

K.C.Hamsa vs State of Kerala

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Court : Kerala

Decided On : Aug-29-2019

Judge : Honourable Mr.Justice a.M.Shaffique,Honourable Mr.Justice N.Anil Kumar

Appeal No. : CRL.A/808/2015

Appellant : K.C.Hamsa

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE A.M.SHAFIQU & THE HONOURABLE MR.JUSTICE N.ANIL KUMAR THURSDAY, THE 29TH DAY OF AUGUST 2019 / 7TH BHADRA, 1941 Death Sentence Ref..No.1 OF 2015 AGAINST THE JUDGMENT IN SC 104/2012 OF SESSIONS COURT,KASARAGOD DATED 14.7.2015 CP NO.236/2008 DATED 29.9.2010 OF JFCM I, KASARAGOD, CRIME NO.74/CR/KNR/08 OF CBCID, KANNUR

APPELLANT/COMPLAINANT: STATE, CBCID, KANNUR, CRIME NO.74/CR/KNR/08 REPRESENTED BY THE PUBLIC PROSECUTOR,

HIGH COURT OF KERALA, ERNAKULAM 682 031. BY SPL.PP SMT. S. AMBIKADEVI, ATROCITIES AGAINST WOMEN & CHILDREN RESPONDENT/ACCUSED NO.1: K.C. HAMSA, S/O. ABDUL RAHIMAN HAJI, AGED 42/08, MASTHIKUNDU HOUSE, MULIYAR VILLAGE, KASARAGOD R1 BY ADV. SRI.P.VIJAYA BHANU (SR.) R1 BY ADV. SRI.P.M.RAFIQ R1 BY ADV. SRI.VIPIN NARAYAN THIS DEATH SENTENCE REFERENCE HAVING BEEN FINALLY HEARD ON 19.6.2019, ALONG WITH CRL.A.770/2015, CRL.A.783/2015, CRL.A.808/2015), THE COURT ON 29.08.2019 DELIVERED THE FOLLOWING: -:2:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE A.M.SHAFIQUE & THE HONOURABLE MR.JUSTICE N.ANIL KUMAR THURSDAY, THE 29TH DAY OF AUGUST 2019 / 7TH BHADRA, 1941 CRL.A.No.770 OF 2015 AGAINST THE JUDGMENT IN SC 104/2012 DATED 14-07-2015 OF DISTRICT & SESSIONS COURT,KASARAGOD CP NO.236/2008 DATED 29.9.2010 OF JFCM I, KASARAGOD, CRIME NO.74/CR/KNR/08 OF CBCID, KANNUR APPELLANT/3RD ACCUSED: MAIMOONA, AGED 37 YEARS, W/O.HAMSA, RESIDING AT MASTHIKUNDU HOUSE, MULIYAR VILLAGE, KASARAGOD TALUK, KASARAGOD DISTRICT. BY ADV. SRI.T.MADHU RESPONDENT/STATE & COMPLAINANT: 1 THE STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM 682 031. 2 THE DEPUTY SUPERINTENDENT OF POLICE CBCID, KANNUR, REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM 682 031. R1 BY SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN & CHILDREN THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19.6.2019, ALONG WITH CRL.A.783/2015, CRL.A.808/2015 & Death Sentence Ref.1/2015, THE COURT ON 29.08.2019 DELIVERED THE FOLLOWING: -:3:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE A.M.SHAFIQUE & THE HONOURABLE MR.JUSTICE N.ANIL KUMAR THURSDAY, THE 29TH DAY OF AUGUST 2019 / 7TH BHADRA, 1941 CRL.A.No.783 OF 2015 AGAINST THE JUDGMENT IN SC 104/2012 DATED 14-07-2015 OF DISTRICT & SESSIONS COURT,KASARAGOD CP NO.236/2008 DATED 29.9.2010 OF JFCM I, KASARAGOD, CRIME NO.74/CR/KNR/08 OF CBCID, KANNUR APPELLANT/ACCUSED NO.4: M.ABDULLA AGED 44 YEARS S/O.PALLIKUNHI HAJI, R/AT ARIKKADI KUNNIL HOUSE, ARIKKADI VILLAGE,KUMBLA,KASARAGOD. BY ADV.SRI.B.RAMAN PILLAI (SR.) SRI.R.ANIL, SRI. M. SUNILKUMAR SRI.SUJESH MENON V.B., SRI. T. ANIL KUMAR SRI.THOMAS ABRAHAM (NILACKAPPILLIL) SRI.E.VIJIN KARTHIK SRI.THOMAS SABU VADAKEKUT SMT.MANJU E.R., SRI. MANESH BHANU.S S.LAKSHMI SANKAR -:4:-

RESPONDENT/COMPLAINANT: THE STATE OF KERALA REPRESENTED BY THE DEPUTY SUPERINTENDENT OF POLICE, CBCID, KANNUR, THROUGH THE PUBLIC PROSECUTOR,HIGH COURT OF KERALA,ERNAKULAM. R1 BY SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN & CHILDREN THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19.6.2019, ALONG WITH CRL.A.770/2015, CRL.A.808/2015, Death Sentence Ref.1/2015, THE COURT ON 29.8.2019 DELIVERED THE FOLLOWING: -:5:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE A.M.SHAFIQUE & THE HONOURABLE MR.JUSTICE N.ANIL KUMAR THURSDAY, THE 29TH DAY OF AUGUST 2019 / 7TH BHADRA, 1941 CRL.A.No.808 OF 2015 AGAINST THE JUDGMENT IN SC 104/201 DATED 14-07-2015 OF DISTRICT & SESSIONS COURT ,KASARAGOD CP 236/2008 DATED

