IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 364 OF 2017

Pradeep @ Shappu Janardhan Kokate,
Age : 29 Years, Occ. Education,
R/o. Near Karandikar Hospital,
Wagh Mala, Ward No. 15,
Ahmednagar .. Appellant
(Original Accused)

VERSUS

The State of Maharashtra .. Respondent

WITH
CRIMINAL APPEAL NO. 345 OF 2017

Divya @ Hema Jitendra Bhatiya,
Age : 34 Years, Occ. Household,
Resident of Sona Nagar, Savedi,
Ahmednagar .. Appellant
(Original Accused)

VERSUS

The State of Maharashtra .. Respondent

Mr. Kuldip Kahalekar, Advocate alongwith Mr. N. S. Ghanekar, Advocate for the Appellant in Criminal Appeal No.364 of 2017;

Mr. Ajeet Manwani, Advocate alongwith Mr.Swapnil Telang, Advocate for and on behalf of A.A. Legal Associate, Advocate for Appellant in Criminal Appeal No. 345 of 2017;

Mr. S. R. Wakale, Assistant Public Prosecutor for the Respondent/State

CORAM : NITIN B. SURYAWANSHI AND
SANDIPKUMAR C. MORE, JJ.

RESERVED ON : 3rd JULY, 2025
PRONOUNCED ON : 4th SEPTEMBER, 2025

JUDGMENT (PER SANDIPKUMAR C. MORE, J):-

1. Both the appellants, namely, Pradeep @ Shappu Janardhan Kokate in Criminal Appeal No. 364 of 2017 and Divya @ Hema Jitendra Bhatiya in Criminal Appeal No. 345 of 2017 are the original accused Nos. 1 and 2 in Sessions Case No. 240 of 2014, respectively. Both of them have challenged the judgment and order dated 17.06.2017 passed in the aforesaid Sessions case, by the learned Additional Sessions Judge-2, Ahmednagar (hereinafter referred to as 'the learned trial Judge'). To avoid ambiguity, both the appellants are referred by their first names. Under the impugned judgment, the appellant Pradeep is convicted as follows :-

Sr.No.	Under IPC Section	Sentence
01.	302	Imprisonment for Life and to pay fine of Rs.5,000/-, in default of payment of fine, Rigorous Imprisonment for six months.
02.	120-B	Imprisonment for life and to pay a fine of Rs. 3000/- in default of payment of fine, he shall undergo R.I. for four months.

03.	387	Rigorous Imprisonment for five years and to pay a fine of Rs. 2000/-. In default of payment of fine, he shall undergo R.I. for three months
04.	Section 3 of Arms Act, 1959	Rigorous imprisonment for four years and to pay a fine of Rs. 2000/-. In default of payment of fine, he shall undergo R.I. for three months.
05.	Section 5 of Arms Act, 1959	Rigorous imprisonment for four years and to pay a fine of Rs. 2000/-. In default of payment of fine, he shall undergo R.I. for three months.

2. Whereas the appellant Divya is convicted as under :-

Sr.No.	Under IPC Section	Sentence
01.	120-B	Imprisonment for life and to pay a fine of Rs. 5000/-.In default of payment of fine, she shall undergo R.I. for four months.
02.	201	Imprisonment for three years and to pay a fine of Rs. 3000/-. In default of payment of fine, she shall undergo R.I. for two months.

3. It is significant to note that in the aforesaid Sessions Case, there was one another accused i.e. accused No.3 Vikram @ Gotya Kishor Berad, who was convicted only for the offence under Section 5 read with 25 of the Arms Act, 1959 and was sentenced to suffer R.I. for four years and to pay fine of Rs. 2000/-, in default to suffer R.I. for three months.

4. The third accused had also filed a separate appeal for challenging his conviction under the impugned judgment, bearing Criminal Appeal No. 358 of 2017. However, during the pendency of said appeal, the appellant Vikram expired on 26.06.2023, and therefore, this Court, vide order dated 22.08.2023, disposed of his appeal as criminal proceeding against him stood abated. Since both the appellants Pradeep and Divya have challenged one and the same judgment whereby they are convicted, we would like to consider both the appeals together as the evidence for both of them is common.

5. The facts of the prosecution case, in a nut shell are as under :-

One Shankar Mohanlal Bhatiya, lodged report in *Kotwali* Police Station, Ahmednagar (now Ahilyanagar) on 27.04.2014 at about 22.15 hours in respect of firing in the shop of his brother, i.e. the deceased Jitendra Mohanlal Bhatiya in the instant case. According to the informant Shankar Bhatiya, deceased Jitendra was looking after shop under the name and style as "*Mohan Trunk Depot*". The said shop premises was rented to Bhatiya family for more than 60 years and at the time of the incident, deceased Jitendra and

his uncle Dharamdas Bhatiya were looking after the same. A civil dispute was also there between Jitendra and the owner of the said shop by name Sudhir Zalani, for termination of tenancy and eviction.

6. It is contended by the informant Shankar that on 26.04.2014 at about 8.00 p.m., when he was in his shop, he received blank phone call on his mobile number from mobile SIM No. 9881010595. Then again, at about 8.55 p.m., he received another call from same mobile number. The person calling him said as "*Ghar Par Koi Phone Nahi Utta Raha Hai, Ghar Par Sab Mar Gaye Kya*." When Shanker asked who was speaking, the other person told him as "*Kal 30 lakh Rupye Tayar Rakhna*" and disconnected the call, which lasted about 42 seconds. Informant Shankar did not pay much attention to call, thinking that somebody might be joking. On the next day, at about 14.32 hours, informant received text message on his aforesaid mobile number from another mobile SIM No. 9561733069 written as "*Shankar 30 Lakh Rupye Tayar Rahana, Rat Ko Aath Baje Call Karuga, Phone Uthana Warna.....*". Due to such S.M.S., he immediately called his uncle Jamnadas, who advised him to file report in police in respect of the same. Thereafter, he went to shop of Jitendra at

Ganj-Bazar area, where Dharamdas and Jitendra both were present. When he told them about the phone call and message received by him, Jitendra told that he had also received one missed call at 9.00 p.m. from mobile SIM No. 9881010595 and when he called back on the said mobile number, it was switched-off. Then at about 4.30 p.m. informant Shankar, Praveen Ahuja, Bunty went to Kotwali Police Station and told about the said call and message to PSI. Ahire. PSI, Ahire also tried to call on both the above said mobile numbers, but it was found that those were switched off. PSI Ahire, then told them to come at 7.50 p.m. since the person calling had told them that he would call at around 8.00 p.m.

7. Accordingly, informant Shankar again went to Kotwali Police Station in the night at 8.00 p.m. and met PSI Ahire and at about 8.20 p.m., the informant Shankar received call on his mobile from mobile SIM No. 9881010595. He put his handset on speaker mode and accepted the call. The person at other side asked as "*30 Lakh Rupye Taiyar Hai Kya*?" When the informant tried to ask as to who was speaking, the other person replied as "*Chutiye Nam bathe kya*" and

disconnected the call. From there, when the complainant went to the shop of Praveen Ahuja, where his uncle Jamnadas had also come, Jamnadas told that he also received phone call from mobile No. 9561733069 and the person from other side was making inquiry as " *30 lakh ka kya hua*". When it was asked as to who was speaking, the call was disconnected. When such talks amongst them were going on, informant Shankar received a phone call from the same number, and therefore, he gave his mobile handset to Praveen Ahuja, by putting the same on speaker mode. Praveen Ahuja, told the other person on call that he was S.P., speaking from Kotwali Police Station and told the other person to tell his name. The other person, instead of telling his name, said as " *Tu Abhi Arthi Ka Saman Tayar Rakho*". Due to such threat, they again went to Kotwali Police Station, but the police personnel of the said police station were in hurry. On making inquiry, they came to know that there was firing in "*Mohan Trunk Depot*." Knowing this, they immediately rushed to the shop of '*Mohan Trunk Depot*' where they found crowd in front of the shop. The people from crowd told the informant Shankar that his brother Jitendra received bullet injury and was taken to the Civil Hospital. They immediately rushed to the Civil Hospital, but

by that time Jitendra was already declared dead. It was also learnt by the informant Shankar from the crowd that the assailant was wearing white T-Shirt and ran towards Laxminarayan Temple side. Since his brother Jitendra died due to bullet injury on his left chest, he lodged report against unknown person in respect of murder of his brother, due to non payment of ransom amount of Rs. 30,00,000/-.

8. On the basis of aforesaid report, police registered crime against unknown person initially and started investigation. During the course of investigation, it was revealed that appellant Pradeep was the person, who had called the informant and his relative for ransom amount and committed murder of deceased Jitendra at the time of the incident. It was also revealed that there were illicit relations between appellant Pradeep and appellant Divya, who was the wife of the deceased. Further, it was revealed that the appellant Pradeep had, in fact, hatched conspiracy with appellant Divya for committing murder of her husband Jitendra and for that he obtained country made pistol from third accused Vikram Berad and executed the plan of committing murder of Jitendra. After the death of Jitendra, informant Shankar Bhatiya had also received a message on his

mobile at about 14.44 hours, from mobile SIM No. 9561733069 as "*Tu mara, Amardham ke vaha pe tuzhe marunga.*" He had also received text message on his mobile at 20.30 hours on the same day from the aforesaid mobile number as " *Kyu re kutte Gali di thi na Ab Tere Bacche Marenge, Uske Bad Teri Bibi aur Fir Tu.*"

9. On completion of the investigation, the investigating machinery filed charge sheet against these two appellants and the third accused for the offence punishable under Sections 302, 387, 507 read with 120-B of the Indian Penal Code and under Section 5 read with Section 25 of the Arms Act. The learned trial Court conducted the trial and on the basis of the evidence adduced on record, convicted all three accused as aforesaid.

10. Learned Advocate for the appellant Pradeep submits that though the prosecution has examined so many witnesses to establish the guilt of the accused, out of those witnesses, 13 witnesses have not supported the case of the prosecution. He further submits that the learned trial Court has definitely erred in appreciating the evidence on record by ignoring vital admissions given by the witnesses, in their

cross-examination. He pointed out that the seizure of mobile Handsets, either from the appellant Pradeep or from the appellant Divya, is highly doubtful. He further pointed out that though the Call Details Record (for short "CDR") of SIM cards used by both the appellants were produced on record, but such type of electronic evidence, without valid certificate under Section 65-B of the Indian Evidence Act, is not admissible at all. According to him, the investigating officers, while collecting such certificates, failed to obtain the same in proper format as per the provision. He also did not record any hash value, he contended that all certificates under Section 65-B of the Indian Evidence Act were given as formality only, without complying all clauses of Section 65-B. He pointed out that no details of IP addresses of computers are given by any of the Nodal Officers, from whom CDR and SDR of the mobile Handsets allegedly recovered from the appellants were obtained which creates doubt about the authenticity of the said electronic evidence. According to him, last digits of mobile Handsets of appellants are missing. Moreover, the SIM cards seized from the appellant Pradeep were not in his name. According to him, the CDR on record in respect of Mobile Handsets of the appellants cannot be relied upon, for want of

proper certificate under Section 65-B of the Indian Evidence Act. Moreover, though it was alleged by the prosecution that cousin of the deceased had recorded call between appellant Pradeep and himself, only transcript of the same has been produced on record. Further, the investigating machinery did not make any effort to obtain any report from Forensic Science Laboratory in respect of voice samples of the appellant Pradeep. Further, according to him, the alleged messages sent to the informant were also not brought on record in the form of screen shots.

