, the trial Court, by exercising powers under Section 73 of the Evidence Act has compared the signatures contained in the above referred hotels register (Exh.145, Exh.147) and receipt of angadia (courier) (Exh.730) and the signature of the accused contained in the charge-sheet papers. It is submitted that firstly, the signature of the accused in all the Court records are in Gujarati (the vakalatnama filed before the Sessions Court can be compared from the record). Secondly, again, there is neither any handwriting expert opinion nor any other circumstance to compare the disputed signature with the accused. Thirdly, no such charge is framed by the Sessions Judge, while framing the charge vide Exh.101. Fourthly, the prosecution has not at all advanced submissions to compare the signature of the accused from the Court record vis-à-vis the disputed signatures, and the trial Court never showed its intention to do so during the trial. Fifthly, the above circumstance was never put to the accused, while recording his further statement under Section 313 of the Cr.P.C. Sixthly, copy of the page of the charge-sheet containing the signature of the accused and vakalatnama filed in the Sessions Court were never provided to the accused. Seventhly, the trial Judge has compared the disputed signature put in English vis-à-vis the signature of the accused put in Gujarati in the Court record. Eighthly, the accused has not at all put the disputed signatures in the name of 'S.N.Rabari', at any point of time. Ninthly, the trial Judge has compared the signature in very casual and slipshod manner without observing even the basic norms of comparison of hand writings in as much as the trial Judge has not observed about pen pressure, strokes, slope, and gaps etc. which must be forming part of the finding. Tenthly, it appears that the trial Judge has compared the signature from the photocopy of the hotel register etc., which is in any case not permissible. Eleventhly, on the face of it, both the signatures (disputed vis-à-vis signature of the accused in the Court record) are

apparently different and distinct. In this regard, reliance is placed on the following judgments at the time of the hearing.

10.18) Learned Senior Advocate Mr.Tolia, has placed reliance on the judgment in the case of Ajaykumar Parmar vs. State of Rajasthan, 2012 (12) S.C.C. 406 and has submitted that the trial Court has committed error in comparing the signatures of two transcripts; one in English and another in Gujarati, in concluding that both the signatures are of A-6.

10.19) Further, from the evidence of the hotel personnel, the prosecution has tried to establish that the accused stayed in the hotels in Ahmedabad as under:

- a) 14.07.2010 (8.30 p.m.) to 15.07.2010 (11.30 a.m.) Hotel Rudra Palace;
- b) 15.07.2010 (11.05 p.m.) to 16.07.2010 (8 p.m.) Hotel Konark Palace;
- c) 16.07.2010 (10.15 p.m.) to 17.07.2010 (6.10 p.m.) Hotel Rudra Palace.

10.20) The trial Court has placed reliance on the record of the hotel and concluded that the accused (in the name of S.N.Rabari) was present in the Hotel up to 8.30 p.m. on 20.07.2010. In fact, the said contents of the register are not proved by leading the evidence of the hotel manager (though examined by the prosecution) qua the stay of the accused in the hotels up to 20.07.2010 (8.30 p.m.).

10.21) With regard to the Lakshya Software used by the I.O., Shri Raghvendra Vats, learned Senior Advocate Mr.Tolia has submitted that the Lakshya Software uses algorithm, which is a set of commands which is followed by a computer to perform calculations or other problem-solving operations. According to its formal definition,

an algorithm is a finite set of instructions carried out in a specific order to perform a particular task. He has submitted that moment the report is generated through this software, there is change in algorithm and hence, a certificate under section 65B of the Evidence Act is mandatory. While placing reliance on the judgment in the case of Aghnoo Nagesia vs. State of Bihar, AIR 1966 S.C. 119, he has submitted that the trial Court has convicted the accused by placing reliance on the statement of the accused, wherein they have referred to the mobile numbers, which is a confessional statement, hence, the reliance placed by the trial Court on such statement is impermissible. He has submitted that all the investigating agencies have failed to investigate the offence, even they did their best but there was no material and they could not find anything. He has submitted that this is the only politically motivated prosecution. Learned Senior Advocate Mr.Tolia, has placed reliance on the judgment of the Apex Court in the case of Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal and Ors., 2020 (7) S.C.C. 1, in support of his submissions, and has submitted that the trial Court has miserably failed in accepting the evidence of the Lakshya Software report Exh.869 prepared by the Investigating Officer.

(11) Submissions on behalf of the CBI :

11.1) Learned Special Public Prosecutor Mr.R.C. Kodekar, appearing for the CBI, at the outset, while referring to the deposition of the father of the deceased – PW-15, Bhikhabhai Kalyanjibhai Jethwa, (Exh.172), has submitted that he would like to highlight on the aspect of motive of committing the murder of the deceased by the accused. He has submitted that as per the deposition of this witness, A-7 had issued threats to him as well as to his son (deceased). It is submitted that there were 22 offences registered against A-7 and the entire evidence, if read in totality, will establish that since his son was an

RTI activist and was filing various applications and complaints against A-4 and A-7, they had all the reason to commit the murder of the deceased. He has submitted that even after the investigation was handed over to the CBI, this witness has deposed that threats were issued by A-7, hence, he filed a complaint before the appropriate authorities. He has referred to various documents from Exh.173 onward, which are addressed by the deceased to various authorities against A-7 relating to his illegal procurement of the passport and VISA, which were subsequently cancelled due to the complaint filed by the deceased against him. He has referred to Exh.175, an F.I.R. dated 22.02.2008, registered by the deceased against the supporters of A-7, who had assaulted the deceased, while he was going in his Gypsy car. He has referred to the contents of such F.I.R. Further, he has referred to the Fax message of the deceased dated 26.01.2009 (Exh.176) sent to the Deputy Superintendent of Police, Amreli, about behaviour meted out to him on 26.01.2009 by A-7. Further, learned Special Public Prosecutor Mr.Kodekar, has referred to the application made by the deceased to the Secretary, Revenue Department, dated 22.04.2010, which pertains to the complaint about the illegal meeting and the illegal resolution passed by Rajmoti Charitable Trust of which A-7 is one of the Trustees. Ultimately, this complaint has found in favour of the authority and the said resolution passed in the meeting was cancelled. Learned Special Public Prosecutor Mr.Kodekar, has referred to Exh.178, the complaint dated 22.04.2010 with regard to the illegal construction. He has also referred to the documents at Exh.179 dated 18.02.2010, which is a complaint against A-4 given by the deceased against installation of illegal mobile towers, which is addressed to the Director of Nagarpalika, Gandhinagar. Similarly, various complaints are made by the deceased against A-4 and A-7, which are referred by the learned Special Public Prosecutor Mr.Kodekar. The last document, which is referred by learned Special

Public Prosecutor Mr.Kodekar, which is of 10 days prior to the murder of the deceased, being an application dated 16/17.07.2010 (at Exh.201), which pertains to cancelling of the lease granted for mining to A-7, such application is made by the deceased to the District Collector, Junagadh, requesting the authority to implement the order dated 16.05.2008, which was already passed cancelling the lease granted to A-7. Thus, learned Special Public Prosecutor Mr.Kodekar, has tried to impress this Court by submitting that the accused had all the motive to commit murder of the deceased in view of the campaign undertaken by the deceased regarding illegal mining and illegal activities committed by A-4 and A-7.

11.2) Learned Special Public Prosecutor Mr.Kodekar has submitted that the defence has raised five points in their favour, which are as under:

- (1) The deceased was having affiliation with the opposition party i.e. Congress Party;
- (2) There is no income source of the deceased, as to how he was managing his family and how he owned his offices and home;
- (3) There are several applications filed by the deceased against various other persons, including the Government Officers, industrialists etc., who would have grudge against the deceased and had the motive to eliminate the deceased;
- (4) The deceased was extorting money from all the aforesaid persons;
- (5) Illicit relationship of his wife with one – Bhagwanbhai Dhakan.

11.3) It is submitted by learned Special Public Prosecutor Mr.Kodekar, that there is nothing coming on record, which shows that any political party was ever interested in committing the murder of deceased and there is no motive established in this regard and hence, it is submitted that the first defence is not tenable in law. So far as the second defence, with regard to the extortion of money by the deceased by filing various applications against the aforementioned persons, it is submitted that the evidence does not in any manner reveals that he was extorting money by undertaking the RTI applications. For the third defence, it is submitted by learned Special Public Prosecutor Mr.Kodekar, that not having the income source or the issue of income source is absolutely subjective and the defence is unable to prove anything in this regard and this cannot be said to be a factor, which would have resulted in the murder of the deceased. So far as the last defence of having illicit relationship of the deceased with wife of one Bhagwanbhai is concerned, he has submitted that the evidence also does not in any manner establish that the wife of the deceased had illicit relation with Bhagwanbhai. It is submitted that so far as the documentary evidence, which is produced at Exh.173 onwards, the defence had not questioned the existence of such documents since the same are made to the lawful authority.

11.4) Learned Special Public Prosecutor Mr.Kodekar, while referring to the evidence of PW-37, Jigneshbhai Bhikhubhai Jethwa (Exh.324), who is the brother of the deceased, has submitted that this witness has deposed that his father (PW-15) was active in Bharatiya Janta Party (BJP), but thereafter he shifted to the Congress Party and his father is knowing A-7. He has referred to the RTI activities of the deceased. He has also stated that the deceased has also contested the election against A-7 in the year 2007. He has referred to the assault by the person of A-7 in the year 2008, while attending one marriage.

He has also admitted that there was PIL (being SCA No.7690 of 2010) filed by the deceased against A-7 and he had warned the deceased that A-7 was giving threats to him (deceased).

11.5) PW-49, Bhavin Bhikhalal Jethwa, (Exh.351) is the brother of the deceased, he also deposed on the same line to that of his brother (PW-37) and has referred to the threats being given to the deceased by A-7. He came to know about the incident from TV. It is admitted that the deceased used to file various applications against many persons over and above A-7 under the RTI.

11.6) PW-17, Manubhai Jesingbhai Dodiya, (Exh.240) this witness is the Secretary of Shri Dhirsinh Karshanbhai Barad (PW-25), who is a politician of the Congress Party. He has also stated that the deceased used to file various applications against A-7. He has referred to the various applications relating to the passport and other complaints made by him against A-7. It is admitted that all the complaints or applications, which are filed by the deceased against A-7 or A-4, have been forwarded by him to PW-25. This evidence of the witness reveals that the deceased used to file various applications and the complaints under the RTI against A-7. He also refers to the various applications / complaints filed by the deceased against A-7.

11.7) PW-50, Kanaksinh Pratapsinh Parmar, (Exh.359) is a translator of documents of the deceased. He refers to the RTI activities of the deceased and has stated that the deceased was pursuing to end the illegal activities of A-7, hence, A-7 had thought of eliminating him.

11.8) Learned Special Public Prosecutor has placed reliance on the documentary evidence of some of the Government officers to prove the motive and substantiate the evidence of the father of deceased (PW-15) at Exh.172. Learned Special Public Prosecutor has referred to the

evidence, in order to show that pursuant to the various applications made by the deceased against the alleged illegal activities of A-4 and A-7, the Government authorities have initiated and taken action against him, which garnered the motive for A-7 to eliminate the deceased. He has referred to the evidence of PW-59, Jigneshbhai Rasiklal Dave, (Exh.388) who is the geologist, in order to show that A-7 was illegally running Somnath Stone Crusher. He has also referred to the evidence of PW-129, who is also a geologist (at Exh.606), PW-81, Taluka Development Officer (at Exh.481), PW-64, who is the Deputy Engineer of PGVCL (at Exh.409), PW-65, who was the Overseer and working in Kodinar Nagarpalika (at Exh.417), PW-69, Mensibhai Rajabhai Kathad, who was the Deputy Engineer of PGVCL (at Exh.432), PW-76, Kentankumar Harshadbhai Dafda, who was a Clerk in the Office of Collector of Junagadh (at Exh.449), PW-77, Bhavesh Jayantilal Pandya, who is an employee in the Office of Assiatant Charity Commissioner, Junagadh (at Exh.458), PW-78, Pratapsinh Kanabhai Zala, who is an officer working under Junagadh Collector (at Exh.462), PW-79, Pankaj Dahyalal Thakar (at Exh.473), who is the Circle Officer with regard to the details of the license of weapons of A-7, PW-80, Manojkumar Vitthalbhai Patel, Vigilance Officer of Pollution Control Board (PW-478), PW-82, Jagdishbhai Bhakhtamalji Jain (Exh.485), who is Vice President of Ambuja Cement and the owner of six firms and to show that A-4 and A-7 are partners in one of the firms, PW-83, Dineshkumar Mansukhlal Agrawat (at Exh.494), who is Deputy Mamlatdar of Gir Somnath, who issued a show cause notice to A-7 and PW-112, Harishbhai Arjunbhai Malani (Exh.561) employee of the Passport Office, who imposed fine of Rs.5,000/-.

11.9) Learned Special Public Prosecutor Mr.Kodekar, while referring to the overall deposition in juxtaposition, has also referred to the various

applications and complaints made by the deceased against A-7 and has submitted that all the documentary evidence would clearly establish that A-7 was having grudge against the deceased in view of many complaints filed by the deceased against him and hence, there was an ample motive on behalf of A-7 to eliminate the deceased.

11.10) Learned Special Public Prosecutor Mr.Kodekar has also referred to the deposition of PW-162, Bharat Kapilrai Mistry (Exh.684), who is the Scientific Officer, Assistant Director of FSL, who has examined the firearm, clothes, cartridges etc., and has referred to the FSL report, he has also referred to the scene of offence Panchnama at Exh.374. He has stated that one *kurta* (long and loose shirt), was recovered from the cover of the headlight of the motorcycle, which contained "B" blood group and with a ball-pen ink 'Dashrathbhai' was written on the piece of *kurta*. It is submitted that the said evidence directly connects with the accused.

11.11) Learned Special Public Prosecutor Mr.Kodekar has referred to the evidence of PW-190, Himmatlal Mohanrai Kundaliya (Exh.811) the first Investigating Officer, who had arrived at the scene of offence immediately. He has submitted that his evidence reveals that he was informed about the incident at 20:46 hours on 20.07.2010 and his investigation at the scene of offence reveals that the accused, after shooting the deceased, ran towards Vishwas City. He has referred to the deposition of PW-22, Indrajitsinh Hathisinh Vaghela (Exh.266), who had also followed the accused for a distance of half to quarter half kilometer. He has also referred to the evidence with regard to the stolen motorcycle, which was found at the scene of offence and he has collected the F.I.R. and from the F.I.R., it was known that the real owner of the motorcycle was PW-34, Ghanshyambhai Jethabhai Soni (Exh.316). He has also collected two mobile numbers being one 985996262, which is of PW-47, whereas another 9427427565 at

Exh.701, (however, his evidence does not reveal that on what manner such mobile numbers are collected by him). He has also admitted that the Police Station is 400 mtrs. away and he reached within 55 seconds, after he was informed about the incident, and when he reached at the scene of offence, Advocate, Mr.Vijaybhai Nangesh and Advocate, Mr.Vajsi Hardas Kanara was present and he knew that Mr.Vijaybhai Nangesh is the advocate of the deceased. He has recorded the statement of Advocate, Mr.Vijaybhai Nangesh on 21.07.2010 i.e. on the next day of the incident. With regard to the statement of (PW-13), Advocate, Mr.A.J.Yagnik, he has admitted that this witness – Mr.A.J.Yagnik has not disclosed in his statement dated 22.07.2010 that the deceased had met him on 19.07.2010 at 2:25 p.m. He has admitted that his investigation also does not reveal that the deceased met with Advocate, Mr.A.J.Yagnik on 19.07.2010. He has also admitted that in order to enter in the High Court premises, a mandatory gate (entry) pass is required, however he has not done any investigation in this regard, as to whether the deceased visited the High Court on that day and he has not collected any CCTV footage from the High Court and he did not come across any evidence, which would suggest that Advocate, Mr.A.J.Yagnik met the deceased on 19.07.2010. He has further admitted that no information or evidence was known to him in his investigation that any threat was issued by A-7 to the deceased as no application was filed by the deceased seeking police protection. He has also admitted that the witness - Rambhai Hajabhai Solanki did not inform about anything with regard to the incident. He has also admitted that the motorcycle was found to be stolen and the owner was one - Ghanshyambhai Jethabhai Soni and no evidence was collected by him with regard to replacing of the number plates. He has also admitted that so far as the vehicle - Gypsy car is concerned, which was found from the scene of offence and was being driven by the deceased, no fingerprints are found. Similarly, no

fingerprints are found on the firearm, though attempts were made to take the fingerprints from such firearm. He has also stated that no fingerprints were found on the wine bottle, which was found at the place of incident. It is also admitted that he has not done any investigation with regard to the ownership of the house of the deceased or his office. It is also admitted that while recording the F.I.R., he had taken advice from the Assistant Commissioner of Police (ACP) and Deputy Superintendent of Police (DSP), who were also present on that day i.e. 20.07.2010 at the scene of offence. On a question put by the trial Court, he has answered that home of the deceased was at a distance of half kilometer from the place of incident. He also admitted that the accused ran away for half and quarter (0.45 km.) in the straight road and went into a street.

11.12) While referring to the circumstance of conspiracy, learned Special Public Prosecutor Mr.Kodekar, at the outset, has submitted that the case of the prosecution solely depends upon the evidence of PW-26, Rambhai Hajabhai Solanki, for establishing that the conspiracy was hatched at the farm house of A-7. Learned Special Public Prosecution Mr.Kodekar, has asserted before this Court that the statement of Rambhai Hajabhai Solanki was recorded under "Section 164(1)" of the Cr.P.C. by Magistrate at New Delhi. The first statement was recorded at Kodinar by the CBI at the Circuit House on 18.01.2013. He has also admitted that only interrogation was done on 18.01.2013 and no statement was recorded, and the first statement under Section 161 of the Cr.P.C. was recorded on 15.05.2013 and the second statement under Section 164 of the Cr.P.C. before the Magistrate was recorded on 16.05.2013. Learned Special Public Prosecutor Mr.Kodekar, has submitted that even if there is delay in recording the statement of the witness - Rambhai Hajabhai Solanki, the same cannot be considered adverse to the case of the prosecution,

as the CBI was entrusted the investigation on 06.09.2012 and the first statement was recorded on 15.05.2013 and the second on 16.05.2013 before the Magistrate.

11.13) Learned Special Public Prosecutor Mr.Kodekar, has submitted that from the evidence, it is revealed, more particularly from the hostile witnesses that from their numbers, there was some communications between them and the accused, hence, it can be easily concluded that there was a conspiracy hatched by A-7. It is admitted that after such data was collected, it was fed into the Lakshya Software by the Investigating Officer, Raghvendra Dr. Shyamsing Vats, and ultimately, after feeding the name of the accused, the Call Detail Analysis report (Exh.869) was prepared and the printout was taken, which has been heavily placed reliance by the trial Court in convicting the accused by proving the conspiracy. Learned Special Public Prosecutor Mr.Kodekar, has very fairly admitted that the Investigating Officer, Raghvendra Dr. Shyamsing Vats, did not issue any certificate, as required under Section 65B of the Indian Evidence Act.

(12) Submissions of amicus curiae - Learned Senior Advocate Mr.Bharat B. Naik.

12.1) Learned Senior Advocate Mr.Naik, who has been appointed as an *amicus curiae*, at the outset, has urged this Court to consider the judgments passed by the Apex Court and this Court relating to this case for proving the involvement and influence of A-7. Learned Senior Advocate has submitted that A-7 joined the politics and was the President of Kodinar Municipality. Thereafter, in the year 1998, he was elected as an MLA from Kodinar. Initially, the deceased was staying at Gandhinagar at MLA Quarter of A-7 but after 2000, when he started the environmental activities, the relation started deteriorating between the deceased and A-7. In the year 2007, the deceased had contested the election against A-7 and the same was

lost by him. But before that, he started taking interest in the Gir Forest and he started asking details of mines operating within 6 kms. radius of Gir National Sanctuary. Mainly, A-7 and his family members are handling the mining activities and other transportation. They started other activities also with mining and erecting mobile towers and when the Central Government allowed grant of Rs.60,00,000/- for construction of a Community Hall and “*Ren Basera*” that was constructed by the municipality and without inviting any tender directly it was transferred to “Rajmoti Trust”, which is of A-7. He has submitted that A-7 was elected as either MP or MLA, and his network was so strong that as and when such application is filed, he knew about the same. He has submitted that despite circulars having been issued by the Central Government and the State Government to stop all the mining operation within 5 kms., still the mines were operated by A-7 in Gir in the year 2007 and in the year 2008, and even lease was also granted to him by the Geology Department. It is submitted that since the deceased did not succeed before the Government authority, he filed a writ petition - PIL (being SCA No.7690 of 2010) before the High Court of Gujarat on this issue, in that petition in Paragraph No.2.29 (Exh.117), there are specific allegations leveled against A-7 and A-4 by name. It is submitted by learned Senior Advocate Mr.Naik that Advocate, Mr.Vijaybhai Nangesh has falsely deposed that there were no allegations against the accused, whereas on the contrary on 06.07.2010, the High Court directed to join A-4 and A-7 as party respondents in the PIL. They were joined as parties and were also served a notice around 10.07.2010 and on 20.07.2010, the deceased was shot dead and only thereafter on 27.07.2010, Somnath Crushers operated by A-7 was ordered to be closed. The PGVCL disconnected the electricity connection and Geology Department canceled the lease and everything was done on 27.07.2010, immediately after his death.

12.2) While referring to the deposition of PW-12, Danaji Bhuraji Rajpur (Exh.155), he has submitted that there are four TI parades (Exh.158, Exh.161, Exh.164 and Exh.167) and Exh.158 undertaken for the identification of A-1 by witness PW-39, Suleman @ Salmanbhai Jahangirbhai (Exh.336) and for identification of A-2, Pachanbhai Gopalbhai @ Shivabhai Desai for A-3, Sanjay Parbatbhai Chauhan, by PW-43, Govindbhai G. Patel (Exh.342), and PW-48, Dharmendragiri Balugiri Goswami (Exh.349) is regarding identification of A-5, Udaji Kantiji Soneji Thakor, by PW-14, Rajeshbhai Pethabhai Bharwad (Exh.170) and Exh.167 is for identification of A-6, Shailesh Nanalal Pandya, by PW-14, Rajeshbhai Bharwad, and PW-9, Vikrambhai K. Naik, (Exh.144), Manager of Hotel Rudra Palace. It is submitted that the statement of these witnesses before the Executive Magistrate is a corroborative piece of evidence and this is supported by the register of the hotel, where the accused persons have stayed. He has submitted that if this is the only evidence, it may not be relied upon, but if the statement is supported by the documentary evidence from the hotel and it is in the same transactions of the offence, it can be relied upon as a link for proving the conspiracy.

12.3) Learned Senior Advocate Mr.Naik, has referred to the evidence of PW-39, Suleman @ Salmanbhai Jahangirbhai (Exh.336). He has deposed that he was taken for the identification of the motorcycle, which was used for commission of the offence. Learned Senior Advocate Mr.Naik has further referred to the evidence of PW-43, Govindbhai Patel (Exh.342), who is serving at Hotel Konark Palace and PW-48, Dharmendragiri Balugiri Goswami (Exh.349) in this regard.

12.4) While referring to the evidence of PW-13, Mr.A.J.Yagnik (Exh.169), he has submitted that PW-13 was also filing PILs' relating to the environmental issues, so he is known to people at large in

Gujarat, therefore, the deceased had come to meet him. He has submitted that the deceased was regularly coming to the High Court and knowing Advocate, Mr.A.J.Yagnik, and therefore, the statement of PW-13 saying that he came to meet him on 19.07.2010 in the recess and informing about the threats from A-7 is a vital piece of evidence. While referring to the evidence of PW-26, Rambhai Hajabhai Solanki, at (Exh.283), he has submitted that the defence has tried to project that this witness was serving as a President of fisheries, however, he has submitted that this witness has categorically denied his signatures on the documents relating to fisheries. Various documents are referred to by learned Senior Advocate Mr.Naik relating to A-7 showing his illegal activities and to show that he is a headstrong person. The complaints are by the Deputy Director General of Police and the District Collector, etc. Learned Senior Counsel has referred to document at Exh.352, which is a letter written by Deputy Director General of Police (Range IG) to Director General of Police, Gujarat State and Exh.467 is a report by the Deputy Collector to the Collector.

12.5) With regard to the evidence of Exh.869, prepared by I.O. Raghvendra Dr. Shyamsing Vats, he has submitted that all the CDRs certificates under Section 65B of the Evidence Act were issued by the Nodal Officers, and after receiving the data, the same was entered in the computer, which is operated by this witness, and this evidence, clearly shows that he fed that data in the computer by using the Lakshya Software and thereafter, whatever he has received as output, he has produced, and he has not relied upon any other person or any other computer. It is submitted that when the person himself has operated the computer and by feeding the data, he finds something and produces himself before the Court then a certificate under section 65B(4) of the Evidence Act is not required. He has submitted that the trial Court is justified in relying upon the report at Exh.869 for

convicting the accused. Learned Senior Advocate Mr.Naik, has relied on the judgment of the Apex Court in the case of Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal and Ors., 2020 (7) S.C.C 1 in this regard.

(13) ANALYSIS OF EVIDENCE OF WITNESSES AND FINDINGS:

13.1) We shall now endeavor to comb the record anew. It is no more *res integra* that the High Court, while exercising its appellate powers under section 374 of the Cr.P.C. is required to assess the evidence adduced before the trial *de novo*, since the personal liberty of the accused is curtailed due to conviction. The decision of the High Court must reflect proper application of mind to the vital evidence and the contentions raised by the respective parties and also on the findings and appreciation of evidence by the trial Court.

13.2) As recorded hereinabove, after the judgment of the Apex Court and this Court, 26 witnesses were re-examined out of which 25 witnesses have again turned hostile. The deposition of one witness PW-23, Bhagwandas Himmatlal Dhakan, (Exh.268) does not help the prosecution in any manner. The trial Court has convicted all the accused for the murder of the deceased by taking aid of section 120B of the IPC. It is held that the main conspirator was A-7. The evidence of the star-witnesses, on which the prosecution and the trial Court have heavily placed reliance, are analyzed and discussed as under:

13.3) **Evidence of PW-26, Rambhai Hajabhai Solanki (Exh.283).**

PW-26 is projected as a star eye-witness to prove the conspiracy hatched by A-7. In his evidence before the trial Court, he has asserted that he used to work at the farm house of A-7, Dinubhai Boghabhai Solanki, for the period from 2003 to 2011.

In his examination-in-chief, he has deposed that he used to know the deceased – Amit Jethwa and his office was near the bus stand at village Khambha. He has deposed that A-1, Bahadursinh Dhirubha Vadher, who was working as a police constable, used to visit A-7, Dinubhai Boghabhai Solanki on his farm house and A-1, Bhadursinh Vadher and the nephew of A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki, were friends. It is further deposed that some incident had occurred between A-7 and the deceased at the time of election in the year 2007, where the deceased had contested the election as an independent candidate. It is stated that A-7 had won that election and thereafter, the deceased had filed various applications under the RTI Act against the illegal mining carried out by A-7. It is asserted in his examination-in-chief that before three months of the murder of deceased – Amit Jethwa, there was one meeting held by A-7 with A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki, and A-1, Bhadursinh Vadher, near the swimming pool of Harmadiya Farm. It is deposed that A-7 told A-1, Bhadursinh Vadher, that the deceased is asking for information under the RTI Act against him, and hence, he should be murdered. It is further deposed that prior to six months of the murder of the deceased, “accused No.7 had called one - Amarsinhbhai (youngest brother of the accused No.7) informing him that the deceased has left from village Khambha and he should be crushed under the truck”. It is further asserted by him that such meeting had taken place between 8 to 9 in the night. It is stated that on 19.07.2010 at about 8 O’clock, A-7 went in his Innova Car from his Harmadiya Farm and he returned on 21.07.2010 at 9 O’clock. He has further stated that A-1 had called him that he is not coming tomorrow. It is further stated that at that time, he received one phone call from the tractor driver from Kodinar and during his conversation, the said driver had informed him to hold the call and from the television, he came to know that someone has shot the

deceased – Amit Jethwa and accordingly, after informing him, the said driver had ended the call. It is further stated by him that in the meeting, which was held in Harmadiya Farm, A-7 resolved to murder the deceased.

Further, it is deposed that his statement was recorded by the CBI at Kodinar Circuit House and thereafter at Diu Circuit House and he was called to Delhi by one CBI Officer, Shri Mukesh Sharma, and he was taken before one Judge, where his statement was recorded. He has stated that he had informed the concerned Judge that he needs police protection, as he was subjected to assault time and again. In the cross-examination, at the behest of A-7, it is noticed that he has been extensively cross-examined for having relationship with the Congress Party. It is admitted by him that he has shared the Facebook photo of Bhikhalal - father of the deceased. Various photographs of him are taken on record by the trial Court being Exh.330 and Exh.331. It is further in his cross-examination elicited that he is working as a photographer since last three years and he is also working as a Driver since last 7 years and he is also an RTI activist.

Further, in the cross-examination this witness has admitted that no statements were recorded by the Sola Police Station, Crime Branch, and the Superintendent of Police, Surendranagar and he did not make any attempt to approach the police for giving any information relating to the conspiracy of murder of the deceased. It is stated that his first statement was recorded by the CBI at Kodinar and thereafter at Diu Circuit House between the gap of one and half month. He has deposed that his statement at Kodinar was not recorded by the CBI Officer, Shri Mukesh Sharma, and when his statement was recorded at Kodinar, the CBI Officer, Shri Mukesh Sharma was not present. He has asserted that the CBI Officer, Shri

Mukesh Sharma was not present when his statement was recorded at the Diu Circuit House also.

It is further admitted by him that after his statement was recorded at Diu, he was taken to a Magistrate, New Delhi for recording his statement. It is admitted by him that in his Facebook account, he used to post the photographs of A-7 and A-4 Shivabhai, in order to defame them. Such photographs of the Facebook are exhibited at Exh.333. In the cross-examination, it is elicited by him that it is true that in the statement before the CBI, he has not stated that on what date, A-1, Bhadursinh Vadher had visited the Farm House and on which month and for how much time, the meeting had taken place.

In the cross-examination on behalf of A-5 and A-6, it is admitted by him that he did not inform about the incident of Amit Jethwa (deceased) to the police. It is further admitted by him that prior to the incident, he has neither informed the family members of the deceased nor to anyone, including his friends or his family members regarding the conspiracy hatched by the accused.

It is further admitted by him that he did not inform about the illegal activities undertaken by A-7, A-4, and A-1, to the police or to his family members or his friends. It is admitted that he did not inform the media also. It is further admitted by him that he did not inform about the meeting of A-7 with other accused to anyone, prior to the statement recorded by the CBI. It is further asserted by him that he did not inform anyone about the discussion of murder of the deceased, including his relatives or his friends or to media and / or to the family members of the deceased. It is also admitted by him that after the death of the deceased, he did not inform about the same before any Court. In further cross-examination, he has admitted that he did not inform that he was serving at the farm of A-7 till his

statement was recorded by the CBI. It is stated that till such statement was recorded by the CBI, he did not inform the said fact to any Government officer or to any Police Station and it is also admitted by him that he has not given any evidence with regard to he being serving / working at the farm of A-7 before the CBI or to any police authority.

It is also admitted by him that he did not disclose the reason about giving his statement after a delay of approximately three years before the Magistrate at New Delhi. It is submitted that he has also not stated for a period of approximately three years about he being employed by A-7. It is further elicited that there were three criminal cases registered against him.

In his further cross-examination, it is admitted that his statement was recorded in Diu by Sandeepbhai and Sharma and other officers collectively. However, we did not find any Investigating officer named as Sandeepbhai. It is further stated and admitted by him that his second statement was recorded by the CBI Officer at Kodinar after 4 to 6 months and he was informed about the same by the CBI Officer, Shri Mukesh Sharma. On a question being asked by the trial Court, he has answered that his statement was recorded at the Kodinar Circuit House. Further, it is stated by him that he was not in contact with the deceased till his death. It is further narrated by him that he went to the office of the deceased one year before along with his relative. It is further admitted by him that father of the deceased - Bhikhabhai was present when he went there and accordingly, he had also taken tea with him in April, 2016. It is admitted by him that he did not inform his father about the conspiracy. He has admitted that he did not disclose any information relating to the murder of the deceased (Amit Jethwa) to his father (Bhikhabhai). It is further admitted by him that no Panchnama of the Harmadiya Farm, where

the alleged meeting was taken place between A-1 and other accused, has been drawn in his presence.

In order to dent the credibility of this witness, the defence has examined two defences witnesses. (DW-1), Govindbhai H. Solanki (Exh.895) & (DW-2) Nitingiri Goswami (Exh.896).

a) DW-1, Govindbhai H. Solanki, who is Ex-sarpanch of the village. This witness is examined by the defence (Exh.895). In his deposition, he has stated that PW-26, Rambhai Hajabhai Solanki, is associated with the Congress Party. Further, it is stated that PW-26 is the President of Bhagyashree Matsya Udyog Co-operative Society before 2012. It is further asserted that he had remained as President of the Fisheries Society from 2006 to 2012. He has also produced documents in this regard, which are Exh.900 and Exh.901 to Exh.905, in which, it is referred that PW-26 was in fact holding the post at that time as the Chairman / President of the said Society. On suggestion put by the learned APP, he has deposed that PW-26, Rambhai Hajabhai Solanki, was not serving as a Supervisor at Harmadiya Farm between 2003 to 2011.

b) Deposition of DW-2, Nitingiri Goswami (Exh.896) – He has deposed that he is the Secretary of Shree Bhagshree Matsya Udhyog Seva Sahakari Madali since 2006 and the President of Fisheries is one Pratap Udabhai Barad since 2012 and before 2012, PW-26, Rambhai Hajabhai Solanki was the President of this Fisheries Co-operative Society. He has accordingly produced all the documents of this society, which contains the signatures of PW-26. It is categorically stated that all the documents reveal that PW-26 was the President of such Fisheries and his documents contain various resolutions passed by the Society as well as the Audit Reports.