29-09-2010 OF JUDICIAL MAGISTRATE OF FIRST CLASS
,KASARAGOD CRIME NO.74/2008 OF CBCID, KANNUR

APPELLANT/ACCUSED NO.1: K.C.HAMSA S/O. ABDUL RAHIMAN
HAJI, MASHIKUNDU HOUSE, MULIYAR VILLAGE, KASARAGOD. BY
ADVS. SRI.P.VIJAYA BHANU (SR.) SRI.P.M.RAFIQ SRI.VIPIN
NARAYAN -:6:- RESPONDENT/COMPLAINANT: STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM R1 BY SMT.AMBIKA DEVI S, SPL.GP
ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C
THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
19.6.2019, ALONG WITH CRL.A.770/2015, CRL.A.783/2015, Death
Sentence Ref.1/2015, THE COURT ON 29/8/2019 PASSED THE
FOLLOWING: -:7:-

JUDGMENT

[Death Sentence Ref. 1/2015 ,CRL.A.770/2015, CRL.A.783/2015 &
CRL.A.808/2015]

Shaffique, J.

These appeals and DSR arise from SC No.104/2012 arising from Crime No. 74/08 of the CBCID, Kannur. By virtue of the impugned judgment dated 14/7/2015, among accused 1 to 5, accused 1, 3 and 4 were found guilty and the first accused was sentenced to suffer death by hanging for offences u/s 302, 201 and 361 of I.P.C. First accused is also imposed a fine of

`10,00,000/- with default sentence of 3 years rigorous imprisonment. He was imposed with punishment to suffer sentence for 3 years and to pay a fine of `5,000/- with default sentence for non payment of fine of 1 year for offence u/s 201 and 361 of I.P.C each. 3rd accused is sentenced to suffer simple imprisonment for 3 years each and to pay a fine of `5,000/- each with default sentence of 6 months simple imprisonment each for the offences u/s 201 and 361 of I.P.C. 4 th accused is sentenced to suffer rigorous imprisonment for three years and to pay a fine of

-:8:- `5,000/- with default sentence of 6 months rigorous imprisonment or 6 months for offence u/s 201 of I.P.C.

2. A minor girl, Safiya, aged 13 years was entrusted by her

parents to accused Nos. 1 and 3, who were husband and wife living with their minor child at Ayyankeri. Safiya was entrusted to them since there was an offer that she will be given necessary education and she will only have to play with their child and do baby sitting. According to the prosecution, without the consent or knowledge of the parents of Safiya, she was taken to first accused's house at Masthikundu in Kasargode District and from there to Goa. The first accused was working as a contractor in

Goa and was residing with his family in an apartment. Prosecution allege that, on 15/12/2006, at about 11.30 a.m, while accused No. 3 and her children were not in the apartment of the first accused, and while first accused was shifting a vessel containing cooked rice and boiled water, it fell over the body of Safiya, who at the relevant time was cleaning the kitchen area. She sustained severe burn injuries. Apprehending that a legal action may ensue, proper medical care was not given to her. She suffered infection and was in a delirious state. According to the

-:9:- prosecution, the first accused thereafter took Safiya to another apartment, inflicted fatal blows on her with a chopper and she

died. In order to conceal the offence and to destroy the evidence, the body was cut into several pieces, it was filled in separate bags and on 16/12/2006, he carried the bags in his vehicle with the intention to abandon the bags. He was assisted by the 4th accused. They abandoned the bags in a forest area. They had a doubt that it was noticed by another person whom they knew. They again collected the bags, took it into their car and it was taken to the work site which was under the control of the 4th accused. A pit was dug as if it was being dug for the purpose of drinking water using an excavator at a depth of 5 metres and more and the bags containing the body of Safiya was dumped into the pit and it was covered. On 21/12/2006, while at Masthikundu, the first accused called for Safiya's father, and when he came, the first accused informed Safiya's father that Safiya was missing since

20/12/2006. Safiya was last seen playing with their child. At the instance of first accused, Safiya's father filed a complaint before Adhur police station and a crime came to be registered. Prosecution also has a case that, to make

-:10:- it appear that Safiya travelled along with them from Goa to Kerala, accused Nos.1 and 4 with the help of accused No.5 corrected the entries in the checkpost register at Manjoli checkpost. The entry of passengers recorded as '2 + 1' was corrected as '3 + 1'.

3. Safiya's body was exhumed in the presence of forensic experts based on the confession statement of the first accused and thereafter the investigation was completed and final report

was filed before the Judicial First Class Magistrate No.1, Kasargode in CP No. 236/2008 which was committed to the Sessions Court as per order dated 29/9/2010. The accused denied having committed any of the charges pursuant to which the prosecution examined PW1 to PW37, placed reliance upon Exts.P1 to P64 and identified MOs 1 to 12. The accused were questioned u/s 313 of Cr.P.C. They denied the incriminating

evidence against them. First accused filed a statement contending that he was only acting as a carrier for taking Saifya from Ayyenkery to Masthikkundu on the request of his brother Ayoob and it is due to the business rivalry with Ayoob that he was implicated in a murder case with the support of the action -:11:- committee. The accused also examined DW1 to DW5 and they placed reliance on Exts.D1 to D18. After complying with the procedural formalities, the Court below had convicted and sentenced the accused as stated above.