11. Learned Advocate for appellant Pradeep further pointed out that the appellant Pradeep was arrested on 1st May and the pistol and cash amount were shown to be recovered on the same day. However, all the *panchnamas* in respect of recoveries are silent on the aspect of sealing the seized articles with wax seals. He further pointed out that while recording memorandum in respect of discovery of pistol at the instance of the appellant Pradeep, Pradeep had not mentioned the exact location of the pistol, where it was hidden by him. He further submitted that description of the said house from which the alleged recovery was made, has been stated differently in *panchnamas* about recovery of pistol and recovery of cartridge.

According to him, when appellant Pradeep was arrested on 1st May, then why his clothes and live bullet were seized on 6.5.2014. As such, he expressed doubt and contended that the investigating machinery must have planted pistol and live bullets conveniently and without sealing, only to match the same with the bullet found in the body of the deceased. He also raised doubt in respect of conduct of the alleged eye witness P.W.12 Rakesh Kanhyalal Fuldahale, According to him, if the said witness had already seen the appellant Pradeep on the spot of incident, at the time of the incident, then why he did not disclose the same to the police on the same day. Further, though it had come in the evidence that sketch of the appellant Pradeep was prepared, but it is not on record.

12. So far as motive is concerned, the learned counsel appearing on behalf of appellant Pradeep submitted that there are two theories on record about committing murder of deceased Jitendra. First one is the demand of ransom and second, the illicit relations between both these appellants. However, both these theories are contrary to each other, and therefore, the learned counsel appearing on behalf of appellant Pradeep submitted that, prosecution has cooked up a false story to implicate the present appellant No.1. Thus, he pointed

out that the prosecution story has to be disbelieved for want of proper sealing of seized articles, non disclosure of places from where the incriminating articles were recovered, unnatural conduct of alleged eye witness P.W.12- Rakesh Fuldhale and non examination of another eye witness Sham Sundar. According to him, the prosecution has failed to prove that there was sufficient light available on the spot of the incident, so that the alleged eye witness was able to see the appellant Pradeep at the time of the incident. Thus, he submitted that prosecution did not examine any independent witness, and therefore, whatever evidence is brought on record by the prosecution, is not reliable and trustworthy for the reasons mentioned above. Thus, he prayed for reversal of the impugned judgment and for acquittal of appellant Pradeep. In support of his submissions, he relied on the following judgments :-

(i) ***Hon'ble Supreme Court in the case of Arjun Panditrao Khotkar Vs. Kailas KushanraoGorantyal and others [in Civil Appeal Nos. 20825-20826 of 2017 decided on 14th July 2020];***

(ii) ***Principal seat of Bombay High Court in the case of The State of Maharashtra Vs. Imtiyaz Ahmad S/o Mohd. Sadik Ali Shaikh [Confirmation Case No. 3 of 2018 with***

Criminal Application No. 1 /2019 dated 14.08.2019];

(iii) ***Principal Seat of this Court in the case of The State of Maharashtra Vs. Ashok @ Suresh Laxman Babr [in Criminal Appeal No. 355 of 99];***

(iv) ***Hon'ble Apex Court in the case of Shivaji Dayanu Patil Vs. State of Maharashtra [Criminal Appeal No. 75 of 1979];***

(v) ***The Hon'ble Apex Court in the case of Rajesh & Another Vs. The State of Madhya Pradesh [Criminal Appeal No(s).793-794 of 2022];***

(vi) ***Judgment of this Bench in the case of Parag Machindra Pathare and Another Vs. State of Maharashtra and another [Criminal Appeal No. 370 of 2018 decided on 5th August 2024];***

(vii) ***The Hon'ble Apex Court in the case of Jagir Singh Vs. The State (Delhi) MANU/SC/0145/ 1974;***

(viii) ***This Bench in the case of Ganesh @ Baban S/o Navnath Lashkare Vs. The State of Maharashtra and another in [Criminal Appeal 155/2017dated 16.02.2024];***

(ix) ***Hon'ble Apex Court in the case of Ganesh Bhavan Patel and Others Vs. State of Maharashtra, MANU/SC/0083/1978;***

(x) ***Hon'ble Apex Court in the case of Balaka Singh and Others Vs. The State of Punjab MANU/SC/0087/1975;***

(xi) ***Bala Pandurang Kesarkar and another Vs. The State of Maharashtra [1999 Bom CR(Cri) 884];***

(xii) ***High Court of this Bench in the case of The State of Maharashtra Vs. Girish Gangaram Kotewad Confirmation Case No.1 of 2024 dated 07th October 2024;***

13. On the other hand, the learned counsel for the appellant Divya, relying on written notes of argument, also submits that the learned trial Court has not appreciated the evidence on record in proper perspective and sentenced her without there being any cogent evidence on record. According to him, there is absolutely no evidence in respect of her alleged illicit relations with appellant Pradeep, since none of the witness has supported the story of the prosecution to that extent. He pointed out that even no proper procedure was followed in respect of seizure of SIM card from the appellant Divya, which was used by her to communicate with appellant Pradeep. Even P.W.5 Monashri, in whose name the said SIM card was purchased, had stated that police had told her that the said SIM card was given by appellant Pradeep to appellant Divya. Thus, he pointed out that the prosecution could not establish any conspiracy between these appellants about committing murder of Jitendra. He further submits that the recovery at the instance of appellant Divya was made on the basis of the disclosure made by her in the memorandum, but

she was not at all conversant with Marathi language and her disclosure statement, which is in Marathi, was not explained to her in Hindi language, with which she was conversant. He pointed out that the confessional statement of appellant Divya, recorded by police was, in fact, recorded by Special Executive Magistrate and the same is not at all admissible. According to him, Judicial Magistrate F.C. or Metropolitan Magistrate can have power to record such confessional statement under Section 164 of the Code of Criminal Procedure. Thus, he requested to discard the said confessional statement of appellant Divya. In the alternative, he pointed out that even the said statement of appellant Divya is read as it is, then also no evidence is there to indicate any conspiracy between these appellants about the alleged crime. He, thus, submitted that there is absolutely no evidence against appellant Divya about her involvement in the crime. On the contrary, though the prosecution alleged that appellant Divya had, in fact, given certain amount with which appellant Pradeep had purchased pistol used as weapon in the crime, but it has also come on record that when certain recovery was made at the instance of the appellant Pradeep, he was found possessing the pistol as well as amount of Rs. 10,000/-. Thus, according to him, it

clearly gives an impression that the amount of Rs. 10,000/- remained as it is with appellant Pradeep and therefore, the case of the prosecution, to the extent of involvement of appellant Divya or alleged conspiracy by her, is falsified. According to him, there is no direct evidence about the involvement of appellant Divya in the crime, but trial Court, merely convicted her on the basis of fact that she was talking to appellant Pradeep continuously on the mobile phone. Thus, he prayed for setting aside the impugned judgment in respect of appellant Divya and prayed for her clear-cut acquittal. In support of his submissions, he placed reliance on the following judgments :-

(i) ***Sujit Biswas Vs. State of Asam, [(2013) 12 Supreme Court Cases 406];***

(ii) ***Parveen @ Sonu Vs. State of Haryana [2021 SCC OnLine 1184];***

(iii) ***Laxman Prasad @ Laxman Vs. State of Madhya Pradesh, [(2023) 6 Supreme Court cases 399];***

(iv) ***State of Punjab Vs. Kewal Krishan, [(2023) 13 Supreme Court Cases 595];***

(v) ***Rajbir Singh Vs. State of Punjab [(2022) 20 Supreme Court Cases 670];***

(vi) ***Majenderan Langeswaran Vs. State, (NCT of Delhi) And Another (2013) 7 Supreme Court Cases 192];***

(vii) ***Bijender @ Mandar Vs. State of Haryana, [(2022) 1 Supreme Court Cases, 92];***

(viii) ***Subramanya Vs. State of Karnataka, [(2023) 11 Supreme Court Cases 255]***

(ix) ***Mano Vs. State of Tamil Nadu, [(2007) 13 Supreme Court Cases 795];***

(x) ***Vaibhav Vs. State of Maharashtra, [2025 SCC Online, 1304];***

(xi) ***P. Sugathan And Another Vs. State of Kerala (2000) 8 Supreme Court Cases 203;***

(xii) ***Ram Sharan Chaturvedi Vs. The State of Madhya Pradesh in Criminal Appeal No.1066 of 2010 decided on 25.8.2022 (SC);***

14. On the contrary, the learned A.P.P. strongly supported the impugned judgment and pointed out that the prosecution has established all the incriminating circumstances against all the accused by properly appreciating the evidence on record, which resulted into their conviction. According to him, the certificates issued under Section 65-B of the Indian Evidence Act in respect of C.D.R. showing conversation between appellant Pradeep and the informant and also PW 15 Jamnadas Bhatiya, are in proper format. Moreover, the prosecution has also properly established the C.D.R. in respect of conversation between both these

appellants, who hatched conspiracy of committing murder of deceased Jitendra. According to him, though the witnesses, who are the family members of the deceased, tried to conceal the fact of illicit relations between these appellants, but the respective portions from their statements, from which they resiled during their evidence, are proved by the investigating officer, who had recorded the same. He further pointed out that the C.A. reports in respect of a bullet found in the body of deceased and two bullets recovered during the course of the investigation, at the instance of appellant Pradeep, have established the fact that the fatal bullet was, in fact, fired by appellant Pradeep with the same pistol. He further pointed out that even though the scientific evidence is kept aside for a while, there is one witness i.e. P.W. 12 Rakesh Kanhyalal Fuldahale, who had seen the accused on the spot of the incident just before the incident and immediately after the incident with the murder weapon i.e. pistol. He pointed out that there is no specific defence raised by both the appellants in respect of their alleged innocence, and therefore, considering the entire evidence on record, the conviction of both these appellants recorded by the learned trial Court has to be upheld. Thus, he prayed for dismissal of both these appeals.

In support of his submissions, learned A.P.P. placed reliance on following judgments :-

(i) ***Judgment of this Bench in the case of Rajendra S/o Babaji Bhor and others Vs. The State of Maharashtra, Criminal Appeal No. 140, 141, 183, 189, 197 of 2017 and 301, 302, 621 of 2021 dated 17.03.2020;***

(ii) ***Ramanand Alias Nandlal Bharti Vs. The State of Uttar Pradesh, (2023) 16 SCC 510***

15. Heard rival submissions. Perused written notes of argument submitted on behalf of the appellant Divya in the light of citations relied by either of the parties. Also perused the impugned judgment along with record and proceedings of the sessions case.

16. It is significant to note that the prosecution has adduced voluminous evidence on record and examined as many as 41 witnesses. The case of prosecution is based on the theory of extortion under which it is alleged that the appellant Pradeep i.e. accused No.1 had demanded ransom from the members of Bhatiya family, by making them phone calls from his Mobile Handset and also by sending messages to that effect. However, the prosecution has also included another

angle to the story, which is in respect of love affair between both these appellants. According to the prosecution, appellant Pradeep got acquainted with appellant Divya on account of preparation of her Adhar Card, since he was working in the Center for preparation of Adhar Card. Due to said acquaintance and as deceased Jitendra i.e. husband of Divya was not treating her properly, her acquaintance with appellant Pradeep converted into their love affair and therefore, to remove obstacle from their love story, they hatched conspiracy to commit murder of Jitendra.