On the cross-examination of this witness by the learned Additional Public Prosecutor, it is elicited that PW-26, Rambhai Hajabhai Solanki was not the employee of A-7 and he used to work from 2003 to 2011 with him. He has also categorically denied about the doubt created on the authenticity of the documents, which he has produced. From his evidence, thus, it is revealed that PW-26, Rambhai Hajabhai Solanki, was related with the fisheries Society and was serving as a President, though PW-26 has denied the signatures of such documents. Learned Additional Public Prosecutor has been unable to extract contradictions, which would affect the credibility of this witness. It is not the case of the prosecution that this witness was having any type of animosity with PW-26.

13.4) Findings on the evidence of the star-witness PW-26, Rambhai Hajabhai Solanki :

The entire case of the prosecution of hatching the conspiracy by A-7 along with A-1 and A-4 hinges on the evidence of this witness. It is alleged that he had overheard the discussion amongst the accused about eliminating the deceased at Harmadiya Farm of A-7. This witness has been examined for the first time after the investigation was handed over to the CBI. He has not come forward to give his statement before any of the investigating agencies, which had carried out the investigation prior to CBI. He has not approached the local police, nor the Crime Branch or the SIT. From the evidence of the I.O., PW-193, Raghvendra Dr. Shyamsing Vats, it is manifest that though a declaration / proclamation was issued in the Kodinar area calling for information / statement or any details relating to murder of the deceased by any one, however this witness has not come forward with any information. As per the evidence of Investigating Officer PW-194, Shri Mukesh Sharma (Exh.840), he had recorded the first statement of PW-26, Rambhai Hajabhai Solanki at Kodinar on 18.01.2013, however, no such statement has been produced on record, despite an

opportunity given to him by the Court. No Station Diary has been produced, though he has assured the trial Court that he would do so within a period of three days. The second statement of this witness under the provisions of Section 161 of the Cr.P.C. was recorded by I.O., PW-194, Shri Mukesh Sharma on 15.05.2013, however, it was signed on 16.05.2013. His statement under the provision of Section 164 of the Cr.P.C. was recorded at Delhi before the Magistrate on 16.05.2013. In the first statement on 15.05.2013, he has mentioned the timing of meeting at the Harmadiya Farm Swimming Pool at 11 a.m., whereas in the statement recorded on the next day i.e. on 16.05.2013 under Section 164 of the Cr.P.C., before the Magistrate, he has chosen not to disclose it.

The evidence of this witness – PW-26, Rambhai Hajabhai Solanki, reveals that at the time of deposition, he was working as a photographer. It is the case of the prosecution that PW-26 was an employee of A-7 and was working at Harmadiya Farm between the period from 2003 to 2011, however no evidence has surfaced on record, which can remotely suggest that he was working at the Harmadiya Farm of A-7. It is admitted by him that he and his family members were also staying in that farm, but no statement, either of his family members or anyone else are recorded. Moreover, the evidence also does not reveal that the Harmadiya Farm belongs to A-7. The investigating officer has ignored to draw necessary panchnama to demonstrate that Harmadiya Farm was having a Swimming Pool, and A-7 held a meeting with A-1 and A-4 and hatched the conspiracy of eliminating the deceased. From the evidence of this witness, it is established that he was not standing near the accused, but he overheard the discussion from a distance. No evidence in the form of panchnama is on record which can prove PW-26, Rambhai Hajabhai Solanki was at an audible distance from A-7, A-1 and A-4, who were

planning murder of the deceased. Even no pointing out panchanam of PW-26, Rambhai Hajabhai Solanki is prepared by the I.O., which can show his location, the Swimming Pool or the presence of accused. All these details could have been highlighted in case the panchanama was drawn or any other witness, who was working in the Harmadiya Farm, was examined. No documentary evidence is collected by the I.O.'s suggesting the ownership of the Harmadiya Farm by A-7. From the documentary evidence and the oral evidence of the defence witnesses, it is revealed that this witness was connected with Bhagyashree Fisheries. He was extensively cross-examined to prove that he was the President of Bhagyashree Fisheries Industries. The documentary evidence reveals that this witness was a Chairman in 2006 of Bhagyashree Fisheries Industries and his name also figures in the name of promoters as per the audit reports. As per the evidence of PW-26, Rambhai Hajabhai Solanki, he was working as a Farm Supervisor at the Harmadiya Farm of A-7 between the period 2003 to 2011. The documentary evidence reveals that he was the Chairman of Bhagyashree Fisheries Industries since 2006 to March, 2007, however, this witness has denied his signatures in the documents, which are produced by defence witnesses. The depositions of the defence witnesses also disclose that this witness was President of the Fisheries Farm. The prosecution is unable to elicit any major contradiction in the deposition of the defence witness. DW-2 has categorically, on a suggestion put by the learned APP, deposed that PW-26 was not serving at the farm of A-7. Thus, there is no evidence on record, which can remotely suggest that the star-witness to the conspiracy, PW-26, Rambhai Hajabhai Solanki, was an employee of A-7 and was working at the Harmadiya Farm.

The testimony of PW-26 also reveals that he has not given any reason for coming forward to give his statement after a period of more

than 2 years and 10 months, though he was having good relation with father of the deceased and with the deceased since he was also an RTI activist. He did not divulge the details of the meeting held by A-7 at the Harmadiya Farm to anyone. As per the evidence of PW-85, Natvarsinh Oganbhai Vala, PW-26, Rambhai Hajabhai Solanki, was also knowing PW-25, Dhirsinh Karshanbhai Barad. Thus, the version of this witness of witnessing hatching of conspiracy at the Harmadiya Farm by A-7, A-4 and A-1 is not palatable. It is hard to believe that though he was an RTI activist, well known to father of the deceased, and also associated with the Congress Party and was close to MLA PW-25, Dhirsinh Karshanbhai Barad (as per evidence of PW-85); he had no courage to mention the conspiracy to anyone for almost three years till the investigation was handed over to the CBI. Thus, the star witness projected by the prosecution has not established himself of sterling quality. Moreover, the evidence of PW-58, Vinodbhai Shivabhai Moliya, as discussed below, dents the genesis of PW-26, Rambhai Hajabhai Solanki, and the credibility of the case of the prosecution.

Though the Trial Court has held that no documentary evidence has been produced by the prosecution, showing that the witness Rambhai Hajabhai Solanki was in fact an employee of accused no.7 and was working at his farm; the Trial Court has thoughtlessly accepted the fact from his cross-examination that he was serving as an employee at the farm house of accused no.7, and was being paid remuneration.

13.5) Deposition of PW-58, Vinodbhai Shivabhai Moliya, (Exh.387) :

PW-58, Vinodbhai Moliya, who is referred in the testimony of PW-26, has turned hostile. He has not supported the statement recorded by the CBI. PW-26, Rambhai Hajabhai Solanki, in his

examination-in-chief has specifically stated that he was informed about the murder of the deceased by one tractor driver, however the evidence does not reveal the name of the tractor driver, who has informed him.

Findings: Though, he has turned hostile, it is the case of the prosecution that PW-58, Vinodbhai Shivabhai Moliya (Exh.387), in his statement recorded by the CBI on 24.02.2013 refers to PW-26, Rambhai Hajabhai Solanki, wherein he has stated that he used to work at Panjrapole Land belonging to A-7, where he was doing digging work and Rambhai Hajabhai Solanki was making the payment, and on payment receipt, Rambhai Hajabhai Solanki used to put his signature, however, no efforts are made by the I.O.'s to collect such receipts in order to establish the link of Rambhai Hajabhai Solanki with A-7 to prove that he was an employee of A-7. It is the case of the prosecution that from the statement of this witness, the name of Rambhai Hajabhai Solanki was revealed for the very first time, which gave clue regarding conspiracy hatched at the Harmadiya Farm by A-7, however from the evidence it is established that the statement of this witness was recorded after recording the statement of PW-26, Rambhai Hajabhai Solanki, which raises serious doubt on the case of prosecution.

13.6) PW-85, Natvarsinh Oganbhai Vala, (Exh.508):

This witness is the relative of A-7. In his cross-examination, he has admitted that PW-26, Rambhai Hajabhai Solanki, is known to him since 25 years and he is a fisherman. He has also admitted that he was also known to Dhirsinh Karshanbhai Barad, who was Ex-MLA and PW-26, Rambhai Hajabhai Solanki, used to drive his car. He has also admitted that Dhirsinh Karshanbhai Barad and A-7 are political rival and the relationship between them are very soar. He has also

admitted that PW-26, Rambhai Hajabhai Solanki, was active member of the Congress Party and Dhirsinh Karshanbhai Barad is along from the same party and they are very close to each other. From this witness, it is revealed that PW-26, is closely associated to Dhirsinh Karshanbhai Barad, who is Ex-MLA and both belonging to the Congress Party.

13.7) PW-13, Advocate, Mr.A.J.Yagnik, (Exh.169) :

PW-13, who is examined at Exh.169, is practicing as an advocate since 1995 in the High Court of Gujarat and he is dealing with PILs. In his deposition, he has stated that his father is running an NGO in the name and style as 'Setu'. It is submitted by him that the deceased - Amit Jethwa met him on 19.07.2010 in his Advocate Chamber No.307, during the recess hours for 10 to 15 minutes. It is admitted that the recess in the High Court is from 1:45 to 2:30. It is further deposed by him that the deceased asked him to meet him privately since in his chamber other advocates were present and accordingly, he came out of his Chamber No.307 and met the deceased, who informed him that A-7, is issuing threats to him in view of the PIL filed by him before the High Court relating to illegal mining at the Gir Sanctuary. It is further deposed by him that his two juniors - Mr.Riddhesh Trivedi, Advocate and Mr.Manoj Shrimali, Advocate were also introduced by him out of his chamber to the deceased. It is deposed that A-7 and his nephew A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki, were doing illegal mining in such areas and they were threatening the deceased. It is further stated that his initial statement was given by him at the Sola Police Station on 22.07.2010, after the incident has occurred on 20.07.2010 and the same was recorded by the Police Inspector, Shri Kundaliya and thereafter, his second statement was recorded by the CBI on 10.01.2013 under the provisions of Section 161 of the Cr.P.C. It is also admitted by him that

the NGO - Setu is situated at Kodinar. It is further deposed that on 20.07.2010, he received a phone call of one Advocate, Mr.Premal Nanavati, who has informed about the incident. It is further admitted by him that he did not inform about the conversation between him and the deceased, which took place on 19.07.2010. It is further deposed by him that various PILs were filed by the deceased in the High Court of Gujarat and he has admitted that he has never appeared on behalf of the deceased as an Advocate. In his further deposition, he has referred that he has filed his Vakalatnama on 15.08.2010 on behalf of brother of the deceased to represent him in the PIL, which was filed for illegal mining in the Gir Sanctuary. It is also admitted that he filed the writ petition on behalf of father of the deceased – Bhikhabhai with regard to the faulty investigation and also represented him in the Apex Court and had appeared against A-7.

It is also admitted in his cross-examination that in his police statement recorded on 22.07.2010 or 23.07.2010, he has not named his two juniors – Mr.Riddhesh Trivedi, Advocate and Mr.Manoj Shrimali, Advocate. It is also elicited that he has met the deceased only once on 19.07.2010 outside his chamber and except that he never met him. It is also admitted that he did not advice deceased - Amit Jethwa to seek the police protection after he issued threats from A-7 and A-4.

Further, it is admitted that he does not have any proof that he had met the deceased on 19.07.2010 outside his chamber. It is further admitted that in the writ petition (Exh.117), the Geology Department did not name A-7 or A-4 doing illegal mining activities.

Findings: This witness has deposed that he met the deceased on 19.07.2010 for 10 to 15 minutes during the recess outside his advocate chamber in the High Court. He has admitted that prior to

19.07.2010, he never met the deceased, however, he used to talk with the deceased occasionally on the telephone and also had met him outside Court No.1. This witness in his cross-examination at the behest of A-3, A-5 and A-6, has admitted that for entering in the Gujarat High Court, one has to obtain mandatory gate pass and the person has to mention all the details and also the name of the advocate is required to be mentioned in such details and it is also necessary to show the Photo ID, at the gate before taking the gate-pass. It is also admitted that he has no proof to show that on 19.07.2010, the deceased had met in the High Court. He has also admitted that he did not advise the deceased to file an application seeking police protection. Though, this witness is an advocate, and was having information given by the deceased to him about the threat having been issued by A-7 of murdering him, he did not do anything, but after two days on 22.07.2010, he got his statement recorded before I.O. PW-190, Shri H.M.Kundaliya. His statement dated 22.07.2010 refers to the name of A-7 only and not of A-4. There is no corroborative piece of evidence coming forth suggesting that the deceased had met him on 19.07.2010 in his chamber after entering into the High Court. The evidence reveals that it is mandatory to have a gate pass for entering the High Court, but the investigating agencies have not collected any evidence in this regard. This witness has not mentioned the names of his two juniors Mr.Shrimali and Mr.Trivedi in his statement recorded on 22.07.2010. It is also curious to note that one of his advocate friends Mr.Premal Nanavati called him on the same day i.e. on the day of incident informing about the incident, but he did not disclose the factum of threat issued to the deceased to him also. Presence of the deceased could have been established on 19.07.2010 at the High Court, if the investigating agencies had acted diligently and responsibly in collecting the evidence, since the evidence of the cousin of deceased PW-127, Chetanbhai Naranbhai

Rathod, reveals that the deceased was with him on 19.07.2010 from 1 p.m. to 5 p.m and they were at Gandhinagar which is at distance of 25 K.M from Ahmedabad. Moreover, the call details of the deceased, though disbelieved by the trial Court, reveal that he was in Amreli and not in Ahmedabad on 19.07.2010. There is no corroborative piece of evidence which can establish the presence of the deceased outside the chamber of this witness at High Court.

There is another aspect which makes the deposition of Mr.A.J.Yagnik doubtful. The deceased was very closely related to PW-2, who is an advocate practicing in the High Court and used to file PIL on behalf of the deceased. He is also a family friend of deceased. He is the one who called the wife of the deceased. It is not palatable that though the deceased confided with Advocate, Mr.A.J.Yagnik and informed about the threats issued to him by A-7, he did not consider to inform about the threats issued by A-7 to PW-2, Advocate, Mr.Vijaybhai Nangesh. The deceased was present at the office of PW-2, Advocate, Mr.Vijaybhai Nangesh at 5:00 to 5:30 p.m. and also around at 8:00 to 8:30 p.m. on the day of the incident, but he did not inform about the threats issued to him by A-7 and A-4 or anyone. Hence, the version of PW-13, Advocate, Mr.A.J.Yagnik relating to the meeting of deceased with him on 19.07.2010 appears to be tainted with doubt.

13.8) PW-24, Advocate, Mr.Manoj Bipinbhai Shrimali, (Exh.271):

He is practicing as an advocate in the Gujarat High Court and he is junior of (PW-13), Advocate, Mr.A.J.Yagnik. He has submitted that on 19.07.2010, he was present in the chamber of Advocate, Mr.A.J.Yagnik, being Chamber No.307 in the recess hours, which is from 1:45 to 2:30. He has deposed that the deceased had met Advocate, Mr.A.J.Yagnik on 19.07.2010 in the recess hours and in

order to meet him, he has gone out of his chamber. He has submitted that for the first time, Advocate, Mr.A.J.Yagnik, introduced Amit Jethwa (deceased) to him. While introducing to Amit Jethwa, he has informed that he was an RTI activist and was carrying environmental activities. He has further deposed that Advocate, Mr.A.J.Yagnik has informed him that the deceased was receiving threats from A-7 and his nephew and thereafter, he went to the Court. His statement was recorded by the CBI in the year 2013, prior to that, the statement of this witness has not been recorded by any of the investigating agency. He has also referred to presence of his colleague – PW-28, Advocate, Mr.Riddeshbhai Kiritbhai Trivedi (Exh.292), who is also junior of Advocate, Mr.A.J.Yagnik. His statement was recorded on 10.01.2013 by the CBI. He has admitted that he has not informed about the incident to anyone, including his senior Shri Girishbhai. He has further admitted that after the incident was reported on the TV on 20.10.2010 and till he deposed in the trial Court, he has not talked about the incident with Advocate, Mr.A.J.Yagnik. He has also deposed in the line of PW-13, Mr.A.J.Yagnik, Advocate, that for entry in the Gujarat High Court, to get entry pass is mandatory. From the deposition of this witness, it is manifest that he has, for the first time in his statement before the CBI, recorded on 10.01.2013, disclosed about the fact of Mr.A.J.Yagnik, Advocate, introducing him to the deceased - Amit Jethwa and actually, he had not heard from the deceased that he was being threatened by A-7 or his nephew. Thus, his evidence appears to be hearsay since he has heard the factum of threats from Advocate, Mr.A.J.Yagnik and the deceased did not tell him.

13.9) PW-23, Mr.Riddheshbhai Kiritbhai Trivedi, Advocate (Exh.292), who is the colleague and also the junior of Mr.A.J.Yagnik, Advocate, has also deposed on the same line and his evidence is also appears to be hearsay.

Both the aforesaid witnesses, PW-24, Mr. Manojbhai Bipinbhai Shrimali (Exh.271) and PW-23, Mr. Riddheshbhai Kiritbhai Trivedi (Exh.292) did not approach to give their statements in similar manner as done by their senior, Advocate Mr. A. J. Yagnik before Police Inspector, Shri Kundaliya. Even Mr. A. J. Yagnik, Advocate, did not take them along with him to get their statements recorded, and for the first time their statements were recorded by the CBI. Even otherwise, the evidence of both the witnesses is hearsay.

13.10) PW-2, Mr. Vijaybhai Hirabhai Nangesh, Advocate, (Exh.116) :

The present witness is a practicing advocate in the High Court of Gujarat. He has deposed in his examination-in-chief that he knew the deceased - Amit Jethwa since 2003. He has further stated that the deceased used to stay in the quarter of A-7, Dinubhai Boghabhai Solanki, in 2004 and the deceased has also contested election against A-7 in the year 2007 and since then, relationship between two were strained. He has referred that he filed a PIL with regard to the illegal mining done at the Gir Sanctuary in the year 2010, which was filed on behalf of Amit Jethwa. A-7 and A-4 were made parties to such PIL, as per the orders of the Division Bench of the High Court vide order dated 06.07.2010. He has referred the incident of 20.07.2010 and has deposed that the deceased - Amit Jethwa was present in his office in the night hours between 8:00 to 8:30 and when he was present at his office at about 8:40 to 8:45, he heard noises and accordingly, he rushed out of his office and saw the deceased lying dead and accordingly, he informed the deceased's wife on the landline, who is staying at Vishwas City. In Paragraph No.7 of the cross-examination, he has admitted that he had not made any allegations in the writ petition (PIL) against A-7. It is further deposed that in the statement recorded by the police on 21.07.2010, he has stated that the deceased has visited his office between 5:00 to 5:30 p.m. on 20.07.2010,

however, he has improved his version and has deposed that the deceased has also visited at 8:30 p.m. He has admitted that in the statement dated 21.07.2010, he has not referred to any evidence or allegations against A-7 connecting him with the murder of the deceased. It is further admitted in his cross-examination on behalf of A-3, A-5 and A-6 that he did not doubt anyone with regard to the incident and has not named anyone either in his police statement dated 21.07.2010 or in the statement dated 23.02.2012. He has further admitted that in the judgment dated 11.02.2011 passed in SCA No.7690 of 2010, which was passed by the Division bench of the High Court, no comment has been made against A-7 and A-4. He has stated that the CBI has recorded his further statement on 06.11.2012.

Findings – PW-2, Mr.Vijaybhai H. Nangesh, Advocate, has admitted that he had filed a writ petition being SCA No.7690 of 2010 at Exh.117 in the High Court of Gujarat on behalf of the deceased, but no allegations are made against A-7. He has also admitted that the deceased was his very close friend and also having family relation with him. Initially, he has, in his police statement, stated that on the day of the incident, the deceased had met him at his office between 5:00 to 5:30 in the evening, however in the examination-in-chief, he has deposed that the deceased visited his office around 8:00 to 8:30 p.m. and again at 8:40 to 8:45 p.m. and when he left thereafter, he heard loud sound and he rushed outside his office and found that the deceased was lying on the road in injured condition. He has also admitted that he did not name the accused in his police statements dated 21.07.2010 and 23.02.2012. It is pertinent to note that though the deceased - Amit Jethwa was known to him since 2003 and was his close friend, he did not even inform him about the threats issued to him by A-7. The deceased, though did not think it fit to inform about the threats issued by A-7 to PW-2, Advocate, Mr.Vijaybhai Nangesh,

however, it is surprising to note that he had informed about the threats to PW-13, Advocate, Mr.A.J.Yagnik, one day prior to the incident *albeit* he never represented him in any litigation, which seems to be doubtful. The deceased was present at the office of PW-2, Advocate, Mr.Vijaybhai Nangesh at 5:00 to 5:30 p.m. and also around at 8:00 to 8:30 p.m. on the day of the incident, but he did not inform about the threats issued to him by A-7 and A-4 or anyone. It is evident that the present witness has not tried to implicate in his evidence any of the accused. His evidence directly impacts the credibility of PW-13, Advocate Mr.A.J.Yagnik. From his deposition, it is also revealed that this witness has made incorrect statement on oath before the trial Court, that he did not make any allegations in the writ petition (PIL) filed by him (Exh.117) against A-7, however, after we have perused Exh.117, which is the PIL filed by PW-2, Advocate, Mr.Vijaybhai Nangesh, it is manifest that in fact, he had made categorical allegations against A-7 for the illegal activities carried out by him in the Gir Sanctuary area as well as other illegal activities. In fact, it is noticed by us that by way of an amendment, A-7 was added as a respondent in the writ petition (PIL), hence, this witness who himself is an advocate, and has presented false evidence before the trial Court, cannot be believed and his evidence cannot be relied upon in convicting the accused.

13.11) PW-51, Mr.Vajsi Hardas Kanara, Advocate (Exh.365):

This witness is also a practicing advocate in the High Court of Gujarat and he is having his office at Satyamav Complex. He has deposed that at around 8:00 to 8:30, in the evening, when he was informed by the staff about the firing, he immediately rushed to the spot and he saw the deceased lying profusely bleeding and thereafter, the police had arrived at the scene of offence. Looking to the presence at the scene of offence, he came to know that someone had fired on

the deceased and thereafter, they fled away. The Sola Police Station as well as the CBI has recorded his statement. He has also referred to the presence of Advocate, Mr.Vijaybhai Nangesh. He has stated that he was present 5 to 7 minutes at the scene of offence. The evidence of this witness does not aid the prosecution in any manner.

13.12) PW-25, Dhirsinh Karshanbhai Barad (Exh.277) :

This witness is associated with the Congress Party, and is an Ex-MLA. From his evidence, in its entirety, it reveals that he is having enmity and also political rivalry, with A-7. He has also admitted that he has contested the election against A-7 on various occasions from 1995 to 2007 and in all the elections, A-7 has won. Further, it is admitted by him that he named A-7 in the media. He has admitted that he is an arch political rival of A-7. It is further admitted by him that during the T.V. interview, which was given after the funeral of the deceased, he has specifically named A-7 without any proof. It is further reflected that there were also criminal cases, involving A-7 filed in 2005. It is also admitted by him that the deceased - Amit Jethwa, after collecting various information under the RTI Act used to supply the same to him. This witness has deposed that at the time of the incident on 20.07.2010, he was at Kodinar and he was informed about the incident by Advocate, Mr.B.M.Mangukiya, who is practicing in the High Court at about 8:30 to 9:45 p.m. He has also deposed those 10 days prior to the incident, the deceased had met him. He has further explained that he had met the deceased when he went to meet Advocate, Mr.B.M.Mangukiya at S.G.Highway in Khodiyar Hotel. It is deposed by him that when he went to have a meal at Khodiyar Hotel, and after having meal, the deceased had met him and informed him that on the date of filing of the PIL on 28.06.2010, A-7 has threatened him of committing his murder and accordingly, he had informed Advocate, Mr.B.M.Mangukiya about such threats issued by A-7 to the deceased.

In his cross-examination, he has admitted that he did not give such information about the threats issued to the deceased by A-7 to the CBI. He has admitted that at the time of incident, when he met the deceased in the hotel, his family members i.e. his wife and his children were also there. He has further admitted that though he had received information about the threats being issued by A-7 to the deceased, he has not taken any steps or he did not advise the deceased to take the police protection and also admitted that he has not made appropriate representation to the police or to the State Government. He has also admitted that he did not inform Advocate, Mr.B.M. Mangukiya to file appropriate application before the High Court for seeking the police protection to the deceased. It is noteworthy that Advocate, Mr.B.M.Mangukiya is not arraigned as a witness by the prosecution.

Findings: Thus, from the evidence of this witness, it is revealed that the deceased was having relationship with this witness, he has also gone to the place of his father at Khamba, when he heard the news of shooting. He was also close to the family members of the deceased. So far as the aspect of threat by A-7 to the deceased as narrated by him, is not palatable since he has specifically admitted that he did not inform to the CBI in this regard. Though this witness was an MLA, he has neither advised the deceased to seek the police protection nor has he asked him to file appropriate application before the High Court nor he has informed Advocate, Mr.B.M.Mangukiya to file an application seeking the police protection. Thus, the version narrated by this witness implicating the A-7 of issuing threat to the deceased is implausible and from the evidence, it appears that both A-7 and this witness are arch political rival, and there are all probabilities of false implication of A-7 by him.

13.13) PW-17, Manubhai Jesingbhai Dodiya (Exh.240):

He is the Secretary of PW-25, Dhirsinh Karshanbhai Barad (the then MLA) (Exh.277), and he has deposed in line of PW-25 by stating that the deceased was receiving threats from A-7 since he was making various RTI applications against A-7 inquiring his illegal mining activities. He has submitted that PW-25, Dhirsinh Karshanbhai Barad was MLA between the period from 2009 to 2012. He has also referred to the illegal activities of A-7. He has admitted that prior to his statement recorded by the CBI Officer, Shri Mukesh Sharma, no one has recorded his statement and he did not approach for giving his statement before the Police Station relating to the murder of the deceased. He has admitted that he has also not approached the DSP, Surendranagar in this regard. He has also admitted that various RTI applications, which were filed by the deceased against A-7, were supplied or forwarded to PW-25, Dhirsinh Karshanbhai Barad. From his evidence, it is disclosed that the witness (PW-25) was having political rivalry with A-7.

(14) Deposition of Family members and relatives of the deceased:

14.1) PW-15, Bhikhabhai Kalyanjibhai Jethwa (Exh.172) (father of deceased – Amit Jethwa). He has named A-7 in his deposition and has leveled serious allegations against him to the effect that A-7 time and again used to issue threats to his son as his son was revealing the illegal activities of A-7. At the time of the incident, he was at Khamba, District Amreli. He has referred to the various applications filed by his son (deceased) under the RTI Act relating to the illegal mining going on within 5 kms. of the Gir Sanctuary. He has also referred to the illegal activities of A-7 undertaken in Kodinar area since he was the MLA or MP. He has stated that on 20.07.2010, when he was informed about shooting of his son (deceased), he immediately rushed from Khamba to Ahmedabad and directly went to the Sola Hospital, where

the dead body of his son was kept and after seeing the dead body of his son, he had given the interview to the media, and at that moment, the Police Inspector, Shri Kundaliya of the Sola Police Station attempted to talk with him, however he has refused to do so since he was giving the interview. He has specifically stated that he refused to talk to Police Inspector, Shri Kundaliya since he was talking to the media. At that moment, while giving the interview he has alleged that his son has been murdered by A-7 and A-4. Thereafter, he has referred to the case filed in the High Court, by which, the investigation was transferred to the CBI. He has also referred to the affidavit filed by him, which contains the averment that if any unpleasant incident happens to him or his family; then A-7 and A-4 should be held responsible. He has produced various documents in the file, which contain several applications filed by the deceased under the RTI Act before the various authorities. He has also referred to the incident, which has happened between A-7 and the deceased on 26th January, however he does not recollect the year. He has stated that the complaint in this regard was also registered before the Veraval Police Station, however, the name of A-7 was deliberately not recorded in the F.I.R. He has admitted that his son has contested the election against A-7. He has also admitted that there are various other persons against whom the deceased had filed the RTI applications and they were holding grudge against the deceased. He has also admitted that before the election, which was contested by the deceased against A-7, they were friends and the relation was cordial. It is also admitted that the deceased used to stay at the quarters of A-7 at Gandhinagar, when he was undertaking the course of LLB. He has also admitted that A-7 used to treat the deceased as his son and in fact, the ceremony of *kanyadan* of his wife, Alpaben, was done by A-7 at the time of marriage of the deceased. He has admitted that an F.I.R. was registered against the deceased in the year 2002 for misappropriation,

due to which, he was suspended and thereafter, he left his service in the year 2007 to 2008 and thereafter, the deceased became an RTI activist. He has admitted that the deceased also filed RTI applications against Salman Khan as well as several politicians and Government officials. He has admitted that he did not register any F.I.R. or complaint against A-7 for the threats issued to him or his family or to the deceased. He has admitted in his cross-examination done by A-1 that before the incident, he did not know A-1, Bahadursinh Dhirubha Vadher, and he has never seen him or he was not having any information of him. In his cross-examination done by A-3, A-5 and A-6, he has admitted that he was informed about the incident by one Mangaldas Vaghela about the firing on the deceased. He has admitted that PW-25, Dhirsinh Karshanbhai Barad, who is associated with the Congress Party, had met him at his house on the day of incident at the time of leaving from his village Khamba. He has admitted that he gave interview to the media in the morning between 7 to 8 and his statement was recorded at the Sola Police Station for the first time on 21.07.2010 at around 10:15 a.m. He has admitted that when he reached at the Trauma Center, the police personnel were present there, however he did not name anyone in his statement. He reached the Trauma Center at around morning between 3 to 4 and he has also admitted that till 10 O'clock, he did not register any complaint. He has also referred to one affidavit filed through Advocate Mr.A.J.Yagnik (Exh.208). He has also admitted that before Sola Police Station, Surendranagar Police Station or before CBI, he has not given details of the ownership of the mines of A-7.

Findings : This witness, who is the father of the deceased, has primarily highlighted the relationship between the deceased and A-7. His deposition reveals that the relationship between the deceased and A-7 were very cordial and friendly, however the same deteriorated

after they contested the elections against each other. He has also admitted that there could have been other persons, who had grudge against the deceased, since he was filing many applications against the Government officers, politicians, film actors etc. He has attributed the motive of murdering his son by A-7 due to the RTI applications filed by the deceased.

14.2) PW-42, Nandanben Bhikhubhai Jethwa, (Exh.341) :

This witness is the mother of the deceased, she has reiterated the same deposition, which has been narrated by the brother of the deceased. She has almost deposed on the same lines, which was deposed by the brother of the deceased.

14.3) PW-37, Jigneshbhai Bhikhabhai Jethwa (Exh.324) :

This witness is the brother of the deceased, he has deposed that his father was active in the BJP and thereafter he joined the Congress Party. He has also admitted that his father, when he was in BJP, was knowing A-7. He has also referred to the RTI activities of the deceased. He has also referred to the election contested by the deceased against A-7 as well as the police complaint filed at Veraval Police Station in view of the incident, which occurred in the year 2008 in the marriage of brother-in-law of the deceased. He has also referred to the incident of 26th January, in which A-7 threatened the deceased and warned him to stop the activities against him. He has also stated that the deceased had informed him that after the order was passed by the High Court in the PIL, which was published in the newspaper; he was being threatened by A-7 and A-4, and such information was given by the deceased to him on the telephone and thereafter, he had warned the deceased to take care of himself, since they were mafias.

In the cross-examination, he has admitted that in his statement recorded by the police on 23.07.2010, he did not name any of the accused. He has also admitted that he was not aware about any source of income of the deceased, except the RTI activities done by him. The evidence of this witness also highlights the animosity between A-7 and the deceased. The same will not come to aid to the prosecution in establishing the conspiracy of murdering the deceased in absence of any cogent evidence on record.

14.4) PW-49, Bhavin Bhikhalal Jethwa (Exh.351)

This witness is also the brother of the deceased and he has also stated about the RTI activities and illegal mining done by A-7 in the Gir Sanctuary area. He has also deposed that due to the RTI applications made by the deceased, he was also being threatened time and again. He has also admitted that after the death of the deceased, he had joined himself as a party in the PIL, which was filed in the Gujarat High Court. He has also stated and admitted that there were many applications filed against various persons by the deceased, including A-7.

14.5) PW-27, Alpaben Amitkumar Jethwa (Exh.287) :

This witness is the wife (widow) of the deceased. She has also narrated on the line of the statement of father-in-law and has submitted that her husband was an RTI activist. She has also referred to the various RTI applications filed by the deceased against A-7 with regard to the illegal mining. She has also referred to the incident in the marriage of her brother and the assault done by A-7 on the deceased. He has stated that various threats were being issued to the deceased on his mobile and hence, he used to remain pensive.