4. We heard learned Senior counsel Sri. Vijayabhanu

appearing on behalf of the 1st accused, Sri.P.Madhu appearing for the 3rd accused and Sri.B.Raman Pillai appearing on behalf of the 4th accused. The prosecution case was argued by Smt. Ambika Devi, Special Public Prosecutor for atrocities against women and children.

5. Before proceeding further, it will be useful to refer to the evidence adduced by the prosecution in brief.

6. PW1 is the father of Safiya. He submitted Ext.P1 FIS on Police Station. PW2 is the mother of the deceased.

7. PW3 Hamsa has been examined to prove that accused 1 and 3 and their family were residing in an apartment close to his apartment at Masthikundu. PW4 is the wife of PW3 who supported the version of PW3.

8. PW5 who is the elder brother of the first accused and -:12:-

brother-in-law of 4th accused turned hostile to the prosecution. PW6 who was brought by the prosecution to prove that he saw A1 and A4 coming out from the car on the way to Belgaum on declared hostile. He was expected to say that he knew A1 and A4 and had seen them at the work site where the excavator was used to dig a pit and the excavator was owned by PW5. PW8 is the sister of 3rd accused who was also declared hostile.

9. PW9 Abbas conducts a stationary shop near the house of 1st accused at Masthikundu. He deposed that he heard that Safiya had disappeared from the house of first accused at Goa itself.

10. PW10 is an attester to the inquest. He is the Chairman

of Safiya Action Committee. He had gone along with PW1 and PW2 for conducting their DNA test. PW11 is a neighbour of PW1 and PW2. PW1 and PW2 used to talk to Safiya on the phone from her house and Safiya used to call in that number as well. PW12 Dr.P.Geetha was also an activist. She is a College Lecturer and was present when the inquest was done. PW13 was a Police Constable. He assisted the Dy.S.P and is an attester to Ext.P10 seizure mahazar of the vehicle register of checkpoint at Manjoli.

-:13:-

PW14 works in the crime branch unit and was present along with the investigation team. He is an attester to the seizure mahazar Ext.P11 of the Maruthi car which

belonged to the first accused. Ext.P12 is the seizure mahazar relating to recovery of passports of A1 and A3. PW15 was also working in the Crime Branch during the relevant time and he was present when the forensic expert was examining the Maruthi Car. He is an attesor to Ext.P13 seizure mahazar by which hair and blood were recovered from the Maruthi car. He is also an attesor to Ext.P14 seizure mahazar by which blood and broom were taken from the bathroom of 'F-4' flat. PW16 was also part of the investigation team and he is an attesor to Ext.P15 recovery mahazar for the excavator based on the confession statement of 4th accused. He is also an attesor to Ext.P16 seizure mahazar of the photographs and the compact disc. PW17 though was an attesor to the seizure mahazar, turned hostile. PW18 who was also expected to say that he had attested Exts.P17 and P18 turned hostile to the prosecution. PW19 is Dhulath Singh Thakoor who only stated that he was an excavator operator at Malom. His service was utilized to recover the remains of Safiya. PW20 Dhanaraj is an attesor to Ext.P19

-:14:-

the observation mahazar from where the dead body was allegedly dumped based on the confession of first accused. PW21 is a photographer who took the photographs of excavation, inspection of car, flat, the skull and skeleton. He is an attesor to Ext.P16 mahazar in respect of the photographs and compact disc. He has also proved Ext.P20 series photographs and Ext.P21 series, the compact disc. PW22 was the Head constable, GD charge of Adhur. He registered Ext.P22 (FIR). He recorded the FIS of PW1. Through him was also marked Ext.D4 a copy of FIR. It was apparently a man missing case.

11. PW23 Sub Inspector of Police, Chittakala Police Station

has produced Ext.P23 register of movement of vehicles to the Dy.S.P. PW24 was on duty at Majoli Checkpost and he was the custodian of Ext.P23 register and Ext.P23(a) is the entry at page No.38 which was produced to prove that the entry '2 + 1' was corrected as '3 + 1'. PW25 was the Sub Inspector of Adhur Police Station. He handed over investigation to the 5 th accused as per Ext.P24 report. PW26 conducted investigation while working at Kasargode Crime Detachment. He seized Ext.P23 register from the checkpost as per Ext.P10 mahazar.

-:15:-

12. PW27 was the Executive Engineer in Water Resources

Department, Government of Goa. He was examined to prove the work carried out by A1. He produced Ext.P25 the letter issued by the department and Ext.P25(a) copy of work order dated

13. PW28 produced Ext.P26 lease agreement executed

between the power of attorney holder of Nashwa apartments and the first accused. Through him was marked Ext.D8 another lease deed. PW29 has issued the ownership certificate Ext.P27 with reference to the building at Goa where the first accused was residing.

14. PW30 the Assistant Director Biology, Regional Forensic

Lab, Thrissur had examined the Maruthi car and the scene of occurrence. Ext.P28 is the vehicle examination report and she collected MO3 hair and MO4 blue fibers from the vehicle. She also collected MO5 cotton swab containing blood particle, MO6 cotton swabs from the toilet slab, MO7 cotton swab from the outlet of bathroom, MO8 control sample of cotton cloth and MO9 broom from the bathroom as per a report Ext.P29. PW31 was the Joint Director (Research) in Forensic Science Lab, Thiruvananthapuram.