17. The prosecution has examined many witnesses i.e. in all 41 witnesses, and therefore, reproducing the evidence of witnesses and to consider it on merits would be repetition of facts. Therefore, we would like to discuss the evidence of prosecution witnesses at proper places, wherever it is material.

18. Admittedly, there is no eye witness in the instant case and the entire evidence against both the appellants is in the nature of circumstantial evidence. The learned counsel for both the appellants i.e. Pradeep as well as Divya, have relied on so many judgments. Out of those judgments, most of the judgments are on the aspect, how to deal with circumstantial

evidence to ascertain guilt of the accused. The sum and substance of those judgments is that, to establish the guilt of accused in a case based on circumstantial evidence, the prosecution has to establish the chain of each and every circumstance pointing out to the criminal act performed by the accused and there should be no other possibility for the conclusion that the criminal act is done by no other persons than the accused. There should not be any other hypothesis except that the accused is guilty. So far as the aforesaid sum and substance of the judgments is concerned, there cannot be any second opinion and it is now well settled. Therefore, we must consider the circumstances against both the accused leading to their guilt or innocence, in the light of the evidence on record.

19. So far as the appellant - Pradeep is concerned, the prosecution has claimed that following are circumstances against him, apparent from the material collected :-

(i) That, he was found in possession of Sim Cards from which calls & messages for ransom amount were made to deceased and other members of Bhatiya Family.

ii) Just before the incident and immediately after the incident, he was seen with the pistol by P.W.12 Rakesh.

iii) The pistol and live bullets were recovered at his instance during the investigation.

iv) Further, he was found talking contentiously with appellant Divya on the Mobile Sim Card, which he obtained in the name of one of his friends, Monashri i.e. P.W. No.5.

20. Similarly, to rope the appellant Divya in this crime along with the appellant Pradeep, the prosecution relied on the following circumstances :-

i) That, she was acquainted with the appellant Pradeep and the said acquaintance turned into love relations as her husband i.e. the deceased was ill-treating her.

(ii) That, she was found talking with appellant Pradeep on the SIM Card given to her by him, which was obtained in the name of his friend P.W. No.5 Monakshi.

(iii) That, she had given amount of Rs. 10,000/- to appellant Pradeep.

21. So far as defence of both these appellants in respect of the accusation made against them is concerned, appellant Pradeep has taken a defence that he was not at all concerned with the criminal act alleged, but he was falsely implicated in

the crime. Whereas, appellant Divya took a stand that she was not knowing Marathi language and never gave any statement before the Magistrate or police and she was not at all concerned with the crime. According to her, her in-laws had, in fact, implicated her falsely in the present case only to deprive her from getting property of her husband i.e. the deceased. Therefore, in the light of aforesaid circumstances and the defence raised by both the appellants, let us consider the evidence on record.

22. Admittedly, death of Jitendra is homicidal and from the *post mortem* notes it has come on record that death was caused due to bullet shot on the left side of his chest. The question, therefore, arises as to whether appellant Pradeep had fired the said bullet. As per the first theory of the prosecution, the appellant Pradeep committed murder of Jitendra for non payment of ransom amount of Rs. 30,00,000/-. It has already come on record that all the members of Bhatiya family were well settled in their respective businesses, having sound financial background. Therefore, evidence of family members in respect of ransom calls to them by the appellant Pradeep is to be scrutinized. P.W. No.4 Shankar Mohanlal Bhatiya of whom the deceased was younger brother, has deposed as to

how deceased was running shop by name '*Mohan Trunk Depot*' at *Ganj-bazar*, Ahmednagar along with uncle Dharamadas Bhaitya. He has specifically deposed that on 26.04.2014 at 8.00 p.m. he received one call on his Mobile Handset bearing Sim No. 9822048029 from SIM Card No. 9881010595. According to him, he cut the said call as there was no proper sound. According to him, the second call came on his aforesaid mobile number on the same day at 8.20 p.m. and the other person, by threatening him, demanded amount of Rs. 30,00,000/-. He had disclosed the said fact to his wife at about 9.30 p.m., but initially he did not take any action, as he thought somebody might be joking with him. However, on the next day on 27.04.2014, at about 2.30 p.m. he received one message on his Handset from Mobile SIM Card No. 9561733069 in English for keeping ready the amount of Rs. 30,00,000/- and it was also written that sender would call at 8.00 p.m. in the night and asked to receive the call. It has further come in his evidence that when P.W. No.4 Shankar immediately called Jamnadas i.e. P.W. No.15, he was adviced to lodge report to Kotwali Police Station about the said message. He also went to the shop of Jitendra i.e. '*Mohan Trunk Depot*' where uncle Dharamdas and Jitendra were

present. When he spoke to them about phone call and message received by him, the deceased Jitendra had told him about receiving one missed call from the Sim Card No. 9881010595 on earlier night & when he tried to call on said mobile number, it was found switched off.

23. To support the aforesaid evidence of P.W.4 Shankar, P.W.16 Dinesh Jamnadas Bhatiya has also stated that on 26.04.2014 when he was present in the shop at M.G.Road, he had also received call from the same aforesaid mobile number and the person calling told him in Hindi language to pay amount of Rs. 10,00,000/-, otherwise Shankar Bhatiya would be killed. P.W.15 Jamnadas has also supported this theory and as per his evidence, when he was in his shop, namely, Jyoti Cosmetic at Mochi lane, Ahmednagar on 26.04.2014, he received phone call from P.W.4 Shankar in between 8 to 8.30 p.m. informing that Shankar had received threat and despite visit to the police station, police did not take down his report and thereafter at 8.45 p.m. Jamnadas had also received call from the aforesaid Mobile Sim No. 9881010595 and the person calling abused him and told him to ask Jitendra for paying amount of Rs. 25,00,000/-, otherwise Jitendra would be killed. Thus, from the evidence of all these witnesses, namely,

P.W.4, 15 and 16, it has been revealed that all of them received threatening calls from Sim Card No. 9881010595 and also a message from Mobile SIM No. 9561733069. Further, it is to be noted that during the cross-examination of all these witnesses, it is not denied by both the appellants that those witnesses received the aforesaid phone calls and messages. Thus, from the evidence of these witnesses, it is also established that even the deceased Jitendra had, in fact received threatening call from Mobile SIM No. 9881010595.

24. It has also come in the evidence of P.W. 4 Shankar Bhatiya that initially when he had gone to Kotwali Police Station for making complaint about such ransom calls, the police did not take down his complaint and the concerned police officer PI- Shri. Ahire had asked him to come around 8.00 p.m. since the caller had told him that he would call around 8.00 p.m. Even before the said P.I. Ahire at about 8.20 p.m, P.W. 4 Shankar received call on his mobile from the aforesaid mobile number. The caller had asked him to keep the ransom amount of Rs. 30,00,000/- ready. Thereafter, the informant Shankar had gone to Praveen Ahuja where P.W. 15 Jamnadas had also come. Shankar again received phone call

from the same number and when Praveen Ahuja pretended himself as S.P. from Kotwali Police Station, the other person threatened him to arrange for articles required for funeral. Therefore, when all of them again went to Kotwali Police Station, they learnt that there was firing in '*Mohan Trunk Depot*' and when they rushed there, they learnt from the crowd gathered over there that Jitendra was shot and was taken to the Civil Hospital. Thus, from the evidence of all these witnesses, it appears that Jitendra was killed due to non payment of ransom amount of Rs. 30,00,000/-.

25. The task before the investigating machinery was to trace out the user of the aforesaid Mobile SIM Cards No 9881010595 and 9561733069. For this purpose, the prosecution has relied on the evidence of P.W.41 Shri. Ashok Mahadevrao Dhekne, P.I. of Local Crime Branch, Ahmednagar. According to this witness, he was serving as P.I. at the said Local Crime Branch till July 2015 and having jurisdiction over entire Ahmednagar district. According to him, he received information that one Shappu Kokate i.e. appellant Pradeep was preparing Adhar Cards, and therefore, he was having identity proofs of various persons with him. It was also revealed to him

that appellant Pradeep used to purchase mobile sim cards in the name of other persons by using their identity proofs. On receipt of such information, he arrested appellant Pradeep on 01.05.2014 and took his personal search in presence of two panchas. It has come in the evidence of this witness that during his personal search, appellant Pradeep was found in possession of two mobile handsets. In one of them, there were two sim cards Nos. 9881010595 and 9561733069. In another handset also there were two sim cards having No 7276253354 and 8855871317.

26. The learned counsel for the appellant Pradeep raised strong objection to place reliance on the evidence of P.W.41 Shri. Dekhne. According to him, P.I. Dekhne was never entrusted with the investigation of this crime, and therefore, there was no reason for him to trace out the user of aforesaid Mobile numbers. He also pointed out that the *panchnama* in respect of personal search of appellant Pradeep is not at all proved by the prosecution, on the basis of evidence of independent witness. According to him, both the *panchas* of said *panchnama* (Exhibit 307) have not supported the seizure of these Mobile Handsets and SIM Cards. Admittedly, the

panch witnesses, namely, Vishal Pardeshi and Vilas Padale, who are P.W. Nos. 6 and 7 respectively, have not supported the theory of prosecution that the aforesaid Mobile Handsets and SIM Cards were seized from appellant Pradeep. However, they have only recognized their signatures on the aforesaid *panchnama* (Exhibit 307).

27. So far as capacity of P.W. 41 P.I. Shri. Dhekne is concerned, it has come on record that he was Police Inspector of Local Crime Branch, Ahmednagar at the relevant time and served there till July 2014. It has specifically come on record that he was having jurisdiction over entire Ahmednagar District. Further, nothing is brought on record that a police officer competent to exercise his jurisdiction over entire Ahmednagar District was not empowered to carry out any type of investigation in the instant crime, which was being investigated by another police officer. The learned trial Judge has specifically observed in the judgment that there were so many instances that investigation of serious crime can be conducted by the concerned police station as well as Local Crime Branch, as per the orders of the State Government. Thus, such simultaneous investigation is not prohibited by any

law. It is also observed by the learned trial Judge that P.W. 41 P.I. Dhekne had not exceeded his jurisdiction with *malafide* intention. Therefore, his act of arresting appellant Pradeep and taking his personal search cannot be doubted, because ultimately it helped in the detection of involvement of the accused in the instant crime.