In her examination-in-chief, she has stated that around 8 O'clock, on the date of incident, some unknown person had

approached at her home and informed that her husband has been shot in front of the High Court and accordingly, she has informed her neighbor – Chandreshbhai. Thereafter, on arrival at the hospital, she came to know that her husband (deceased) had passed away. She had admitted that the deceased was holding a revolver license and he was also having the revolver.

In the cross-examination, it is elicited that her statement was recorded by the CBI Investigating Officer, Shri Mukesh Sharma and she had admitted that Shri Sharma had taught her how to depose in the trial Court. She has admitted that whatever the facts, which are stated in her statement before the CBI, are not stated by her before the local police station. She has admitted that no details of threats being issued to the deceased were ever informed to any authorities. She appears to be tutored witness; hence her testimony cannot come to the aid of prosecution.

14.6) PW-127, Chetanbhai Naranbhai Rathod, (Exh.602) :

He is the cousin of the deceased and he came to know about the incident on the T.V. On coming to know about the incident, he called his cousin - Atulbhai Rathod on the telephone and thereafter, both of them went to the Sola Civil Hospital, where they saw the dead body of the deceased. He has admitted that the deceased was an RTI activist. He, in his deposition, has admitted that one day prior to the incident i.e. on 19.07.2010, he had met the deceased at CM Motors, Naranpura area, near Mirambika School in the afternoon, between 1 to 2 O'clock. Thereafter, he has deposed that he and the deceased were with each other till 5 to 6 in the evening and he was in the company of the deceased at Gandhinagar between 2 to 5. He has admitted that if the deceased was having any trouble, he would have definitely informed him. It is also admitted that the deceased did not

inform about the threats issued to him by anyone and he has admitted that the deceased had filed various RTI applications against the companies, Government servants and Government departments etc., and due to which, there were many enemies of the deceased.

Findings: If the evidence of this witness is believed then prior to the day of incident on 19.07.2010, the deceased was present at Gandhinagar between 2:00 p.m to 5:00 p.m., where, if the evidence of the Nodal Officer (PW-166) is believed then the mobile tower location of the deceased shows his presence at Amreli at various places. In case the evidence of PW-166 and this witness is believed then presence of the deceased on the same day i.e. on 19.07.2010 between 1:45 to 2:30 p.m. at the High Court outside Chamber No.307 of Advocate, Mr.A.J.Yagnik (PW-13) appears to be doubtful. This witness does not refer to any information given by the deceased to him relating to threats, though they were together with each other on 19.07.2010. Thus, the presence of deceased on 19.07.2010 at a particular place appears to be uncertain.

14.7) PW-128, Atulbhai Kakubhai Rathod (Exh.603) :

He is also cousin of the deceased and he has admitted that he had gone along with PW-127, Chetanbhai Naranbhai Rathod, and has admitted that there were many applications filed by the deceased against various persons, however the deceased had not informed about the threats issued to him at any point of time.

14.8) PW-50, Kanaksinh Pratapsinh Parmar (Exh.359) :

He was the friend of the deceased. He is working as a translator at Gandhinagar. He has stated that he knew the deceased since 2005 and the deceased was an RTI activist and was running Gir Nature Youth Club. He has referred to the illegal mining activities done by A-7

in the Gir Sanctuary. He has stated that A-7 was a dangerous person and people were afraid from him, including the women of that area. He has stated that no one had courage to raise any voice against A-7. He has also stated that since 1980, when A-7 joined the politics, he has been doing mafia activities and till today his illegal activities are continued and no one dares to raise voice against him. He has referred to the incident at Kodinar, the deceased and A-7 and though the FIR for assault was registered, however A-7 was not named in the F.I.R. He has deposed that since the deceased was undertaking necessary activities, in order to stop A-7 from committing illegal activities, A-7 garnered grudge against him, and thought of eliminating him. Thereafter, he has referred to the various applications made by the deceased against A-7 about the illegal activities done in Kodinar Nagarpalika etc. He has also referred to the elections contested by the deceased in the year 2007. He has further deposed that the deceased was apprehending accidental death or unnatural death attributed by A-7 and his men since the deceased had filed various RTI applications against A-7 and accordingly, the deceased had filed various applications in this regard to the Hon'ble Chief Minister, Hon'ble Chief Justice of the Gujarat High Court, Judges of the Apex Court etc.

In the cross-examination, he has admitted that PW-24, MLA, Dhirsinh Karshanbhai Barad is his relative (cousin). He has admitted that in the statement, recorded by the Sola Police Station Police Inspector, Shri Kundaliya (PW-190) on 28.07.2010, he has not referred A-7 and he has also admitted that in further statement recorded before S.P., Surendranagar on 11.02.2010, he has not given the details of the allegations against A-7 levelled by the deceased. He has further admitted that A-7 is his distant relative.

In his cross-examination, he has admitted that before the Sola Police Station or before the CBI, he has not stated that women in their

area were afraid from A-7. He has admitted that he has not produced the evidence, which would show that A-7 was indulging in the activities of forcing the women from his area in prostitution. He has stated that he is not aware about the PIL, which was filed by the deceased in the High Court. He has admitted that since the deceased was filing various applications under the RTI Act against many persons, they were holding grudge against him.

The evidence of this witness reiterates the sour relationship between A-7 and the deceased. However, he has not informed the police about the threat issued by A-7 to the deceased about eliminating him.

14.9) PW-195, Bharatbhai Vaghjibhai Kamaliya (Exh.882) :

This witness, is a friend of the deceased. He has also referred to various RTI applications undertaken by the deceased as well as the PIL filed by him. He has also referred to the applications made by the deceased against A-7.

In his cross-examination, it is elicited that in his police statement, recorded by the Sola Police, he has not given names of any person, who were issuing threats to the deceased. He has also stated that he has not made any statement that the deceased was receiving threat from anyone.

(15) Deposition of independent witnesses:

15.1) PW-7, Rameshbhai Pyareji Vachheta (Exh.141) :

He is examined by the prosecution for the purpose that he had handed over the bag containing the articles of A-5 and A-6 in the offence. However, in his deposition, he has admitted that at the time of handing over the bag, he did not see the articles in the bag. He has

refused to identify the accused in the Court. Thus, his evidence did not help the prosecution in any manner.

15.2) PW-9, Vikrambhai Krushnalal Naik (Exh.144) :

This witness was working at Hotel Rudra Palace, Thaltej in Ahmedabad in the year 2010. He has admitted that it is mandatory to have ID proof of the customers, while staying at the hotel and their signatures are also taken. He has produced the register (Exh.145), which contains Entry No.1389 of 14.07.2010, however, he is unable to identify such entry, as he is illiterate. He has also produced the register having relevant Entries No.1389 and 1402, which is exhibited at Exh.146 and Exh.147. He has refused to identify the accused in the Court, though he has admitted that in the TI parade, he had identified the accused. He has also admitted that no statement was recorded by the CBI and he does not know whether any statement was recorded by the Crime Branch. He has not identified the accused before the trial Court.

In his cross-examination, it is elicited by him that it might have happened that the police had asked him to identify the accused and simultaneously, he has also deposed that it is possible that he did not identify anyone in the TI Parade. Thus, this witness cannot be relied upon and he has established himself as an irrelevant witness.

15.3) PW-10, Prakashkumar Chimanlal Bhojak (Exh.150) :

This witness was serving as a Manager, Hotel Rudra Palace, Thaltej, Ahmedabad, he was shown the hotel register (Exh.145) for the period from 14.07.2010 to 16.07.2010. Entry No.1389 (at page No.139) was shown to him, he has stated that on 14.07.2010, one 'Sanjay Rabari' had come in the hotel and stayed at around 8:00 to 8:30 and on 15.07.2010 at around 11:30, he had left the room and accordingly, the entry in his handwriting has been recorded in the

register. He has also produced the photocopy of the ID proof and election card. He has also admitted that the ID proof, which is shown to him is not of 'Sanjaybhai Rabari' and the same is not the ID proof, which was produced at the relevant time. It is admitted that the CBI had collected register and accordingly Seizure Memo was prepared (at Exh.151). He has admitted that the accused at the relevant time, who has stayed in the hotel, is not present in the Court.

Findings: Thus, the evidence of this witness would not help the prosecution, as the same does not in any manner implicate any of the accused. It is the case of the prosecution that A-6, Shailesh Nanalal Pandya, had impersonated himself as 'Sanjay Rabari' and stayed at Hotel Rudra Palace on 14.07.2010 and 15.07.2010 in the morning hours, however, there is no link established by the prosecution in this regard. Though the Investigating Officer had collected the relevant entries of the Register, which were allegedly made by the accused, no investigation is done and such entries are not sent to the handwriting expert and the trial Court has undertaken the necessary exercise for connecting the link between "Sanjay Rabari" and A-6, Shailesh Nanalal Pandya.

We have perused the document at Exh.145, which is a Register (i.e. Entry No.1389), which reveals even the thumb impression as well as licence number, however the same is not investigated. A photocopy of the Register also reveals the mobile number stated therein in the name of one 'Sanjay Nanjibhai Rabari'. Thus, the Investigating Agency has not taken care to investigate either the mobile number or sent the entries to handwriting expert for comparison of the handwriting or to verify the licence number, as mentioned in the ID proofs. The most clinching evidence to prove the presence of A-6 was the thumb impression in the Hotel Register, however no opinion in this regard was obtained from the FSL, after collecting the specimen thumb impression of A-6.

15.4) PW-11, Rameshbhai Shankardas Patel (Exh.152) :

In order to establish the complicity of A-5 and A-6 in the offence, the prosecution has examined PW-11, who has turned hostile. Similarly, this witness has further re-examined after the judgment of the Apex Court. Even on re-examination, he has turned hostile and has not supported the case of the prosecution.

15.5) PW-14, Rajeshbhai Pethabhai Bharwad, (Exh.170 and Exh.1034)

Similarly, another eye-witness, who has identified A-6 during TI parade i.e. PW-14, Rajeshbhai Bharwad, Exh.170 and Exh.1034 on re-examination, after the judgment of the Apex Court, has not supported the case of the prosecution and has turned hostile.

15.6) PW-184, Manendrasinh Shreeraghunandansinh Kachhava Rajput (Exh.780 and Exh.1030)

This witness is cited as an eye-witness to the incident. He is examined at Exh.780 and thereafter, re-examined at Exh.1030 and he had been projected as an eye-witness by the prosecution and he used to work in the ATM on the First Floor, Satyamev Complex, and was present at the scene of offence, however, has not supported the case of the prosecution and has been declared hostile on both the occasions.

15.7) PW-4, Rameshbhai Danabhai Chawda (Exh.129) :

This witness was an employee of Hotel Akash Palace, Chotila, Dist. Surendranagar in the year 2010. He has turned hostile and has not supported the case of the prosecution. This witness has been examined, in order to establish presence of the A-1, A-3 and A-6, at his hotel, however he has been declared hostile.

Similarly, another witness – PW-177, Ajaybhai Nandlal Medha (Exh.738), owner of Hotel Akash Palace, has also not supported the case of the prosecution and has been declared hostile.

15.8) PW-23, Bhagwandas Himmatlal Dhakan (Exh.268 and Exh.1104)

This witness is examined at Exh.268 and he was re-examined at Exh.1104 after the order of the Apex Court, it appears that he has not fully supported the case of the prosecution on both the occasions. PW-23, in his evidence, stated that he was the partner of the deceased, running an NGO - Gir Nature Youth Club and he has also deposed in the line of the father of the deceased and referred to the activities carried out by the deceased of filing RTI applications against the A-7. He has also referred the threats being issued to the deceased; however, his evidence appears to be hearsay evidence. He has also submitted that through the news items, he came to know that the deceased was filing the RTI applications against various other persons. Thus, the evidence of this witness does not in any manner come in aid to the prosecution to actually establish conspiracy to link with the other accused or with A-7 to the offence.

15.9) PW-22, Complainant - Indrajitsinh Hathisingh Vaghela (Police Constable) (Exh.268) :

He is the police constable, examined at Exh.266. He is the complainant. He is projected as an eye-witness. He has deposed that in 2010, at the time of incident i.e. on 20.07.2010, he was posted at Sola High Court Police Station and he was on duty between 12:00 noon till night at 8:00 O'clock and after he finished his duty at 8:00 O'clock, he was going on his motorcycle to Bhagwat Vidhyapeeth Crossroads, and at that time, he met his friend Bhupatsinh, who was staying at a Hotel and thereafter, both of them were taking tea at the Satyamav Complex, which is opposite to Gujarat High Court, where they stayed for 5 to 7 minutes, and when they were returning, after having the tea at around 8:40 p.m., he heard sound of firing near the Satyamav Complex corner and accordingly, both of them rushed at

the spot where 5 to 6 persons had gathered and he saw that one person wearing white clothes was lying in the injured-bleeding condition and accordingly, he informed Police Inspector, Shri Kundaliya (PW-190), who was the Police Inspector of Sola High Court Police Station. He has stated that he saw one motorcycle lying there and also one white coloured Gypsy car stationed there. He also saw one pistol, a liquor bottle and one plastic bag. It is narrated by him that when he was talking to the phone, somebody had informed him that the assailants ran towards the Vishwas City and accordingly, he and his friend went towards the Vishwas City in search of such assailants and also searched the nearby areas, however they did not find anyone and accordingly they returned to the place of the incident. He has further deposed that at that moment, PI, Shri Kundaliya as well as two Advocates i.e. Mr.Nagesh and Mr.Kanara were present. The ambulance was called by PI, Shri Kundaliya by dialing 108 and when the staff had checked the deceased, he was already dead and they came to know from the public that the name of the deceased was Amit Bhikhabhai Jethwa, who was also an advocate. He has admitted that the advocate as well as the relatives of the deceased, who were present at the time of offence, since refused to give any complaint, he had registered the complaint. Thus, from the deposition, it is established that he is not an eye-witness, though he was present at nearby the scene of offence and on hearing the shot, he immediately rushed from the pan shop and saw that the public had already gathered, when the incident had occurred. It is also established that though the relatives of the deceased were present, however they refused to register any complaint and ultimately, he has registered the complaint.

In his cross-examination, he has admitted that the place of incident was in dark and he could not see the place from where he was having tea. In his cross-examination, he has admitted that after

20 minutes on the scene of offence his superiors arrived. He has admitted that he declared before his officers that he has not seen the incident. The officer named by him was Shri Satish Sharma (DCP), Shri Brijesh Jha (DCP) as well as Shri Himanshu Shukla (DCP), who arrived at the scene of offence with a span of 20 minutes. None of the officers, except PW-188, Shri Himanshu Shukla, are examined by the prosecution. Thus, this witness, who is the complainant, has not witnessed the incident of firing on the deceased.

(16) Test Identification (TI) Parade :

16.1) PW-12, Danaji Bhurajibhai Rajput (Exh.155) :

This witness is the Executive Magistrate, who has undertaken necessary TI parades at the relevant time on 18.08.2010, 27.08.2010, 15.08.2010, 25.08.2010 and 28.11.2010, of A-1, A-2, A-3, A-5 and A-6. His evidence reveals that he has supported and established the TI parade, which was undertaken by him on the respective dates, however all the witnesses, who have earlier identified the accused in the TI parade, have turned hostile and such witnesses have not identified any of the accused in the trial Court. Neither the panchas nor the witnesses have supported the case of the prosecution and all of them have turned hostile.

16.2) PW-20, Surendrasinh Daulatsinh Davar (Exh.256) :

This witness is another Executive Magistrate, who has undertaken the TI parade of A-5, Udaji Kantiji Soneji Thakor (Exh.5). He has established the TI parade held by him on 05.10.2010, however neither panchas nor the witnesses have supported the case of the prosecution and they have turned hostile. Thus, only the factum of holding the TI parade is proved, however the same would not be sufficient enough to convict the accused in wake of the fact that the

panchas as well as witnesses have turned hostile. Otherwise also, it is well settled legal precedent that the evidence of the TI parade is a weak piece of evidence and only can be used for corroborative purpose.

(17) Evidence / Deposition of Nodal Officers :

17.1) PW-166, Ravi Kishan Soni (Exh.698) :

He is the Nodal Officer of BSNL. He has produced on record the relevant call details of Mobile No.9426938812, which belongs to the deceased in his evidence before the trial Court. He has stated that on "19.07.2010", the mobile tower locations of the deceased showed his presence at Amreli at various locations. He has stated that at around 15:11:59 (hours-minutes-second), as per the mobile tower location, it is shown at Amreli Dhari and on the very same day at about 15:52:37 (hours-minutes-second), the mobile tower locations of the deceased were shown at Amreli Khambha, whereas at 15:51:39 (hours-minutes-second), the tower location was shown at Amreli Pataniya. Thus, from the tower locations, presence of the deceased was shown at Amreli at various places at 15 hours on 19.07.2010.

Findings On a perusal of the findings of the trial Court, it is revealed that the trial Court has not believed the CDRs produced by this witness, as they are treated as faulty. In fact, this witness has admitted that the CDRs can be altered or manipulated. He has produced call details for 10.07.2010 to 30.07.2010 along with certificate under Section 65B(4)(c) of the Evidence Act. He has admitted that such CDR (at Exh.1241) is defective.

17.2) PW-179, Bhavik Arvindhbai Joshi (Exh.740) :

This witness is the Nodal Officer working in Idea Company. He has admitted that in the year 2010, one Shri Vinod Chahal, who was

also serving as a Nodal Officer, has left the job. In view of the communication dated 14.09.2020 written by the Deputy Commissioner (Crime), Ahmedabad City, he has given details of Mobile No.7698085799, 7698085798, 9824591612, 9824069023 and 9824284384, for the period from 01.03.2010 to 14.09.2010. He had also given details of CDRs of Mobile No.9723389358 for the period from 01.06.2010 to 30.09.2010. He has also deposed that he has also given a certificate, as required under Section 65B(4)(c) of the Evidence Act, while giving such CDRs. All the CDRs are produced at Exh.743.

From his evidence, it is manifest that though the CAF was given for other numbers, however, no CAF of A-4 was supplied by this witness.

In the cross-examination, he has admitted that Exh.743 i.e. the CD, which contains the CDRs details does not bear his signature and he does not know, whose signatures they are. The CD contains the CDRs as well as CAF form. He has also admitted that he is not aware that who was the computer operator, who has inserted the details in the CDR. He has also admitted that such CDRs are being maintained in his office for one year. It is submitted that the main server of the Idea Company is at Pune, whereas he and his colleague – Shri Vinod Chahal are employed at Ahmedabad. He has deposed that he is not aware about the details of the server at Pune. He has admitted that he himself has not collected the data of the CDRs. This witness was recalled / re-examined, after the judgment of the Apex Court.

After he was recalled, he has admitted that there was some discrepancy in the cell ID in the CDRs (Exh.743) and after the said discrepancy was corrected manually, the same was submitted again which is at Exh.1342. The same was corrected and submitted before the trial Court at Exh.1343, with a certificate under Section 65B of

the Evidence Act. He has admitted that thus, the data was produced and calculated with the help of his employee Shri Vishal Kadu, who is his junior and he is not examined as a witness. He has admitted that the details of Exh.1343 are not collected from the main server of Pune and the site addresses, which are referred in Column Nos.3 and 4 of Exh.1343, are also not maintained in the main server at Puna. It is also admitted that such details are collected by him from the company's Network Department, however he has not obtained any certificate under Section 65B of the Evidence Act from such department.

It is elicited from his cross-examination that he is not aware that how, when and by whom the details are provided from the Network Department, which are recorded in the Exh.1343 and also admitted that there is no signature of Shri Vishal Kadu.

Findings: The evidence of this witness reveals that the initial data (Exh.743) produced by him was faulty and it is corrected and again produced at Exh.1342 when he was re-examined after the decision of the Apex Court.

17.3) PW-180, Shyamsundar Keshavbhai Prajapati (Exh.753) :

He is the Nodal Officer of Bhartiya Airtel and he has supplied information of Mobile Nos.9898552518, 9998510430, 9998102727, 9725702727, 9650002727 and 9974133900 for the period from 01.01.2010 to 30.08.2010 along with the CAFs, as demanded by the CBI Officer Shri Mukesh Sharma (PW-194) at Exh.754. Such details were called through email by the CBI Officer, Shri Mukesh Sharma, vide Email at Exh.754.

Another email was sent at Exh.755 by the CBI Officer for calling the details of Mobile Nos.9650002727, 9785702727 for the period from 01.01.2010 to 30.08.2010. He has further sent the details of

Mobile No.9898552518 of Shri Amarsinh Vadher, who is brother of the accused No.1, to the CBI Officer, Shri Mukesh Sharma, who had also called for the certificate issued under Section 65(B)(4)(c) of the Evidence Act. He has deposed that the Mobile No.9925702727 is in the name of Shri Ghansyambhai Solanki, as per the CAF, whereas Mobile No.9998102727 is in the name of Ms.Shantaben Dineshbhai Solanki, he has produced the CAF along with the requisite documents. He has admitted that the main server of his company is at Pune. He has admitted that there is no transcript produced in the CDR. It is further admitted that after decoding the cell ID, he had provided the data of location of such mobile numbers to the Investigating Agency and while giving such refurnished data showing the locations of the mobile numbers, he had also given the certificate, as required under Section 65B(4)(c) of the Evidence Act from 23.08.2018. He has admitted that such data was prepared manually and the same can be edited as well as deleted and altered. It is noteworthy that the aforesaid persons Shri Ghanshyambhai Solanki or Ms.Shantaben Solanki are not arraigned as witnesses.

17.4) PW-126, Zaheerkhan Pathan (Exh.599) :

This witness was serving as a Nodal Officer in the year 2010 at Tata Docomo Services at Ahemdabad. He was asked to produce the call records of Mobile No.8866284531 from 01.03.2010 to 14.09.2010. As per his deposition, this mobile number was activated on 18.07.2010 in the name of one Shri Dineshkumar Prabhudas, on the basis of the documentary evidence i.e. the election card and accordingly, CDRs are submitted by him at Exh.601. This officer is also re-examined after the decision of the Apex Court and along with CDRs, he has also produced the certificate under Section 65B of the Evidence Act. As per his deposition, he has stated that the location, as per the CDRs, is shown at Rajkot and Shela Highway and the second

at Chotila. Initially, the CDRs were given by the Nodal Officer, Smt. Phalguni Malviya.

In his cross-examination, it is elicited that the data produced by him cannot be said to be fool-proof. It is to be noted that the aforesaid Shri Dineshkumar Prabhudas is also not arraigned as a witness.

17.5) PW-181, Kshatriya Satindranath Sing (Exh.760) :

He was serving as a Nodal Officer in 2010 in the Airtel Company and he has sent the details of Mobile Nos.9898552518 and 9998510430 pursuant to the communication issued by Shri Himanshu Shukla, Deputy Commissioner of Police (Crime). In his deposition, he has admitted that Mobile No.9898552518 is registered in the name of Shri Amarsinh Vadher, as per the CAF. Mobile No.9998510430 is registered in the name of Shri Dharmesh T. Ramuji Chauhan. He has provided the CDRs of both these persons. He has further admitted that he has not issued any certificate under Section 65B(4)(c) of the Evidence Act. Both these persons viz. Shri Amarsinh Vadher and Shri Dharmesh Chauhan are not arraigned as witnesses.

17.6) PW-138, Dhirenbhai Jayantilal Bariya (Exh.624) :

He is the Nodal Officer of Vodafone Mobile Services. He has produced the CDRs of Mobile Nos.987919788, 909950616, 9978995267, 9586171304 and 9099165376 for the period from 01.03.2010 to 14.09.2010 as per the communication addressed by the Deputy Commissioner of Police (Crime) – Shri Himanshu Shukla vide communication dated 14.09.2010. As per his deposition, Mobile No.9879197888 is in the name of Shri Vishnubhai Shivabhai Patel. Mobile No.9099550616 is in the name of Sattani Gitaben Madhukantbhai. Mobile No.9978995261 is in the name of M/s.Patel Perfumery (C/o.Keyur R. Vanpariya). Mobile No.9586171304 is in the

name of Shri Harendrabhai Nathubhai Jadeja. Mobile No.90991653760 is in the name of Shri Sanjay Nanjibhai Rabari. Admittedly, none of these persons have been arraigned as witnesses.

He has admitted that he has not prepared the CDRs and such CDRs are collected from the office system. This witness is recalled / re-examined. It is submitted that on the basis of cell ID, he had prepared the locations of those cell numbers and the same were produced at Exh.1300. He has also produced the necessary certificate under Section 65B(4)(c) of the Evidence Act, while giving the documents at Exh.1325. He has admitted that when the earlier CDRs are produced, the same did not reflect the area of use of mobile numbers and subsequently, the same are produced by him by examining such CDRs and incorporating the places where the same were used. It is admitted that as per the policy of the company such details are only maintained for a period of 12 months and thereafter, they are automatically deleted. This witness has admitted that the details given at Exh.1325 are not system generated but are manually prepared and such details can be edited, deleted or altered. On a specific question asked by the trial Court, how the information in Exh.1325 was prepared, this witness has answered that the same was prepared in view of the data given below Exh.627 to Exh.631 and Exh.636 to Exh.638, which contains the cell ID number and after such data was obtained from the trial Court, necessary information were called for from the company's Network Department along with the cell ID number as well as locations and address and the same was provided by the officer of network team Shri Rohit Mistry, who is the personnel of the Technical Department, however he is not examined as a witness and no certificate under Section 65(B) of the Evidence Act of Shri Rohit Mistry is obtained.

Findings: Thus, the deposition of this witness reveals that whenever the earlier data is produced, the same contained the cell IDs, but no details with regard to the locations were specified. It appears that the locations were in fact in the form of cell IDs in the earlier data and thereafter for determining his specific locations from such cell IDs, again a data was prepared with the help of technical teams (Network Department) showing the details of locations. It is also coming forth that such data was manually prepared and report was manually generated. It is also established from the evidence of this witness, the Nodal Officer, that such data could be edited, altered or deleted manually and it was not the system generated data.

(18) Evidence of the Investigating Officers :

In the instant case, initially, the investigation was done by the local police officer, then by the Crime Branch, thereafter by the Special Investigating Team (SIT) and finally by the Central Bureau of Investigation (CBI).

18.1) PW-190, Shri Himmatlal Mohanrai Kundaliya (Exh.811) :

He is the first Investigating Officer, who was posted at the Sola High Court Police Station as a Police Inspector. He has referred to the incident of 20.07.2010 of firing on the deceased and as per his deposition, he was informed about the incident at 20:40 hours by the Police Constable Shri Indubha i.e. Indrajitsinh Vaghela (PW-22), who is the complainant and accordingly, as per his deposition, he immediately rushed to the scene of offence and when arrived, he was informed that two persons had opened fire on the deceased and they have fled away towards the Shayona City. He has carried out necessary investigation and had stated that he had taken photographs of the motorcycle and the country made pistol. He has also called the FSL officers to collect the fingerprints from the motorcycle as well as

the pistol. He has also called for the Dog Squad. Thereafter, the dead body of the deceased was taken to the Sola Civil Hospital at Trauma Centre and the Inquest Panchnama (Exh.195) was drawn. He has referred to the Bajaj motorcycle having registration No.GJ-01-DQ-2482 and also the chassis number and has drawn the panchnama and has referred that in front of the motorcycle, one cream colour kurta (long sleeve shirt) was folded and inside this kurta with ballpen, a name "Dashrathbhai" was written. He has also found one empty cartridge. All these articles were sent to the FSL. He has also referred about one Maruti Gypsy car having registration No.GJ-05-CA-7017, and on the number plate in white letters "Jethva" was written. He has accordingly drawn a panchnama of the scene of offence. He has also referred to the blood at the scene of offence and accordingly collected the samples. He has further referred about the seizure of the mobile handset of the deceased having Mobile No.9426938813. He has stated that his investigation disclosed that the motorcycle was found to be stolen and, in this regard, an F.I.R. was registered at Dholka Police Station on 25.04.2007, which was collected by him at Exh.317. He has also deposed that he has done the investigation with regard to the Mobile number being 9427427565 for a period from 19.07.2010 to 25.07.2010 and necessary tower locations as well as incoming and outgoing call details were also called. Accordingly, he has recorded the statements of the family members of the deceased being his wife, parents and brothers. He has recorded the statements of Advocate, Mr.Vajsi Kanara (PW-51), and Advocate, Mr.Vijaybhai Nangesh (PW-2) on 21.07.2010. He has also recorded the statements of one Shri Pareshbhai Shambubhai Andani (PW-47) on 21.07.2010. He has also recorded the statement of Shri Dharmendrasinh Ranoba (PW-45) on 26.07.2010 and also of witness Shri Bhupatsinh Pravainbhai Jhala (PW-8). He has recorded the statement of Shri Rameshbhai Shankardas Patel (PW-11) on 22.07.2010. He has also

stated that he has recorded the statement of Advocate, Mr.A.J.Yagnik on 22.07.2010 and also the statement of Shri Rajeshbhai Bharwad (PW-14). He has recorded the statement of father of the deceased – Bhikhabhai Jethwa (PW-15) on 21.07.2010. On 22.07.2010, he has recorded the statements of Shri Ghanshyambhai Jethabhai Soni (PW-34) and Smt.Nandanben Bhikhabhai Jethwa (PW-42) as well as Shri Kanaksinh Parmar (PW-50). He has also recorded the statement of one Shri Vanrajbhai Bhuraramji Prajapati (PW-120) on 21.07.2010 and on the same day, he recorded the statement of Shri Vijay Ramkishore Pandey (PW-124). The statements of Chetanbhai Naranbhai Rathod (PW-127) and Atualbhai Kakubhai Rathod (PW-128), Mahendrabhai Jethalal Salot (PW-131) and Smt.Alpaben Amit Jethwa (PW-27) were also recorded by him. He has recorded the statement of eye-witness Shri Mandendrasinh Rangunadansinh Kachava (PW-184) on 21.07.2010 and on the very same day, he as recorded the statement of witness – Shri Dhirajkumar Anmolsinh Chauhan (PW-171).

He has further deposed that he was entrusted with the investigation on 20.07.2010 till 15.08.2010. He has also admitted that when he recorded the statement of Advocate Mr.Vijaybhai Nangesh (PW-2), he had stated that the deceased had gone from his office at 5:40 hours in the evening and after 7 minutes, he returned, whereas the incident has occurred 8:40 p.m. and he has not inquired the whereabouts of the deceased from 5:40 to 8:40 p.m. He has admitted that he arrived at the scene of offence within a period of 55 seconds, after he was informed and the police station is 400 mtrs. away from the scene of offence. When he arrived at the scene of offence, Advocate Mr.Vijaybhai Nangesh (PW-2) and Advocate Mr.Vajsi Kanara (PW-51) were already present. He has also admitted that for the first time, he came to know that the deceased was Amit Jethwa from Advocate, Mr.Kanara (PW-51). He has further admitted that both Advocate,

Mr.Vijaybhai Nangesh as well as Advocate Mr.Kanara have not mentioned any names of the accused. He has further stated from the statement of Shri Rajeshbhai Bharwad (PW-14), he came to know that there was dark at the scene of offence and he could not clearly see the assailants. He has deposed that PW-184, Manendrasinh Kachava, was serving as a Security Guard and was an eye-witness. Further, he has admitted that the witness – Mr.A.J.Yagnik, Advocate, (PW-13) has approached him 22.07.2010 for getting his statement recorded and the said Advocate Mr.A.J.Yagnik had informed that the deceased had come to meet on 19.07.2010 at around 2:25 in the afternoon at the High Court. He has also admitted that Advocate Mr.A.J.Yagnik, in his statement dated 22.07.2010, had stated that on 19.07.2010 at 2:25 p.m. when the deceased had come to meet him, no one else was present in his office. He has deposed that in his investigation, it was revealed that the deceased had met Advocate Mr.A.J.Yagnik outside his chamber. He has further admitted that during his investigation, he has not recorded any statement of other advocates practicing with Advocate Mr.A.J.Yagnik or any other advocates were present with the deceased and had met Advocate, Mr.A.J.Yagnik. He has also admitted that for entering into the Gujarat High Court campus, obtaining of the gate pass is mandatory, however, he did not investigate whether the deceased had come to Gujarat High Court on 19.07.2010 and has not obtained or procured evidence regarding the gate pass for entering into the Gujarat High Court. He has not collected the CCTV footage from the Gujarat High Court. He has further admitted that till the investigation was being carried out by him, he did not come across any evidence that A-7 or A-4 were giving threats to the deceased and he had not collected any documents in this regard. He has also admitted that during his investigation, he did not find any application given by the deceased to any of the police station seeking the police protection or informing about any threat issued to him by A-7 or A-4.