-:16:-

His report is Exts.P30, P31 and P32. In Ext.P30, he opined that there is no seminal stains and there were no fibre similar to item 4(iv) hairs. He opined that the hairs are human scalp hairs. In Ext.P31, he stated that items 4(ii) and 4(iii) contains blood of fowl. With reference to items 5(a) to 5(c) and item 6, he opined that the blood was insufficient to ascertain its origin. In Ext.P32 report, he stated that MO10 skull and mandible is that of the deceased.

15. PW32 was the Scientific Officer, DNA division of Forensic

Science Department, Chennai. He examined two pieces of bone and blood samples of the deceased and her report is Ext.P33. The DNA analysis indicated that the DNA profile of the bones exhumed matches the DNA profile of PW1 and PW2.

16. PW33 was the Professor and Head of Department of

Forensic Science, Medical College Hospital, Kozhikode. She had witnessed the whole procedure of excavation and prepared Ext.P34 the list of materials collected. Ext.P35 is the report and Ext.P36 is her letter. She opined that skeleton was of a female girl, decomposition started about two weeks back and death occurred as a result of homicide.

:-17:-

17. PW34 was the Scientific Assistant of Forensic Science Lab, Thiruvananthapuram. His report is Ext.P38. According to him, the entry in Ext.P23(a) was altered from '2 + 1' to '3 + 1'.

18. PW35 was the Detective Sub Inspector, Crime Branch, Kasargode who seized the lease agreement, building tax receipt, ownership certificate, site plan etc., of the building in which the first accused was residing.

19. PW36 was the Investigating Officer who conducted

investigation. He had submitted Ext.P39 to conclude the investigation and Ext.P40 is the report against A1. PW37 was the Dy.S.P., Kannur Crime Branch during the relevant time and he had conducted major part of the investigation. Exts.P42 and P43 are his reports. Ext.P63 is the confession statement of the first accused on the basis of which the dead body was exhumed. Ext.P48 is the confession statement of the first accused based on which the blood stained clothes of the deceased and knife were recovered. Ext.P51 is the confession statement of the 4th accused based on which the equipment used for digging the pit was recovered.

20. DW1 to DW3 were examined only for the purpose of :-18:-

defending the 5th accused who has already been acquitted by the trial Court and therefore there is no reason to consider the said evidence for the purpose of the present appeals. DW4 was examined to prove Ext.D17, a newspaper and Ext.D17(a) news item which indicates that police had questioned the accused who had murdered and buried the victim at Goa. DW5 was examined to prove Ext.D1 contradiction.

21. PW33, Dr.Shirly Vasu is the forensic expert in whose presence the remains of Safiya were excavated. The bones that were recovered were examined by her and after examination, her remarks are as under:-

(a) All the bones could belongs to one individual a female aged above 12 and below 14 years of slim built and average stature with no deformities of any sort and intact dentition.

(b) The nature and extent of decomposition on the bones were consistent with primary burial at the waterlogged soil of said period of around 18 months.

(c) The injuries were suggestive of blunt head trauma due to personal violence as well as use of weapon (chopper cut to neck) before death with had resulted in her death.

(d) There were additional bony injuries suggestive of

attempts at postmortem dismemberment of the body at the region of neck and thighs. The injuries suggested the neck was partly cut and bent, the thighs were partly cut and bent back probably facilitating packing the body by wrapping it in the skirt recovered. From her evidence it is clear that death of Safiya was a homicide.

22. Prosecution case is that, since the body of Safiya was

recovered on the basis of information given by the first accused and there is evidence to prove that Safiya was missing while in the custody of the first accused, he alone will be in a position to

know as to what happened to Safiya and under what circumstances he had to bury the body of the girl. It is a matter purely within the knowledge of the first accused alone and in terms of S.106 of the Evidence Act, he alone can explain. The explanation given by the accused is that he was falsely implicated in the case at the instance of his brother, Ayoob. He brought Safiya from Ayyenkeri to Masthikundu on the request of Ayoob, who alone required the services of Safiya.

23. Learned counsel for the appellants attacked the

judgment on all counts. According to the counsel for 1st accused,

the recovery was not proper as the place of burial was known well in advance by the police and it even came in a local daily published on 30/6/2008, even before arrest of the accused. The recovery of other articles were planted and even otherwise, there -:20:-

is nothing incriminating to implicate the first accused for murder. He also placed reliance upon the fact that even according to the prosecution, the victim died at the residence of the first accused wherein he was residing with the third accused. 3rd accused is the wife of first accused. Though prosecution alleges that victim suffered burn injuries, there is no evidence to prove the same. The prosecution further alleges that victim was taken to another apartment and she was murdered with a chopper, she was cut

into pieces, filled in three bags and later buried. But there is absolutely no evidence to prove either of these facts. When it is admitted by the prosecution that the first accused is residing along with his wife and child, in the absence of any evidence that the first accused himself is responsible for the crime, the prosecution did not rule out the possibility of the crime being committed by his wife, the 3rd accused. It is further argued that though the prosecution attempts to place reliance on S.106 of the Evidence Act to implicate the first accused, the first accused cannot give any evidence against his wife on account of the restriction imposed u/s 122 of the Evidence Act. He placed reliance on the judgment of the Apex Court in M.C.Verghese v.