28. The learned counsel for the appellant Pradeep also pointed out that such seizure of two Handsets and four SIM Cards from appellant Pradeep, on the basis of evidence of only P.W. 41 Ashok Dhekane, cannot be relied upon, since the independent *panch* witnesses on the aforesaid *panchnama* (Exhibit 307) have refused to support the case of the prosecution to that effect. Admittedly, both these *panchas* have not supported the said seizure, but it is significant to note that the witness has his own reason for not supporting the case of prosecution. It is to be noted that despite searching cross examination, nothing adverse or any *malafide* intention of P.W. 41- Ashok Dhekane has been brought on record. Further, the learned A.P.P. has also relied on the observation of Hon'ble Apex Court in the case of ***Ramanand @ Nandlal Bharati Vs. The State of Uttar Prdesh in Criminal Appeal No. 6465 of 2022 decided on 13th October, 2022.***

The Hon'ble Apex Court in this judgment has specifically observed that even if the independent witnesses to the discovery *panchnama* are not examined or no such witness was present at the time of discovery or if no person had agreed to affix his signature on the document, it is difficult to hold, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and discovery evidence was unreliable. Though this observation is in respect of recovery *panchnama,* discovery *panchnama* contemplated under Section 27 of the Indian Evidence Act, but the same analogy can be made applicable to the personal search of appellant Pradeep, which is not supported by the *panch* witnesses, but proved by P.W. 41 P.I. Dhekne.

29. At the cost of repetition, we would like to state here that there was no prohibition of law for simultaneous investigation of the crime by the concerned police station and the Local Crime Branch operating in the said area. Moreover, the defence could not bring on record any *malafide* intention on the part of P.W. 41 P.I. Dhekne, so as to falsely involve the appellant Pradeep in the crime. Further, though *panch* witnesses did not support the case of personal search of the appellant Pradeep, but atleast they have admitted their

signatures on the seizure *panchnama* (Exhibit 307). Of course, there is evidence in respect of CDR and SDR in respect of the conversation made by appellant Pradeep in respect of ransom calls from some of the SIM Cards in the form of electronic evidence. It can thus be inferred that the prosecution has proved that appellant Pradeep was possessing the aforesaid two Mobile Handsets having four SIM Cards of the above mentioned numbers. The prosecution has also adduced electronic evidence in the form of CDR and SDR in respect of the SIM Cards found in possession of appellant Pradeep in his personal search taken by P.W.41 P.I. Shri. Dhekane in presence of panchas, as mentioned above. P.W.40 i.e. P.I. Hanpude Patil, who had conducted partial investigation in the instant case, was serving as P.I. at Kotwali Police Station at the relevant period. He has stated that P.I. Dhekne of Local Crime Branch, after arresting appellant Pradeep on 01.05.2014, had in fact handed appellant Pradeep to him along with pistol, cash of Rs. 10,000/-, two Mobile Handsets and four Sim Cards. Further, it appears that P.W. 40 PI Hanpude Patil then issued letters to Cyber Cell for collecting information of CDR and SDR in respect of the Sim Cards seized from appellant Pradeep. Those letters are marked as Exhibits 251 to 254.

30. The prosecution has examined P.W. 34 Dattaram Shantaram Angre i.e. the Nodal Officer of Idea Cellular Company Limited, at Exhibit 193. It has come in his evidence that he was serving as a Nodal Officer in the aforesaid Company since 2006. He received E-mail from Additional Superintendent of Police, Ahmednagar in respect of the instant crime and accordingly CDR and SDR for Mobile No. 9881010595 were called for the period from 01.04.2013 to 27.04.2014. Similarly, CDR in respect of Mobile Nos. 9822048029 and 9822067396 were called for the period from 20.04.2014 to 30.04.2014, and CDR as well as SDR were called in respect of Mobile No. 9822067396 for the period from 20.04.2014 to 30.04.2014. Further, call details and subscribers details in respect of Mobile No. 9822033743 from 01.07.2013 to 30.04.2014 were also called. It has come in the evidence of this witness that on 15.07.2014, he sent the certified copies of aforesaid CDR and SDR in respect of Mobile No. 9881010595 and the certificate under Section 65(B) of the Indian Evidence Act was also sent by him to the office of Additional S.P. Ahmednagar, which is at Exhibit 196.

31. In the evidence of P.W.34 Dattaram Angre, it has come on record that SIM Card having Mobile No. 9881010595 was in the name of Sham Gangaram Deogune, resident of 977, Renukanagar, Bolhegaon, District Ahmednagar, and it was a pre-paid number. Further, as per P.W. 34 Dattaram Angre i.e. a Nodal Officer, SIM Card No. 9822048029 was issued in the name of informant-Shankar Bhatiya on his address, and it was also a pre-paid number. Further, Mobile No. 9822067396, was found to be in the name of one Bapusaheb Deshmukh, resident of P.No. 187, Sector No. 28, Nigdi, Pune, which was also a pre-paid number. The said number was activated on 9th August 2000 and during the period from 20.04.2014 to 30.04.2014 it was active. Similarly, Mobile No. 9822033743 was issued in the name of appellant Divya Bhatiya, which was activated on 4th August 2011 and remained active during the relevant period. P.W. 34-Angre further deposed that he took print out and sent the e-mail, to the Additional S.P. Ahmednagar and issued certificate under Section 65(B) of the Indian Evidence Act, under covering letter dated 15.07.2014. Though an objection was raised before the learned trial Judge on behalf of appellant- Pradeep that the certificate under Section 65(B) was belatedly sent, but it has now been settled

that the certificate in respect of electronic evidence can be sent lateron also. Therefore, we would like to skip the discussion on this aspect.

32. The learned counsel for the appellant- Pradeep raised objection that the electronic evidence in the form of CDR and SDR connecting the appellant- Pradeep with the ransom threats given to informant and other members of Bhatiya family, is not admissible for want of necessary particulars in the certificates produced on record, by the Nodal Officer i.e. P.W. 34- Angre to that effect. According to him, such certificate under Section 65(B) of the Indian Evidence Act requires all the particulars, not only in Section 65(B)(1) and (2), but it also need the particulars as per Section 65(B)(4) of the Act. Unless, those requirements are fulfilled, the certificate and the electronic evidence is of no use. For that purpose, the learned counsel for the appellant Pradeep heavily relied on the judgment of Hon'ble Apex Court in the case of ***Arjun Khotkar Vs. Kailas Gorantyal and others (supra)***. The Hon'ble Apex Court in paragraph No. 23 of the aforesaid judgment has made the following observations;

> *"23 Under Sub-section (4), a certificate is to be produced that identifies the electronic record containing the statement and describes the manner in which it is produced,or gives particulars of the device involved in the production of the electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of " relevant activities"- whichever is appropriate. What is also of importance is that it shall be sufficient for such matter to be stated to the "best of the knowledge and belief of the person stating it". Here, " doing any of the following things...." must be read as doing all of the following things, it being well settled that ht expression "any" can mean "all'' given the context (see, for example, this Court's judgment in* ***Bansilal Agarwalla Vs. State of Bihar [(1962) 1 SCR 33]*** *and* ***Om Prakash V. Union of India [(2010) 4 SCC 17)]****. This being the case, the conditions mentioned in sub-section (4) must also be interpreted as being cumulative".*

33. This judgment also refers the earlier judgment of Hon'ble Apex Court in the case of Anwar wherein, following observations are made.

> *"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 paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the 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. They 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) 6 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."

34. Thus, the learned counsel for the appellant-Pradeep submits that, unless all the conditions of Section 65(B)(4) of the Act are satisfied, the electronic evidence produced in this case is not permissible. According to him, only the condition (A) and (E) of Section 65(B)(4) of the Act are satisfied in the instant matter.

35. As against this, the learned A.P.P. placed heavy reliance on the observation of this Court in the judgment in ***Rajendra S/o Babaji Bhor Vs. The State of Maharashtra [Criminal Appeal No. 140 of 2017]***. This Court under the judgment and order dated 17.03.2020 in the aforesaid case has observed as follows :-

> *"110. The learned APP placed reliance on the case of* ***State of Karnataka Lokayukta Police Station, Bangaluru Vs. M.R. Hiremath reported as AIR 2019 SC 2377.*** *This case is in respect of compliance of provision of Section 65-B of the Evidence Act. The relevant observations are at para 16 are as under :-*
>
> > *"16. Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate under section 65B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise."*

> *There is no dispute over the aforesaid observation. This Court has also considered the circumstances that one nodal officer produced the requisite certificate during the evidence and his evidence is to the effect that the copies of C.D.R already tendered on record are in accordance with the information stored in the system. He has given evidence that, he has control over the system. His evidence is considered and believed by the Trial Court and this Court also sees no reason to disbelieve this witness and consider the certificate which was produced subsequently under Section 65-B of the Evidence Act ".*

36. Thus, in the light of these observations we have to see as to whether the electronic evidence adduced in the instant matter, fulfills the criteria and requirements of Section 65(B) of the Indian Evidence Act.

37. Admittedly, from the observations of the Hon'ble Apex Court, it has been made clear that for relying on the electronic evidence, compliance of Section 65(B) of the Indian Evidence Act is required completely. The Hon'ble Supreme Court has cautioned for such compliance in all respect, since the electronic records are more susceptible to tampering, alteration, transposition and exigent. Therefore, without such safeguards as contemplated in Section 65(B) of the Act, it is dangerous to rely on electronic records which can lead to

perversity of justice. In the instant case, the record pertaining to C.D.R and SDR is duly certified by P.W. 34 Dattatrya Shantaram Angre. Nothing is there on record to show that after such certification, some additional data was taken out from the server without any certificate.Therefore, the certificate under Section 65(B) of the Evidence Act in respect of CDR of SIM Card No.9881010595, which is at Exhibit 96, if perused, then it is evident that it runs in (a) to (e) clauses. Those clauses appear to be as per Section 65(B) (2)(a) to (d) of the Evidence Act. Further, as per Section 65(B)(4) of the Act, it is required that the manner in which electronic record was produced, must be described in respect of particulars of device involved in production of record. Further, such certificate has to be signed by the person occupying responsible official position in relation to the operation of relevant device.

38. In the instant case, P.W. 34- Dattaram Angre has specifically stated in his evidence that he has taken out the computer print out directly from the main server of which he was given access by issuing necessary Login I.D. and password. It is significant to note that while obtaining CDR and SDR, this witness did not copy the record from main server to any other instruments such as C.D., V.C.D., or any

chip. He has only reproduced the computer data of the concerned company, stored in main server in regular course of business. Therefore, considering his evidence and perusal of certificate under Section 65(B) of the Act at Exhibit 96, it is evident that the prosecution has followed all the preconditions mentioned in Section 65(B) of the Act for getting the electronic record. Further, this witness has also stated in the certificate that he is a responsible officer in relation to the operation of the computer of Idea Cellular Company and therefore, the certificate at Exhibit 196 has satisfied all the conditions in the entire Section 65(B) of the Evidence Act.

39. Similarly, certificate under Section 65(B) in respect of Mobile No. 9822048029 and 9822067396 at Exhibit 200 is also having similar contents as that of Exhibit 196. Moreover, the Nodal Officer, who issued the certificates appears responsible officer of Idea Cellular Company. Further, Section 65(B) certificate in respect of Mobile No. 9822033743 at Exhibit 201 also fulfills the aforesaid conditions. Though, Nodal Officer has given admission that all the requirements of Section 65(B) of the Evidence Act are not mentioned in the certificate issued by him, but nothing is there on record that the learned counsel for the appellant Pradeep suggested as to

what part of the section is missing. On bare perusal of the said certificates and the evidence given by the concerned Nodal officer, *prima facie* it appears that compliance of conditions mentioned in Section 65(B) of the Act has been done and therefore, no significance can be given to the aforesaid admission of this witness. Further, this witness was also suggested that task of maintenance of the server was assigned to somebody else and he was not having lawful control over the server used by him. However, it is to be noted that this witness was the Nodal Officer and the requisite Login I.D and password was shared to him. Thus, it can be said that he was having lawful authority and control over the server used by him. Thus, the admission on the part of this witness that he could not tell whose lawful control was there, over server used by him, is not helpful to the appellant Pradeep. Thus, considering all these aspects, the certificates at Exhibits 196, 200 and 201 appear to be duly issued by the competent authority and therefore, the electronic records pertaining to CDR and SDR of all these SIM Cards seized from the custody of appellant Pradeep, at the time of personal search on 01.05.2014, are very much admissible in the evidence without further proof.