He has also admitted that during his investigation, he did not know about Rambhai Hajabhai Solanki, who is the resident of Damli Kodinar, Dist.Junagadh. During the investigation, it was found that the motorcycle used in the commission of offence, belonged to one Shri Ghanshyambhai Jethabhai Soni, which was stolen. He has further admitted that he did not investigate the RTO number of the motorcycle and who had changed it and when it was changed at what place, and such details were not revealed in his investigation. He has admitted that during his investigation, it was not revealed that as to how the motorcycle was also found at the scene of offence. He has not investigated about the ownership of the Gypsy car, which was found at the scene of offence. With regard to the fingerprints, he has admitted that no fingerprints have been found on the weapon used for shooting as well as from the motorcycle. No fingerprint was found from the liquor bottle, which was found from the scene of offence. Further, it is admitted that neither the parents of the deceased nor his brother supplied any documents. He has admitted that the First Informant, Shri Indraajitsinh Hathisingh Vaghela, (PW-22), Police Constable had not seen the accused on the day of the incident. Further, it is stated by him that when the complaint was registered on 20.07.2010 at 21:15 hours and within 20 to 25 minutes during the recording of the complaint, his seniors ACPs and DCPs have arrived at the scene of offence and accordingly, he acted on their instructions.

18.2) PW-188, Mr.Himanshu Shukla (Exh.791) :

This witness is the officer of Crime Branch. After the initial investigation was done by the Local Police Officer – Shri H.M. Kundaliya (PW-190), the investigation was transferred to the Crime Branch on 15.08.2010, pursuant to the written order of the Commissioner of Police. This witness was Deputy Commissioner of Police (Crime Branch), Ahmedabad. On 16.08.2010, he has appointed

Shri Satishkumar Manilal Chaudhary (PW-192) to undertake further investigation. As per the deposition, he has called for the records of various mobile numbers from the Nodal Officers. He has further deposed that after the orders were passed by the Gujarat High Court, the investigation was handed over to S.P., Surendranagar, who is the Investigating Officer of SIT – Raghvendra Dr. Shyamsing Vats (PW-193) and all the CDRs were handed over to him.

He has in fact admitted that thereafter CDRs, which are collected by him through the different Nodal Officers and they were stored in the different computers, such data from the CDRs were burnt and copied in one single CD and the same was collected by Raghvendra Dr. Shyamsing Vats (PW-193) on 20.02.2013 and given to the CBI Officer, Shri Mukesh Sharma (PW-194). (Mark-111/25)

Handing Over Memo and DVD is produced at (Exh.799), on which Shri Mukesh Sharma, CBI Officer has signed. From his deposition, it is apparent that the data in the CD, which was given to the CBI Officer, Shri Mukesh Sharma (PW-194) contained the data of various computers of the Crime Branch and he has admitted that such data was collected from the servers of various computers and the CD was prepared, which were handed over to the Officers. It is established that he has not issued any certificate, as required under Section 65B(4)(c) of the Evidence Act, which is mandatory.

18.3) PW-192, Shri Satishkumar Manilal Chaudhary (Exh.830) :

This witness is an Officer of Crime Branch. He was serving as a Police Inspector of Crime Branch, Ahmedabad at the relevant point of time in the year 2010 and he was handed over the investigation on 16.08.2010. During his investigation, he found the details about the motorcycle and it was revealed that the same was obtained from one Samir Hajirasul Vora (Ghanchi) (PW-41) (a hostile witness) at Exh.338 by A-1.

Accordingly, A-1 was arrested on 16.08.2010 i.e. on the very same day when the investigation was handed over to him. During his interrogation, he has found that A-1 was owning some land in his brother's name at Alidar Village and due to loss caused to him, he had to sell the land because of various RTI applications filed by the deceased. A-1 was the friend of A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki and both of them were aggrieved from the activities of the deceased and accordingly, they hatched a conspiracy at Keshod and accordingly, two SIM cards were procured being 7698085798 and 7698085799 from Keshod and they contacted his friend A-2, Pachanbhai Gopalbhai @ Shivabhai Desai to identify and do recce of the deceased and to identify someone, who could commit the murder of the deceased. He has further stated that A-2, Pachanbhai Gopalbhai @ Shivabhai Desai used to contact with A-1 by Mobile No.9898552518 and A-4 with Mobile No.9824284384 and thereafter, A-2 used to talk with A-1 with Mobile No.7968085799 and other number, which was procured by A-1. Mobile No.7698085798, was being used by A-3, Sanjay Prabatbhai Chauhan and who in turn had contacted the shooter – A-6, Shailesh Nanalal Pandya, who was ready to eliminate the deceased on payment of Rs.11,00,000/-. Accordingly, after ascertaining the whereabouts of the deceased, he was murdered by the shooter – A-6, Shailesh Nanalal Pandya by going along on the motorcycle with his friend - A-5, Udaji Kantiji Soneji Thakor on 20.07.2010 at about 8:40 p.m. in front of the Satyamav Complex, opposite Gujarat High Court.

As per his deposition, the investigation revealed that the motorcycle as well as the firearm were found from the scene of offence was used by the accused, and thereafter A-6, Shailesh Nanalal Pandya and A-5 fled away from the scene of offence. After committing the offence, A-2- Pachanbhai Gopalbhai @ Shivabhai Desai had contacted

A-1 through Mobile No.7698085799 and thereafter, in order to collect the blood money of Rs.11,00,000/-, they had gone to Sasan, Gir and A-2 had given Rs.6,00,000/- at Keshod, through Amrit Kanti Angadiya (courier) to A-6, Shailesh Nanalal Pandya, who collected it from Rajkot and Rs.1,00,000/- was sent through Madhav Magan Angadiya (courier) to Gandhidham.

These entire facts are unearthed by this witness on the very same day of handing over the investigation. Accordingly, he had undertaken the necessary exercise of investigating the mobile numbers, as referred hereinabove and necessary TI parades were also arraigned by him. He has also arrested the accused – A1-Bahadursinh Dhirubha Vadher and A-2, Pachanbhai Gopalbhai @ Shivabhai Desai on 18.08.2010 on the information received that he was present at Gita Mandir Bus Stand. He was arrested at 21:00 to 22:00 hours.

He has further deposed that during his interrogation, A-1, Bahadursinh Dhirubha Vadher, has admitted about the conspiracy hatched at the Shivalay Complex at Kodinar and accordingly, a panchnama of the said place was carried out (at Exh.521). It was revealed that A-1, Bahadursinh Dhirubha Vadher, and A-2, Pachanbhai Gopalbhai @ Shivabhai Desai and A-6, Shailesh Nanalal Pandya had stayed at Comfort-Inn Hotel at Diu and accordingly, the spot panchnama was carried at Exh.515 and the statement of (PW-139) Manager, Jivabhai Babubhai Kamliya was recorded by him at Exh.640 (a hostile witness).

Thereafter, A-3, Sanjay Parbatbhai Chauhan was arrested on 22.08.2010 and accordingly, a panchnama was drawn at Exh.369. Thereafter, the witness – Prakashbhai Rathod (PW-147) at Exh.650 was contacted and an amount of Rs.3.5 lakhs was recovered from the witness PW-147 (hostile witness – twice examined) and Panchnama

Exh.138 was prepared. This I.O., thereafter recovered the car having registration No.GJ-11-S-6873 as well as one Nokia Mobile-2690, having IMEI No.352010047728996 from the witness - Amarsinh Dhirubhai Vadher, brother of A-1 and accordingly, a panchnama at Exh.436 was prepared. He has recorded the statement of PW-43, Shri Govindbhai Gotaji Patel at Exh.342 on 26.04.2010 (hostile witness) and PW-10, Prakeshkumar Chimanlal Bhojak at Exh.150, who were connected with Hotel Rudra Palace, Thaltej. Accordingly, the TI parade was also arraigned through PW-43, Shri Govindbhai Gotaji Patel by this witness. Further on 07.09.2010 at 11:00 O'clock, he has arrested A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki and recovered an amount of Rs.25,000/-, which was given to Hirabhai Narshanbhai Rathod, by A-2, Pachanbhai Gopalbhai @ Shivabhai Desai and accordingly, a panchnama Exh.518 was prepared. PW-145, Hirabhai Karshanbhai Rathod is examined at Exh.648 and he was re-examined at Exh.1075 and in both the occasions, he has turned hostile. Thereafter, TI parade was undertaken of A-2, Pachanbhai Gopalbhai @ Shivabhai Desai by PW-48, Dharmendragiri Balugiri Goswami and PW-43, Govind Gotaji Patel PW-43, both of them have turned hostile (hostile witnesses). He has also recovered one Mobile Nokia-E72 used by A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki from Jisaan Kalumiya Nakvi (PW-151) at Exh.654 (hostile witness) on 09.09.2010 and panchnama at Exh.559 was drawn in this regard.

Thereafter on 02.10.2010, he has arrested A-5, Udaji Kantiji Soneji Thakor and two phone numbers and one driving license were recovered from him and panchnama at Exh.568 was drawn.

On 04.10.2010, he has collected one bag from Shri Ramesh Vaccheti (PW-7) at Exh.141 (who has not supported the case of the prosecution) from which certain documents were found showing that A-6, Shailesh Nanalal Pandya, impersonated himself as Sanjaybhai

Nanjibhai Rabari to stay at the hotel. Thereafter, TI parade, through the witnesses – Shri Manendrasinh Rangunandan Kachava (PW-184), Shri Vikramkumar Nayak (PW-9) and Shri Rameshbhai Vachheti (PW-7) were undertaken. (All the hostile witness.) The TI parade panchnama at Exh.259 was drawn. (Panchas also turned hostile).

Thereafter, TI parade was undertaken on 15.10.2010 of A-5, Udaji Kantiji Soneji Thakor through witness - Rajeshbhai Pethabhai Bharwad (PW-14) at Exh.170 (hostile witness) Exh.164 is the panchnama of the TI parade.

Thereafter, he collected the shirt worn by A-5, Udaji Kantiji Soneji Thakor from the witness Shri Nagji Thakore (PW-156), who is twice examined at Exh.662 and Exh.1070 and on both the occasions, he turned hostile.

Thereafter on receiving secret information the shooter – A-6, Shailesh Nanalal Pandya was arrested on 21.11.2010 on the basis of a transfer warrant from Bombay. No arrest panchnama of this accused has been drawn. No mobile phone is recovered from this accused, and he has been thereafter produced before the Executive Magistrate for TI parade and the TI parade panchnama at Exh.167 was drawn. The TI parade was carried through the witnesses Rajeshbhai Petabhai Bharwad, Shri Vikram Nayak and Shri Govind Gotaji Patel (all the witnesses turned hostile).

During the investigation, it was informed that A-1, Bahadursinh Dhirubha Vadher was using his Mobile No.9898552518 and for the conspiracy Mobile No.7698085799 was procured and the same was used in his mobile instrument and also it was revealed that A-3, Sanjay Parbatbhai Chauhan, was using Mobile No.9824069023 and the second Dummy Card No.7698085798, however, in the

investigation, this witness has stated that both the numbers i.e. Mobiles No.9898552518 and No.7698085799 are used from single mobile instrument.

In his cross-examination, he has admitted that during the arrest of A-1, Bahadursinh Dhirubha Vadher, he had not recovered any instrument from him, connecting him with the offence. In his cross-examination, it is admitted that he did not know about the information of Samir Hajirasul Vora (Ghanchi) (PW-41). He has admitted that he came to know from witness Samir Hajirasul Vora (Ghanchi)(PW-41) about the stolen motorcycle, but he did not take any action against him. In his cross-examination, he has admitted that from the statement of Samir Hajirasul Vora (Ghanchi) (PW-41), he came to know that the motorcycle was procured by him from one Shri Bupendrasinh (Bhupi), however he has not recorded the statement from his staff since the person had passed away. He has admitted that during his investigation, it is revealed that the deceased was knowing Samir Hajirasul Vora (Ghanchi) (PW-41) as a Sarpanch of village Jhambu, Taluka Limbdi and the deceased was a Congress Party worker. He has admitted that he did not collect any CCTV footage of hotel, where the accused have allegedly stayed and hatched the conspiracy. He has also admitted that during his investigation, he has not collected any specimen fingerprints of the accused or their friends or their specimen signatures or thumb impression or specimen of handwriting. He has been examined twice, after the decision of the Apex Court at Exh.830. He has admitted that he has not collected any CCTV footage from any Angadiya Pedhi (couriers). He has admitted that during his investigation, it is revealed that the motorcycle, which was used in the offence was seized by Shri Bhupendrasinh, who was a recovery agent, and was given to witness Samir Hajirasul Vora (Ghanchi) (PW-41) .

During the trial, the trial Court had confronted this witness with regard to the various questions, including the mobile call details, the identity of 'Sanjay Rabari' and also the firearm, which was used for the offence. So far as the identity of 'Sanjay Rabari' is concerned, his ID, which was found and collected from the hotel, he has admitted that he has not done any investigation for finding the real identity of 'Sanjay Rabari' and he has also not investigated about the address, which was mentioned in the registers of Hotel Rudra Palace and Hotel Konark Palace. He has also admitted that he has not done any investigation with regard to the firearm and the cartridges.

In his cross-examination, he has admitted that the investigation does not reveal that on the day of incident, A-3, Sanjay Parbatbhai Chauhan, A-5, Udaji Kantiji Soneji Thakor and A-6, Shailesh Nanalal Pandya, all three of them had met near the High Court Bus Stand. He has also admitted that till he filed the charge-sheet, the witness - Rambhai Hajabhai Solanki did not come forward to give his statement or that there was any one named as Rambhai Hajabhai Solanki.

18.4) PW-193, Raghvendra Dr. Shyamsing Vats, Superintendent of Police, Surendranagar and Investigating Officer of SIT formed by the High Court.

He was heading the Anti-Corruption Branch CBI at Gaziabad. He has been the officer of the SIT and Superintendent of Police, Surendranagar. He has investigated the offence from 28.12.2011 to 06.10.2012. As per his deposition, he has visited the hotels, where the accused had stayed and recorded the statements of the owners, employees and manager. He has seized the Maruti Swift car, having registration No.GJ-01-HQ-3922. He has recorded further statement of Advocate, Mr.A.J.Yagnik on 26.12.2011 and the statement of father of the deceased - Bhikhalal Jethwa (PW-15) on 03.11.2011 and also of the witness – Yusufbhai Juneja (PW-16) on 23.11.2011. Further statement was recorded by him of the witness – Manojbhai Haribhai

Jadav (PW-32) on 23.11.2011. He has recorded the statement of Prushottam Ambaliya (PW-46) on 23.11.2011. He has also recorded the statement of witness – Shri Kanaksinh Pratapsinh Parmar (PW-50) on 11.02.2012 and Shri Ajaybhai Nandlal Mendha on 27.11.2011. He has admitted that during his cross-examination, that the witness – Rambhai Hajabhai Solanki, did not inform him either through telephone or through any communication in the form of electronic or written or in any other manner about any fact relating to this case or he wanted to give any evidence. He has further admitted that during his investigation, none of the witnesses have referred to any statement or to the witness – Rambhai Hajabhai Solanki. He has further stated that the witnesses – Advocate, Mr.Riddhesh Trivedi and Advocate, Mr.Manoj Shrimali did not give any information to him through any medium. This witness has asserted that despite the proclamation / announcement issued inviting any disclosure by anyone in Kodinar area, the witness – Rambhai Hajabhai Solanki did not come forward to give any evidence relating to this offence.

In the cross-examination, it is elicited that there were two charge-sheets filed before he was handed over further investigation and, in both the charge-sheets, A-7 was not named and his involvement was not forming the part of the charge-sheets. It is further stated that no evidence was found against A-7. It is further admitted by him that in fact, the proclamation was issued by him in the Kodinar area inviting anyone, who was inclined to give any evidence / statement relating to the offence. It is further stated that however, the witness PW-26, Rambhai Hajabhai Solanki did not approach him to give any statement either by post or by any other electronic media. It is further stated that he did not find any evidence against A-7, indicating his involvement in the offence. This witness was re-examined after the judgment of the Apex Court as PW-193 at

Exh.837. He has referred in his deposition about the analysis report prepared by him at Exh.869 about the different CDRs. He has specifically stated that after the CDRs details were obtained from the mobile company, he fed the same into his computer and after undertaking necessary analysis through the software, which was provided by the State of Gujarat named as 'Lakshya', he prepared a report, which indicated the tower locations and area of each of the mobile numbers used in the offence. He has submitted that such information was processed by Lakshya Software on the basis of cell ID, which was received from the mobile companies. He has also referred to seven names of the accused, which were written in the report and he has also admitted that these were manually fed by him in the report. In the cross-examination, it is admitted that he has not produced any document, which would suggest that the Lakshya Software was provided officially by the State of Gujarat to the office of Surendranagar S.P. It is admitted by him that neither the State government nor the Central Government has issued any instructions, which can make the report of Lakshya Software at Exh.869 as admissible in evidence. He has also admitted that he is not aware that who has developed the Lakshya Software.

Findings: From the evidence of this witness, it is established that all the data are manually fed by him in the Lakshya Software in his computer, after such data was called from various cell companies. The names of the accused were also manually fed by him and after undertaking the necessary analysis of such data, new report was generated through the software and printout of such report is taken, which is produced at Exh.869. He has also admitted that for using such data or report as a proof in the Court of Law, no certificate has been issued by any authority neither the Central Government nor the State Government. Indubitably, he has not issued any certificate, as

required under Section 65B(4)(c) of the Evidence Act. Till he had completed the investigation, he did not find any evidence against A-7. We have perused the report at Exh.869. A glance at the report discloses that the same contains the names of accused - A-1, Bhadursinh Dhirubha Vadher, A-2, Pachanbhai Gopalbhai @ Shivabhai Desai, A-6, Shailesh Nanalal Pandya and two witnesses - PW-41, Samir Hajirasul Vora (Ghanchi) and PW-39, Suleman @ Salmanbhai. In the evidence before the trial Court this I.O. specifically deposes that his report contains names of seven accused, which includes name of accused A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki, however, we did not find the name of accused Shiva @ Pratap (i.e. A-4), hence, he has incorrectly deposed before the trial Court. Moreover, his report does not contain the mobile numbers attributed to A-5, Udaji Kantiji Soneji Thakor. Thus, the report effectively contains the names of three accused only. The trial Court has heavily placed reliance on the Lakshaya Software Report for convicting the accused.

18.5) PW-194, Mukesh Sharma, CBI Investigating Officer (Exh.840) :

After the judgment dated 25.09.2012 of the High Court rendered in Special Criminal Application No.1925 of 2010, the investigation was handed over to the CBI, and this witness has investigated the case further. He has received all the relevant papers from the former I.O., Raghvendra Dr. Shyamsing Vats, Superintendent of Police, SIT (PW-193). Thereafter, he has recorded the statements of various witnesses. The Investigation Officer (PW-194) in his evidence has in fact admitted that prior to handing over the investigation to the CBI, the name of A-7 was not disclosed in the reports of earlier investigation officers i.e. Sola Police Station, Ahmedabad, Crime Branch as well as by the Superintendent of Police, Surendranagar and they have not referred to the witness - Rambhai Hajabhai Solanki (PW-26) in the report. He has

admitted that the name of the said witness was revealed from the statement of one witness Vinodbhai Shivabhai Moliya (PW-58), which was recorded on 24.02.2013. It is admitted by him that he did not record or collect any evidence of PW-26 Rambhai Hajabhai Solanki showing that he was working at the Farm House of A-7. He has further admitted that he has not verified the ownership of the said farm. He has also admitted that no Panchanama has been drawn of the said farm, where the alleged meeting of conspiracy was held. It is admitted that he does not know that Harmadiya Farm House is owned by A-7. It is further admitted that he had not collected any evidence showing that the PW-26, Rambhai Hajabhai Solanki was residing with his family at Harmadiya Farm, where the meeting was held and the conspiracy was hatched for murdering the deceased. It is also admitted by him that he has not personally visited the Harmadiya Farm. It is also admitted by him that he had recorded the statement of PW-26 on 18.01.2013 under the provisions of Section 161 of the Cr.P.C., however he has not enclosed the same with the charge-sheet. On a specific question asked by the trial Court in this regard, he has asserted that he has, in fact, recorded the statement of PW-26 on 18.01.2013 and he was also maintaining the Case Diary and he assured that the same will be produced by him within a period of 2 to 3 days. It is further admitted by him that except from the evidence of PW-26, he did not find the involvement of A-7 in the offence. It is further admitted that he did not inquire from PW-26 as to why he was giving his statement after a gap of three years.

He has also referred that he had called for CDRs, scanned copy of the CAFs of the following mobile numbers for the duration of 01.01.2010 to 30.08.2010 along with the details regarding locations of towers.

- (1) 8866284531 and 9221702727 (Tata Telly service);
- (2) 9824403727, 7698085798, 9824591612, 9723389358, 7698085799, 9824069023, 9824284384, 9824233455 and 9714212018 (Idea Telly communication);
- (3) 9426938812, 9429602727 (BSNL Telly Communication);
- (4) 9712493559, 9879197888, 9979376136, 9886171304, 9978995267, 9099550616, 9825068179 (Vodafone);
- (5) 9898552518, 9998510430, 9998102727, 9650002727, 9974133900 (Airtel Telly Service);

He has also sent the reminder for the CDRs of Mobile Nos.9426938812, 9429602727 of the same duration. He has also called for the RTI applications made by the deceased, from the Deputy Conservator of Forest, Gir Division. He has also collected various applications from brother of the deceased and also from the Geologists of Mining Department and PGVCL, Una. He has admitted that during the investigation, he has found that A-1, Bahadursinh Dhirubha Vadher was using his Mobile No.9898552518 and he also purchased two SIM cards bearing No.7698085799 and No.7998085798 and he used to regularly talk from his No.9898552518 with A-7, Dinubhai Boghabhai Solanki on his numbers bearing No.9824402727 and No.9429602727.

Findings This Investigation Officer has admitted that involvement of A-7 in the offence was not disclosed in the earlier investigation done by the investigation officers i.e. Sola Police Station, Ahmedabad, Crime Branch as well as by the Superintendent of Police, Surendranagar and they have not referred to the witness - Rambhai Hajabhai Solanki (PW-26) in the report. He has admitted that the name of the present witness was revealed from the statement of one witness Vinodbhai Shivabhai Moliya (PW-58), which was recorded on

24.02.2013. At this stage, we may refer a glaring fact that the statement of witness Rambhai Hajabhai Solanki is recorded prior to the statement of witness Vinodbhai Shivabhai Moliya. Hence, the origin / source of witness Rambhai Hajabhai Solanki, who has overheard the conspiracy, appears to be doubtful. No investigation is done by this I.O., which can highlight that PW-26, Rambhai Hajabhai Solanki, was working at the Farm House of A-7. No investigation is done about the ownership of Harmadiya Farm. It is shocking to note that this I.O. has not even visited the Harmadiya Farm, from which the theory of conspiracy stems out.

We have also examined the statement recorded under Section 161 of the Cr.P.C. dated 15.05.2013 by the Superintendent of Police, Surendranagar and CBI at New Delhi and the statement recorded under the provisions of Section 164 of the Cr.P.C., in both the statements, PW-26 has stated that he overheard the conversation of A-7 along with other accused i.e. A-4 as well as A-1 relating to eliminating the deceased 2 to 3 months back before the date of incident, however, in the statement recorded under Section 161 of the Cr.P.C., he has stated that the meeting was held at Harmadiya Farm House, near Swimming Pool at 11 a.m, whereas in the statement recorded under Section 164 of the Cr.P.C on 16.05.2013, before the Metropolitan Magistrate, New Delhi, he has not referred the time of the meeting held at Harmadiya Farm House.

It is admitted by this witness that Mobile number being 9898552518 belongs to the brother of A-1. Amarsinh Vadher, however he has not been examined as a witness. Though, the Investigating Officer, Shri Mukesh Sharma (PW-194), during his deposition, has asserted that there was regular talk or conversation between A-7 with Mobile No.9898552518, it is surprising to note that his brother Amarsinh Vadher is neither made an accused nor a witness. It was

expected from an officer of CBI to investigate in this regard; however, a statement is made in this regard by him that his investigation reveals that the aforesaid number being 9898552518 was of A-1, Bahadursinh Dhirubha Vadher and he was in constant touch with A-7 between 29.05.2010 to 20.07.2010.

This witness has admitted that his investigation reveals that A-6, Shailesh Nanalal Pandya was using Mobile No.7998085798 and he was talking with A-1, Bahadursinh Dhirubha Vadher, through this mobile. He has further stated that his investigation further reveals that A-1, Bahadursinh Dhirubha Vadher is also using Dummy SIM Card being 7998085799 and they used to contact each other. Further, his investigation reveals that A-2, Pachanbhai Gopalbhai @ Shivabhai Desai was using Mobile No.9099550616, second number being 9879197833, third number being 9824591612 and also fourth Mobile No.9998510430 and with these numbers, the accused used to talk with A-1, Bahadursinh Dhirubha Vadher. He has further referred that A-6, Shailesh Nanalal Pandya was using mobile No.769085798 and through this mobile, he used to talk to A-2, Pachanbhai on his Mobile Nos.9998510430, 9824591612 and 9824069023.

He has further stated that in his investigation, it was revealed that A-6, Shailesh Nanalal Pandya was using one another Mobile bearing No.8866284531. He has further stated that A-7, Dinubhai Boghabhai Solanki used to contact A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki from his Mobile bearing No.9725702727 on Mobile No.9824284382. He has also stated that the accused A-6, Shailesh Nanalal Pandya from his Mobile No.8866284531 contacted A-2, Pachanbhai Gopalbhai @ Shivabhai Desai on his Mobile No.9099550616. He has further stated that the IMEI number for handset of A-7 was 351996042589090 (SIM Card No.9429602727) and another IMEI number of the handset was 358238039274160 (in

Mobile No.9824402727). It is noteworthy that there is no evidence that the accused were using the handsets having such IMEI numbers. No such handsets are recovered from A-7. He has deposed that he has not found any evidence regarding Mobile No.9824402727, which was ported from Idea to Vodafone. He has admitted that during his investigation it was found that A-7 has destroyed his mobile handset. He has identified the mobile Nokia Modal number 2690 bearing IMEI No.352010047728996, in which, the SIM card being number 9898552518 was used. He is deposed that he has produced one chart showing the details of communications of the aforesaid numbers vide Chart Mark "AA".

(The document Mark "AA" is not exhibited by the trial Court, however both the parties have heavily placed reliance on it. The CBI has placed reliance to show that all the accused were contacting with each other with these mobile numbers, whereas the defence has relied on the chart, showing that none of the mobile numbers as mentioned therein the chart belong to the accused and there is no documentary evidence showing the ownership or authorship of the numbers of connecting these numbers with the accused except one number of A-7.)

In his cross-examination, he has submitted that during the investigation he has not sought for any opinion of the handwriting expert. It is also admitted that he has not asked any witness by showing the mobile instruments to them that who was using which instrument for the communication. In response to the query of the Court, this witness has stated that total 5 to 6 mobile handsets were recovered by the Gujarat Police out of which, one handset, he has produced in the Court. He has admitted in his cross-examination, that he has not recorded any statement of the owner of any hotel. He has further admitted that during his investigation, it was revealed that the Mobile No.9725702727 was in the name of Ghanshyambhai. He has admitted that the said Ghanshyambhai has not stated anything in his statement that the said number was being used by A-7 or he has

handed over the SIM card to A-7. He has further admitted that he has not made any investigation regarding purchase of any of the mobile handset. He has admitted that he has not made any specific investigation regarding the locations of both the mobile callers and mobile receivers.

Finally, it is admitted by the I.O. that during his investigation, it is revealed that there are many other persons against whom the deceased had filed various RTI applications, apart from A-7 and he has not done any investigation in this regard. He has admitted that the mobile, which was used by A-1, Bahadursinh Dhirubha Vadher was in fact in the name of his brother Amarsinh Vadher. He has admitted that there is no documentary evidence to suggest that the aforesaid number of Amarsinh was used by A-1. He has admitted that he has not collected any CDRs of the witness - Rambhai Hajabhai Solanki (PW-26).

He has admitted that during his investigation he has not collected any documentary evidence like gate pass or CCTV footage showing that the deceased has visited the Gujarat High Court on 19.07.2010. He has also admitted that he has not recorded any statement of the employee of the High Court regarding issuance of gate pass on 19.07.2010 to the deceased for meeting with Advocate Mr.A.J.Yagnik.

He has specifically admitted that he has not collected any CDR of the mobile number of the deceased. He has admitted that the CDR of the mobile found with the deceased was collected by the Gujarat Police. He has categorically admitted in the cross-examination that during his investigation, he has found that none of the accused from the numbers, as mentioned hereinabove in his deposition, has called

the deceased. He has further admitted that (till today), he has not received any information about the numbers from which the deceased was issued threats. In response to the query made by the trial Court, this witness has stated that the analysis report at Exh.869 was prepared by the S.P., Raghvendra Dr. Shyamsing Vats, on the basis of the CDR of different mobile numbers.

(19) Illegal activities of A-7, Dinubhai Boghabhai Solanki :

For establishing that A-7 was doing illegal activities, the prosecution has examined PW-64, Jasubhai Bhikhabhai Barad, (Exh.409), who refers to the Somnath Stone Crusher having run by A-7, however in his evidence, it is revealed that there is no documentary evidence to show that A-7 was in fact holding or running Somnath Stone Crusher with the partnership with Rajubhai Hirabhai Solanki, who is the nephew of A-7. For establishing the illegal activities in Kodinar Nagarpalika, the prosecution has examined PW-65, Prafulkumar Jagjivandas Kubavat (at Exh.417), he has admitted that in view of the RTI application filed by the deceased, notices were issued to A-7.

The prosecution has examined PW-69, M.R. Kathad (at Exh.432), who is the Deputy Engineer of PGVCL, for proving that Somnath Stone Crusher was being run by A-7. He identifies the signature of PW-58, Vinodbhai Shivabhai Moliya on the documents pertaining to the PGVCL, who is examined as PW-58, however he has been declared hostile twice, even after re-examination and has not supported the case of the prosecution.

The prosecution has also examined the PW-76, Ketankumar Dafda (at Exh.449) with regard to the cancellation of arms licence of A-7, in view of the RTI application filed by the deceased against him.

Various other witnesses have been examined, who are the Government Officers to point out the RTI applications filed by the deceased against A-7, such as PW-77, Bhavesh Jayantilal Pandya (at Exh.458), PW-78, Pratap Jhala (at Exh.462), PW-79, Pankaj Thakar (at Exh.473), PW-80, Manoj Patel (at Exh.478), PW-81, S.B. Devdhar (at Exh.481), PW-82, Jagdish Jain (at Exh.485), PW-83, Dinesh Agrawat (at Exh.494), PW-129, Abhay Mule (at Exh.606), PW-130, Vinod Rathod (at Exh.607), PW-166, Ravi Harikishan Soni (at Exh.698) and PW168, Dilip Vaghela (at Exh.710).

(20) Analysis of circumstantial evidence :

After the foregoing analysis of the witnesses, we shall now endeavor to discuss the different facets of offence. The same are as under. The first and foremost is the conspiracy. It is alleged that the main conspirator of the crime is A-7.

20.1 Conspiracy :

a) Before we deal with the evidence related to the conspiracy, we may with profit incorporate the provision in this regard. Section 120B of the IPC, which defines the “conspiracy”, reads as under : -

“120B. Punishment of criminal conspiracy.--(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, [imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.”

Section 10 of the Evidence Act makes the act and statements of co-conspirators admissible in evidence. The stipulation of the provision of section 10 to the Evidence Act suggests that a proof of a criminal conspiracy by a direct evidence is very hard. The same reads as under:

“SECTION 10 : Things said or done by conspirator in reference to common design:

“Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.”

b) In the case of **Praveen @ Sonu (supra)** relied upon by learned Senior Advocate Mr.Nanavaty, the Apex Court has reiterated thus: -

“12. It is fairly well settled, to prove the charge of conspiracy, within the ambit of Section 120-B, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. At the same time, it is to be noted that it is difficult to establish conspiracy by direct evidence at all, but at the same time, in absence of any evidence to show meeting of minds between the conspirators for the intended object of committing an illegal act, it is not safe to hold a person guilty for offences under Section 120-B of IPC. A few bits here and a few bits there on which prosecution relies, cannot be held to be adequate for connecting the accused with the commission of crime of criminal conspiracy. Even the alleged confessional statements of the co-accused, in absence of other acceptable corroborative evidence, is not safe to convict the accused. In the case of Indra Dalal v. State Of Haryana, 2015 11 SCC 31 this Court has considered the conviction based only on confessional statement and recovery of vehicle used in the crime. In the said case, while setting aside the conviction, this Court has held in paragraphs 16 & 17 as under:-

“16. The philosophy behind the aforesaid provision is acceptance of a harsh reality that confessions are extorted by the police officers by practising oppression and torture or even inducement and, therefore, they are unworthy of any credence. The provision absolutely excludes from evidence against the accused a confession made by him to a police officer. This provision applies even to those confessions which are made to a police officer who may not otherwise be acting as such. If he is a police officer and confession was made in his presence, in whatever capacity, the same becomes inadmissible in evidence. This is the substantive rule of law enshrined under this provision and this strict rule has been reiterated countless by this Court as well as the High Courts.

17. The word “confession” has nowhere been defined. However, the courts have resorted to the dictionary meaning and explained that incriminating statements by the accused to the police suggesting the inference of the commission of the crime would amount to confession and, therefore, inadmissible under this provision. It is also defined to mean a direct acknowledgment of guilt and not the admission of any incriminating fact, however grave or conclusive. Section 26 of the Evidence Act makes all those confessions inadmissible when they are made by any person, whilst he is in the custody of a police officer, unless such a confession is made in the immediate presence of a Magistrate. Therefore, when a person is in police custody, the confession made by him even to a third person, that is, other than a police officer, shall also become inadmissible.”