-:21:- T.J.Ponnan and another (AIR 1970 SC 1876). It is further argued that even going by the prosecution case, at best the evidence is available only to prove exhumation of the remains of Safiya and the only offence that could be charged against the first accused is u/s 201 of I.P.C. and he cannot be charged for murder. Finally it is argued that even assuming that there is evidence to prove the guilt against the first accused, this is not a case in which death penalty should be given as it does not amount to rarest of rare cases. Even assuming that there is enough proof to implicate the accused, even according to the

prosecution, the death happened only on account of a misconception that the girl may die on account of the burn suffered by her, which may create unnecessary issues and it is only to avoid such complications that an attempt had been made to destroy the evidence by burying the body of the victim. He also placed reliance upon a judgment of the Apex Court in Sawal Das v. State of Bihar [(1974) 4 SCC 193]. This judgment is cited to emphasise the point that in a similar situation, the Apex Court held that the provisions under S.106 of the Evidence Act would not absolve the prosecution from the duty of discharging

-:22:- its general or primary burden of proving the prosecution case beyond reasonable doubt. Paragraph 10 is relevant, which reads as under:-

10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused. The crucial question in the case before us is: Has the prosecution discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt?

24. Yet another judgment relied upon is Shambhu Nath

Mehra v. State of Ajmer (AIR 1956 SC 404). In this judgment, the Apex Court was considering the scope and effect of S.106 of the Evidence Act and it is held that S.106 is an exception to S.101.

25. Reference is also made to the judgment of the Apex

Court in Vikramjit Singh v. State of Punjab [(2006) 12 SCC 306] wherein also the Apex Court had occasion to consider the scope and effect of S.106 of the Evidence Act. Paragraphs 14, 15 -:23:- and 16 are relevant which reads as under:-

14. Section 106 of the Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule e.g. where burden of proof may be imposed upon the accused by reason of a statute.

15. It may be that in a situation of this nature where the

court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well-settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only

conclusion herein that the prosecution has not been able

to prove its case beyond all reasonable doubt.

16. In Sharad Birdhichand Sarda v. State of Maharashtra

this Court laid down the law in the following terms: (SCC p. 185, para 153) 153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is

to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned must or should and not may be established. There is not only a grammatical but a -:24:- legal distinction between may be proved and must be or should be proved as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC para 19, p. 807 : SCC

(Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between may be and must be is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not

to leave any reasonable ground for the conclusion

consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (emphasis in original) It was further observed: (SCC pp. 194-95, paras 179-80) 179. We can fully understand that though the case superficially viewed bears an ugly look so as to prima facie shock the conscience of any court yet suspicion, however great it may be, cannot take the place of legal -:25:- proof. A moral conviction however strong or genuine cannot amount to a legal conviction supportable in law.

180. It must be recalled that the well-established rule of

criminal justice is that fouler the crime higher the proof. In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautious and meticulous approach was necessary to be made.

Learned counsel for accused 1 and 3 argued that there is no evidence to prove that Safiya was taken to Goa without the consent of her parents. The finding of guilt under Section 366 of I.P.C. was without any material. Learned counsel for accused 3 and 4 argued that there is no evidence to prove that they participated in commission of the offence under Section 201 of I.P.C.

26. Controverting the aforesaid submissions on all counts based on the finding of the court below, the learned Public Prosecutor placed reliance upon the following judgments:-

(i) State of Maharashtra v. Suresh [(2000) 1 SCC

471]. This was also a case in which the dead body of the victim was exhumed on the basis of the confession statement of the accused. It was held at paragraph 26 as under:-

26. We too countenance three possibilities when an -:26:- accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the

criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.

(ii) *Thrimukh Maroti Kirkan v. State of Maharashtra* [(2006) 10 SCC 681]. This is an oft quoted judgment wherein the Apex Court had reiterated the principle u/s 106 of the Evidence Act at paragraph 18 as under:-

18. The question of burden of proof where some facts are within the personal knowledge of the accused was examined in *State of W.B. v. Mir Mohd. Omar*. In this case the assailants forcibly dragged the deceased, Mahesh from the house where he was taking shelter on account of the fear of the accused and took him away at about 2.30 in the night. Next - :27:- day in the morning his mangled body was found lying in the hospital. The trial court convicted the accused under Section 364 read with Section 34 IPC and sentenced them to 10 years RI. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for murder charge. The accused had not given any explanation as to what happened to Mahesh after he was abducted by them. The learned Sessions Judge after referring to the law on circumstantial evidence had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons and the discovery of the dead body in the hospital and had concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act and laid down the following principle in paras 31 to 34 of the reports: 31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof on the

prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in

establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a -:28:- course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of

one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical

conclusion as the most probable position. The above

principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct, etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the Court that

Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to

Mahesh at least until he was in their custody.

(iii) Ningappa Yallappa Hosamani v. State of

Karnataka [(2009) 14 SCC 582]. In this case, the evidence conclusively proved that accused 1 and 2 had buried the gunny bag containing the dead body of Namadev and that it was -:29:-

detected in furtherance of the voluntary information furnished by them. Apex Court held that the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by him.

(iv) Dharam Deo Yadav v. State of Uttar Pradesh

[(2014) 5 SCC 509]. In this case the Apex Court held that recovery of a dead body or incriminating material from the place pointed out by the accused, points out to three possibilities - (i) that the accused himself would have concealed it; (ii) that he would have seen somebody else concealing it, and (iii) he would have been told by another person that it was concealed there.