40. As such, on the basis of this evidence it has been established that SIM Card Nos. 9881010595 and 9822067396 were issued in the name of Sham Devgune and Bapusaheb Deshmukh, but the same were in possession of the appellant Pradeep. Further, it has also been established that Mobile No. 9822033743 was issued in the name of appellant Divya. Further, Mobile No. 9822048029 was in the name of informant Shankar Bhatiya. It is already established by the evidence of investigating officers P.W. 40- P.I. Shri. Hanpude Patil and P.W. 41 P.I. Shri. Dhekane that appellant Pradeep was using all SIM Cards obtained in the names of others. Therefore, it is in corroboration with the evidence of P.W. 34- Dattaram Shantaram Angre. The record shows that P.W. 35- Jitendra Nagpal was the Nodal Officer of *Airtel* Company, Maharashtra from April 2016. The erstwhile Nodal officer was one Mr. Chetan Patil. However, he left the service after August 2016. P.W. 35 Jitendra Nagpal had worked with Chetan Patil for about three months and therefore, he was acquainted with the signature of Chetan Patil. P.W. 35- Jitendra Nagpal in his evidence has explained the procedure in respect of lawful control over the server of the said company. According to him, in normal course of operation, call related information gets

automatically stored in servers of *Airtel*. Those servers were having high security controls and no manual intervention. He has established that as a Nodal Officer, he was having his own user name and password to retrieve data in respect of the aforesaid call related information. He specifically deposed that as per request of Additional Superintendent of Police, Ahmednagar made on 14.07.2014, they provided CDR of Mobile No. 9561733069 for the period from 01.04.2013 to 27.04.2014 under the certificate of the then Nodal officer Chetan Patil.

41. Further, customer details supported by customer application form, singed by Chetan Patil, were also forwarded along with the certificate under Section 65(B) of the Evidence Act in respect of CDR. He has deposed that those C.D.R. were directly taken out from the server which was installed in Pune Office for which individual Login number and password were provided to each Nodal Officers. As per this witness, the aforesaid mobile number was subscribed to Sham Deogune and it was activated on 21st December 2012. P.W. 35 Jitendra Nagpal has proved the fact that certificate under Section 65(B) of the Evidence Act at Exhibit 201 is signed by Chetan Patil, who had left the company. Though the

prosecution has not examined Chetan Patil, but P.W. 35 Jitendra Nagpal has specifically deposed as to how the call details were automatically stored in servers of *Airtel* Company and it was having high security controls and no manual intervention. Since this witness had worked with Chetan Patil for about three months, he was also familiar with the signature of Chetan Patil and therefore, it can be presumed that the electronic record extracted from server of the company by Mr. Chetan Patil was after obtaining lawful procedure, fulfilling all the conditions of Section 65(B) of the Act. It is to be noted that the appellant did not dispute the existence of the certificate issued by Chetan Patil. Further, authority of Chetan Patil as a Nodal Officer was also not denied, and therefore, merely because Chetan Patil is not examined by the prosecution, the certificate issued by him in respect of C.D.R and S.D.R of 9561733069 cannot be said inadmissible in the evidence. There is nothing on record that for obtaining the aforesaid electronic evidence, Chetan Patil had, in fact, adopted any other procedure. Therefore, the evidence of P.W. 35-Jitendra Nagpal appears reliable in respect of the aforesaid C.D.R and S.D.R of Mobile No. 9561733069.

42. The learned counsel for the appellant Pradeep has also raised objection that SIM Cards from which ransom calls and messages were made by appellant Pradeep, were in fact in the name of some other persons, but they have stated that they never purchased the cell or used the cell. For that purpose, the prosecution has examined Somnath, i.e. son of Sham Deogune. The learned counsel for the appellant Pradeep also relied on the judgment Division Bench of this Court in case of ***Ganesh Alias Baban Lashkare Vs. The State of Maharashtra*** [***Criminal Appeal No. 155 of 2017, decided on 16.02.2024***] wherein it is observed that "*When the SIM Card from which the kidnapper made first two calls, stood in the name of someone else and there is nothing to indicate that the said SIM Card was used by the accused, then prosecution has to adduce evidence that it was the accused who had used it.*"

43. Thus, the learned counsel submitted that the case of prosecution that appellant Pradeep was using those SIM Cards which were purchased in the names of some other persons is doubtful. However, we have already mentioned earlier that as per the evidence of P.W. 40 P.I. Mr. Handpude Patil and 41 P.I. Mr. Ashok Dhekane , who are the Investigating

Officers, it has come on record that appellant Pradeep was possessing those SIM Cards and also using the same. Therefore, it can safely be inferred that the appellant Pradeep must have made ransom calls and sent messages by using the aforesaid SIM Cards. Therefore, considering the C.D.R. and S.D.R. vide Exhibit 198, 203 and 209 along with certificates under Section 65(B) of the Evidence Act at Exhibits 196, 200, 201, 208, 209 and 210, coupled with evidence of informant Shankar and Nodal Officers P.W. 34 Tukaram Angre and P.W. 35 Jintendra Nagpal, it has been established that on 26.04.2014, at about 8.00 p.m., informant Shankar received blank call form SIM Card No. 9881010595 and thereafter received second call from same Mobile number at about 8.20 p.m. demanding ransom of Rs.30,00,000/-. Since the appellant Pradeep was using the said mobile number at the relevant time, it has established that he had, in fact, demanded ransom of Rs.30,00,000/-.

44. Further, the evidence of P.W. No.4 Shankar Bhatiya is corroborated by C.D.R. at Exh. 198 that on 26.04.2014, at about 21:08 hours, there was call from same SIM Card on the land-line number 0241 2417912. It has come in the evidence

of P.W. No.31 Dattatray Markad i.e. Nodal Officer of B.S.N.L that aforesaid land-line number was in the name of Mohanlal Bhatiya and landline No. 2417913 was in the name of Shankar Bhatiya. Further, it has been established that P.W. 4 Shankar had also received a message on 29.04.2014, at about 14.44 hours, from Mobile No. 9561733069 used by appellant Pradeep as "*Tu Mara, Amardham ke vahi pe tuzhe Marunga*.". Further, on 28.04.2014 also at about 8.30 i.e. on the date of funeral of deceased Jitendra, he again received message on his mobile as *"Kyu re Kutte Gali Di Thi Na, Ab Tere Bacche Marenge, Uske Bad Teri Bibi or Fir Tu*." It has been confirmed that these messages and calls on 28.04.2014 were received on the SIM Card of the complainant i.e. 9822048029, by the evidence of Nodal Officer and the C.D.R details Exhibit 203.

45. The learned trial Court, in the impugned judgment, has discussed in detail, as to how the prosecution has established the ransom calls made by appellant Pradeep to the informant and his family members and the messages of threats on the basis of CDR and the certificates issued by concerned Nodal Officers under Section 65(B) of the Indian Evidence Act. On going through the evidence on record to that effect, we are also of the same opinion that prosecution has proved the fact

that appellant Pradeep was using Mobile SIM Card No. 9881010595 and SIM Card No. 9561733069 for giving ransom calls and sending messages of threats to P.W. Nos.4 informant Shankar Bhatiya, P.W. 14- Dharamdas Bhatiya and P.W.15- Jamnadas Bhatiya.

46. Besides the electronic evidence on record, the prosecution has also examined P.W. 12 Rakesh Fuldahale at Exhibit 85, on the point of presence of accused Pradeep on the spot of incident, at the time of incident. This witness resides in Tapidas Lane, which is just adjacent to the shop of deceased Jitendra. According to him, on 27.04.2014, it was Sunday and his weekly off. He had been to market for purchasing ice cream for his kids at about 8.45 p.m. He was returning home after purchasing the ice cream. When he was near his house in Tapidas Lane, he saw one young boy from the age group of 20 to 24 years, came from the side of shop of deceased i.e. '*Mohan Trunk Depot*', in the lane towards his house. This witness has specifically stated that the said boy was holding pistol in his hand. Further, the said boy stopped near him and within four to five seconds, turned back and went towards the shop i.e. '*Mohan Trunk Depot*'. Thereafter, within four to five seconds he

heard noise of firing from the said shop and within four to five seconds immediately the said boy again came to place, where he was standing and thereafter walked towards Dane dabara through Tapidas Lane. Further, this witness has stated that public gathered in front of '*Mohan Trunk Depot*' and he immediately told the crowd that one boy armed with the pistol just went towards Dane-dabara through Tapidas lane. According to this witness, he and others went towards Dane dabara in auto rickshaw in search of the said boy, but the said boy could not be found. When he returned back to the shop of deceased, he saw Jitendra Bhaitya in injured condition due to firing and thereafter public took him to the Civil Hospital. This witness has stated that the boy, who fired bullet, had worn half white shirt and pant of faint blue colour and having height of around 5 fit with wheatish-black complexion and small hair. This witness has also stated that the said boy was wearing sport shoes.

47. From the evidence of P.W. 12 Rakesh Puldhale, it can very well be gathered that the said boy must have fired the fatal bullet, which killed the deceased. Considering the time gap stated by this witness of merely four to five seconds, when he first saw the boy and thereafter the boy went to shop and

then came back again, it is clearly evident that there was no intervention of third person in firing bullet on the deceased. It has been specifically stated by this witness that when the boy went to the shop of deceased, within four to five seconds he heard noise of firing and immediately witnessed the boy coming in four to five seconds back to him. Therefore, it has to be gathered that none other than the said boy must have fired the fatal bullet.

48. It is to be noted that P.W.12 Rakesh Fuldhale was having his house in the said Tapidas Lane and therefore, his presence near the spot of the incident and witnessing the presence of the accused was most natural. Though the objection was raised on behalf of the accused No.1 Pradeep that this witness even, after noticing the accused, did not disclose the said fact immediately to the police who had immediately arrived on the spot of the incident. It is to be noted that the said incident had occurred during the night hours and Jitendra was taken immediately to hospital in the said night. Thus, it can be understood that there was no occasion for this witness to make immediate disclosure. However, this witness had, in fact, disclosed the presence of the accused to the police immediately on the next day.

49. The learned counsel for the appellant Pradeep objected for believing evidence of P.W. 12 Rakesh, since he had stated that he and one Umesh Tiwari had seen the assailant at the time of the incident, but Umesh Tiwari was not examined by the prosecution. Though this witness stated that he along with Umesh Tiwari chased the assailant to Tapidas Lane, but merely on the point that Umesh Tiwari was not examined, the evidence of this witness which appears trustworthy cannot be thrown away entirely.