In the present case, it will be apposite to mention that the place of conspiracy has changed after the investigation was handed over to the CBI. Prior to the investigation done by the CBI, the prosecution has alleged that the conspiracy was hatched between A-1 and A-4 at the Shivalaya Complex at Kodinar, whereas after the CBI took over the investigation, the place of conspiracy is shifted to Harmadiya Farm on the basis of statement of PW-26, Rambhai Hajabhai Solanki. The entire case of the prosecution for proving the conspiracy of commission of crime hinges on the evidence of PW-26. He is projected as an eye-witness, who has overheard the discussion of A-7 with A-1 and A-4 at Harmadiya Farm few months before the actual offence has taken place. It is alleged that A-7, who was the Member of Parliament of BJP hatched the conspiracy to eliminate the deceased, an RTI activist, as he was making numerous applications against A-7. Till the investigation was handed over to the CBI in the year 2013, no evidence surfaced, which can even remotely suggest the involvement of A-7. The A-7, A-1 and A-4 have been roped in on the basis of the statement of PW-26, Rambhai Hajabhai Solanki, in order to establish the hatching of the conspiracy by these accused at Harmadiya Farm. As noted hereinabove, the evidence of PW-26, does not inspire confidence and he has not been able to establish himself as a sterling witness. As per the settled legal principles, in order to prove the charge of conspiracy and to bring the act within the ambit of Section

120B of the IPC, it is necessary to establish that there was an agreement between the accused for doing unlawful act. Though, it is very difficult to establish the conspiracy by a direct evidence, however, the prosecution has to show or establish the meeting of minds between the conspirators, who intended to achieve the object of committing the offence. The alleged confessional statements of the co-accused, as per provision of section 10 of the Evidence Act in absence of other acceptable corroborative evidence, is not safe to convict the accused. In the case of *Praveen @ Sonu (supra)* the Apex Court, while referring to the judgment in the case of Indra Dalal vs. State of Haryana, (2015) 11 S.C.C. 31, has held that the conviction based only on confessional statement and recovery of articles used in the crime is not sufficient. In the present case the trial Court has heavily placed reliance on the statement recorded under the provision of Sections 161 and 164 of the Cr.P.C. of PW-26, Rambhai Hajabhai Solanki and also the confessional statements of the accused, wherein the mobile phones have been recovered from some of the accused, in order to record conviction against them. Though, the evidence does not in any manner establish any link between the accused or mobile phones or the call records, however the trial Court has considered these statements also and has concluded that A-1, A-4 and A-7 had conspired to eliminate the deceased and in order to facilitate the conspiracy, they had further contacted the other accused, who played their respective roles for elimination of the deceased. Thus, the prosecution has miserably failed to establish the meeting between the conspirators at Harmadiya Farm since the C.B.I, Officer did not even care to visit the place of conspiracy, where the witness - PW-26 had overheard the plot being hatched by the accused A-7, A-1 and A-4 for committing the murder of the deceased. Even the prosecution has failed to establish that PW-26, Rambhai Hajabhai Solanki was ever an employee of A-7 and was in fact working at Harmadiya Farm during

the period as mentioned by PW-26 in the statement recorded under Section 164 of the Cr.P.C. at Delhi. Thus, in absence of such evidence, which would actually prove that these three accused have in fact met at Harmadiya Farm and PW-26 was at an audible distance and he was able to hear the discussion of conspiracy between the accused, the charge of the conspiracy cannot be proved by placing reliance on the description of this sole witness. There is no further tangible link established by the prosecution, which remotely suggests that these three accused have further contacted the other accused in any manner and ultimately A-5 and A-6 executed the outcome of the conspiracy. The further discussion and analysis of the evidence will reveal that the prosecution has also miserably failed to prove the incident of murder of deceased by A-5 and A-6. Thus, even if the theory of conspiracy, as alleged by the prosecution, is accepted such theory falls flat in wake of the fact that the prosecution has miserably failed to establish the involvement of A-5 and A-6, who played role in eliminating the deceased. The standalone evidence of establishing conspiracy is not enough to convict the accused for a serious offence like murder, unless the complicity or role of other co-conspirators, who actually executed the murder is proved.

c) Aspect of delay in recording the statement of PW-26, Rambhai Hajabhai Solanki.

The Apex Court in the case of *Babuli (supra)* relied upon by learned Senior Advocate Mr.Nanavaty has disbelieved the eye-witness, who did not name the accused when the First Information Report was lodged about 20 hours after the occurrence and in the case of *Shahid Khan (supra)*, the Apex Court, in Paragraph No.11, has observed thus :-

“11. The statements of PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir were recorded after 3 days of the occurrence. No explanation is forthcoming as to why they are not examined for 3 days. It is also not known as to how the police came to know that these witnesses saw the occurrence. The delay in recording the statements casts a serious doubt about their being eye-witnesses to the occurrence. It may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced. The circumstances in this case lend such significance to this delay. PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir, in view of their unexplained silence and delayed statement to the police, does not appear to us to be wholly reliable witnesses. There is no corroboration of their evidence from any other independent source either. We find it rather unsafe to rely upon their evidence only to uphold the conviction and sentence of the appellants. The High Court has failed to advert to the contentions raised by the appellants and re-appreciate the evidence thereby resulting in miscarriage of justice. In our opinion, the case against the appellants has not been proved beyond reasonable doubt.”

The Apex Court in the facts of that case has held that there was no explanation offered by the prosecution as to why they have not been examined within a period of 3 days and also it was not stated, how the police came to know that these witnesses saw the occurrence and delay in recording the statement casts a serious doubt about their being eye-witnesses to the occurrence.

A glaring aspect which has come to notice in the present case is that the CBI Officer, Shri Muskesh Sharma, before the trial Court has asserted that he has recorded the statement of PW-26, Rambhai Hajabhai Solanki on 18.01.2013, and he also assured the trial Court to produce the same along with his Case Diary, but he did not do so, and the trial Court has not further called for it. It appears that this was the first statement of PW-26, Rambhai Hajabhai Solanki, which could actually throw some light on the facts, but it has been withheld. In the present case also, there is no explanation coming forth that how the police came to know about the witness PW-26, Rambhai Hajabhai Solanki, who was present at the place of conspiracy. From the evidence, it appears that the case of the prosecution is that from the statement recorded by the CBI on 24.02.2013 of PW-58,

Vinodbhai Shivabhai Moliya, the name of PW-26, Rambhai Hajabhai Solanki is revealed, however, his statement has been recorded subsequently to that of PW-26, Rambhai Hajabhai Solanki i.e on 18.01.2013. Thus, there is no evidence which can prove or show about the genesis of the most crucial and star witness. The blissful silence of PW-26, Rambhai Hajabhai Solanki for more than 2 years and 10 months, is fatal for the case of the prosecution, since no explanation is tendered by him or the prosecution for delayed recording of the statement, *albeit*, a proclamation was already issued by the police in Kodinar area inviting any one to give any information relating to the offence. It is projected by the prosecution that since A-7 was a very powerful person and headstrong person, the witness (PW-26) was afraid in getting his statement recorded before the Gujarat Police, however such reason does not appear to be palatable since this PW-26 was himself an RTI activist, he has also knowing PW-25, Shri Dhirsinh Karshanbhai Barad, who was an MLA at that time. PW-26 also knew the father of the deceased as well as the deceased. In such circumstances, it is very hard to believe that PW-26 remained silent for all these years and ultimately, cropped up after the investigation was handed over to the CBI. In the context of the evidence of PW-26, Rambhai Hajabhai Solanki, we may refer to the judgment of the Apex Court in the case of **Badam Singh vs. State of M.P.**, (2003) 12 S.C.C. 792. The Apex Court, while evaluating the evidence of a consistent witness, has held thus:

“16. The learned Sessions Judge after considering the evidence on record and accepting the evidence of the eyewitnesses found the appellant guilty of the offence under Section 302 IPC and sentenced him to imprisonment for life. The High Court by its impugned judgment dismissed the appeal preferred by the appellant. We have perused the impugned judgment of the High Court. The High Court which was the first court of appeal did not even carefully appreciate the facts of the case. It mentions that the FIR was lodged by PWs 5 and 6 whereas the fact is that the FIR was lodged by PW 4, the Forest Officer. Without subjecting the evidence on record to a critical scrutiny, the High Court was content with saying that the three eyewitnesses having deposed against the appellant, the prosecution had proved its case beyond reasonable doubt. In our view, the High Court has not approached the evidence in the manner it should have done being the first

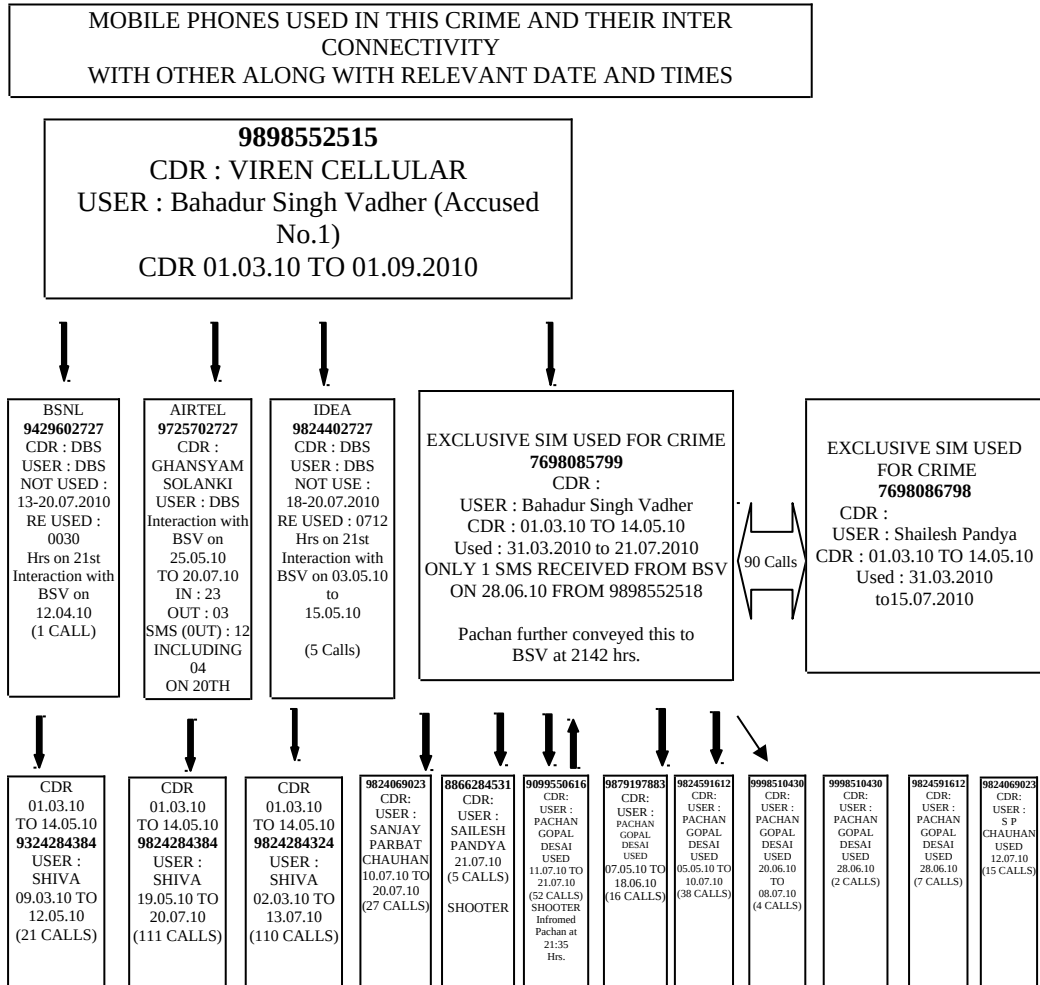
court of appeal. The mere fact that the witnesses are consistent in what they say is not a sure guarantee of their truthfulness. The witnesses are subjected to cross-examination to bring out facts which may persuade a court to hold, that though consistent, their evidence is not acceptable for any other reason. If the court comes to the conclusion that the conduct of the witnesses is such that it renders the case of the prosecution doubtful or incredible or that their presence at the place of occurrence as eyewitnesses is suspect, the court may reject their evidence. That is why it is necessary for the High Court to critically scrutinise the evidence in some detail, it being the final court of fact. We have, therefore, gone through the entire evidence on record with the assistance of the counsel for the parties.”

It is held that that the High Court has to critically inspect the evidence in detail, it being a final court of fact. It is observed that mere fact that the witnesses are consistent in what they say is not a sure guarantee of their truthfulness, and they are subjected to cross-examination to bring out facts, which may persuade a court to hold, that though consistent, their evidence is not acceptable for any other reason. It is also directed that if the court comes to the conclusion that the conduct of the witnesses is such that it renders the case of the prosecution doubtful or that their presence at the place of occurrence as eye-witnesses is suspect, the Court may reject their evidence. In the present case, PW-26, though appears to be consistent, however, he has not established himself as a reliable witness for the reasons as recorded hereinabove. Thus, the theory of conspiracy of the prosecution, as projected through the evidence of this witness is not firmly established.

20.2 Analysis of CDR's and Exh.869 DAR (Detailed Analysis Report):

a) In order to convict the accused, the trial Court has primarily placed reliance on the CDR's and Exh.869 Report prepared by I.O. Raghvendra Dr. Shyamsing Vats. The details of the mobile numbers provided in the following chart has been placed reliance by both the prosecution and defence before us in support of their submissions. The same was also placed before the trial Court. In order to prove the complicity of the accused in the offence through the use of the mobile numbers by the accused, the CBI has placed reliance on the following

chart.



b) Mobile number attributed to A-2, Pachanbhai Gopalbhai @ Shivabhai Desai.

Exh.534 is the arrest Panchnama of A-2, Pachanbhai Gopalbhai @ Shivabhai Desai. He was arrested by the Investigating Officer – Shri S.M. Chaudhary, Crime Branch, and he was arrested on 18.08.2010 at 22:00 hours. At the time of his arrest, one mobile phone of Nokia company being Model No.1616-2 having IMEI No.353406041533417 having SIM card of Vodafone Company being No.9712493559 was recovered. Both the panchas of the arrest panchnama – PW-97, Altaf Hamidali Ansari (at Exh.533) and second panch – PW-98, Tanveerkhan Latifkhan Pathan (at Exh.535) have turned hostile. No

investigation has been done relating to the recovered Nokia handset. The CAF of Mobile No.9712493559 reveals that the same is in the name of one Shri Chamanbhai Boghabhai Bavaliya. The Investigating Officer has not examined the subscriber – Shri Chamanbhai Boghabhai Bavaliya as a witness nor his statement is recorded. Thus, the evidence with regard to the mobile handset of Nokia and the SIM card, which was recovered in the handset at the time of arrest of A-2 pales into insignificance as no investigation is done.

c) **Mobile number attributed to A-3, Sanjay Parbatbhai Chauhan (Exh.369) :**

This accused was arrested by the Investigating Officer, Shri S.M. Chaudhary on 22.08.2010 at 16:30 hours, and the arrest panchnama at Exh.369 was drawn. The contents of the arrest panchnama reveal that at the time of arrest of this accused one Nokia phone being Model No.2700 was recovered having IMEI No.354192036784376 with SIM card being Mobile No.9824079203 of Idea Company. Both the Panchas of the arrest panchnama – PW-110, Raees Hasan Shama (at Exh.557) and PW-53, Sarfaraj Ismail Sheikh (at Exh.368) have turned hostile and no investigation has been done so far as this mobile No.9824079023 is concerned. The evidence does not show whether the same belongs to the present accused. The CDRs reveal that this IMEI number of the Nokia mobile number, which was recovered at the time of arrest, is not revealed. Though, the arrest panchnama refers to Mobile No.9824079023, the Investigating Officer has collected the CAF numbers from the Idea Company and the same are produced during the evidence of the Nodal Officer, Shri Bhavik Joshi, (PW-179) at Exh.740, no such CAF forms, indicating the said number, which has been incorporated in the arrest panchnama, are produced and instead of that, it is the case of the prosecution that this accused has used Mobile No.9824069023 and the CAF reveals

that the same is in the name of one Shri Mukeshbhai Jethabhai. The ID card, in the form of the election card is also produced on record however, he is not examined nor has his statement been recorded. Hence, the authorship and ownership of neither the handset nor the mobile number is established.

d) Mobile number attributed to A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki (Exh.559):

This accused was arrested on 07.09.2010 vide Exh.559. During the investigation, it was revealed that the mobile allegedly used by A-4 was with one Shri Jeesan Nakvi (PW-151) at Exh.654 and accordingly, recovery panchnama at Exh.559 of such mobile phone was drawn. Regarding the arrest of A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki, an arrest panchnama was drawn at Exh.403. The same does not in any manner reveal that any instrument or mobile or SIM cards or any articles are recovered from him. The panchas have also not supported the case and turned hostile. The contents of the Exh.559 reveal that one Nokia Phone E-72 Model having IMEI No.352724041714873 was recovered from Jisaan Kalumiya Nakvi, in which, a SIM card of Idea Company having No.9824284384 was inserted and the SIM card was having number 89912000000 – 90449550GJ00. Both the panchas – PW-111, Mohd. Javed Mohd. Anish Sheikh (at Exh.558) and PW-113, Nileshbhai Gulbhai Kiri (at Exh.566) have turned hostile. As per the call records of this number, there no communication established with any of the accused except A-7.

PW-151, Jeesan Nakvi has also turned hostile and has not supported the case of the prosecution. The trial Court has relied on the evidence of the hostile witness PW-33, Vinaben Shantibhai Rawal (at Exh.315), in order to establish that the Mobile No.9824284384 was being used by this accused. Thus, two witnesses PW-151 (at Exh.654)

and the second witness PW-33 (at Exh.315) have turned hostile. The Nodal Officer has also not produced any CAF from of A-4 and the same is not forming part of the CDRs and even no authorship or ownership is also established. It is also revealed from the CDR that the IMEI number, which is reflected in the panchnama and the phone, which is recovered and allegedly have been used by PW-151 (Jeesan Nakvi) and is also mentioned in the panchnama at Exh.551 is not reflected in the CDRs and the CDRs reflect different IMEI numbers and none of the IMEI of CDRs match with the IMEI numbers mentioned in the panchnama. Thus, at the most, it can be assumed that even if the said Mobile No.9824284384 belongs to A-4, he is the nephew of A-7 and he has interacted with A-7, who is his close relative and hence, it cannot be presumed that A-4 and A-7 have interacted with each other for hatching the conspiracy, in absence of any cogent or reliable evidence connecting both of them with the conspiracy or motive.

e) **Mobile number attributed to A-5, Udaji Kantiji Soneji Thakor (at Exh.568)**

This accused was arrested on 02.10.2010 and his arrest panchnama was drawn vide Exh.568. The contents of the arrest panchnama reveal that one Nokia mobile being modal No.6303, having IMEI No.358005034102399 having SIM Card of Idea Company being Mobile No.9723389358 was recovered and another handset of Nokia mobile model No.1280, having IMEI No.354308045582342 having SIM card mobile No.9979376136 was recovered. As per the evidence of the Nodal Officer, PW-179, Shri Bhavik Joshi of Idea Company, Mobile No.9723389358 is registered in the name of one Shri Prakash Veera Kathar and not in the name of A-5 and the call records, which are produced, are of IMEI No.2390 (last four digit) instead of 2399.

We have examined the CDRs, which are produced on record, the same disclose that there is no IMEI number No.35800503410299, which has been referred in the panchnama and the call records suggest that the IMEI number of 358005034102390, which has been used in various mobile numbers. The CDRs reveal that this IMEI number has been used for various mobiles of different companies of Vodafone, Airtel and Idea. The CDRs reveal that the single IMEI has been used for various mobile numbers, which corroborates with the evidence of the Nodal Officer that the data is not temper-proof. The Nodal Officer (PW-198) has admitted that an incorrect data was earlier given and the mistake was committed in the earlier CDRs and new CDRs were produced after correcting the same (at Exh.1343), which was manually fed by the employee Shri Vishal Kadu and the same was produced during the trial proceedings. Thus, the technical data does not appear to be fail-safe and trustworthy.

PW-138, Shri Dhirenbbhai Bariya (at Exh.624) is the Nodal Officer. He has produced the CAF. The CAF of this number i.e. 9979376136 reveals that the same is in the name of one Shri Samat Dafda and the SIM card is of Vodafone. His statement was not recorded and he is not cited as a witness and his ID proof reveals that he is a resident of Anjar Kachchh (Driving Licence in ID proof). The IMEI number of this Mobile No.9979376136 does not match with the IMEI, which is recorded in the panchnama. It is also an admitted fact that the report (at Exh.869) prepared by I.O., Raghvendra Dr. Shyamsing Vats neither reflects the aforesaid mobile numbers nor the IMEI number. Thus, the ownership or authorship of the mobile numbers are not proved and hence, the CDRs cannot be placed reliance in proving the complicity of the present accused in the offence.

f) **Mobile numbers attributed A-7, Dinubhai Boghabhai Solanki :**

Initially, as per the case of the prosecution and as per the evidence of PW-26, Rambhai Hajabhai Solanki, this accused was using 5 mobile numbers:

- (i) 9429602727 (BSNL);
- (ii) 9998102727 (Airtel);
- (iii) 9824402727 (Idea);
- (iv) 9725702727 and
- (v) 9221702727 (TATA Telly)

However, as per the separate sheet or chart submitted by the CBI, as referred hereinabove, and as per the case of the CBI, there were two mobile numbers in the name of A-7 -- (i) 9424602727; and (ii) 9824402727 and (iii) was the number of his nephew of Shri Ganshyam Solanki being No.9725702727. As per the case of the prosecution, the first BSNL mobile number was used once to interact with A-1, Bahadursinh Dhirubha Vadher, the second of Idea number was not used from 18th July to 20th July, 2010 and reused on 21.07.2010 and he interacted with A-1, Bahadursinh Dhirubha Vadher on 03.05.2010 to 15.05.2010 and made 5 calls. So far as the Airtel number, which is of his nephew – Shri Ghanshyam Solanki, it is projected that A-7 used the same to interact with A-1 and he made calls on various dates.

So far as the number of TATA Telly communication 9221702727 is concerned, the CDRs are not available. The details of the mobile number 9998102727 were also not procured by the Investigating Officer.

It is not in dispute that the Mobile No.9898552518 is in the name of Amarsinh Vadher, who is the brother of A-1 and he is not examined as a witness. Thus, in order to establish the link between the aforesaid mobile numbers with Mobile No.9898552518, which

belongs to Amarsinh Vadher, brother of A-1, the CDRs of that number were required to be called for and the subscribers of that mobile number i.e. Amarsinh Vadher was required to be examined.

g) Mobile numbers attributed to A-1, Bahadursinh Dhirubha Vadher:

This accused was arrested by the Investigating Officer, Shri S.M.Chaudhary of Crime Branch on 16.08.2010. No arrest panchnama has been shown to us. As per the deposition of this witness, at the time of arrest, no instrument or any articles were found from A-1. As per the case of the prosecution, this accused has used three mobile numbers; first being 9898552518, which is the number of his brother - Amarsinh Vadher and the second mobile number, which is a dummy SIM card being 7698085798, which was given to A-3, Sanjay Parbatbhai Chauhan and the third mobile number being 7698085799.

It is admitted fact that no handsets have been recovered showing that these numbers are used from the particular handset having particular IMEI number. The CDRs reflect these numbers. So far as the first Mobile No.9898552518 is concerned, the brother - Amarsinh Vadher of A-1 is not examined as a witness. There is no evidence suggesting that this number was used by A-1. The panchnama Exh.436 is drawn for recovery of the mobile phone from the brother of A-1 and also one Maruti Swift car bearing registration No.GJ-11-S-6873 and Nokia Modal No.2690 having IMEI number 352010047728996 having Airtel mobile phone number 9898552518. The panch of the said panchnama - PW-70, Narendra Kanaiyalal Airwal is turned hostile and the second panch - Upendra Balmukund Vanoda is not examined.

As per the deposition of the Nodal Officer (PW-180) of Airtel, Shyamsundar Prajapati (at Exh.753), Mobile No.9898552518 belongs to the brother of A-1. The CAF number at Exh.757 is also showing that the SIM card is in the name of the brother of A-1. The evidence does not in any manner reveal that the aforesaid number was used by A-1. So far as the dummy SIM card being Mobile No.7698085798 is concerned, it is the case of the prosecution that A-1 contacted one PW-132, Kirpalsinh Parmar, (at Exh.615), who has turned hostile and has not supported the case of the prosecution. It is alleged that he is the relative of A-1. Further, it is projected that PW-132 contacted one Shri Kanu @ Shyamji Bhatt, a Valveman of Keshod Nagarpalika, who was dead. The prosecution has alleged that the said deceased Kanubhai had procured the SIM card in the name of one Shri Pranbhai Rathod (PW-152) at Exh. 656, who is the Pan Shop Owner in Keshod. It is further alleged that the said Kanubhai purchased two SIM cards from PW-143, Bhavanbhai Mucchad, who is examined at Exh.646, who is the dealer of Sundram Mobile Gallary, he has also turned hostile. In order to further strengthen the case, the prosecution has examined the main distributor of Idea SIM card PW-153, Ashishbhai Kotadiya, who is examined at Exh.657 and re-examined at Exh.1068; he was firstly examined in the trial Court and secondly, after the order passed by the Apex Court and on both the occasions, he has turned hostile.

We have examined the relevant documents produced by the Nodal Officer (at Exh.743), which shows that the said number belongs to one Shri Pranbhai Rathod and his Identity Card (Election Voter Card) also reveals his name. We have examined the evidence of PW-152, Shri Pranbhai Rathod at Exh.656, who has admitted that he had given the identity card and one copy of ration card to the deceased - Kanubhai for obtaining loan, however thereafter Kanubhai has passed

away. The prosecution has alleged that the deceased Kanubhai, after obtaining the SIM card in the name of Shri Pranbhai Rathod, further gave to PW-132, Kripalsinh Parmar, who in turn gave it to someone from the bus stand at Keshod and ultimately, it landed in the hands of A-1. The evidence is absolutely silent so far as the person, who has given such dummy SIM card to A-1. There is no link established by any sort of evidence, suggesting that after such dummy SIM cards were procured by Shri Kripalsinh Parmar, the same are sent to A-1. Even otherwise none of the witnesses have supported the case of the prosecution and they have turned hostile. It is further alleged that the said dummy SIM card was given by A-1 to A-3 in order to hatch the conspiracy, however no evidence is coming forth to establish such theory.

h) Another SIM card No.7698085799:

It is the case of the prosecution that the aforesaid SIM card was destroyed by A-1 at Hiran River, Gir Forest and accordingly, a NIL panchnama at Exh.520 was drawn. There is no documentary evidence to produce that this SIM card, in any manner belongs to A-1 or any other accused. The Nodal Officer, Shri Bhavik Joshi (PW-179) of the Idea Company has deposed that it belongs to Shri Pranbhai Rathod. In order to establish the link with Mobile No.7698085798, the prosecution has examined four witnesses – PW-41, Samir Hajirasul Vora (Ghanchi) (Exh.338), PW-33, Vinaben Shantibhai Rawal (Exh.315), PW-149, Hurkhan Sikandarkhan Pathan (Exh.652), PW-52, Ishanbhai Adambhai Vora (Exh.367). All the witnesses have turned hostile and have not supported the case of the prosecution. Thus, in absence of any evidence, which would show that A-1 was in possession of some particular handset having a particular IMEI number and from that the SIM cards were used, the CDRs of such mobile numbers are of no value. No such handset or instrument has been recovered by the investigating agency.

i) **Mobile number attributed to A-6, Shailesh Nanalal Pandya:**

This accused was arrested on 18.01.2011, there is no arrest panchnama of the accused, unquestionably there is no recovery or discovery of any articles from the accused. No mobile instruments or no SIM cards are recovered. As per the case of the prosecution, this accused was using five mobile numbers : -

- (1) 9586171304
- (2) 9099165376
- (3) 8866284531
- (4) 7698085798
- (5) 8141472028

The first mobile number – 9586171304 is alleged by the prosecution that this number was purchased in the name of one Harendrasinh Nathubha Jadeja, however, he is not examined as a witness. The CAF shows that it belongs to Harendrasinh Nathubha Jadeja. In order to establish the location of this accused at the Satyamav Complex, Ahmedabad or Rajkot, this mobile number has been placed reliance. The second mobile number 9099165376 is purchased in the name of one Sanjaybhai Nanjibhai Rabari of Vodafone. The CAF reveals his name; however no investigation is done whether any such person exists or not.

It is alleged that in the photo ID i.e. the driving license, in which, the photograph has been changed, however no investigation has been done and no proof has been collected. In order to show that A-6 had collected money from Aagandiya (courier) of Gandhidham, this number is relied upon. It is alleged that A-6 had collected Rs.1,00,000/- through the witness – Shri Baldev Joshi (PW-159) at Gandhidham, who is examined at Exh.665. He has completely turned hostile and has even denied of meeting with A-6 at any point of time.

So far as the third Mobile No.8866284531 is concerned, as per the evidence of Nodal Officer (PW-126) Zaheerkhan Pathan, who is examined at Exh.599, this number belongs to one Shri Dineshkumar Prabhudas. It is alleged by the prosecution that this number was used after commission of crime by the A-6 to call A-2 and also to find his location on 21.07.2010 between Ahmedabad and Rajkot. Dineshbhai Prabhudas is not arraigned as a witness.

So far as forth Mobile Number 7698085798 is concerned, the same is found to be in the name of Shri Pranbhai Mangabhai. As per the prosecution, this is a dummy number, as discussed hereinabove, the same is in the name of Shri Pranbhai Mangabhai. No attempt is made to trace out the real subscriber.

So far as the fifth Mobile No.8141472028 is concerned, this number is found from the entries made in the Register at Exh.145, which is the Register of Hotel Rudra Palace and Exh.146 is the Register of Hotel Konark Palace, which shows this mobile number, however no investigation is done in this regard.

From the evidence, it is established that there is no recovery or discovery of any of the phone or SIM cards from A-6. Without there being any evidence connecting the mobile handset or the instrument, which is being used for the aforesaid SIM cards and also in wake of the fact that no investigation has been done about the ownership or authorship of the SIM cards and the instruments, such evidence cannot be relied upon to convict A-6.

Findings: The prosecution, in order to establish the connection amongst the accused, has relied upon the CDRs and IMEI numbers mentioned therein, however in absence of any authorship or ownership of the instrument and the transcript as well as the

subscription of the mobile number of a particular subscriber, and its evidence connected to it, it cannot be presumed or it cannot be positively said that the accused have used these numbers for hatching the conspiracy and thereafter, they executed the same by committing the offence. All the aforesaid CDRs and the numbers mentioned therein have some bearing, for establishing the complicity of the accused in the offence provided the investigation agencies had collected call details of the deceased. The investigation agency has acted in a very casual and perfunctory manner, by not comparing the call records and call details of the deceased, though the data was collected and available, no efforts are made to trace out any of the aforesaid mobile numbers.

20.3. Findings of the trial Court on the call records and use of mobile phones :

The trial Court, in Paragraph No.98 of the judgment, has arrived on a definite finding that the aforementioned mobile numbers have been used by the respective accused on the basis of the CDRs and the Exh.869 (Lakshya Software report). Surprisingly, the trial Court has shifted the burden on the accused by observing that in the further statement recorded under Section 313 of the Cr.P.C., they have not taken defence and have not explained that they were not using any mobile and they have not disclosed that they have no knowledge about the use of mobile numbers in their daily lives, and hence, the trial Court by invoking the provisions of Section 106 of the Evidence Act has recorded that though they were having such knowledge, it was their duty to provide such information, however since they have not done so and it was only in their personal knowledge, it is held by the trial Court that all the aforesaid numbers have been used by the respective accused for commission of offence for execution of the

conspiracy. The burden of proving the mobile numbers is shifted by the trial Court on the accused by invoking the provision of section 106 of the Evidence Act, which is perverse since, in the first place the prosecution has miserably failed to establish the ownership or authorship of particular mobile number connecting with the accused.

20.4 Evidentiary value of the call records:

No transcript of any communication is placed on record by the prosecution. Such transcript has not been collected by the investigating agencies. At the most, the evidence, even if it is taken as it is, it can be said that there was a talk between one instrument with another instrument at a particular time. The trial Court has extensively placed reliance on the call records and the report, Exh.869 prepared by I.O. Raghvendra Dr. Shyamsing Vats in order to establish the involvement of all the accused in crime. The trial Court has proved conspiracy in a serious offence of murder of the deceased by placing reliance on the CDRs. In order to validate the evidentiary value of the CDRs and the Report at Exh.869, we may refer to the law enunciated by the Apex Court. In the case of ***Babubhai Bhimabhai Bokhiria (supra)***, the Apex Court has held thus : -

“20. The other evidence sought to be relied for summoning the appellant is the alleged conversation between the appellant and the accused on and immediately after the day of the occurrence. But, nothing has come during the course of trial regarding the content of the conversation and from call records alone, the appellant’s complicity in the crime does not surface at all.”