(v) Shanti Devi v. State of Rajasthan [(2012) 12 SCC

158]. In this case the Apex Court held that the factum of recovery of the body of the deceased at the instance of the appellant was one other strong circumstance against the appellant in roping her involvement in the elimination of the deceased and thereby providing no scope for any other hypothesis other than her guilt

-:30:- in the killing of the deceased.

(vi) Suresh v. State of Haryana (AIR 2015 SC 518). In

this case the Apex Court held that in a case where Section 106 of the Evidence Act is attracted, still the burden of proof is on the prosecution and Section 106 is not meant to relieve it of that duty but the said provision is attracted when it is

impossible or it is

proportionately difficult for the prosecution to establish facts

which are strictly within the knowledge of the accused. When recovery of dead bodies from covered gutters and personal belongings of the deceased from other places disclosed by the accused stood fully established, it casts a duty on the accused as to how the accused alone had the information leading to recoveries which was admissible under Section 27 of the Evidence Act. Failure of the accused to give an explanation or giving of false explanation is an additional circumstance against the accused.

27. The fact that Safiya was in the custody of first and third accused is proved by the evidence of PW1, PW2, PW3, PW4 and PW11.

28. Sending children for doing domestic work in households -:31:-

is a common feature in our society. Such practices would stop, not merely by enacting laws. Proper awareness should be created among the parents of such children, agents who are involved in arranging such jobs, those who solicits and avails their services

etc. Pitiable living conditions, social, cultural, economic and a host of other factors play a vital role in continuance of such unhealthy and illegal, social evil. Care for children should not remain as a mere catch word. It has to be put into practice by all concerned. The obligation does not rest with Governmental authorities alone, but all other agencies including every citizen is responsible to ensure non recurrence of child misuse.

29. The fact that the skeletons that were unearthed in the

case was that of Safiya is proved by the evidence of PW32 in so far as the DNA profile of the bones which were exhumed from the pit matched the DNA profile of PW1 and PW2, who were the parents of Safiya.

30. The remains of Safiya were unearthed based on confession statement of the first accused. Ext.P63 is the confession statement of the first accused. In Ext.P63, though certain portion of inadmissible statement of the accused had -:32:-

been incorporated, the only incriminating portion regarding the place where the body has been buried can be taken as evidence in terms of section 27 of the Evidence Act. He had stated that the body of Safiya was buried in a place near Molom Bandhara in Goa. Pursuant to the aforesaid confession statement, the remains of Safiya were recovered. Section 27 of the Evidence Act is in the nature of a proviso or an exception, which partially lifts the ban imposed by Sections 25 and 26 of the Evidence Act and makes admissible so much of such information, as relates to the fact thereby discovered, when made by a person accused of an offence while in police custody.

31. There cannot be any quarrel regarding the legal position

involved in this case. It is settled law and as held by the Apex Court in Dharam Deo Yadav (supra), that recovery of a dead body or incriminating material from the place pointed out by the accused, points out to three possibilities - (i) that the accused himself would have concealed it; (ii) that he would have seen somebody else concealing it, and (iii) he would have been told by

another person that it was concealed there. In Anuj Kumar Gupta v. State of Bihar [(2013) 12 SCC 383], the Apex Court -:33:-

held that once it is found that there was definite admission on

behalf of the accused by which the prosecuting agency was able to recover the body of the deceased from a place, which was within the special knowledge of the accused, the only other aspect to be examined is whether the appellant had any convincing explanation to get over the said admission. In Chunda Murmu v. State of W.B. [(2012) 5 SCC 753] the Apex Court held that, from the evidence of the investigating officer, if it is clear that the statement of the accused leading to the recovery of dead body was made while he was in custody and the same was in the presence of police officers, the recovery of the dead body, therefore, is a fact

which is admissible in evidence under Section 27 of the Evidence Act, 1872.

32. In *Sawal Das* (supra) the Apex Court held that the

provisions under S.106 of the Evidence Act would not absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. In *Shambhu Nath Mehra* (supra), the Apex Court held that S.106 is an exception to S.101. In *Vikramjit Singh* (supra) also, the Apex Court had occasion to consider the scope and effect of

-:34:- S.106 of the Evidence Act and held that Section 106 of the Evidence Act does not relieve the prosecution from its burden to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved, the burden in regard to such

facts which was within the special knowledge of the accused may

be shifted to the accused for explaining the same, or where burden of proof may be imposed upon the accused by reason of a statute. Even if the court may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence, but applying the well-settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only conclusion herein that the prosecution has not been able to prove its case beyond all reasonable doubt.

33. In *Suresh* (supra), the dead body of the victim was

exhumed based on the confession statement of the accused. Apex Court held that if the accused chooses to refrain from telling the court as to how he had come to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself, and such an -:35:-

interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act. In *Thrimukh Maroti Kirkan* (supra) the Apex Court placing reliance on *State of W.B. v. Mir Mohammad Omar* [(2000) 8 SCC 382] found favour with the findings in the said judgment, wherein it is held that the pristine rule that the

burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof on the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty. And it further held that, When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.

34. In Ningappa Yallappa Hosamani (supra), the Apex Court held that when the accused is the only person who can :-36:-

offer the explanation as to how else he came to know of such concealment of dead body and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by him. In Shanti Devi (supra), the Apex Court held that the factum of recovery of the body of the deceased at the instance of the appellant was one other strong circumstance against the appellant in roping her involvement in the elimination of the deceased and thereby providing no scope for any other hypothesis other than her guilt in the killing of the deceased. In Suresh (supra), the Apex Court

held that Section 106 of the Evidence Act is not meant to relieve

the prosecution to prove the case, but the said provision is attracted when it is impossible or it is proportionately difficult for the prosecution to establish facts which are strictly within the knowledge of the accused. When dead body of the deceased is recovered from places disclosed by the accused, it casts a duty on the accused to explain as to how the accused alone had the information leading to

recoveries which was admissible under Section 27 of the Evidence Act. Failure of the accused to give an

-:37:- explanation or giving of false explanation is an additional circumstance against the accused.