50. Further, it is important to note that P.W. 12- Rakesh Fuldahale has also identified appellant Pradeep during the test identification parade. The learned counsel for the appellant- Pradeep also raises suspicion in respect of the manner in which the test identification parade was held. According to him, it was held after one month and two days from the date of incident and during the said period, the police must have shown accused- Pradeep and his photographs to this witness before the identification parade. However, these suggestions given to this witness in his cross-examination are totally denied by him. He has specifically stated about the procedure adopted by the Special Judicial Magistrate Bhaskar Bhikaji Bhos (P.W.30) while conducting the said parade and as

to how he identified accused- Pradeep. Nothing adverse to the prosecution has been brought on record during the cross-examination of this witness in respect of the manner in which the test identification parade was conducted. The testimony of this witness to that effect remained un-shattered.

51. The evidence of P.W.12- Rakesh Fuldahle, in respect of test identification parade is also corroborated by evidence of P.W. 30 Bhaskar Bhikaji Bhos, who was working as Special Judicial Magistrate at the relevant time. As per the evidence of this witness, he received letter from Kotwali Police Station on 17.05.2014 and also from Local Crime Branch, Ahmednagar whereby he was requested to arrange for test identification parade for accused- Pradeep. Accordingly, the identification parade was held on 29.05.2014. His evidence further indicates that the jail authority handed over accused-Pradeep to him for identification parade and thereafter introducing himself to the accused, necessary formalities were performed. Moreover, two panchas and one witness were asked to remain present outside the room, where the separate arrangement was made for sitting of the accused Pradeep. Thereafter, this witness has deposed about the manner in which the test identification parade was conducted. This

witness has also deposed as to how six dummy persons similar to accused No.1 i.e. the appellant- Pradeep, were called in the passage and accused Pradeep was given liberty to stand at any place in the row. Moreover, this witness has specifically stated as to how P.W. 12- Rakesh Fuldahale identified accused Pradeep by pointing him. He has also deposed as to how the report of the identification was reduced into writing in presence of panchas by mentioning necessary particulars of each and every stage. He also proved the contents of said report (Exhibit 168).

52. Though the learned counsel for the appellant- Pradeep raised objection that due to holding such identification parade belatedly i.e. after about one month, there is dilution of evidentiary value of identification parade, however, it has come on record that P.W. 12 Rakesh Fuldhale had seen the accused- Pradeep on the spot of incident at the time of the incident and at that time only he had given full description of accused- Pradeep by mentioning necessary particulars i.e. his age, complexion, clothes, etc. Further, his statement was also recorded immediately on the next day of the incident and on the basis of his information, the investigating machinery had also prepared rough sketch of the

appellant. Though there is no evidence as to what happened to the said rough sketch, but it is to be noted that P.W 12 had ample opportunity to watch the accused- Pradeep from very close distance. Therefore, though the said rough sketch does not find place on record, but the identification of accused- Pradeep, at the hands of P.W.12- Rakesh Fuldahale cannot be disbelieved, merely on the ground that the test identification parade was conducted after about one month of the incident. As such, the evidence of P.W. No.12- Rakesh Fuldahale in respect of identification of the accused- Pradeep can safely be relied upon. The learned counsel for the appellant Pradeep pointed out that the description in respect of clothes of accused Pradeep given by the P.W. 12 Rakesh differs from the actual clothes. Admittedly, Article 16 before the trial Court is white colour half shirt with round neck color and P.W.12- Rakesh Fuldahale has stated that Pradeep was wearing white coloured round neck T-Shirt. As such, the confusion is only in respect of the shirt worn by the appellant Pradeep, whether it was T-shirt or Shirt. Possibility cannot be ruled out that P.W.12- Rakesh Fuldahale might have mistakenly stated so that accused was wearing half sleeve T-Shirt due to round neck color of the shirt of Pradeep. Therefore, this ambiguity

cannot be said to be material since other descriptions of appellant Pradeep in respect of his looks and other clothes are correctly given by this witness. Therefore, merely on this aspect, the evidence of P.W. 12- Rakesh Fuldahale cannot be doubted.

53. Though the evidence of P.W. 30-Bhaksar Bhose has been challenged by the learned counsel for the appellant on the ground that test identification parade was held belatedly and that there was every opportunity for P.W.12- Rakesh Fuldahale to see him since appellant Pradeep was produced before the Magistrate on 02.05.2014 and 07.05.2014. However, merely delay in holding the test identification parade cannot be said to be fatal to the case of the prosecution. Moreover, P.W. 40 i.e. the investigating officer Hanpude-Patil has not admitted in cross examination that appellant Pradeep was produced before the Magistrate on 12.05.2014 without covering his face. However, P.W.12 i.e. eye witness Rakesh has also denied that he had seen the appellant Pradeep before test identification parade. As such, the evidence in respect of identification of the accused adduced by P.W.12 Rakesh Fuldahale and P.W.30- Bhaskar Bhose cannot be doubted. The learned trial Court has minutely scrutinized the evidence in

respect of test identification parade, presence of panchas and identification of appellant Pradeep at the hands of P.W. 12- Rakesh Fuldahale and ultimately came to the conclusion that the test identification parade was properly conducted by P.W.30- Bhaskar Bhose and P.W. 12- Rakesh Fuldahale without being influenced by outer machinery.

54. The learned counsel for the appellant Pradeep vehemently argued that the present case is based on circumstantial evidence and there is no direct evidence of any witness, who had seen appellant Pradeep actually firing the bullet. However, it has been established with trustworthy and cogent evidence that appellant Pradeep had given phone calls and messages to informant Shankar and his relatives before and after the incident of killing Jitendra on 27.04.2014. Further, the SIM Cards from which the ransom phone calls and messages were made, were found in possession of the appellant Pradeep. It is also established that appellant Pradeep, by making phone calls and sending messages, demanded different ransom amounts from family members of deceased Jitendra Bhatiya. Appellant Pradeep was found clever enough to vindicate the investigating machinery by calling members of Bhatiya family from the SIM Cards in the

name of other persons obtained by taking disadvantage of his position as an employee engaged in preparation of *Adhar* Card Department. It was obvious for him to collect the identification proofs and residential proofs of other persons for purchasing SIM Cards in their names since he was in possession of those documentary proofs in course of his service.

55. The learned counsel for the appellant Pradeep also tried to argue that since the incident had taken place around 8.30 p.m., there was no sufficient light on the spot of incident which would have prevented P.W 12 to have close look of accused Pradeep. For this purpose, he heavily relied on the judgment of this Court in the case of ***Bala Pandurang Kesarkar Vs. State of Maharashtra*** (supra). Admittedly in the said judgment this Court has observed that " in cases resting on identification evidence, the burden of proving that there was light on the spot of incident, always rests on the prosecution and it never shifts from it and it is only when the prosecution has discharged the said burden, then the said burden shifts on defence". Admittedly, in criminal cases, the entire burden to prove the guilt of accused along with the circumstances pointing to guilt of the accused is upon the prosecution. The learned counsel for the appellant Pradeep

has thus submitted that the prosecution did not bring on record any reliable evidence, that at the time of incident there was sufficient light on the spot. However, on going through the map in the spot *panchnama* Exh. 39, it is clearly evident that the place of incident i.e. '*Mohan Trunk Depot*' was surrounded by other shops and residential houses. Even there are shops in Tapidas lane as reflected in the map of the spot of incident in spot panchnama. Therefore, considering these facts, coupled with the evidence of P.W 12, it cannot be said that there was no source of light on the spot which could have prevented PW 12 from having close look of the appellant Pradeep. As such, the submission of learned counsel for the appellant Pradeep, to that effect, needs to be discarded.

56. The prosecution has claimed that after the incident of firing PW 40 Investigating Officer Hanpude-Patil had gone to the spot of incident. As per his evidence, he collected blood sample on the spot with the help of cotton swab and also recovered one empty cartridge. The seizure *panchnama* to that effect was made in presence of *pancha* P.W. 2 Daulat Kukreja, who is one of the *panchas* of the spot *panchnama*. The evidence of P.W. 40-Hanpude-Patil is also supported by this *panch* Daulat Kukreja. As per the evidence of Daulat Kukreja,

informant Shankar showed the spot of incident and the deceased was lying inside the counter of shop. One empty cartridge of fired bullet was also there and the blood stains along with the said cartridge were seized in his presence. Apparently, the evidence of P.W 40- P.I. Mr. Hanpude Patil and P.W. 2- Daulat Kukreja on the aspect of drawing *panchnama* of the spot and seizure of empty cartridge cannot be treated as doubtful. There are minor contradictions in respect of the place of empty cartridge, since according to P.W. 2- Daulat Kukreja the said cartridge was lying on the floor inside the counter and that *panchnama* Exh. 39 indicated that empty cartridge was found in front of steps of the shop. However, what is important to be noted is the existence of cartridge on the spot of incident. As such, the aforesaid contradiction can be ignored. Further, the learned counsel for the appellant Pradeep also doubted the evidence of P.W. 2- Daulat Kukreja on the ground that he was close relative of informant Shankar. However, merely because he is close relative of informant Shankar, the evidence of P.W. 2- Daulat Kukreja cannot be discarded, since true account of the facts discovered from the spot of incident as stated by this witness is supported by evidence of P.W. 40 Hanpude-Patil.

57. From the examination of Dr. Amol Shinde i,e, P.W.18 who had conducted *post mortem* over the dead body of Jitendra, it has come on record that the body was referred to him from District Hospital, Ahmednagar immediately on the next day of incident and he along with Dr. H. S. Katiya conducted *post mortem* in between 10.45 a.m. to 11.45 a.m. According to his evidence, he found firearm wound entry present over left side of chest laterally, situated 16 c.m. below axillary fold in anterior axillary line and 07 c.m. below and left lateral to left nipple of size 2.5 c.m. x 2 c.m. On dissection it was found that bullet passed through subcutaneous tissue, fracturing left sixth rib in anterior axillary line 13 c.m. left to mid-line of size 1.5 c.m. diameter. It was found that tract of bullet was hamorrhagic, contused, lacerated and reddish. He has specifically deposed that external injury No.1 under column 17 of *post mortem* notes corresponds to internal injuries. He has specifically given the opinion in respect of death of Jitendra that it was due to traumatic and hamorrhagic shock due to fire-arm injury. The *post mortem* report mentioning the cause is at Exh.130. Though there was searching cross examination of this witness, but this witness has stated that if the bullet was fired through country-

made pistol, then the empty cartridge may fall at the spot. Further, the evidence of this witness leads to inference that appellant Pradeep must have fired bullet from the distance of less than 2 to 3 feet from the deceased. Further, the bullet is also recovered from the body of the deceased.

58. It is significant to note that on 6.5.2014, appellant Pradeep was in police custody and made disclosure statement to produce one bullet and his clothes. P.W. 10 panch Bhausaheb Gangaram Pawar in his evidence has stated how appellant Pradeep voluntarly made statement for production of bullet and his clothes, which he had hidden. The evidence of this witness further indicates that appellant Pradeep then led them to his house and then produced his clothes worn at the time of the incident, consisting one round collar T-shirt like Shirt and blue colour Jeans Pant. He also produced one live bullet from the rear right pocket of said Jeans pant. The clothes and live bullet were seized under *panchnama* Exh.76. This panch P.W. 10 has fully corroborated with the evidence of Investigating Officer Hanpude-Patil, on the point of disclosure statement and recovery of clothes and bullet. It is significant to note that white round collar T-Shirt and blue Jeans Pant has been identified by P.W. 12 Rakesh Fuldhale, who had an

opportunity to see the accused at the spot of incident at the relevant time.