In the case of ***Rajesh (supra)***, the Apex Court has observed thus : -

“34. The proverbial last nails in the coffin of the prosecution’s case, if at all needed, are the shocking lapses and the slipshod investigation on the part of the police. It is on record that when the Investigating Officer (PW-16) undertook the first search of Om Prakash Yadav’s house under Ex. P-37 Panchnama, nothing was found. However, a

later search with the aid of Brijesh Yadav led to the seizure of two mobile phones from a trunk in one of the rooms of Om Prakash Yadav's house. As to why these phones were not found during the first search is not explained. That apart, Shaival @ Bambam (PW-9), a witness to the seizure of the phones, claimed that there were no SIM cards in the mobiles but candidly admitted that they did not open the mobiles and look inside. He said that they did not try to operate the mobiles or see the numbers inside and that both the phones were turned off. The self-contradictory deposition of this witness does not aid the dubious investigative process adopted by the police. As regards the call data and the ransom calls, we may note that Santosh Jadhav, Assistant Nodal Officer, Reliance Communication, was examined as PW-17 and spoke of the call data of mobile number 8305620342 from which the ransom calls were made. According to him, the SIM card with the said mobile number was given to one Bhuraji, son of Deepu, whose address was House No. 433, Sanjay Gandhi Ward, Tehsil Jabalpur. He produced Bhuraji's 'Customer Application Form' along with his attached Election ID card. These documents were marked as Ex. D6. The call data of 28.03.2013 showed that this SIM card was used on the mobile handset with IMEI No. 358327028551270. He marked in evidence Ex. P35 in that regard. Therefore, the mobile number from which ransom calls were made was in the name of one Bhuraji, s/o Deepu, and his address was available. However, the police did not even attempt to contact Bhuraji or examine him to find out how and why his SIM card was used for making the ransom calls. Even more startling is the fact that, though PW-17 placed on record actual proof of the allotment of this mobile number to Bhuraji (Ex. D6), no such steps were taken by the police to establish the link between Om Prakash Yadav and mobile number 9993135127, which was attributed to him. PW-15 baldly stated that the said mobile number was allotted to Om Prakash Yadav but did not mark in evidence any document in proof thereof. Surprisingly, he had stated in his deposition that he had brought the certified copy of the application form and the ID used when this SIM card was allotted to the subscriber, Om Prakash Yadav, but the same were not marked. In effect, no palpable connection is established between the said mobile number and Om Prakash Yadav. In the absence of such a tangible link, the call data report (Ex. P31) and the contents thereof are practically useless in establishing the prosecution's case that the ransom calls were made from Om Prakash Yadav's mobile phone handset by inserting Bhuraji's SIM card, with mobile number 8305620342, therein."

A preceding observations of the Apex Court will ascertain that the call records exclusively are not adequate enough to substantiate the conviction in absence of the actual conversations or contents of the conversations, which have taken place amongst the accused. The CDRs can prove the location of the mobile holder at a particular place at a particular time, however before placing reliance on such evidence,

it is mandatory to establish the link between the mobile number to the accused, who has used the same in commission of crime. In the case of *Rajesh (supra)*, the Apex Court has disbelieved the evidence of call records since the actual subscriber, in whose names such mobile number was found, was not examined by the prosecution and no link was established by the prosecution to show that such mobile number or handset was used by the particular accused. Identically placed is the case of the prosecution in this case also. Though, the Nodal Officer has produced the CAF form of the various mobile numbers and also there is recovery of few handsets, six in the number, however the investigating agencies have not examined those subscribers, in whose names the actual forms were found bearing a particular mobile number. Even the call records, which are produce on record, the IMEI numbers of the mobile numbers do not match. Thus, essentially no link or connection has been established by the Investigating agencies to show that a particular accused was in constant touch with the other from a particular number and the actual conversations between them had taken place. The Investigating agencies were having mobile number of the brother of A-1 i.e. Amarsinh Vadher. Surprisingly, they made no efforts to make him either a witness or accused. Even if independent exercise is undertaken, ignoring the Report, Exh,869, which the CBI has endeavored before us, the same only leads to blind alley, since there is no evidence collected establishing the link between the accused and the mobile numbers. Hence, the trial Court has totally misdirected itself in convicting the accused by placing reliance on the call records of the accused, while ignoring a very vital aspect that the actual subscribers of the mobile numbers were not examined as witnesses and their statements are also not recorded. Thus, there is no persuasive and substantial evidence collected by the investigating agency to show that the accused were using these SIM cards in order to interact with each other and even if the mobile

numbers and call records are procured, not a single transcript – either of the SMSs or the call records have been produced, in order to establish the link between them.

(21) Detailed Analysis Report (DAR) (Exh.869) and Section 65B of the Evidence Act.

The admissibility of the Lakshya Software report at Exh.869 prepared by the Investigating Officer Raghvendra Dr. Shyamsing Vats as evidence, is governed by the distinguished decision of the Apex Court in the case Anvar P.V. vs. P.K. Basheer, (2014) 10 S.C.C. 473. The Apex Court has discussed the contours of the provision of 65-B of the Evidence Act, which pertains to the evidence adduced by way of an electronic record. The relevant observations are thus:

“14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B(2). Following are the specified conditions under Section 65-B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

15. Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

- (a) There must be a certificate which identifies the electronic record containing the statement;
- (b) The certificate must describe the manner in which the electronic record was produced;
- (c) The certificate must furnish the particulars of the device involved in the production of that record;
- (d) The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act; and
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A—opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.

19. It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.

20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating

to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

21. In State (NCT of Delhi) v. Navjot Sandhu [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerised records of the calls pertaining to the cellphones, it was held at para 150 as follows : (SCC p. 714)

“150. According to Section 63, “secondary evidence” means and includes, among other things, ‘copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies’. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed [Ed. : Reference is to State v. Mohd. Afzal, (2003) 71 DRJ 178] at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.”

It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65-B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65-B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.

22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case [State (NCT of

Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715], does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

The afore-noted analysis of the Apex Court on the electronic evidence directs that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B of the Evidence Act are satisfied. It is held that, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B of the Evidence Act obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible. According to Section 63 of the Evidence Act, “secondary evidence” means and includes, among other things, ‘copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies’. Section 65 of the Evidence Act enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable.

In the instant case, we again reiterate that the Nodal Officers have produced the call records of the mobile numbers along with the certificate issued under 65B(4) of the Evidence Act. They have issued certificate under section 65B of the Evidence Act in connection with the call records, and they have admitted that initially some of the call records were incorrect and again the said data was corrected and was produced subsequently in the re-examination on 05.09.2018. Thus, the initial incorrect data was fed by the Investigating Officer, Raghvendra Dr. Shyamsing Vats in the Lakshya Software and after such data was fed, the report at Exh.869 was generated. It is an

admitted position that so far as the CDR of the deceased is concerned, the trial Court has disbelieved the same and are found to be faulty, as presence of the deceased was found one day prior to the incident at Amreli instead of Ahmedabad. The Nodal Officers of the mobile companies, as discussed hereinabove, have admitted that the data is not infallible. Some of the CDRs also reveal different IMEI numbers of the same mobile numbers within a span of few minutes.

It is also established on record, that when the initial CDRs of mobile numbers were produced by the Nodal Officers, the location of mobile numbers as per the tower of the companies were reflected numerically, and thereafter a fresh report was prepared by converting the “numerical” location to actual location / place. All the data was collected by the Investigating Officer, Raghvendra Dr. Shyamsing Vats and fed into the Lakshay Software installed in his computer. The evidence also reveals that the CDRs did not contain any name of the accused. Hence, the Investigating Officer, Raghvendra Dr. Shyamsing Vats manually fed the names of the accused in the software by assuming that the particular number was being used by the accused. As we have already recorded that the Exh.869 report discloses that the same contains the names of accused, A-1- Bhadursinh, A-2, Pachanbhai Gopalbhai @ Shivabhai Desai, A-6, Shailesh Nanalal Pandya and two witnesses – PW-41, Samir Hajirasul Vora (Ghanchi) and Suleman, and not all of the accused. After he fed all the data of CDRs in the Lakshya Software, he generated the Report, Exh.869, for proving the time and place / location of the accused and took out the printout. After taking the printout of the Report, Exh.869 was generated; he did not issue any certificate, as required under the provision of 65B of the Evidence Act. The report Exh.869 has been formulated by using the CDRs data, and it is generated by using the Lakshaya Software by manually feeding the names of the three

accused and two witnesses, hence the same becomes the secondary evidence, as envisaged under section 63 of the Evidence Act. Thus, when a report is generated by using a software in a computer, and a new data showing location of the accused is prepared, and its printout is taken, the characteristics of such report will get encompassed under section 63 of the Evidence Act, hence, as a sequel, the issuance of the certificate under section 65B of the Evidence Act becomes mandatory. The prior issuance of certificates under 65B of the Evidence Act by the Nodal Officers will pale into insignificance, since subsequently such data has been analysed by using a new software, and the names are manually fed in the software, and a fresh report is generated. In view of the overall evidence as adduced by the Nodal Officers, a presumption exists that such data was not foolproof, hence in wake of such evidence, the requirement of certificate under 65B of the Evidence Act becomes more necessary, to show that the computer which is generating the evidential output is properly working. Even if the original CDR data was produced along with the certificate under section 65B of the Evidence Act, its authenticity / accuracy gets dented if such data is fed into alien software in a new computer and a fresh report is generated. Any electronic record is prone to alteration or tampering hence the statute provides for various safeguards to treat such record as evidence before the Court of law. Thus, it was mandatory for the Investigating Officer, Raghvendra Dr. Shyamsing Vats to give a certificate under section 65B(4) of the Evidence Act certifying that the data had remained un-altered from the "original document" i.e. the computer in which such report was generated. In a subsequent decision, of the Apex Court in the case of **Arjun Panditrao Khotkar (supra)**, the Apex Court, while examining the provisions of 65B of the Evidence Act, and the law declared in the case of **Anvar P.V. (supra)** has further clarified as under : -

“73. The reference is thus answered by stating that:

73.1 Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.

73.2 The clarification referred to above is that the required certificate under Section 65B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the “computer” happens to be a part of a “computer system” or “computer network” and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). The last sentence in Anvar P.V. (supra) which reads as “...if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act...” is thus clarified; it is to be read without the words “under Section 62 of the Evidence Act,...”

With this clarification, the law stated in Paragraph No.24 of *Anvar P.V. (supra)* does not need to be revisited.

The decision of the Apex Court in the case of *Arjun Panditrao Khotkar (supra)* is subsequent to the judgment passed by the trial Court, however, the law enunciated by the Apex Court in the case of *Anvar P.V. (supra)* is only negligibly clarified as above. Thus, the trial Court, in our considered opinion has fell in error in admitting this report (Exh.869) as evidence and giving it an exhibit in absence of certificate under Section 65B of the Evidence Act, which is mandatory under the provisions of Section 65B of the Evidence Act. The involvement of all the accused, including their presence at a particular place or location has been believed by the trial Court by placing heavy reliance on this sole report (Exh.869), which, in our considered opinion, is perverse. The Report (Exh.869) does not fall within the

categories of the reports, as prescribed under the provision of section 293 of the Cr.P.C. Section 293 of the Cr.P.C empowers the Court for acceptance of the reports of the scientific experts, as enumerated in sub-section (4) of section 293 of the Cr.P.C. in evidence, and as per the provision of sub-section (3) thereof, the Court, if desires can summon and examine such expert as to the subject matter of the report. Unquestionable, the Investigating Officer, Raghvendra Dr. Shyamsing Vats does not fall within the categories of “scientific experts”, hence the Report Exh.869 cannot be read in evidence for want of certificate issued under section 64B(4) of Evidence Act.

Finally, after a perusal of the Report at Exh.869, we find that the names and mobile numbers of only five persons are referred. Out of five, three are accused, who are A-1, A-4 and A-6 and two other are witnesses PW-41, Samir Hajirasul Vora (Ghanchi), and his nephew, PW-39, Suleman @ Salmanbhai Jahangirbhai. Thus, the trial Court has placed reliance on the report (Exh.869), which pertains to the call records of only three accused, which is very perilous.

(22) Handwriting comparison by the trial Court by invoking section 73 of the Evidence Act.

a) As per the evidence at Exh.146, which is the Register of Hotel Konark Palace, the entry shows that one ‘Sanjay N. Rabari’ and A-2, Pachanbhai Gopalbhai @ Shivabhai Desai had stayed at Room No.503 on 09.05.2010; an Entry No.1328 has been registered and they left on 10.05.2010 in the morning at 7:00 a.m., in which, the election card of A-3, Sanjay Parbatbhai Chauhan was taken as an identity proof and the address was mentioned as Somnath Society, B-26 and thereafter, on 15.07.2010, one ‘Sanjay Rabari’ again came and stayed at Room No.510 and he arrived at 11:00 p.m. and left on 16.07.2010 in the evening at 8:00 O’clock. An Entry No.3576 has been recorded and an

election card is taken as an identity proof. Exh.145 is the Register of Hotel Rudra Palace. As per the case of the prosecution, A-6, Shailesh Nanalal Pandya, impersonated himself as "Sanjay Rabari" had stayed in the hotel, and an Entry No.1389 shows that on 14.07.2010, said "Sanjay Rabari" had arrived at the hotel and has shown himself as the resident of Gandhidham. He came at night at 8:30 p.m. and thereafter, left on the morning of 15.07.2010 at 11:30 and an ID proof of the election card was taken. It also refers to Entry No.1032 dated 16.07.2010, which shows the signature of 'Sanjay Rabari', in which he arrives in the night till 10:15 p.m. and leaves on 17.07.2010 at 6:10 p.m.

b) A bare examination of the aforesaid Registers shows that before the entry, the thumb impressions of the persons, who had stayed in the hotel have been put, however no investigation is done by the Investigation Agency either to find the person, who had put the thumb impression or the verification of the address mentioned in the Register or to verify the mobile numbers. The trial Court, in order to arrive at the finding that A-6, Shailesh Nanalal Pandya was the same person, who has stayed in both the hotels by impersonating as "Sanjay Rabari" has compared the signatures of the Registers, the election cards with the documents of the charge-sheet. The trial Court has also compared CAF of Mobile No.9886171304 and the signatures put on such CAFs at Exh.72. As per the CAF, the name was contended one customer Shri Harendra Nathubhai Jadeja and the same was signed in English as "H.N.Jadeja", the trial Court has selected "N" in H.N.Jadeja and compared it with the signature 'S.N.Rabari' with Exh.730 i.e. the receipt of Aagandiya and has arrived at the conclusion that "N" as well as the "S" of both the documents are one and the same and has been written by the same person. The trial Court, in paragraph No.234 of the judgment, has recorded a definite finding that A-6, Shailesh

Nanalal Pandya has posed himself as “Sanjay Rabari” and stayed in the Hotel Konark Palace and Hotel Rudra Palace by comparing the signatures of “S.N.Rabari”. Such comparison is done with the signature put on the charge-sheet papers by A-6, Shailesh Nanalal Pandya and by invoking Section 73 of the Evidence Act, the trial Court has arrived at the definite finding that A-6 had stayed as “Sanjay Rabari” on both the hotels on both these dates.

Findings: We have perused the papers of the Court record and charge-sheet papers. They indicate that A-6 has put his signature in vernacular language i.e. Gujarati and not in English and the trial Court has compared the signatures of different scripts that is one, which is found in the ‘CAFs and the Register’ are in English to the signature of the ‘charge-sheet papers’, which are in Gujarati by invoking the provisions of Section 73 of the Evidence Act. The trial Court has erroneously held that A-5 and A-6 had stayed on 19.07.2010, on the basis of comparison of the signatures and placing reliance on Exh.869, the Lakshya Software Report at Hotel Rudra Palace or at Hotel Konark Palace. We have also examined the documents and the Register and we did not find the name of Udaji Kantiji Soneji Thakor or A-5 in any of the documents and it is not the case of the prosecution that Udaji Thakore had also stayed in the hotel by adopting another name, however the trial Court has presumed that A-5 had also stayed with A-6 and this presumption is only drawn from the Lakshya Software report Exh.869 from the mobile record. So far as the identification of A-5, as recorded in Paragraph No.462 of the judgment, the trial Court has recorded a definite conclusion that identification of both the A-5 and A-6 are proved by the witness PW-14, Rajesh Pethabhai Bharwad in the TI parade, however this witness (PW-14) has turned hostile twice and has totally denied the identification of both the accused and incorrect

perverse finding is recorded by the trial Court so far as this witness (PW-14) having identified A-5 and A-6.

The trial Court, in order to convict A-5 and A-6 and to show their presence has heavily placed reliance on two things; (1) call records; and (2) comparison of the handwriting (signature of A-6), which is allegedly done by A-6 and has signed in the Register of the Hotel Konark Palace and Hotel Rudra Palace by adopting the name of 'S.N.Rabari'. In this regard, we may refer to the decision of the Apex Court in the case of *Ajaykumar (supra)* in light of the provision of section 73 of the Evidence Act. It is held thus:

"22 In O. Bharathan v. K. Sudhakaran & Anr., AIR 1996 SC 1140, this Court considered a similar issue and held that the facts of a case will be relevant to decide where the Court will exercise its power for comparing the signatures and where it will refer the matter to an expert. The observations of the Court are as follows:

The learned Judge in our view was not right.....taking upon himself the hazardous task of adjudicating upon the genuineness and authenticity of the signatures in question even without the assistance of a skilled and trained person whose services could have been easily availed of. Annulling the verdict of popular will is as much a serious matter of grave concern to the society as enforcement of laws pertaining to criminal offences, if not more. Though it is the province of the expert to act as Judge or jury after a scientific comparison of the disputed signatures with admitted signatures, the caution administered by the Court is to the course to be adopted in such situations could not have been ignored unmindful of the serious repercussions arising out of the decision to the ultimately rendered."

(See also: Lalit Popli v. Canara Bank & Ors., AIR 2003 SC 1795; Jagjit Singh v. State of Haryana & Ors., (2006) 11 SCC 1; Thiruvengada Pillai v. Navaneethammal, AIR 2008 SC 1541; and G. Someshwar Rao v. Samineni Nageshwar Rao & Anr., (2009) 14 SCC 677).

23 The opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the Court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the Court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the Court may also not be conclusive. Therefore, when the Court takes such a task upon itself, and findings

are recorded solely on the basis of comparison of signatures or handwritings, the Court must keep in mind the risk involved, as the opinion formed by the Court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The Court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the Court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision.”

In the present case, the trial Court has compared the ‘English’ signatures (hotel registers, CAF) with the ‘Gujarati’ signatures (charge-sheet papers) of A-6 that too which was signed in the name of “S.N.Rabari”, which are of different languages. The Apex court has observed that the provision of section 73 of the Evidence Act enables the Court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwriting to be the same or different, as the case may be, but in doing so, the Court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the Court may also not be conclusive. In the case of **O. Bharathan vs. K. Sudhakaran & Anr.**, AIR 1996 S.C. 1140, which has been noticed by the Apex Court refers that it would be a hazardous task of adjudicating upon the genuineness and authenticity of the signatures in question even without the assistance of a skilled and trained person whose services could have been easily availed. In the present case, there was no handwriting expert opinion, and the trial Court undertook the exercise of comparing the handwriting of A-6 of different scripts, in order to prove that he had stayed in the Hotel Konark Palace and Hotel Rudra Palace and the mobile number has been used on the basis of handwriting found in the CAF. It is not the case of the trial court that services of the expert were unavailable. Such an approach of the trial Court runs contrary to the observations

made by the Apex Court as narrated hereinabove. It is also noticed by us, that in the statement recorded under Section 313 of the Cr.P.C. no question is put to the accused in this regard. Hence, the findings of the trial Court with regard to the involvement and presence of A-6 at the hotels, on the basis of the comparison of handwriting of different languages by invoking the provisions of Section 73 of the Evidence Act requires to be deprecated.

(23) Money transactions:

23.1) It is the case of the prosecution that the murder of the deceased, who was an RTI activist, was planned and ultimately executed by the accused for the amount of Rs.11,00,000/-, which was given by A-7. As per the charge, this amount was distributed further by A-1 to the other accused. A-1 gave an amount of Rs.11,00,000/- to other accused. A-1 gave an amount of Rs.11,00,000/- to A-2, Pachanbhai Gopalbhai @ Shivabhai Desai and thereafter the amount was further distributed to the Angandiya Firm of one Amritlal Kantilal Angandiya by three transactions.

23.2) The witness PW-145, Hirabhai Rathod, has been examined twice – first before the trial Court at Exh.648 and the second time, after the judgment of the Apex Court at Exh.1075 and on both the occasions, he has turned hostile. He is the Manager of Angadiya (Courier), Jasdan, Dist. Rajkot. The contents of the panchnama reveal that A-7 has paid an amount of Rs.11,00,000/- to A-1 and out of that amount Rs.25,000/- has been handed over by this witness to the Investigating Officer, Shri S.M.Chaudhary. The said witness - Hirabhai Rathod (PW-145) has categorically denied of having given any amount to the Investigating Officer. Hence, in wake of the fact that the panchas and the said witness have turned hostile, the amount of Rs.25,000/-, as

per the contents of the panchnama, which has been deposited by A-2, Pachanbhai Gopalbhai @ Shivabhai Desai in the courier is not supported by any evidence.

23.3) In order to establish that the amount of Rs.11,00,000/- contained in the bag was handed over by A-1, Bahadursinh Dhirubha Vadher, at Sasan Gir, pointing out a place of panchnama at Exh.520 was drawn by I.O. Shri S.M.Chaudhary. The content of the panchnama reveals that the said amount of Rs.11,00,000/- was given in a polythene bag. The said panchnama is 'NIL' panchnama since, it also refers to the disposing of the SIM card and mobile used by the accused. Both the panchas – PW-91, Valibhai Usmanbhai Shama, who is examined at Exh.519 has turned hostile and not supported the case of the prosecution, and the second panch PW-127, Chetanbhai Naranbhai Rathod has turned hostile and has not supported the case of the persecution. In order to establishing this link of handing over the amount of Rs.11,00,000/- by A-1 to A-2, the prosecution has also examined a witness – PW-32, Manojbhai Haribhai Jadav (Exh.314). He has turned hostile and he has not supported the case of the prosecution. It is alleged that A-2, Pachanbhai Gopalbhai @ Shivabhai Desai has given the amount of Rs.6,00,000/- to PW-145, Hirabhai Rathod at Jasdan. He has turned hostile and has not supported the case of the prosecution, though he has been examined twice. It is also alleged that the said witness – PW-145, Hirabhai Rathod has further given the said amount to PW-141, Dineshbhai Patel, who is an employee of Amritbhai Kantilal Angadiya (courier) at Rajkot. He has been examined twice and on both the occasions, he has turned hostile. The entry (voucher) at Exh.731 is seized by the police at Rajkot from the said courier and according to the same entry, the sender is one Shri Vijaybhai and receiver is one 'S.N.Rabari' at Rajkot. The seizure of panchnama of this entry is at Exh.553. The panchas

PW-108, Shri Alpeshbhai Patel (Exh.552) and PW-109, Shri Pareshkumar Patel (Exh.554), have turned hostile.

23.4) Thus, for the amount of Rs.25,000/- and the amount of Rs.6,00,000/- as mentioned hereinabove, which the prosecution has alleged has reached to A-6; there is no link established by cogent evidence.

23.5) As per the case of the prosecution and as per the panchnama at Exh.518, which has been drawn by the Investigating Officer, Shri S.M.Chaudhary, Police Inspector, Crime Branch, PW-145, Hirabhai Rathod had come forward and given an amount of Rs.25,000/- from an amount of Rs.11,00,000/-. Both the Panchas – PW-169, Mohd. Usman Mohd. Ishaq Sheikh (Exh.712) and PW-90, Afzalkhan Latifkhan Pathan (Exh.517) have turned hostile.

23.6) It is the case of the prosecution that PW-145, Hirabhai Rathod has further sent amount of Rs.3,50,000/- from the aforesaid amount of Rs.11,00,000/- to the PW-146, Pravinbhai Sindhav (Exh.649). He has been examined twice and on both the occasions, he has turned hostile. The prosecution has tried to establish that this witness has sent amount of Rs.3,50,000/- to PW-147, Prakash Rathod (Exh.650) at Shankeshwar. He also examined twice and on both the occasions, he has turned hostile.

23.7) The panchas of seizure panchnama at Exh.138 i.e. PW-88, Manoj Dabhi (Exh.513) has turned hostile and the second panch – PW-6, Deepakbhai Goswami (Exh.137) has also turned hostile. As per the contents of this panchnama, amount of Rs.3,50,000/- has been recovered from PW-147, Prakashbhai @ Lalabhai Rathod, however, he has also not supported the case of the prosecution. This amount is recovered by the Investigating Officer, Shri S.M.Chaudhary. Thus, the

only evidence is the evidence of the Investigating Officer, Shri S.M.Chaudhary, who says that this amount is recovered from the aforesaid Angadiya Firm (courier) and the employees working therein, however, no link is established showing that this amount is either deposited by the accused or thereafter taken by the accused.

23.8) In this circumstance, it would be very unsafe to convict the accused only by placing reliance on the deposition of the Investigation Officer, more particularly when the independent witnesses have not supported and the contents of the panchnama are not proved as required by the law.

23.9) The prosecution has alleged that the amount of Rs.1,00,000/- was sent by PW-145, Hirabhai Rathod to PW-140, Dhanjibhai Sindhav from Madhavlal Maganlal Angadiya Firm at Jasdan. This witness PW-140, Shri Dhanjibhai Sindhav (Exh.641) has been examined twice and on both the occasions, he has turned hostile. Further, it is alleged that PW-140, sent money to PW-159, Shri Baldev Joshi at Gandhidham and he has accepted the said amount on behalf of A-6. He is also examined twice and on both the occasions, he has turned hostile. For showing that money was collected from of courier at Gandhidham, a panchnama at Exh.590 has drawn in this regard. Two witnesses, and invoices of Rs.1,00,000/- from the courier at Jasdan and seizure panchnama at Exh.590 was drawn and both the panchnama being PW-122, Pravinbhai Rathod (Exh.589) and PW-123, Navghansinh Nathuji Vaghela (Exh.591) have turned hostile. Similarly, PW-102, Shri Hitesbhai Vasudevbbhai Mehta (Exh.543) and PW-103, Shri Pradeepsinh Ramprakashsinh Parmar (Exh.515) have also turned hostile.

23.10) A panchnama at Exh.553 was drawn with regard to the entry slip No.731 of Amritlal Kantilal Agandiya Firm. The panchnama was drawn at the behest of PW-141, Dineshbhai Ambalal Patel (Exh.642), but he has turned hostile. He has been examined twice and on both time, he has turned hostile. Both the panchas – PW-109, Pareshkumar Babulal Patel (Exh.554) has not supported the case of the prosecution and PW-108, Alpeshbhai Pravinbhai Patel (Exh.552) has also not supported the case of the prosecution.

Findings: At this stage, we may refer to the observations made by the trial Court (Paragraph No.602 of the judgment), wherein the trial Court has specifically held that so far as the transactions of money are concerned, there is no evidence established on record as to whether any of the accused in view of the conspiracy have received any money in advance, from anyone, at any point of time, at anywhere. The trial Court, however observed that such an information would be exclusively in the knowledge of the accused. It is also not in dispute that no recovery or discovery from any of the accused with regard to the booty is concerned, has been established by the prosecution and the prosecution has totally failed to prove any link of the circumstance with regard to the receipt or disbursement of the amount by any of the accused persons.

(24) Main Incident of shooting :

24.1) The incident of firing on the deceased – Amit Jethwa, as per evidence, has occurred on 20.07.2010 at about 8:30 p.m. In order to establish the presence of A-5 and A-6 with the motorcycle at the scene of offence, the prosecution has examined two eye-witnesses being PW-14, Rajeshbhai Pethabhai Bharwad (Exh.170) and PW-184, Manvendra Kachhawa (EXh.780). They are examined twice, and on both the occasions, they have turned hostile. In the TI parade of both

the accused, they were identified, but before the trial Court they have not supported the case of the prosecution. The trial Court has recorded an incorrect finding that PW-14, Rajeshbhai Pethabhai Bharwad has identified A-5. The trial Court has surprisingly presumed that both the accused had concealed their identity by covering the face and also have concealed their fingerprints without any evidence on record. Thus, the findings of the trial Court are contrary to its observation. If the case of the witness is believed that he has seen the accused, then simultaneously, it cannot be believed that the accused had covered their face and had concealed their identity.

24.2) The evidence reveals that one Bajaj Discover motorcycle having Registration No.GJ-01-DQ-2482 has been recovered. This has been recorded in the scene of offence panchnama at Exh.374, which has been drawn on the very same day at 2:30 hours on 21.07.2010 under the supervision of I.O., Shri H.M.Kundaliya, Police Inspector, Sola High Court Police Station. The panch to the said panchnama – PW-75, Maganbhai Nathabhai Patel (Exh.445) has turned hostile and another panch PW-55, Phoolchand Babulal Prajapati (Exh.373) has also turned hostile. Till the investigation was handed over to the Crime Branch on 16.08.2010, no details with regard to the said motorcycle, which has been used for committing the offence, have emerged. The Investigating Officer, PW-192, Shri Satishkumar Manilal Chaudhary (Exh.830) commenced the investigation on 16.08.2010 and in his investigation it is revealed that the said motorcycle was given by one witness PW-41, Samir Hajirasul Vora (Ghanchi) (Exh.338), who has been examined twice; once at Exh.338 and after the judgment of the Apex Court, he was re-examined at Exh.1159 and on both the occasions, he has not supported the case of the prosecution.

24.3) The prosecution has further tried to establish that the motorcycle was stolen and the original owner was one Shri Ghanshyambhai Jethabhai Soni (PW-34), who is examined at Exh.316. The motorcycle was stolen on 22.04.2007 and the F.I.R. in this regard is at Exh.317, which is registered at Dholka Police Station against unknown person on 25.04.2007. PW-34, Ghanshyambhai Jethabhai Soni in his deposition has referred the original number of motorcycle being GJ-01-EL-5708. He has also identified the motorcycle. The prosecution has further projected that PW-41, Samir Hajirasul Vora (Ghanchi) at Exh.338 gave the said motorcycle further to his nephew – PW-39, Suleman @ Salmanbhai Jahangirbhai, who is examined at Exh.336, however he has also turned hostile. Thus, the first link of the motorcycle having procured by Bhupendra @ Bhupi is broken since he passed away and the second link of the said motorcycle having been given by PW-41, Samir Hajirasul Vora (Ghanchi) to PW-39, Suleman @ Salmanbhai Jahangirbhai is also broken since both have turned hostile. It is further alleged by prosecution that PW-39, Suleman @ Salmanbhai with PW-40, Valibhai Mohammad @ Muko gave the motorcycle to A-1. PW-40, Valibhai Mohammad @ Muko has been examined at Exh.337 and he has been re-examined after the judgment of the Apex Court at Exh.1133 and on both the occasions, he has turned hostile.

24.4) It is further alleged by the prosecution that A-1 gave the motorcycle to A-3, Sanjay Parbatbhai Chauhan, who further took it for repairing at Shiv Service Point Auto Garage at Una. In order to establish that link, the prosecution has examined two witnesses of Shiv Service Point Auto Garage being PW-157, Bharatbhai Dodiya (Exh.663), who is the mechanic of Shiv Service Point Auto Garage. He has turned hostile and the second witness PW-158, Miteshbhai Patel, who is examined at Exh.664, he is the owner of the garage, has also turned hostile.

24.5) Further it is alleged that A-3 gave the motorcycle to accused No.6 – Shailesh Pandya, who is the shooter and he used that motorcycle on that day, however there is no link even remotely established indicating that in what manner A-3 gave the motorcycle to A-6 and how he came in possession of the said motorcycle. In order to establish the link between A-3 and A-6, the prosecution has examined three witnesses : PW-35, Dharmeshbhai Jagdishbhai Prajapati, he has been examined twice, first at Exh.319 and thereafter, he has been re-examined after the judgment of the Apex Court at Exh.1094 and on both the occasions, he has turned hostile. PW-54, Yogesh Dashrathbhai Pandya, is the real brother of A-6, as per the case of the prosecution. He has been examined twice, first at Exh.371 and thereafter he was re-examined after the judgment passed by the Apex Court at Exh.1090 and on both the occasions, he has turned hostile. PW-155, Mahadevji Somabhai Thakor, who is examined at Exh.659, who is the relative of A-5, Udaji Kantiji Soneji Thakor, is also examined twice and on both the occasions, he has also turned hostile.

24.6) Thus, right from procuring the motorcycle, till it is used in the offence, the prosecution has miserably failed to establish the links. There is no evidence, suggesting that this motorcycle, after it was stolen in the year 2007, was procured by deceased Bhupendra, and he in turn gave it to PW-41, Samir Hajirasul Vora (Ghanchi), who then gave it to PW-39, Suleman @ Salmanbhai and thereafter PW-39 along with PW-40 gave it to A-1 and A-1 gave the motorcycle to A-3, who ultimately gave the motorcycle to A-6, Sailesh Pandya, who used the same on the fateful day of the incident.