35. That when the body of the victim is exhumed on the

basis of the confession statement of the first accused, in the absence of a valid explanation it can be treated as a strong circumstance against the first accused. That apart, the knife and blood stained clothes of the victim were recovered based on Ext.P48 confession statement of first accused.

36. Since this case rests on circumstantial evidence, all the

circumstances which points to the guilt of the accused are to be proved by the prosecution beyond all reasonable doubt and there should not be any hypothesis that would point to the innocence of the accused. The evidence in this case clearly discloses the fact that Safiya was in the custody of accused 1 and 3. PW1 in his evidence has stated that Safiya, his eldest daughter was studying in a school at Ayyankeri. She was attending the 6 th standard, but she could not continue studies on account of poverty. At the instance of the 2nd accused, they came into contact with accused Nos.1 and 3 who offered to educate her and she need only to do some baby sitting. Accordingly, accused 1 and 3 came and took

-:38:-

Safiya in their car in the presence of 2 nd accused to Masthikundu where accused 1 and 3 were residing. PW1 further deposed that they used to call Safiya once in a while over phone, but she was not speaking freely. Safiya was brought home once and she was again taken back to Masthikundu. The first accused had informed PW1 that he is shifting his family from Masthikundu to Goa where he is having some contract work. According to PW1, though he protested, on the premise that Safiya will be brought back immediately, she was taken to Goa. However, they used to speak to her over telephone while she was at Goa. But she was not happy. During Ramzan period, PW1 along with his wife wanted to go to Goa. But

first accused informed them that he will bring the child to the native place during Bakrid. On 20/12/2006, a few days before Bakrid, first accused called PW1 and asked him to reach Masthikundu. Since he did not have the money for travel, he borrowed some ginger from a neighbour and with the sale proceeds of the same, he proceeded to Masthikundu. He reached the house of first accused after lunch. A few persons were sitting in the sit out area of the first accused's house. First accused came carrying his younger daughter and informed PW1 that Safiya was

-:39:-

missing. They saw her playing with their younger daughter in the courtyard and later she was missing. PW1 got worried and at the instance of first accused, he proceeded to Adhur Police Station. Accused went inside the police station and after sometime, he was called. He had given a statement Ext.P1 to the police as instructed by the first accused. In Ext.P1, he stated that he was working at Masthikundu and Safiya was with him. He had gone in the first week of December to visit his wife to his native place and he did not take Safiya and she was entrusted with the first accused. He had permitted the family of first accused to take her to Goa for visiting the said place. They had gone to Goa on 6 th December. First accused had informed him that they came back to their native place on 20/12/2006. He came to visit the house of first accused on 22/12/2006 and 3rd accused told him that Safiya was missing from 2 p.m on 20/12/2006 and though they had made enquiries in various places, the child could not be located. After giving the complaint, he stayed in the house of first accused a day and left the next day morning and informed his wife that Safiya will come for Bakrid. A few days after that, first accused called PW1 and he along with his wife and younger son

-:40:-

proceeded to Masthikundu. They went to the police station along with the first accused and later police called PW1 and threatened him stating that Safiya was concealed by him to grab money by filing a false complaint. He was kept in the lock up of the station for some time. When PW2 started crying aloud stating that her daughter is lost and her husband is under lock up and the younger son also

started crying, police released PW1. At the instance of A1, PW1 and his wife had even gone to a priest to find out the missing girl. PW2, mother of Safiya also had given

evidence on similar lines. Ext.P1 statement also indicates that Safiya was in the custody of the first accused at the relevant time. Evidence of PW3 and PW4 further supports the fact that Safiya was residing with accused 1 and 3 at Nashwa Apartments, Goa. PW3's evidence is supported by PW4, who is the sister-in-law of accused 1 and 3. She also resides in the same apartment. PW11's evidence further reiterates the fact that Safiya was in the custody of accused 1 and 3. She deposed that PW1 and PW2 used to contact Safiya over telephone from her house while she was in the house of accused 1 and 3 either at Masthikundu or at Goa. From the aforesaid facts it is rather clear that Safiya was in the

-:41:- custody of accused 1 and 3 while at Masthikundu and at Goa.

37. From the medical evidence adduced in the case, it has

come out that the skeletal remains were around 18 months old. The recovery procedure was done on 5/7/2008 and 6/7/2008. The complaint Ext.P1 was given by PW1 to the Adhur police on occurred a few weeks before 22/12/2006. According to PW1, it was on 20/12/2006 that he was called by the accused and asked him to come to Masthikundu.

38. Yet another circumstance which had been proved by the

prosecution, is the false representation made by A1 and A3 to PW1 and PW2. Both of them told the parents of Safiya that the girl was missing effective from 20/12/2006. When the skeletal remains of Safiya were recovered on the basis of confession statement of first accused from Goa, it is rather clear that the said explanation was absolutely false. By the time A1 and A3 knew that Safiya was no more and A1 knew that Safiya was buried in a place at Goa. They in fact misled PW1 and PW2 and even the police.