59. The prosecution has examined P.W. 32 Gauri Milind Vengurlekar, who was serving as Scientific Assistant in Forensic Laboratory, Mumbai from March 2013. According to her evidence, she completed her M.Sc. in Organic Chemistry from Mumbai University and from March 2013 to December 2015 she was serving in Ballistic Department, Mumbai. According to her, she had worked on country made, standard weapon including Pistol, Revolver, Rifle and hand guns. She had handled around 500 matters pertaining to different weapons. She has stated that on 07.05.2014, she received total 11 sealed parcels and envelopes from Kotwali Police Station, Ahmednagar pertaining to present crime. Office copy of the receipt, is at Exh. 178. Those parcels and envelopes were containing following items :-

(1) One country made pistol with magzine, wrapped in paper marked 12.

(2) One intact KF 7.65 mm pistol cartridge put in an envelope marked-13.

(3) One intact KF 7.65 mm pistol cartridge put in an envelope marked-14.

(4) One intact KF 7.65 mm pistol empty having indentation one the cap put in an envelope marked-1.

(5) One half T-shirt wrapped in paper marked-3.

(6) One full pant.

(6-A) One belt Exh.6 and 6A together wrapped in paper marked-4.

(7) One sandow baniyan wrapped in paper marked-5.

(8) One underwear wrapped in paper marked-6.

(9) One kurta wrapped in paper marked-16.

(10) One full jeans pant wrapped in paper marked-17.

(11) Cotton swab put in an envelope marked-2.

60. Her further evidence indicates that she perused the queries made by the Investigating Officer and then took measurement of country made pistol, then she carried out test firing by using 7.65 mm cartridges through the pistol, after firing she received two cartridge cases and two test fired bullets. On comparison of those two empty cartridges with the empty cartridge found on the spot, it was transpired that all those empty cartridges were same. Further, she also compared the bullet sent by Medical Officer which was recovered from the body of the deceased, with the test fired bullet. She found that both the bullets were having same brushing marks. As such, it was revealed to her that the test

fired bullets and the bullet which was sent by the Medical Officer were fired from same pistol. This witness has given detail evidence about the procedure for arriving at the aforesaid conclusion and nothing has come on record in her cross-examination, which is adverse to the prosecution case. Thus, her evidence has established the fact that the country made pistol seized from the appellant -Pradeep was, capable of firing and that the empty cartridge and the part of bullet found in the dead body of deceased was, in fact fired from the same country made pistol Article No.10.

61. The learned counsel for the appellant Pradeep also tried to argue that evidence of this witness i.e. P.W 32 Gauri Vengurlekar has to be disbelieved, since in her evidence, it has come on record that at the time of her evidence, no seals of her office were found on the articles, which she had sent to Kotwali Police Station. Admittedly, after going through her evidence, it reveals that she has admitted that seals of her office were not found on those articles and instead of that those articles were found sealed with stapler pins. Thus, learned Advocate for the appellant Pradeep submits that, there was clear cut tampering with the articles sent to this witness. However, P.W. 32 Vengurlekar has specifically deposed in her evidence that when

she had sent the articles after analysis to Kotwali Police Station, those were sealed and the seals were intact. Thus, even if, at the time of her evidence, those articles were found sealed with stapler pins and without seals of her office, her reports cannot be doubted, since she is firm on the point that she had sent the articles to Kotwali Police Station in sealed condition. If at the time of her evidence, those seals were not found, there may be possibility of handling the articles by opening the seals of office of Ballistics Expert. But such type of tampering at the hands of police, will have no adverse effect on the result of analysis, since by that time, the analysis had already taken place. Thus, merely because there were no seals found on the *Muddemal* articles of the office of Ballistic Expert at the time of evidence of P.W. 32, it cannot be said that those reports are fabricated. Thus, the evidence of P.W. 32 can safely be accepted.

62. It has also come on record in the evidence of P.W.41 P.I. Mr. Dhekane that he had recovered the pistol consequent to the disclosure statement made by appellant Pradeep as per Section 27 of the Indian Evidence Act. The evidence of P.W. 41-P.I. Shri. Dhekane definitely indicates that after he arrested appellant Pradeep, he disclosed that he had also received

amount of Rs. 10,000/- from appellant Divya. It has further come in the evidence that appellant- Pradeep had taken them near his house and took out one pistol from Air cooler of Ken-star make, by removing two screws, the pistol was having stainless steel magzine. Pradeep also produced cash of Rs. 10,000/- from one cupboard. We have also perused the said country made pistol from *Muddemal* and it is found that the description given in recovery *panchnama* of the said pistol matches with it. Though the panch witness Dharmendra Shinde i.e. P.W.11 has not supported the prosecution on the aspect of recovery of pistol and cash amount, but the investigating officer P.W 41- P.I. Shri. Dhekane has established the said fact of recovery. Thus, merely because panch witness did not support, the evidence of P.W. No.41- P.I. shri. Dhekane cannot be discarded. Moreover, the said recovery *panchnama* at Exh. 308 is signed by the appellant Pradeep and he did not dispute his signature thereon. In view of the same, it can safely be inferred that the pistol and cash amount was recovered at the instance of appellant Pradeep. Though there is no evidence in respect of voice recording of appellant Pradeep, but appellant Pradeep has not challenged the conversation on the phone calls and messages. Further, from

the CDR and SDR coupled with evidence of P.W. 4 Shankar Bhatiya, P.W.14 Dharamdas Bhatiya, P.W.15-Jamnadas Bhatiya and P.W.16- Dinesh Bhatiya it has already been established that it was only appellant -Pradeep, who had made ransom calls and messages. The learned trial Judge has made proper discussion as to how he believed the evidence of P.W.41- P.I. Shri. Dhekane in respect of recovery of pistol and cash amount of Rs. 10,000/- at the instance of the accused. After going through the said discussion, we are also in agreement with the findings of learned trial Judge.

63. The learned counsel for the appellant- Pradeep also pointed out that the contradiction in the evidence of P.W. 12- Rakesh Fuldahale and 15- Jamnadas Bhatiya. According to him, P.W. 15- Jamnadas Bhatiya had deposed before the Court that appellant- Pradeep had covered his face with handkerchief. However, there is no such statement by P.W. 12- Rakesh. Admittedly, P,W, 15 Jamnadas has deposed that the assailant of deceased Jitendra had covered his face with handkerchief at the time of incident, which is contrary to the evidence of P.W. 12 Rakesh, that he had seen Pradeep without such covering of face. It is pertinent to note that P.W. 15

Jamnadas is not an eyewitness and he also never claimed that he had seen the assailant. As per his evidence, he heard from the mob that the assailant had covered his face with handkerchief. Thus, it is revealed that this witness was not having actual information of the covering of face by the appellant. His evidence, to that effect, is hearsay evidence, which is not admissible. On the contrary, P.W. 12- Rakesh had actually seen the assailant on the spot of incident. As such, no weightage can be given to the discrepancy in the evidence of P.W. 12- Rakesh Fuldhale and P.W.15- Jamnadas Bhatiya as regards the covering of face with handkerchief by the assailant at the relevant time. Thus, considering all these aspects, the prosecution has definitely established the material circumstances connecting the appellant Pradeep with the crime beyond reasonable doubts. Thus prosecution has established following facts on the basis of trustworthy and reliable evidence.

(i) Appellant Pradeep was found in possession of the SIM Cards from which calls for ransom amounts and messages were made to the deceased and other members of Bhatiya family. It is also established that even after the incident, he made threatening call to the informant.

(ii) Just before the incident and immediately after the incident, the appellant Pradeep was seen by P.W.12 Rakesh Fuldhale on the spot of incident with pistol and that P.W. 12- Rakesh Fuldhale heard the noise of firing from close distance.

(iii) The pistol and live bullets were recovered at the instance of appellant Pradeep.

(iii) It was transpired in the evidence of Ballistic Expert that live bullets recovered from appellant - Pradeep were found similar to the bullet recovered from the body of the deceased.

(iv) It has also been established from the said Ballastic Expert witness that all the bullets including the bullets used for test firing and bullet found in the body of appellant Pradeep were fired from the pistol which the appellant Pradeep was possessing.

64. Therefore, considering all these facts, the prosecution has conclusively established the guilt of accused, which is proved beyond all reasonable doubts. The act of appellant-Pradeep of killing Jitendra was with motive to extort ransom amount and his intention to kill the deceased is also apparent since he fired bullet on the chest of deceased i.e. vital part of the body from a near distance of 2 to 3 feet. Therefore, all the ingredients for offence punishable under Section 302 of the IPC are proved by the prosecution,

65. Now, we come to the parallel story of the prosecution in respect of the crime and it is regarding the conspiracy between appellant Pradeep and appellant Divya which led the appellant pradeep for extortion and murder of the deceased. Admittedly, the deceased Jitendra and the appellant Divya were husband and wife. The prosecution is claiming that there were illicit relations between appellants Pradeep and Divya and since the deceased was treating appellant Divya with mental and physical cruelty, she conspired with appellant-Pradeep for killing her husband by providing certain cash amount to him. Thus, the prosecution is indirectly claiming that Divya had given certain cash amount to appellant Pradeep for procuring the pistol used in the crime.

66. So far as evidence in respect of illicit relations between the appellants Pradeep and Divya is concerned, the prosecution claims that informant Shankar Mohanlal Bhatiya i.e. P.W. 4 Shankar disclosed the said relation before the police firstly on 8.5.2014. According to him, he gathered such information from one Monika aunty residing behind his house, who had told his wife Kanchan that her sister-in-law i.e. appellant Divya talks on phone throughout the day with one

boy and the said boy within age group of 20 to 22 years visits Divya's house in absence of deceased Jitendra and her children. Since Jitendra had a doubt on character of Divya, there was quarrel between deceased Jitendra and Divya on this count. Thus, the prosecution is claiming that when deceased Jitendra got the knowledge about love affair between these appellants, they conspired with each other for killing Jitendra and purchased pistol from Vikram Berad i.e. accused No.3, who is no more. Admittedly, the disclosures made by these appellants before the investigating officer are not admissible, but it certainly give a clue for further investigation. As such, the prosecution has relied on the evidence of witnesses along with the electronic evidence.

67. It is case of the prosecution that appellant Pradeep had given SIM Card of Mobile No. 8177917704 to Divya, which he had obtained in the name of Monakshi Ahire i.e. P.W. No.5 and he was talking with Divya from his another Mobile No. 8855871317. However, as per the evidence of Monakshi Ahire, she was not aware about the fact that said Mobile number was obtained by the appellant- Pradeep in her name and it was given to appellant Divya for having conversation. Admittedly, it has been disclosed that appellant -Divya was also possessing

another SIM Card having Mobile No. 9822033743. However, there were no phone calls on this number from any of SIM Card possessed by the appellant - Pradeep. However, there are CDR in respect of calls between Mobile No. 8177917704 which was being used by appellant- Divya and Mobile No. 8855871317 possessed by the appellant Pradeep . However, these call details are not duly certified by certificate under Section 65(B) of the Indian Evidence Act, therefore, we cannot rely on the same for concluding that appellants Pradeep and Divya were having love affair and they used these mobile phones for making conversation between them in respect of their relationship.