24.7) As per the case of the prosecution and as per the statement recorded under Section 164 of the Cr.P.C., when he procured the motorcycle, the Registration number was GJ-01-DE-4252. Thus, the

overall evidence, with regard to the motorcycle reveals that three registration numbers are mentioned (i) GJ-01-EL-5708, as per the owner PW-34, Ghanshyambhai Jethabhai Soni; and (ii) the second number of the motorcycle being GJ-01-DE-4252, when the motorcycle was handed over by the deceased Bhupendra to PW-41, Samir Hajirasul Vora (Ghanchi) and the last number (iii) i.e. the GJ-01-DQ-2482, which was on the motorcycle at the time when it was found at the scene of offence. There is no evidence, suggesting that A-1 was in possession of the motorcycle or even other accused i.e. A-3 as well as A-5 and A-6 have ever used the motorcycle. There is no CCTV footage collected and no witness has seen them with the motorcycle. There is no evidence worth the name, pointing out even remotely that any of the accused were in possession of the motorcycle found at the place of offence. Even the eye witnesses, who had initially given the statement before the police and have subsequently turned hostile, do not say that this motorcycle was used by any of the accused or more particularly by A-5 and A-6 as none of the witnesses have identified these accused in the Court and the TI Parade is also not proved. Even the charge at Exh.101 does not refer that A-1 has used the motorcycle or the accused have changed the number of the motorcycle. The prosecution has not explained, under what circumstances and who and at what point of time the number of the motorcycle has been altered.

24.8) PW-192, Investigating Officer, S.M.Chaudhary has even admitted that there is no evidence to show that how the motorcycle was procured by the deceased Bhupendra. Even the trial Court in Paragraph No.206 of the judgment has recorded a finding that there is no evidence signifying that A-1 has procured the motorcycle and thereafter, he got it repaired at Shiv Shakti Service Point, Una and the number plate was changed by him. The statement of PW-41, Samir

Hajirasul Vora (Ghanchi) under Section 164 of the Cr.P.C. was recorded by the Additional District Judge, Shri Bharat Ganatra at Exh.726. As per his deposition, he has admitted that such statement of PW-41, Samir Hajirasul Vora (Ghanchi) has been recorded by him. The trial Court, while placing reliance on the Lakshya Software report at Exh.869 prepared by PW-193, Raghvendra Dr. Shyamsing Vats, Investigating Officer, has concluded that such motorcycle was used by the accused and the same was procured from Samir Hajirasul Vora (Ghanchi) by A-1. The reliance is also placed along with the report at Exh.869 with the statement recorded under the provisions of Section 161 of the Cr.P.C., which is impermissible in law. Further, the trial Court has also observed that since the accused have not explained the circumstances, it is presumed that such motorcycle was used by the accused in commission of the offence. Even the trial Court in Paragraph No.474 observed that it is not relevant whether the motorcycle was stolen by Bhupendra @ Bhupi or it was seized since the said motorcycle was being used by PW-41, Samir Hajirasul Vora (Ghanchi) and the same was given on 09.07.2010 to A-1 through his nephew PW-39, Suleman @ Salmanbhai Jahangirbhai at Limbdi. Such a finding of the trial Court runs contrary to the settled legal precedents and is illegal.

24.9) (a) PW-56, Babuji Nanji Thakore (Exh.382) :

The prosecution has examined PW-56 and it is alleged that he is a friend of A-5 and in order to prove his presence along with the Bajaj Discover bike, he has been examined at Exh.382 however, he has turned hostile and has not even identified the accused in the Court.

(b) PW-131, Mahendrabhai Salot (Exh.612) :

This witness has stated that the registration number plate being GJ-01-DQ-2482 is the number plate of his moped. He is the owner of

the moped and number of his moped was used in the motorcycle, which was used for committing the alleged offence.

(c) **PW-175, Pravin Ramanuj (Exh.729) :**

It is established from the evidence that no fingerprints of any of the accused, more particularly A-5 and A-6 or even of the deceased have been found from the bike.

(25) At this stage, it would be apposite to refer to the evidence of PW-7, Rameshbhai P. Vachheta, who is examined at Exh.141, who is a washer-man and handed over the bag to the Crime Branch, which included the Trouser of *Kurta*, which was found in the headlight of the cover of the bike, however this witness (PW-7) has not supported the case of the prosecution and has even refused to identify the articles, which were found in the bag.

KURTA (long sleeve shirt) found in the motorcycle:

25.1) In order to establish the link between A-6 with the motorcycle, the prosecution has tried to establish it by a piece of '*Kurta*' recovered from the headlight cover of the bike, which was found at the scene of offence. It is projected that in that piece of *Kurta*, by a ball-pen, one name 'Dashrathbhai' was written and hence, on investigation, it was found that the same belongs to the father of PW-54, Yogeshkumar Dashrathlal Pandya, who is examined at Exh.371. It is the case of the prosecution that the son of the real uncle - Yogesh Dashrathbhai (PW-54) gave the *Kurta* to the accused. He has also turned hostile and has not supported the case of the prosecution, though he was examined twice. The father of this witness – Yogesh Dashrathbhai Pandya (PW-54), whose name was written on the *Kurta* was not examined as a witness. Another witness – Dharmeshbhai Jagdishbhai Prajapati (PW-35), who is examined twice, first at Exh.319 and thereafter, re-

examined at Exh.1094 however, on both the occasions, he has turned hostile. It is the case of the prosecution that this *Kurta* was worn by A-6 in his shop.

Findings of the trial Court on use of Motorcycle in the offence :

(26) In order to prove that A-5 and A-6 had come with the motorcycle and stayed at the place of PW-155, Mahadevji Somaji Thakor, who is examined at Exh.659. He has been declared hostile. No exact descriptions of bike or number plate are even otherwise given by him. He has been examined twice and on both the occasions, he has turned hostile. The prosecution has also alleged that three to four months prior to the incident, A-6, Sailesh Pandya has visited one Navrang Hotel at Bhavnagar, while following the deceased and he was roaming near this hotel. The hotel owner i.e. PW-161, Vijaybhai Yadav, who is examined at Exh.679 has been declared hostile.

26.1) From the findings recorded by the trial Court, it is apparent that the trial Court has placed reliance on the statements recorded under the provisions of Sections 161 and 164 of the Cr.P.C. for arriving at the finding that the bike has been used by the accused in commission of the offence. Though, the defence has placed reliance on the decision of the Gujarat High Court in the case of **Hinaben Haribhai vs. State of Gujarat**, 1996 (2) G.L.H. 421, the trial Court has considered those statements. It is also recorded by the trial Court that in all probabilities, the witness PW-41, Samir Hajirasul Vora (Ghanchi) has not supported the case of the prosecution and has given false evidence in view of influence of A-1, Bahadursinh Dhirubha Vadher as he was his friend and thereafter, by making such observations, the trial Court has ultimately relied upon the Lakshya Software report at Exh.869 for holding that the bike was used in the offence by the accused. The trial Court has also observed that since the accused have not tendered any

explanation in their further statement recorded under the provisions of Section 313 of the Cr.P.C., it is presumed that the accused are involved in the offence and have used the motorbike for the commission of offence. The trial Court has presumed that the motorcycle has been used by the accused, since it was stolen and thereafter, found from the scene of offence. It appears that the trial Court is oblivious of the fact that all the witnesses have turned hostile and have not supported the case of the prosecution remotely suggesting that they had procured the bike and such bike has been used for commission of offence.

(27) Motive for commission of crime :

a) It is well settled legal precedent that even if the circumstance of motive is established against the accused, the same may be important circumstantial evidence, but cannot be a substitute of a conclusive proof of commission of crime. The Apex Court in case of **Subramanya (supra)** in Paragraph No.92 has observed thus : -

“92.Thus, even if it is believed that the accused appellant had a motive to commit the crime, the same may be an important circumstantial but cannot take the place as a conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the accused appellant but suspicion, howsoever strong, cannot be a substitute for proof of the guilt of the accused beyond reasonable doubt. The trial Court rightly disbelieved motive to commit the crime as the evidence in this regard is absolutely hearsay in nature.”

b) In order to establish that A-7 and A-4 garnered hate for the deceased and they had motive to commit the murder of the deceased, the prosecution has placed reliance on various documentary evidence, such as RTI applications and the complaints filed by the deceased against A-7. It is alleged that due to such applications loss was caused to A-7 and A-4. The prosecution has also placed reliance on

the communications of the police authorities suggesting that A-7 was a very headstrong person and was capable enough to commit the murder of the deceased. Indubitably, the evidence on this facet is overwhelming. The evidence is replete to prove the temperament of A-7. It appears that he is a headstrong person and also famous for his notoriety in Gir area, more particularly Taluka Kodinar. There are various criminal cases against him. There are communications, which are written by the police authorities *inter se*, which reflect about his conduct and illegal activities undertaken by him in such area however, such demeanor would not be sufficient enough to convict A-7 for the offence in absence of further corroborative piece of evidence. The guilt of the A-7 is required to be established beyond reasonable doubt. Long back, the Division Bench of the Calcutta High Court in the case of Amrital Lal Hazra vs Emperor, AIR 1916 Cal 188 in context of section 54 of the Evidence Act which refers to the bad character of the accused has held that “*It is an elementary rule that a man's guilt is to be established by proof of the facts, and not by proof of his character; such evidence might create prejudice but not lead a step towards substantiation of guilt.*”

Though, the evidence indicates that the relationship between the deceased and A-7 was not cordial and was very strained however, such *factum* itself would not be fatal for A-7 and he cannot be convicted for a serious offence like murder. The prosecution has alleged the loss caused to the accused, more particularly by A-7 and A-3, however, no conclusive or substantial evidence has been shown in this regard. It is well established legal precedent that however strong suspicion exists against the accused, the same cannot replace a conclusive proof of evidence. Under the circumstances, the motive, which the prosecution has alleged against these accused for committing murder of the deceased, will not by itself be sufficient

enough to convict the accused, for the offence for which they were charged in absence of any corroborative or supportive piece of evidence.

c) There is another aspect, which requires to be mentioned is that evidence of the Investigating Officers and the witnesses established that there were many other persons over and above the accused, who could be the enemies of the deceased since the deceased was making various RTI applications against institutions, Government employees, businessman, actors and political persons etc. however, the investigation is not done in this regard. But, failure of the investigating agency on this count cannot benefit the accused persons. If the line of investigation points out the involvement of a particular accused; then it is left on the wisdom of such agencies to conclude the involvement of a person in a crime on the basis of the proof gathered by them through such investigation. Ultimately, it is left on the discretion of the Courts to analyze and scrutinize such investigation and the evidence and sift the evidence which points out the truth.

(28) Statements under section 313 of the Cr.P.C.:

a) It is no more *res integra* that the trial Court, while recording further Statement under Section 313 of the Cr.P.C., has to first establish the circumstances through reliable evidence against the accused. The incriminating circumstances, which are established against the accused, are required to be brought to the notice of the accused so that he can meet with such circumstances. The Apex Court, in the case of *Indrakunwar (supra)*, has summarized the principles with regard to Section 313 of the Cr.P.C. as under :

“35. A perusal of various judgments rendered by this Court reveals the following principles, as evolved over time when considering such statements.

35.1 The object, evident from the Section itself, is to enable the accused to themselves explain any circumstances appearing in the evidence against them.

35.2 The intent is to establish a dialogue between the Court and the accused. This process benefits the accused and aids the Court in arriving at the final verdict.

35.3 The process enshrined is not a matter of procedural formality but is based on the cardinal principle of natural justice, i.e., audi alterum partem.

35.4 The ultimate test when concerned with the compliance of the Section is to enquire and ensure whether the accused got the opportunity to say his piece.

35.5 In such a statement, the accused may or may not admit involvement or any incriminating circumstance or may even offer an alternative version of events or interpretation. The accused may not be put to prejudice by any omission or inadequate questioning.

35.6 The right to remain silent or any answer to a question which may be false shall not be used to his detriment, being the sole reason.

35.7 This statement cannot form the sole basis of conviction and is neither a substantive nor a substitute piece of evidence. It does not discharge but reduces the prosecution's burden of leading evidence to prove its case. They are to be used to examine the veracity of the prosecution's case. 34.8 This statement is to be read as a whole. One part cannot be read in isolation.

35.9 Such a statement, as not on oath, does not qualify as a piece of evidence under [Section 3](#) of the Indian Evidence Act, 1872; however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution.

35.10 The circumstances not put to the accused while rendering his statement under the Section are to be excluded from consideration as no opportunity has been afforded to him to explain them.

35.11 The Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defence. The defence so articulated must be carefully scrutinized and considered.

35.12 Non-compliance with the Section may cause prejudice to the accused and may impede the process of arriving at a fair decision.”

b) It is noticed by us that in the further statement under section 313 of the Cr.P.C. when the A-1, Bahadursinh Dhirubha Vadher, was confronted with the CDR data, he has denied the alleged number on which the prosecution has placed reliance, and has stated that he had

never used the same and it does not belong to him. Moreover, he has submitted that he has been victim of the political rivalry and has been dragged into a false case. A-2, Pachanbhai Gopalbhai @ Shivabhai Desai, has denied in the statement recorded under Section 313 of the Cr.P.C. about the use of mobile No.9099550616 and other mobile numbers. Similarly, A-3, Sanjay Parbatbhai Chauhan, in his further statement, has specifically denied that the alleged mobile numbers do not belong to him and he has never used the same. Further, he has stated that the police had taken his Identity Card from his pocket at the time of arrest and the same is misused by the police. On a specific question being asked by the trial Court under the provisions of Section 313 of the Cr.P.C. to A-3, Sanjay Parbatbhai Chauhan of using the mobile number, in response the said accused has specifically tendered the explanation that at the time of arrest, he was using TATA Telly service number. Similarly, A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki, in the further statement recorded under Section 313 of the Cr.P.C. and on being a question asked by the trial Court to him with regard to the CDR or mobile evidence, he has specifically denied that this mobile numbers do not belong to him. Moreover, he has not talked on such mobile numbers. He has specifically stated that the mobile number 9824284382 does not belong to him and he has not talked on the mobile No.9725702727. In his further statement, he has specifically denied that he has never done the business of mining. A-5, Udaji Kantiji Soneji Thakore, in his further statement denied all the intimating evidences and has submitted that the same are concocted. He has specifically stated that all the panchnamas have been fabricated and false details are mentioned therein. He has further denied that he was not present with any of the accused in the hotels, as alleged by the prosecution. He has also denied that he has not talked with any accused on the phone. He has stated that he has not been identified in the TI parade

by any of the witness, moreover, the witnesses were already shown his photographs by the police. A-6, Shailesh Pandya, has also completely denied his involvement in the crime and has submitted that the evidence is fabricated against him. On a question being asked with regard to IMEI number locations and found in the Exh.869 Lakshya Software, to A-7, Dinubhai Boghabhai Solanki, he has categorically stated that such report is not generated from the system and main server and has been manually fed and is concocted. It is further clarified that the data of the report is tempered. It is further stated by him that such data is manually fed.

c) Similarly, by the trial Court, while recording the statement under Section 313 of the Cr.P.C., so far as A-6 is concerned, no question has been put relating to the circumstance of findings arrived at by comparison of handwritings. The conclusion, with regard to the handwriting has been directly recorded by the trial Court, while passing the impugned judgment, without consulting the accused. Thus, the circumstances, which are not put to the accused, are to be excluded from consideration, while arriving at the findings, as no opportunity has been afforded to A-6 in this regard and in the case of A-3, the accused has offered the explanation, which the trial Court was required to analyze carefully; and failure to consider the explanation of the accused to the incriminating circumstances, may vitiate the trial and can be fatal to conviction. Even otherwise, as per the settled legal precedent, the statements recorded under Section 313 of the Cr.P.C. cannot form a sole foundation for conviction since such statements are neither a substance nor a substitute piece of evidence and it does not discharge but reduce the prosecution's burden of leading to prove its case. The accused cannot be put to prejudice for any omission or inadequate questioning and the trial Court cannot premise its findings adverse to the accused without

affording any opportunity to the accused in this regard. Any statement, which is recorded under this provision, cannot be used against the accused without the circumstance having been pointed out against him, as it would seriously prejudice him / her. The prime consideration and aim of the trial Court, while undertaking necessary exercise under section 313 of the Cr.P.C., is to secure the ends of justice, and should not only concentrate on drawing an adverse inference against the accused on inculpatory part by ignoring the exculpatory part. The explanation or non-explanation by the accused can be treated as link while considering the totality of the circumstances and cannot be exclusively relied upon for conviction of the accused. Such a link in the chain of circumstances can be of a constructive value, provided the prosecution is able to establish the complicity of the accused by convincing and rational evidence. The non-explanation of the accused to a circumstance, which is perfunctory in nature cannot be held detrimental to him and cannot be used against him. The trial Court has premised the conviction of the accused on such aspects; hence, it becomes fatal for the prosecution.

(29) Police Statements :

a) It is noticed by us that the trial Court has heavily placed reliance on the statement recorded of the witnesses under Section 161 of the Cr.P.C. and also the statement of the aforesaid witnesses, whose statements are recorded under Section 164 of the Cr.P.C. We may at this stage incorporate the observations made by the Apex Court in the case of ***Samasundrama (supra)***, wherein the Apex Court has observed thus : -

“PURPORT AND VALUE OF SECTION 164 OF CRPC

81 Section 164 of the CrPC enables the recording of the statement or confession before the Magistrate. Is such statement substantive evidence? What is the purpose of recording the statement or

confession under Section 164? What would be the position if the person giving the statement resiles from the same completely when he is examined as a witness? These questions are not res integra. Ordinarily, the prosecution which is conducted through the State and the police machinery would have custody of the person. Though, Section 164 does provide for safeguards to ensure that the statement or a confession is a voluntary affair it may turn out to be otherwise. We may advert to statements of law enunciated by this Court over time. 22 (2011) 5 SCC 161

82. As to the importance of the evidence of the statement recorded under Section 164 and as to whether it constitutes substantial evidence, we may only to advert to the following judgment, i.e., in George and others v. State of Kerala and another:

“36. In making the above and similar comments the trial Court again ignored a fundamental rule of criminal jurisprudence that a statement of a witness recorded under S. 164, Cr.P.C., cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating him.”

83. What is the object of recording the statement, ordinarily of witnesses under Section 164 has been expounded by this Court in R. Shaji v. State of Kerala:

“27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is two fold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in Court should be discarded, is not at all warranted.

16. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Cr.P.C., such statements cannot be treated as substantive evidence.”

84. Thus, in a case where a witness, in his statement under Section 164 of the CrPC, makes culpability of the accused beyond doubt but when he is put on the witness stand in the trial, he does a complete somersault, as the statement under Section 164 is not substantial evidence then what would be the position? The substantive evidence is the evidence rendered in the Court. Should there be no other evidence against the accused, it would be impermissible to convict the accused on the basis of the statement under Section 164.”

The Apex Court has thus, clarified and reiterated that the statement recorded under Section 164 of the Cr.P.C. of a witness is not a substantial evidence and it would be impermissible to convict

the accused on the basis of the statement recorded under the provisions of Section 164 of the Cr.P.C. The purport of Section 164 of the Cr.P.C. is to deter the witnesses from changing their stand by denying the contents of such statement and secondly, to tide over the immunity from Section 164 of the Cr.P.C. such statements can only be used for the purpose of contradicting and corroborating the witness as per the provisions of Section 157 of the Evidence Act. The purport of recording the statements under Sections 161 and 164 of Cr.P.C. is to test the credibility of the witness with reference to the provisions of Section 145 of the Evidence act. Hence, the trial Court has misconstrued the provisions of Sections 161 and 164 of the Cr.P.C. and has totally followed the ill-conceived process by solely placing reliance on such statement in convicting the accused. The trial Court has also believed the recovery of mobile and numbers mentioned in the arrest panchnamas, despite the panchas having turned hostile. Assuming that the mobile handsets and numbers are recovered, then also such recovery is futile since no link is established connecting the phone numbers or handset with the accused. The investigation commenced on the first arrest made of A-1, Bahadursinh Dhirubha Vadher on 16.08.2010, and on the basis of the confessional statement, the involvement of other co-accused was established. The prosecution is unable to point out any arrest panchnama of this accused. At the time of arrest, no recovery or discovery of any article is shown from him.

b) The admissibility of the confessional statement of the accused before the police is hit not only by Sections 25 and 26 of the Evidence Act but also by virtue of Section 162 of the Cr.P.C. because only that much of the disclosure / confessional statement is admissible as the same relates distinctly to the fact discovered. Though, the panchas of all the panchnamas have turned hostile, the contents of the same

could have been proved through the evidence of the Investigating Officers, but no such procedure has been followed. The Apex Court in the case of Subramanya vs. State of Karnataka, in AIR 2022 S.C. 5110 has clarified the manner in which the panchnama is required to be drawn for accepting its evidentiary value. It is observed thus:

"82. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:

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

83. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.

84. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panchwitnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the

investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."

Thus, the law requires that the Investigating Officer has to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. In the instant case, the panchnamas do not satisfy the requirement of Section 27 of the Evidence Act. The Investigating Officers have also failed to observe the requirement of Section 27 of the Evidence Act. Hence, the trial Court was expected to ignore the evidence emanating from the panchnamas for recording the findings of guilt of the accused persons.

(30) Opinion on the findings and observations of the trial Court:

The overall analysis of the judgment of the trial Court inculcates a feeling that the trial Court has conducted the trial with a preconceived notion of convicting the accused. It appears that the trial Court was ignorant of the cardinal principle that life and liberty cannot be compromised at any cost. The presumption of innocence in favour of the accused till the prosecution proves his guilt beyond reasonable doubt is not a casual notion. The violation of the cardinal principles governing the free and fair trial and investigation directly impacts the valuable rights of the individual imbibed in Articles 14 and 21 of the Constitution of India. The trial Court has failed in its cardinal duty of fair trial by adopting the following procedure in convicting the accused persons.

a) The trial Court, by taking aid of the police statements of hostile witnesses, has convicted the accused persons. The law on the probative value of evidence of the hostile witness is no more *res integra*. The enunciation of the Apex Court in the case of **Sat Paul vs. Delhi Administration**, 1976 (1) S.C.C. 727, lucidly explains the

evidentiary value of hostile witness. The Apex Court has considered the provisions of Sections 142 and 154 of the Evidence Act read with Section 162 of the Cr.P.C. in light of testimony of hostile witness. It is held thus:

“25 As regards the reticence of the appellant on the query made by the Inspector, we do not think it necessary to burden this Judgement with a discussion of the question whether this conduct amounts to a statement made to a Police Officer in the course of investigation and as such is hit by sec. 162 of the Code of Criminal Procedure. Suffice it to say that even on the assumption that it was admissible as conduct - and not as a 'statement' - u/s. 8, Evidence Act, its probative value in the circumstances of this case would be almost nil. The appellant explained that he did not protest and resist out of fear, that the inspector might make matters worse for him, even for getting bail, it would not be unusual even for an honest Officer to be frightened out of wits on being suddenly accused of bribe-taking by a superior Officer.

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37. To steer clear of me controversy over the meaning of the terms "hostile" witness, "adverse" witness, "unfavourable" witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared "adverse" or "hostile". Whether it be the grant of permission u/s. 142 to put leading question, or the leave under Section 154 to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court. The discretion conferred by Section 154 on the court is unqualified and untrammelled, and is apart from any question of "hostility". It is to be liberally exercised whenever the court from the witness's, demeanour temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, think that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as "declared hostile", "declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts.

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50 In Narayan Nathu Naik V/s. Maharashtra State, (1971) 1 SCR 133 the court actually used the evidence of the prosecution witnesses who had partly resiled from their previous statements, to the extent they supported the prosecution, for corroborating the other witnesses.

51 From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court by the party calling him his evidence cannot, as a matter

of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto.

52 It was in the context of such a case, where, as a result of the cross-examination by the Public Prosecutor, the prosecution witness concerned stood discredited altogether, that this Court in Jagir Singh V/s. State, with the aforesaid rule of caution which is not to be treated as a rule of law - in mind, said that the evidence of such a witness is to be rejected en bloc.

53 In the light of the above principles, it will be seen that, in law, the part of the evidence of the Panch witnesses who were thoroughly cross-examined and contradicted with their inconsistent police statements by the Public Prosecutor, could be used or availed of by the prosecution to support its case. But as a matter of prudence, on the facts of the case, it would be hazardous to allow the prosecution to do so. These witnesses contradicted substantially their previous statements and as a result of the cross-examination, their credit was substantially, if not, wholly, shaken. It was therefore, not proper for the courts below to pick out a sentence or two from their evidence and use the same to support the evidence of the trap witnesses.”

b) In a recent decision of the Apex Court in the case of **Manoj Kumar Soni Vs. State of Madhya Pradesh**, AIR 2023 S.C. 3857, while examining the disclosure statements recorded under Section 27 of the Evidence Act, it has been held thus:

“21. A doubt looms: can disclosure statements per se, unaccompanied by any supporting evidence, be deemed adequate to secure a conviction? We find it implausible. Although disclosure statements hold significance as a contributing factor in unriddling a case, in our opinion, they are not so strong a piece of evidence sufficient on its own and without anything more to bring home the charges beyond reasonable doubt.

*22. The law on the evidentiary value of disclosure statements under Section 27, Evidence Act made by the accused himself seems to be well-established. The decision of the Privy Council in **Pulukuri Kotayya and others vs. King-Emperor, 1946 SCC OnLine PC 47; AIR 1947 PC 67** holds the field even today wherein it was held that the provided information must be directly relevant to the discovered fact, including details about the physical object, its place of origin, and the accused person's awareness of these aspects. The Privy Council observed:*

The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into s. 27 something which is not there, and admitting in evidence a confession barred by s. 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.

*23. The law on the evidentiary value of disclosure statements of coaccused too is settled; the courts have hesitated to place reliance solely on disclosure statements of co-accused and used them merely to support the conviction or, as Sir Lawrence Jenkins observed in **Emperor vs. Lalit Mohan Chuckerburty, (1911) ILR 38 Cal 559**, page 588 to 'lend assurance to other evidence against a coaccused'. In **Haricharan Kurmi vs. State of Bihar, AIR 1964 SC 1184** this Court, speaking through the Constitution Bench, elaborated upon the approach to be adopted by courts when dealing with disclosure statements:*

13. ...In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right.

28. The testimony of the seizure witnesses, we are inclined to the view, is the only thread in the present case that could tie together the loose garland, and without it, the very seizure of stolen property stands falsified. We cannot overlook the significance of the circumstance that all four independent seizure witnesses (PWs 5, 6, 11, and 16), who were allegedly present during the seizure/recovery of the stolen articles from Manoj's house, having turned hostile and not support the prosecution case, the standalone evidence of the I.O. on seizure cannot be deemed either conclusive or convincing; the recoveries made by him under Section 27, Evidence Act must, therefore, be rejected."

The conspectus of the preceding observations is that the previous statements of the hostile witnesses, to the extent they supported the prosecution, for corroborating with the other witnesses, after their cross-examination and contradiction, his / her evidence cannot, as a matter of law, be treated as washed-off the record altogether, and it is for the trial Court to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard

to a part of his testimony. It is further held that if in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence *in toto*, and it is therefore, not proper for the Courts below to pick out a sentence or two from their evidence and use the same to support the evidence of the trapped witnesses. In case the seizure witnesses turn hostile and do not support the prosecution case, the standalone evidence of the Investigating Officer on seizure cannot be deemed either conclusive or convincing; the recoveries made by him under Section 27 of the Evidence Act must therefore, has to be rejected. In the instant case, the trial Court has validated the statements of the hostile witnesses, though the prosecution has miserably failed to extract any information through their cross-examination, which can corroborate with other evidence. Hence, the conviction recorded by the trial Court on the substratum of the statements of hostile witnesses is perverse and against the provisions of law.

c) The trial Court has devoted Paragraph Nos.101 to 193 of the judgement for proving the motive of the offence. The trial Court has discussed all the RTI applications filed by the deceased against A-7. The trial Court has also discussed the complaints filed by the deceased against the illegal constructions, passing of resolutions of the trust, complaint before Kodinar Municipal Corporation setting up of illegal towers, contesting of election in the year 2007 by the accused and the deceased, encroachment of the gaucher land etc. The trial Court has also considered the communications of the police authorities, which suggest that A-7 was a headstrong person and was carrying out illegal activities and was affecting the law and order situation. All these factors have weighed upon the trial Court to conclude that A-7 had all the means and reasons to eliminate the

deceased. The trial Court has ultimately concluded in Paragraph No.187 that though the conspiracy cannot be proved only by placing reliance on the evidence of PW-26, Rambhai Hajabhai Solanki, by considering other evidence, the trial Court has opined that A-7 was the key conspirator.

d) The trial Court, while placing reliance on the statement recorded under Section 164 of the Cr.P.C. of PW-26, Rambhai Hajabhai Solanki, has arrived at a definite finding that he was serving at the Farm House of A-7 between 2003 to 2011. Hefty reliance is placed on this statement recorded under Section 164 of the Cr.P.C. before the Magistrate at Delhi. The trial Court, in order to establish the link between A-7 and other accused has further in order to justify the findings of conspiracy had taken aid of the CDRs of the mobile numbers of the accused and also the Lakshya Software report at Exh.869. We have also noticed that the trial Court commented upon the investigation done by the first Investigating Officer i.e. Police Inspector, Shri Kundaliya and has also deprecated the manner and method, in which he has collected the evidence and thereafter, has praised the investigation done by the CBI Officer, Shri Mukesh Sharma. On an overall appreciation of the findings of the trial Court, we are of the firm opinion that the trial Court was predetermined to convict the accused persons without appreciating the evidence in its true perspective. A bare minimum perusal of the evidence of PW-26 and other witnesses, will clarify that in fact, except the evidence of PW-26 in no other witness's evidence or the investigation done by any of the agency prior to the investigation taken over by the CBI, the name of A-7 is figuring. PW-26 has maintained silence for more than two years and ten months and did not come forward to give his statement. The trial Court has not considered the delay. The evidence collected by all the agencies does not remotely suggest or indicate that

PW-26 was the employee of A-7, however the trial Court on the presumption has held that PW-26 was his employee and was working at the Farm House of A-7. As we have noted hereinabove, the CBI Officer, Shri Mukesh Sharma, has not even made any efforts to visit the scene of offence at Harmadiya Farm and draw any panchnama, which would at least suggest that such farm was having some swimming pool and was in the name of A-7. Thus, the trial Court has miserably failed to appreciate the evidence and the findings with regard to the conspiracy appear to be absolutely perverse.

e) With regard to the use of Mobile No.9725702727 by A-7 is concerned, the trial Court has believed the testimony of PW-67, Dhirubhai Navghanbhai Baria (Exh.429), who was the Sarpanch of Village Harmadiya, Taluka Kodinar between 2007 to 2011 as he has deposed in his examination-in-chief that he was used to talk to A-7 on this number as A-7 was MLA at the relevant point of time. Thereafter, he has been declared hostile. We have also noticed in Paragraph No.46 of the judgment that the trial Court has believed the factual incorrect statement of PW-67, Dhirubhai Navghanbhai Baria, though he has specifically denied that on 20.07.2010 at around 4:00 or 4:30, A-7 had called him and informed about the purchase of land. He has denied the statement recorded by the CBI however, the trial Court has believed this version despite specific denial of PW-67, Dhirubhai Navghanbhai Baria in this regard, which is factually incorrect. The trial Court has further referred to Mobile No.9725702727 that the same was used by A-7, despite there being evidence of PW-44, Vikramsinh Dashrathsinh Gohil, ACP N-Division, Ahmedabad, who has been examined at Exh.344 that this number was being used by his nephew Ghanshyam. The trial Court has disbelieved him only on the ground that the said nephew of A-7 i.e. Ghanshyam is not examined. The trial Court believed the version of the hostile witnesses

relating to the use of aforesaid mobile and it is also further observed that in the CDR, Mobile No.9725702727 shows the IMEI No.358238039274160, was being used by A-7, albeit no handset has been recovered from A-7 and there is no documentary evidence showing the ownership or authorship of the said mobile number.

f) In Paragraph No.65, the trial Court has believed the recovery of the Maruti Car having registration number being GJ-11-S-6873 as well as the mobile handset of Nokia Modal No.2690 of holding IMEI No.352010047728996 having Airtel SIM Card No.9898552518 on the deposition of the panch witness – PW-70, Narendra Kanaiyalal Ahirwal, who is examined at Exh.435. He has completely turned turtle and has not supported the case of the prosecution at all, however the trial Court has believed his evidence for the reason that he has not made any representation to the Higher authorities that his signature was obtained on the panchnama without informing the contents of the panchnama. This approach of the trial Court is absolutely perverse and the recovery of the cars and mobiles are believed on this ground, that too on deposition of the hostile witnesses. Similarly, the trial Court has believed the deposition of the hostile panchas for proving other panchnamas.

g) In Paragraph No.79, the trial Court has believed the version of PW-151, Jisaan Kalumiya Naqvi, at Exh.654 though he has turned hostile and his evidence is believed for proving that A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki was using Mobile No.9824284384. As per the case of the prosecution, the same was recovered in presence of PW-111, Mohd. Javed Mohd. Anisha Sheikh (Exh.558) and PW-113, Nileshbhai Gulabhai Kiri, (Exh.566), though both of them have turned hostile. The trial Court has placed reliance on the deposition of the Investigating Officer, PW-192, Shri S.M.Chaudhary and has believed

the version that A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki, had thrown the mobile, which suggests his conduct and also the complicity in the offence, though, all the aforementioned prosecution witnesses have turned hostile i.e. PW-151, Jeesan Nakvi, PW-111, Mohd. Javed Mohd. Anisha Sheikh and PW-113, Nileshbhai Gulabhai Kiri.

h) In Paragraph No.81, the trial Court, in order to justify that A-5 and A-6 had stayed together at the house of the witness i.e. PW-56, the police statement of PW-56, Babubji Nanaji Thakor is believed, though he has turned hostile. The trial Court has believed this fact through the deposition of the Investigating Officer, Shri S.M.Chaudhary (PW-192), who has deposed that this witness, in his police statement, has stated such fact. Similarly, for proving that A-5, Udaji Kantiji Soneji Thakor was using the mobile numbers being 9979376136 and 9723389358, the trial Court has believed the deposition of the Investigating Officer and by observing that he has no reason to state untrue facts and A-5, Udaji Kantiji Soneji Thakor has not taken the defense that he was not using such mobile.

i) In Paragraph No.87 of the judgment, the trial Court has arrived at the finding that A-6 has collected the money from Baldevbhai Natvarlal Joshi (PW-159), who is the Security Guard at the factory for believing that A-6 has collected Rs.1,00,000/- from Madhavlal Maganlal Agandiya (courier) on 23.07.2010, *albeit* the witness PW-159, Baldevbhai Natvarlal Joshi, has turned hostile on both the occasions and has not supported the case of the prosecution. On the deposition of the Investigating Officer and on the basis of the statement recorded under Section 161 of the Cr.P.C., it is held by the trial Court that there is no reason to believe that the Investigating Officer is stating incorrect fact.

j) In Paragraph No.99, the trial Court has recorded that since the accused have not tendered any explanation under Section 313 of the Cr.P.C., that they were not using these mobile numbers and have not disclosed their personal numbers, which were used by them daily, as per provisions of Section 106 of the Evidence Act, the burden shifts on them to prove that such mobile numbers were not used by them, which is an absolutely perverse observation.

k) It is also noticed by us from reading the judgement that the trial Court has placed reliance on the deposition of the Investigating Officer, who has deposed and reproduced verbatim, the statements of the witnesses recorded under Section 161 of the Cr.P.C. though they have turned hostile and have not supported the case of the prosecution and have specifically denied the statement under Section 161 of the Cr.P.C. These findings of the trial Court are from Paragraph Nos.190 to 277, which include the evidence of TI parade though the witnesses have not supported the case of the prosecution. The trial Court has placed reliance on the evidence of the Executive Magistrate, who had conducted the TI parade, *albeit* the panchas of TI parade and all the witnesses have turned turtle, and such witnesses have refused to identify the accused in the Court.

l) In Paragraph No.200 of the judgment, it seems that the trial Court has committed the grave error and we would like to incorporate the findings recorded by the trial Court (translated version of Paragraph No.200 from Gujarati version), which reads as under : -

“200. It is submitted from Defense that the accused cannot be convicted only on the basis of statement given before the Police. This argument is appropriate, but if the other evidences are taken into consideration alongwith the same, it is found that Samir Hajirasul Vora has given false deposition on oath before the Court and by doing so, Samir Hajirasul Vora has helped his friend and police staff Bahadursinh Dhirubha Vadher. There is reason to believe

that Samir Hajirasul Vadher has helped due to friendship or due to reason that Bahadursinh Dhirubha Vadher is a policeman or that Bahadursinh Dhirubha Vadher may have threatened him or that he may have been influenced by some allurements, temptation or enticement. Because, when the Senior Officer of SIT Mr. Raghvendra Dr. Shyamsinh Vatsa had taken over the investigation, they had prepared information on the basis of Call Detail Report of the accused persons and witnesses, collected during the investigation and the same was produced vide Exh. 869 during the deposition of CBI Inspector Mr. Mukesh Sharma. In this regard, this witness Mr. Raghvendra Vats was recalled as per section 311 of the Cr.P.C. and on being inquired by the Court, the Investigating Officer Mr. Raghvendra Vats stated that he had prepared analysis report in detail regarding the phone calls used in this offense. It is produced vide Exh.869 and he identified the same. He had obtained CDR reports from the Mobile Companies during the investigation. He had entered the details of the same in the software and after getting output therefrom, he himself had done the analysis of that Call Detail. During the period of incident, he was performing duty as S.P. of Surendranagar and the Government of Gujarat had provided software named Lakshya to the S.P. Office and by using the same, he had obtained information of Exh.869. Each company provides information of area based on the mobile tower number i.e. Cell ID number. On the basis of that data using the Cell I.D. number, the information regarding the area was obtained. When the Court inquired that Cell I.D. number is not mentioned in the document of Exh.869, it was stated that it has not been mentioned, as all the details could not be included in one sheet and he pointed out the mobile number of accused Bahadursinh Dhirubha Vadher in the Call Detail Analysis Report of Exh.869. Moreover, the mobile numbers of witness Samir Hajirasul Vora and Suleman were also mentioned. In the Cross-examination conducted by the Defense, the Investigating Officer Mr. Raghvendra Vats has denied the fact that he had not prepared the information of Exh.869. It is also denied that the information was got prepared through his subordinate staff. He has also denied the fact in the cross-examination that this information of Exh.869 is not authentic.”