68. It has come on record in the evidence of P.W. 13 Deepak Zende, who acted as a panch witness that on 7.5.2014, he was called in Kotwali Police Station, where another panch Jakir Wali Ahmed Khan was present. This witness has stated that Investigating Officer P.I. Hanpude-Patil told him that appellant Divya was about to give memorandum. According to this witness, appellant Divya, while in police custody made a statement that she would produce Mobile Handset used in connection with the crime and also to show the place where she threw away the SIM Card fitted in the said

mobile. This witness has also identified appellant- Divya in the open Court and further deposed as to how she produced the Mobile Handset and showed the place where she had thrown away the SIM Card. However, for want of certificate under Section 65(B) of the Evidence Act, the CDR in between SIM Card No. 8177917704 and Sim Card No. 8855871317 has not been proved. Therefore, the evidence of P.W. No.13 Deepak Zend is not sufficient to establish the love affair between both the appellants.

69. The prosecution has also relied on the confessional statements of both these appellants, wherein they have disclosed as to how they got acquainted with each other and having love with each other. It is also disclosed as to how the deceased was harassing appellant Divya and, therefore, both of them decided to eliminate him for continuation of their love affair. Admittedly, P.W. No. 30 Bhaskar Bhikaji Bhose, who in his evidence has posed himself as Special Judicial Magistrate for Ahmednagar district and claims that as a part of his job, he recorded statement of both the appellants as well as P.W. No. 5 Monkakshi Ahire under Section 164 of the Code of Criminal Procedure. However, it is extremely important to note that as per Section 164 of the Code of Criminal Procedure,

only Judicial Magistrate (F.C) or the Metropolitan Magistrate are empowered to record confessional statement. This P.W. 30-Bhakar Bhose though claim himself as Special Judicial Magistrate, but in fact he appears to be a Special Executive Magistrate. Moreover, it has already come on record that as per the judgment of this Court in the case of ***State of Maharashtra Vs. Krishna*** reported in [***2014 All M.R. (Cri) 4224***] and in case of ***Bhausaheb Vs. State of Maharashtra*** reported in [***1997 Cr.L.J. 467***], the confessional statement recorded by Special Judicial Magistrate is just a scrap paper and having no evidentiary value at all. It appears that the learned trial Judge has exhibited these confessional statements for identification purpose and its evidentiary value was to be decided at the time of final stage. Thus, in the light of observations of this Court in the aforesaid judgments, these confessional statements cannot be used as evidence to prove love affair or any conspiracy between both these appellants.

70. According to the prosecution, the illicit relationship between both these appellants Pradeep and Divya was revealed for the first time, when informant Shankar Bhatiya gave his supplementary statement on 08.05.2014. Though while deposing before the Court, informant Shankar refused the part

of his supplementary statement from where the illicit relations between the appellants revealed, but the Investigating Officer i.e. P.W. No.40- P.I. Hanpude Patil has proved those parts which are marked as portion "A" and "B" at Exhibit 249 and Exhibit 250, respectively. On going through the said portion marked exhibits 249 and 250, it appears that Shankar got the knowledge of such illicit relationship between appellants through his wife Kanchan, to whom the said fact was disclosed by one Monika aunty residing at back side of his house.

71. The prosecution has also examined P.W. No.19 Monika Kishor Hasija at Exh. 132. Though this witness refused to support the prosecution on the point of illicit relations between the appellants, but she has admitted that she used to talk occasionally with Kanchan Bhatiya i.e. wife of Shankar. The prosecution has also examined Kanchan Bhatiya as P.W. 17, who has stated that she came to know from Monika aunty about illicit relations between these appellants and when she had asked appellant Divya about her relations with the appellant Pradeep, Divya told her that the boy, who had come to her house was a computer repairing person. Moreover, other relatives of Shankar i.e. P.W. 15 Jamnadas Bhatiya and P.W. No.16 Dinesh Bhatiya have also stated about

the existence of illicit relations between both these appellants. Therefore, though some members of Bhatiya family along with the daughter Lavina of the deceased, refused to make comment on the said relationship, but some of them have stated about such relationship. Therefore, it is obvious that the members of Bhatiya family, who refused to support the prosecution on this ground, must have tried to screen those relations to avoid defamation of their family on that count. Thus, even though the confessional statement of appellant Divya is discarded, but the evidence of some of the family members has established that there was illicit relations between both these appellants since around two years prior to the incident.

72. It appears that the learned trial Judge, in view of illicit relations between these appellants and relying on the observations of the Hon'ble Apex Court in the case of ***Mohammad Kalid Vs. State of West Bengal*** reported in [***(2002) 7 SCC 334]*** inferred that there was conspiracy between these appellants for eliminating Jitendra Bhatiya. The observation relied upon by the learned trial Judge in the aforesaid case is reproduced herein below :-

> *" There can not always be much directed evidence about conspiracy. The offence of conspiracy can be proved either by direct or circumstantial evidence. However, conspiracies are not hatched in the open, by their nature, they are secretly planned. Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Directed evidence in proof of a conspiracy is therefore, seldom available. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object,* which the *objections set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all that is necessarily as matter of inference. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.*"

73. The learned trial Judge also appears to have relied upon the evidence of P.W. 5- Monakshi Ahire, P.W.40 P.I. Shri. Hanpude Patil, P.W. 13- panch Dipak Zende, P.W. 37- Nodal Officer Dhananjay Yadav in respect of the facts that appellant Pradeep had given SIM Card to appellant Divya and how the handset from which appellant Divya used to contact appellant Pradeep was recovered at the instance of Divya, etc.

74. On the basis of this evidence, the learned trial Judge has drawn an inference that there was some conspiracy

between these appellants and the same was only to finish Jitendra Bhatiya. However, from the aforesaid facts, it has only been established that there was illicit relationship between these appellants. So far as the theory of prosecution in respect of conspiracy between these appellants to kill deceased Jitendra Bhatiya is concerned, only inference to that effect is not sufficient. Some, more material or evidence is required by the prosecution to support such theory. Though the learned counsel for the appellant Divya relied on various judgments as mentioned above, but most of the judgments are on the point that when the prosecution wants to establish guilt of accused in the case based on circumstantial evidence, then it has to establish each and every circumstances to complete the chain pointing towards the guilt of accused. So far as this point is concerned, it is settled position.

75. The learned counsel for the appellant Divya also relied on the judgment of Hon'ble Apex Court in the case of ***State of Kerala Versus P. Sugathan and another [AIR 2000 Supreme Court 3323],*** wherein it is observed as below :-

> *"circumstances should give rise to a conclusive inference of an agreement between two or more persons to commit*

an offence. Circumstances should be prior in time then the actual commission of offence and conspiracy is a continuous offene and any act committed by any of the conspirator during the subsistence of conspiracy would attract Section 120-B".

76. He also placed reliance on the judgment of Hon'ble Apex Court in the case of ***Ram Sharan Chaturvedi Vs. The State of Madhya Pradesh [Criminal Appeal No. 1066 of 2010 decided on 25.08.2022],*** wherein following observations are made :-

"It is not necessary that there must be a clear, categorical and express agreement between the accused. However, an implied agreement must manifest upon relying on principles established in the case of circumstantial evidence."

77. Thus, on going through the impugned judgment, it is evident that the learned trial Judge has drawn direct inference merely based on the fact that there were love relations between these appellants, and therefore, as there was love relations they conspired with each other and executed a plan of killing Jitendra. However, it further appears that the learned trial Judge while convicting appellant Divya for the offence punishable under Section 120-B of the Indian Penal

Code, has not made any objective analysis of the evidence on record referring to the particular act of appellant Divya indicating that she hatched a conspiracy with appellant Pradeep. As per the observations of Hon'ble Apex Court in the aforesaid cases ***State of Kerala Versus P. Sugathan and another*** and ***Ram Sharan Chaturvedi Vs. The State of Madhya Pradesh.***

78. In the instant case, prosecution is relying on the cash of Rs. 10,000/- found in possession of appellant Pradeep, which was allegedly given to him by appellant Divya. The prosecution has thus suggested that appellant Divya had provided such cash amount to purchase a weapon for committing murder of her husband. However, had appellant Divya given such cash amount to appellant Pradeep for purchasing weapon, Pradeep would have spent it. It is surprising to note that appellant Pradeep did not use it since he had already obtained pistol from accused No.3 Berad, who is no more. Moreover, except the fact of illicit relations between the appellants, there is no other evidence on record in respect of conduct of appellant Divya, which could establish that, she in fact, played some active role to facilitate appellant Prdeep in

hatching conspiracy for killing her husband. On the contrary, an inference can also be safely drawn that appellant Pradeep due to his affair with appellant Divya, might have taken independent decision to kill her husband, who according to her was harassing her physically and mentally. The evidence on record does not suggest any overt act on the part of appellant Divya. Therefore, considering these aspects, it appears that the learned trial Judge has directly jumped to the conclusion that appellant Divya was also part of conspiracy for eliminating her husband Jitendra.

79. There are no circumstances established by the prosecution about the involvement of appellant Divya in the crime. On the contrary, it appears that it was an independent decision of appellant Pradeep to commit murder of husband of appellant Divya. It is well settled that suspicion, how so ever grave, cannot replace the proof. Therefore, we are of the opinion that, the learned trial Judge has committed an error by drawing inference that appellant Divya was also involved in the present crime. Further, it has come on record that appellant Divya had shown the place where she destroyed the SIM Card given to her by appellant Pradeep for having conversation with her. The prosecution has failed to recover

the said SIM Card and even otherwise also the CDR in respect of SIM Card Nos. 8177917704 and 8855871317 are not admissible for want of proper certificate under Section 65(B) of the Indian Evidence Act. As such, no active role of appellant Divya in hatching conspiracy for killing Jitendra, has been established by the prosecution beyond all reasonable doubts and therefore, she is certainly entitled for benefit of doubt. In view of the same, we pass the following order :-

ORDER

(I) Criminal Appeal No.364 of 2017 stands dismissed.

(II) Criminal Appeal No.345 of 2017 stands allowed and the judgment and order dated 17.06.2017 passed by the learned Additional Sessions Judge, Ahmednagar in Sessions Case No. 345 of 2017 is hereby quashed and set aside only to the extent of appellant - Divya @ Hema Jitendra Bhatiya i.e. original accused No.2.

(III) The appellant - Divya @ Hema Jitendra Bhatiya is acquitted from the offence punishable under Sections 120-B and 201 of the Indian Penal Code.

(IV) The appellant - Divya @ Hema Jitendra Bhatiya is on bail, her bail Bail Bond stands cancelled and she is set at liberty.

(V) The fine amount, if any, paid by this appellant, be refunded to her.

(VI) The Record and Proceedings be sent back to the learned trial Court.

(VII) Criminal Appeal No. 364 of 2017 and Criminal Appeal No. 345 of 2017 are disposed off.

(SANDIPKUMAR C. MORE)
JUDGE

(NITIN B. SURYAWANSHI)
JUDGE

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