The afore-noted reasoning / findings made by the trial Court manifestly illustrate that the trial Court has considered absolute inadmissible evidence and the evidence of the hostile witnesses for convicting the accused.

m) In Paragraph No.209, the trial Court believed the facts recorded in the police statement of witness – PW-54, Yogesh Dashrathbhai Pandya dated 20.12.2010 recorded by the Investigating Officer, S.M.Chaudhary, who has been examined twice, even after the judgment of the Apex Court, though he has turned hostile on both the

occasions. The trial Court has entirely believed this statement recorded by the Investigating Officer under Section 161 of the Cr.P.C. and has believed that A-5 and A-6 came to the house on the motorcycle having registration number being GJ-01-DQ-2482, they were also having weapons with them and they had also collected the clothes of Dashrathlal Pandya. This statement dated 28.12.2010 in verbatim believed by the trial Court, though the witness has turned hostile twice. Similarly, the trial Court has believed the version of other witnesses also, though they have turned hostile.

n) In Paragraph No.215 of the judgment, the trial Court despite observing that only on the deposition of PW-43, Govindbhai Gotaji Patel [hostile witness], it cannot be proved that A-2, Pachanbhai Gopalbhai @ Shivabhai Desai and A-3, Sanjay Parbatbhai Chauhan had stayed at Hotel Konark Palace on 09.05.2010 till 10.05.2010, the trial Court has relied upon the production-cum-seizure memo Exh.512 and has observed that during the remand of A-3, Sanjay Parbatbhai Chauhan, on 30.08.2010, he has confessed that he has stayed in that hotel with A-2, Pachanbhai Gopalbhai @ Shivabhai Desai at Hotel Konark Palace. Thus, the trial Court, though has not believed the version of witness - Govindbhai Gotaji Patel, while placing reliance on the confessional statements of both the accused while he was in the police custody during remand, has believed that both the accused stayed at Hotel Konark Palace on 09.05.2010 to 10.05.2010. The trial Court, it appears that, is absolutely ignorant about provisions of Section 25 of the Evidence Act. It is very shocking to note that the trial Court has placed reliance on a photocopy of the Election Card, which was found at the Hotel Konark Palace and has compared it with the photograph attached with the charge-sheet and has held that A-6, Shailesh Pandya had stayed at the Hotel Konark Palace, though the witnesses have not supported.

o) In Paragraph No.227, the trial Court has arrived at a finding on the basis of the deposition of the Investigating Officer Shri S.M. Chaudhary (PW-192) and also the panchnama at Exh.515 and has declared that both the accused have stayed at Hotel Comfort-Inn at Diu along with A-1, Bhadursinh Dhirubha Vadher, on 09.07.2010 and thereafter, on 09.07.2010 they had stayed at Hotel Akash Palace at Chotila and in the morning of 10.07.2010, they left for Diu and on 10.07.2010, they stayed at 12:00 O'clock in Hotel Comfort-Inn at Diu in Room Nos.501 and 503. This finding has been arrived on the basis of the deposition of the Investigating Officer, though the panchas and all the material witnesses have turned hostile.

p) In Paragraph No.273, the trial Court, while comparing the CAF at Exh.632 of Vadofone prepaid application of Mobile No.9586171304, in which, the name of one "Harendrasinh Nathubha Jadeja" is written and it is held that the photograph of such application form was of the accused - Shailesh Pandya and scanned copy of the same indicates the signature of "H.N.Jadeja" in English. The trial Court compared the said signature with the receipt of Angandiya form at Exh.730, which is signed in the name of "S.N.Rabari" in English and it is held that "N" & "S" of both the signatures are compared and it is proved that both of them are done by the same person. After observing this, it is concluded by the trial Court that A-6, Shailesh Pandya, was using the Mobile No.9586171304 and the same was procured in the name of "Harendrasinh Nathubha Jadeja" and also the Mobile No.9099165367 was procured in the name of "Sanjay Nanjibhai Rabari", which was used for commission of offence. However, it is pertinent to note that at the time of arrest of A-6, no articles were recovered from him and in fact, no arrest panchnama has been drawn.

q) The trial Court in Paragraph No.427, without there being any evidence on record and despite no case having been carved out by the

prosecution or any submissions made by the prosecution or any Investigating Officer making any deposition, has arrived on a definite finding that the accused – Shailesh Pandya, in order to commit the offence had worn a plastic cover and have taken all the precautions that no fingerprints are found.

r) In Paragraph No.445, the trial Court has held as under:-
(Translated from the judgment, which is originally in Gujarati)

“445. Defense Advocate Mr. S. V. Thakkar for Accused No.2 has argued that in this case the witnesses do not support the case of the Prosecution and if the accused is convicted only on the basis of the deposition of the Investigating Officer, the purpose of justice will not be served and justice will not be done to the accused persons.

*However, the Prosecution has submitted strongly interlinked evidences. Under such circumstances, such argument of the Ld. Defense Advocate is not tenable. It may have happened that the hostile witnesses may have been manipulated by any of the accused, for which force or tricks and tactics may have been used or that they may have been taken on their side by giving them financial benefit. In addition, the Investigating Officer does not have any personal bias against any of the accused of this case. In such circumstances, on taking into consideration the judgement of the Hon'ble Supreme Court in *Bhagwandas v/s The State, A.I.R., 2011, Supreme Court, 1863*, there is no reason for not believing the facts dictated by the witnesses in the statement given before the Investigating Officer.”*

The aforementioned observations run contrary to the settled legal precedents. The trial court has misread the decision of the Apex Court in the case of *Bhagwandas (supra)*. As discussed hereinabove, the settled legal precedent is that the trial court has to examine whether, after the cross-examination and contradiction of the hostile witness, his testimony can still be believed in part or it has to be totally discarded, and if his whole testimony stands discredited then it is impermissible for the trial court to pick out a sentence or two from their evidence and use the same to support the evidence. In the instant case, the witnesses, who have turned hostile, have completely

not supported the case of the prosecution. Their entire testimony has to be discredited, as they have totally denied their previous statements, and the prosecution has miserably failed to extract any evidence which could come to their aid.

s) The trial Court, in order to justify that PW-26, Rambhai Hajabhai Solanki, did not get his statement recorded or did not give his evidence before the local police authority, has arrived at the finding that this witness PW-26 was a labourer, whereas A-7 was a Member of Parliament (MP) and hence, PW-26 could not inform the father of the deceased about the conspiracy. This fact is not stated by PW-26 in his evidence.

t) The trial Court, while placing reliance on the Lakshya Software Report at Exh.869 along with the pointing out panchamas by A-1, Bahadursinh Dhirubha Vadher as well as A-5 and A-6 has arrived at the finding that A-5 and A-6, after shooting the deceased ran away towards Vishwas City and how the accused had stayed at the Bus Stand. It is also believed by the trial Court that A-1 had hatched the conspiracy at Shivalaya Complex with A-4, Pratapbhai @ Shivabhai Hamirbhai Solanki in his office during the meeting. This evidence is believed by the trial Court by invoking the provisions of Section 27 of the Evidence Act though, none of the panchas have supported the case of the prosecution and no recovery or discovery is done. The Investigating Officers have also not proved the same in accordance with law.

u) The trial Court has recorded a definite finding that the Investigating Officer, Raghvendra Dr. Shyamsing Vats has admitted that there is no authorization given by the State Government relating to Lakshaya Software, which is used by him while preparing Exh.869

and he has not given the certificate, as required under Section 65B of the Evidence Act and in fact, has not issued any certificate or statement to that effect; however, regardless of this observation, the trial Court has very ardently convicted the accused while placing reliance on Exh.869 Report.

(31) Flaws in the Investigation:

a) In the instant case, as we have noted hereinabove, four different investigating teams have carried out the investigation. The charge-sheets are also filed at different stages accordingly. The Division Bench of this Court in its judgement dated 25.09.2012 passed in Special Criminal Application No.1925 of 2010, while issuing directions to the CBI, the highest investigating agency, has observed thus:

“10. All the above circumstances put together indicated that the investigation was controlled from the stage of registering the FIR and only the clues provided by the accused persons themselves were investigated to close the investigation by filing Charge-sheet No.158 of 2010 dated 10.11.2010 and further investigation had not served any purpose. Therefore, the investigation with the lapses and lacunae as also the unusual acts of omission and commission did not and could not inspire confidence. It may not be proper and advisable to further critically examine the charge-sheet already submitted by the police, as some of the accused persons are already arrested and shown as accused persons and even charge is yet to be framed against them. The facts and averments discussed in paragraphs 6 and 7 hereinabove also amply support the conclusion that the investigation all throughout was far from fair, impartial, independent or prompt.

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15 In the facts and for the reasons discussed hereinabove, while concluding that the investigation into murder of the son of the petitioner was far from fair, independent, bona fide or prompt, this Court refrains from even remotely suggesting that the investigating agency should or should not have taken a particular line of investigation or apprehended any person, except in accordance with law. It is clarified that the observations made herein are only for the limited purpose of deciding whether further investigation was required to be handed over to CBI, and they shall not be construed as expression of an opinion on any particular aspect of the investigation carried out so far. However, in view of the peculiar facts and circumstances, following the ratio of several judgments of the Apex Court discussed hereinabove and in the interest of justice and to instill confidence in the investigation into a serious case having far

reaching implications that we order that further investigation into I-C.R.No.163 of 2010 shall be transferred to the Central Bureau of Investigation (CBI), with the direction that the CBI shall immediately undertake an independent further investigation, and all the officers and authorities under the State Government shall co-operate in such investigation so as to facilitate submission of report of investigation by the CBI as early as practicable and preferably within a period of six months.”

Thus, while reposing immense faith in the CBI, this Court had handed over the investigation to it, however the facts indicate that the CBI has also carried out a slipshod and perfunctory investigation. We may remind the investigating officers including CBI the significant observations made by the Apex Court in the below mentioned cases:

- i) The Apex Court in the case of State of Bihar v. P.P. Sharma, 1992 Supp (1) SCC 222 : 1992 SCC (Cri.) 192 at page 258 has held thus:

“47. The investigating officer is the arm of the law and plays pivotal role in the dispensation of criminal justice and maintenance of law and order. The police investigation is, therefore, the foundation stone on which the whole edifice of criminal trial rests — an error in its chain of investigation may result in miscarriage of justice and the prosecution entails (sic) with acquittal. The duty of the investigating officer, therefore, is to ascertain facts, to extract truth from half-truth or garbled version, connecting the chain of events. Investigation is a tardy and tedious process. Enough power, therefore, has been given to the police officer in the area of investigatory process, granting him or her great latitude to exercise his discretionary power to make a successful investigation. It is by his action that law becomes an actual positive force. Often crimes are committed in secrecy with dexterity and at high places.....

- ii) In the case of Common Cause vs. Union of India, (2015) 6 S.C.C. 332, the Apex Court has held thus:

“31. There is a very high degree of responsibility placed on an investigating agency to ensure that an innocent person is not subjected to a criminal trial. This responsibility is coupled with an equally high degree of ethical rectitude required of an investigating officer or an investigating agency to ensure that the investigations are carried out without any bias and are conducted in all fairness not only to the accused person but also to the victim of any crime, whether the victim is an individual or the State.”

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33. Similarly, in Manohar Lal Sharma [Manohar Lal Sharma v. Union of India, (2014) 2 SCC 532 : (2014) 4 SCC (Cri) 1] this Court observed that investigations have to be fair, impartial and uninfluenced by external influences. It is stated as follows: (SCC p. 555, para 33)

“33. A proper investigation into crime is one of the essentials of the criminal justice system and an integral facet of rule of law. The investigation by the police under the Code has to be fair, impartial and uninfluenced by external influences. Where investigation into crime is handled by CBI under the DSPE Act, the same principles apply and CBI as an investigating agency is supposed to discharge its responsibility with competence, promptness, fairness and uninfluenced and unhindered by external influences.”

iii) In the case of Maria Margarida Sequeira Fernandes vs. Erasmo Jack de Sequeira, (2012) 5 S.C.C. 370, the Apex Court has observed thus:

“33. The truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.”

31.1) The Investigating Officers were expected to be mindful of the following principles:

- a) The truth should be the guiding star in the entire judicial process, the edifice of justice is built alone on truth. Justice delivery system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth;
- b) The Investigating Officer is the arm of the law and plays pivotal role in the dispensation of criminal justice and maintenance of law and order and the police investigation is the foundation stone on which the whole edifice of criminal trial rests an error in its chain of investigation may result in miscarriage of justice both to the prosecution and the persons who are charged with offence;

- c) There is a very high degree of responsibility placed on an investigating agency to ensure that an innocent person is not subjected to a criminal trial. The high degree of responsibility placed on an investigating agency is attached with an equally high degree of ethical rectitude required of an investigating officer or an investigating agency to ensure that the investigations are carried out without any bias and are conducted in all fairness not only to the accused person but also to the victim of any crime, whether the victim is an individual or the State;
- d) A proper investigation into crime is one of the essentials of the criminal justice system and an integral facet of rule of law. The investigation by the police under the Code has to be fair, impartial and uninfluenced by external influences. Where investigation into crime is handled by the CBI it is supposed to discharge its responsibility with competence, promptness, fairness and uninfluenced and unhindered by external influences.

31.2) Since we are dealing with the defects in the investigation, we may refer to the decision of the Apex Court in the case of Munna Lal vs. State of Uttar Pradesh, AIR 2023 S.C. 634. The Apex Court has cautioned the Courts with regard to the faulty or defective investigation. It is held thus :

“42 Although, mere defects in the investigative process by itself cannot constitute ground for acquittal, it is the legal obligation of the Court to examine carefully in each case the prosecution evidence de hors the lapses committed by the Investigating Officer to find out whether the evidence brought on record is at all reliable and whether such lapses affect the object of finding out the truth. Being conscious of the above position in law and to avoid erosion of the faith and confidence of the people in the administration of criminal justice, this Court has examined the evidence led by the prosecution threadbare and refrained from giving primacy to the negligence of the Investigating Officer as well as to the omission or lapses resulting from

the perfunctory investigation undertaken by him. The endeavour of this Court has been to reach the root of the matter by analysing and assessing the evidence on record and to ascertain whether the appellants were duly found to be guilty as well as to ensure that the guilty does not escape the rigours of law. The disturbing features in the process of investigation, since noticed, have not weighed in the Court's mind to give the benefit of doubt to the appellants but on proper evaluation of the various facts and circumstances, it has transpired that there were reasons for which PW-2 might have falsely implicated the appellants and also that PW-3 was not a wholly reliable witness. There is a fair degree of uncertainty in the prosecution story and the courts below appear to have somewhat been influenced by the oral testimony of PW-2 and PW-3, without taking into consideration the effect of the other attending circumstances, thereby warranting interference.”

31.3) The Apex Court has held that *albeit*, mere defects in the investigative process by itself cannot constitute ground for acquittal. It is the legal obligation of the Court to examine carefully in each case the prosecution evidence *de hors* the lapses committed by the Investigating Officer to find out whether the evidence brought on record is at all reliable and whether such lapses affect the object of finding out the truth. Being conscious of the said observations, we had scaled the evidence threadbare. On a close scrutiny of the entire evidence, we have found that all the Investigating Officers have failed to observe the untainted standards. The learned Public Prosecutor has also failed in his duty. The cross-examination of hostile witnesses appears to be an empty formality. No efforts are made to extract relevant evidence, which has corroborative value. The witnesses, who are cross-examined, were all enjoying police protection, but all of them have turned hostile and have ditched the prosecution.

31.4) Right from the inception of offence, the investigation was iniquitous and biased hence, the investigation was handed over to CBI. The Apex Court, while rejecting the challenge to the transfer of investigation, has endorsed the observations made by the High Court. One of the observations relates to the investigation done by I.O., Raghvendra Dr. Shyamsing Vats. The same is “*Similarly, the*

conclusion recorded by the High Court that "The incorrect statements made by Superintendent of Police Mr. Vats regarding past record of Mr.DB as seen and discussed earlier in Para 3 herein, clearly indicated an attempt at somehow shielding the person who was the prime suspect, according to the statements of the relatives and associates of the deceased" again only alludes to the statements of the relatives and witnesses. It cannot be said to be a conclusion reached by the High Court, about the guilt of the appellant. Therefore, the conclusion cannot be said to be unwarranted."

31.5) After the CBI was handed over the investigation pursuant to the directions of this Court, the highest standards akin to its stature were expected from it for unfolding the truth however, it has miserably failed to do so. The investigation has obliterated the trust reposed by this Court and confirmed by the Apex Court. It is not palatable that the CBI officer, Shri Mukesh Sharma would ignore or forget to visit the place where the alleged conspiracy was hatched, i.e. Harmadiya Farm. He has also not made any endeavor to collect the information as to whether the said farm belongs to A-7 and the witness; Rama Haja was his employee and was staying in the farm with his family. The witness - Rama Haja is the sole person, who claims to have overheard the conversation. After he is projected as a witness after 2 - 1/2 years, no efforts are made to corroborate his facts by independent evidence. The CBI Officer, though has assured the trial Court to produce the Station Diary and the first statement of the witness - Rambhai Hajabhai Solanki on 18.01.2013, he has not done so and the trial Court has also failed to bring the same on record. No efforts are made by the CBI Officer to collect certificate under Section 65B of the Evidence Act in order to make Exh.869 Report admissible and reliable. Such certificate could have been collected by him even after the investigation was handed over to him. The Investigating Officers have

not made any efforts to arraign the subscribers of the mobile phones as witnesses. Although, recovery of the mobile handsets is done, no investigation is done establishing the IMEI numbers. The authorship and ownership of the mobile numbers and handset is not proved since no evidence is collected. No evidence such as CCTV footage from any of the locations, including the toll-booths is collected. The most glaring aspect is that there is no data collected from the mobile phone of the deceased, though the call records were available. The Investigating Officers were supposed to co-relate any mobile number of the accused with his number. Even a layman, who uses the mobile can figure out such fact however, it is shocking and surprising and also heart wrenching that all the Investigating Officers have not examined this bare minimum fact. It is also shocking to note that the Investigating Officers were aware of mobile number used by the brother of A-1, Amarsinh Vadher. It is also their case that the Swift Car having registration No.GJ-11-6873 was used in the offence. The witness - Rama Haja has deposed at one point of time, that Amarsinh Vadher called A-1 to kill the deceased by crushing him under a truck. However, shockingly he is neither made an accused nor a witness. No arrest panchnama of the shooter – A-6, Shailesh Nanalal Pandya, who was arrested on 21.11.2010 on the basis of a Transfer Warrant from Bombay has been drawn. No mobile phone is recovered from this accused, and he has been thereafter produced before the Executive Magistrate for TI parade and the TI parade panchnama at Exh.167 was drawn. No efforts are made to compare the fingerprints of the accused. There are various loopholes in the investigation. It appears that the Investigating Officers have tried to fix square pegs into round holes, and have presented nothing more than unsubstantiated assertion. Thus, it appears that the loopholes in the investigation are deliberately kept unfastened in order to alter the final outcome of complicity of accused in crime.

(32) Perjury by the Witnesses:

While hearing the instant appeals, it is noticed by us that the learned Public Prosecutor has also played perfunctory role. The prosecution before the trial court has miserably failed to effectively examine the hostile witnesses. We may at this stage refer to the decision of the Division Bench of this Court rendered in the case of Mahendrasinh Pravinsinh Zala vs. State of Gujarat, Criminal Appeal No.378 of 2015 dated 25.02.2019. It is held thus:

“73 A criminal case is built upon the edifice of evidence (whether it is direct evidence or circumstantial evidence) that is admissible in law. Free and fair trial is the very foundation of the criminal jurisprudence. There is a reasonable apprehension in the mind of the public at large that the criminal trial is neither free nor fair with the Prosecutor appointed by the State Government conducting the trial in a manner where frequently the prosecution witnesses turned hostile.

74 We have noticed, while hearing the criminal appeals, that there is practically no effective and meaningful cross examination by the Public Prosecutor of a hostile witness. All that the Public Prosecutor would do is to confront the hostile witness with his police statement under Section 161 of the Cr.P.C. and contradict him with the same. The only thing that the Public Prosecutor would do is to bring the contradiction on record and thereafter prove those contradictions through the evidence of the Investigating Officer. This is not sufficient. The objects of cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief to sift the facts already stated by the witness to detect and expose the discrepancy or to elicit the suppressed facts which will support the case of the cross examining party. What we are trying to convey is that it is the duty of the Public Prosecutor to cross examine a hostile witness in details and try to establish that the witness is speaking lie and has deliberately resiled from his police statement recorded under Section 161 of the Cr.P.C. A good, seasoned and experienced Public Prosecutor will not only bring the contradictions on record, but will also cross examine the hostile witness at length to establish that for any reason, the witness has turned around and resiled from his previous statement.

6 In the aforesaid context, we may refer to a decision of the Supreme Court in the case of Perumal vs. Janaki reported in (2014) 5 SCC 377, wherein the Supreme Court had observed as under:

"19. Therefore, all that sub section (4) of Section 195 says is that irrespective of the fact whether a particular court is subordinate to another court in the hierarchy of judicial administration, for the purpose of exercise of powers under Section 195(1), every appellate court competent to entertain the appeals either from decrees or sentence passed by the original court is treated to be a court concurrently competent to exercise the jurisdiction under Section 195(1). High Courts being constitutional courts invested with

the powers of superintendence over all courts within the territory over which the High Court exercises its jurisdiction, in our view, is certainly a Court which can exercise the jurisdiction under Section 195(1). In the absence of any specific constitutional limitation of prescription on the exercise of such powers, the High Courts may exercise such power either on an application made to it or suo moto whenever the interests of justice demand.

20. The High Courts not only have the authority to exercise such jurisdiction but also an obligation to exercise such power in appropriate cases. Such obligation, in our opinion, flows from two factors - (1) the embargo created by Section 195 restricting the liberty of aggrieved persons to initiate criminal proceedings with respect to offences prescribed under Section 195; (2) such offences pertain to either the contempt of lawful authorities of public servants or offences against public justice.

21. Any superintendence like any other power impliedly carries an obligation to exercise powers in an appropriate case to maintain the majesty of the judicial process and the purity of the legal system. Such an obligation becomes more profound when these allegations of commission of offences pertain to public justice."

77 In *Manila Vinod Kumari vs. State of M.P.* reported in 2008 Cri. L.J. 3867, the Supreme Court had observed in paras 9 and 10 as under:

"9. The object of the provision is to deal with the evil perjury in a summary way.

10. The evil of perjury has assumed alarming proportions in cases depending on oral evidence and in order to deal with the menace effectively it is desirable for the courts to use the provision more effectively and frequently than it is presently done."

78 Thus, the message of the Supreme Court is loud and clear. In order to deal with the menace of the witnesses turning hostile, the Trial Courts must make use of the provisions of Section 344 or 340 of the Cr.P.C., as the case may be, more effectively and frequently.

Xxxxxx

79 Free and fair trial is sine quo non of Article 21 of the Constitution of India. The criminal justice system is meant not only for safeguarding the interest of the accused persons, but is equally devoted to the rights of the victims as well. If the criminal trial is not free and fair, then the confidence of the public in the judicial fairness of a Judge and the justice delivery system would be shaken. Denial to fair trial is as much injustice to the accused as to the victim and the society. No trial can be treated as a fair trial unless there is an impartial Judge conducting the trial, an honest and fair defence counsel and equally honest and fair Public Prosecutor. A fair trial necessarily includes fair and proper opportunity to the Prosecutor to prove the guilt of the accused and opportunity to the accused to prove his innocence. [see : *Dinubhai Boghabhai Solanki vs. State of Gujarat and others* (Criminal Appeal No.492 of 2014 decided by the Supreme Court on 30th October 2017)].

80 We are conscious of the fact that the prosecution for perjury should be sanctioned only in those cases where the perjury appears to be deliberate and conscious and conviction is the reasonably probable or likely. We are

also conscious of the fact that the mere fact that a person has made a contradictory statement in the judicial custody is not by itself sufficient to justify prosecution under Sections 199 and 200 of the Penal Code, but it must be shown that the witnesses examined by the prosecution have intentionally given a false statements or fabricated false statements. In the case on hand, we are, prima facie, convinced that the witnesses deliberately resiled from their previous statements only with a view to save the accused and not only they resiled, but they led false evidence. Giving a false evidence, as noted above, is an evil, which must be effectively curbed with a strong hand. We are satisfied that appropriate action is required in the interest of justice and appropriate in the facts of the case.

81 In view of the above, we direct the Additional Sessions Judge, Limbdi to initiate criminal proceedings against the witnesses named above under the appropriate provisions for intentionally giving contradictory and false statements on oath before the Court.

82 The Registry is directed to forward a copy of this judgment to the Additional Sessions Judge, Limbdi to act in accordance with the directions issued in para 81 hereinabove.”

The trial proceedings, questioned before us, in the present appeals, also divulge the similar and identical approach of the learned Public Prosecutor to that of which is recorded by the Coordinate Bench. The learned Public Prosecutor has merely confronted the hostile witnesses with the police statement recorded under Section 161 of the Cr.P.C. and has only brought the contradiction on record and has proved the contradictions through the evidence of the Investigating Officer which would be insufficient. As noted by the Division Bench “*The objects of cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief to sift the facts already stated by the witness to detect and expose the discrepancy or to elicit the suppressed facts which will support the case of the cross examining party.*” The duty of the learned Public Prosecutor to effectively cross-examine a hostile witness is to try and establish that the witness is speaking lie and has deliberately resiled from his police statement recorded under Section 161 of the Cr.P.C. The Coordinate Bench, after taking note of the judgements of the Apex Court has observed that “*In order to deal with the menace of the witnesses turning hostile, the Trial Courts must make use of the provisions of Section 344 or 340 of the Cr.P.C., as the case may be,*

more effectively and frequently.” After making such observations, direction is issued for initiation of the criminal proceedings.

32.1) The trial Court in Paragraph No.621 of the judgement has issued directions for initiation of the proceedings under the provisions of Section 340 of the Cr.P.C. read with Section 193 of the IPC against 38 witnesses, who have not supported the case of the prosecution. After examination of the evidence, we find that the trial Court is justified in issuing the directions against the following witnesses:

- 1) Rajesh Petabhai Bharwad
- 2) Manendrasinh Kachava.
- 3) Samir Haji Rasool Vora
- 4) Suleman Jahangirbhai Vohra
- 5) Prakashbhai Khodabhai Rathod
- 6) Hirabhai Rathod
- 7) Dineshbhai Ambalal Patel
- 8) Dhanjibhai Sindhav

For the rest of the witnesses, we do not find that such direction is necessitated. The trial court has also directed to make a detailed inquiry on a presumption that the minor son of PW-48, Dharmendragiri Balugiri Goswami, was kidnapped on 01.02.2018, in order to see that this witness may not testify in the case. Such a direction of the trial Court is misplaced and unwarranted, since this witness was enjoying the police protection, and he was twice examined. On both the occasions, he has turned hostile. Before the trial Court the issue of the missing minor son was raised, and this witness has specifically informed the trial Court, that his son was playing at his neighbour's house and was found. Hence, the said direction also warrants interference and is set aside.

:: FINAL ORDER ::

On the substratum of the preceding discussion and analysis, we are inclined to allow the appeals to the aforesaid extent. We reiterate that the entire investigation right from the inception of the offence appears to be perfunctory and prejudiced. The prosecution has failed to secure the confidence of the witnesses. The trial Court, on a preconceived notion of conviction, has analyzed the evidence *de hors* the statute and settled legal precedents. The trial Court was duty bound to apply the law as written, and not as per its instinct.

Resultantly, the common judgment and order of conviction dated 11.07.2019 passed by Special Judge CBI, Court No.1, Ahmedabad in Special (CBI) Sessions Case No.2 of 2014, No.1 of 2014 and No.3 of 2014, whereby the accused have been convicted for the offence under Section 302 read with Sections 120B and 201 of the Indian Penal Code, 1860 and are sentenced, is quashed and set aside. The appellant-convicts are acquitted of the offence for which they are convicted. The convicts, who are on bail, their bail bonds stand cancelled. The convicts who are undergoing sentence and are in custody shall be set at liberty forthwith, unless they are required to be confined in any other offence.

We may place on record our deep appreciation for the immense assistance rendered to us by amicus curie, learned Senior Advocate Mr.B.B.Naik.

We may part with the distinguished address of Nanabhoy "Nani" Ardeshir Palkhivala in the case of Madhav Rao Jivaji Rao Scindia vs. Union of India, (1971) 1 S.C.C. 85 :

'The survival of our democracy and the unity and integrity of the nation depend upon the realisation that constitutional morality is no less essential than constitutional legality. Dharma lives in the hearts of public men; when it dies there, no Constitution, no law, no amendment, can save it.'

Record and proceedings shall be sent back.

Sd/- .
(A. S. SUPEHIA, J)

Sd/- .
(VIMAL K. VYAS, J)

MAHESH/01