39. The third and crucial circumstance is the recovery of the -:42:- remains of Safiya on the basis of confession statement of first

accused. The accused had a case that the place of burial was known to the police even before the accused was arrested. The accused has a case that in Exts.D17 which is a local newspaper published on 30/6/2008, there was report Ext.D17(a) that Safiya was buried by the first and fourth accused at Goa and that they were being questioned. DW4 had been examined to prove the said newspaper. But, her evidence would indicate that she had no personal knowledge about the particulars of the news item but according to her, the Editor will be knowing as to how he got information and it got published in the newspaper. It is settled law that newspaper report is not evidence. A reporter may even assume certain factors without any proof. Evidence in this case would indicate that the first accused was arrested on 1/7/2008 as per Ext.P44 arrest memo. It was notified to first accused's father and also to his uncle. He was later produced before the Magistrate. The accused did not complain that he was arrested on the previous day. When materials placed on record indicate the arrest of the accused on 1/7/2008 and it is supported by the evidence of the investigating officer, we find no reason to

-:43:- disbelieve the said statement. The confession statement Exts.P48 and P63 had been recorded after the arrest. Based on Ext.P48, MO12 wooden handle of a knife had been recovered. Ext.P18 is the mahazar.

40. During 313, the accused had given a false explanation.

According to him, he had taken Safiya from Ayyankeri to Masthikundu for the purpose of his brother which is found to be false, once we accept the evidence of PW1 to PW4 and PW11. Safiya was very much staying in the house of accused 1 and 3.

41. Ext.P14 is the seizure mahazar for recovery of MOs 5 to

9. According to the prosecution, Safiya was taken to the

bathroom of F-4 flat and the murder was committed there. When the materials collected from the bathroom were examined by the Forensic Science Lab, presence of blood could be noticed, but its origin could not be traced. Ext.P31 is the said report. But we do not think that absence of such evidence is material.

When the prosecution is able to establish that Safiya was in the custody of accused 1 and 3 and she was working as a domestic worker and the accused 1 and 3 gives a false explanation that she was missing effective from 20/12/2006 and by scientific evidence it is

-:44:-

found that the death occurred two weeks prior to the said date and there is evidence to show that A1 and A3 were at Goa during the relevant time, the inescapable conclusion that could be arrived at is that the victim died while she was in the custody of A1 and A3. Therefore, when the first accused discloses the place where the dead body of Safiya was buried and the other circumstances which we have already narrated are proved by the prosecution, he alone will have to explain as to how the body of Safiya came to his hands. Apparently, he had given a false explanation which is also an incriminating factor against him.

42. Learned counsel for the appellant however has a

submission that when Safiya was in the custody of A1 and A3, in the absence of any evidence to prove as to who had committed the murder, the first accused cannot be asked to explain or to

give evidence against his wife. Such an argument cannot be sustained on account of the fact that during 313 questioning, accused has denied all these facts and he had given an explanation. He had given written submission stating that Safiya was taken to Masthikundu and that he had gone to Ayyankeri to collect Safiya at the instance of his brother Ayoob. He never knew

-:45:- PW1 or PW2. For some time, Safiya was in his native place and thereafter she was sent back home and she never resided with them. He further submitted that he had shifted to Nashwa apartments in 2006 and he was residing in Flat No.F2 on the first

floor. He denied having given a confession statement. He also denied having gone with PW1 to Adhur Police Station. According to him, the case was falsely put up at the instance of Safiya Action Committee. But his explanations are belied by the

oral testimony of PW1, PW2, PW3, PW4 and PW11 who had categorically given evidence stating that Safiya was residing at Goa with accused 1 and 3. When such evidence is available, it is for the first accused to explain as to what happened to Safiya. Of course, 3rd accused also has a duty to explain, but she is not charged with a case of murder. When the circumstance proved in the case clearly points to the culpability of the first accused and the explanation offered by him is found to be false, he cannot take a contention that he is protected from giving evidence against his wife in terms of S.122 of the Evidence Act.

43. As already mentioned, prosecution has proved that Safiya died while she was in the custody of A1 and living in his -:46:-

apartment. Therefore, how Safiya's homicide occurred is within the exclusive knowledge of the accused for which the prosecution cannot adduce any evidence, and it is for the accused to explain the facts which are within his knowledge. In the absence of valid explanation, S.106 of the Evidence Act squarely applies and for that reason also, it has to be found that sufficient evidence had been adduced by the prosecution to attribute guilt on the accused for having committed the murder of Safiya and for having attempted to destroy the evidence punishable under Sections 302 and 201 of I.P.C respectively.

44. Though accused had been found guilty u/s 361 I.P.C.,

from the factual aspects involved in the matter, we do not think that a case of kidnapping from lawful guardianship had arisen in this case. Kidnapping from lawful guardianship is defined u/s 361 of I.P.C., which reads as under:-

361. Kidnapping from lawful guardianship.- Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. -:47:- Explanation.-The words lawful guardian in this section include any person lawfully entrusted with the care or custody of

such minor or other person. (Exception) This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Though there is evidence of PW1 and PW2 that their child was taken to Goa without their consent, we do not think that the said deposition can be believed. They have given their minor daughter for doing domestic work and not baby sitting alone and accused 1 and 3 were residing at Masthikundu. It is also in evidence that Safiya used to call them while at Goa, but, according to them, she was not happy. Therefore, the implied consent of the parents is already there by which they had sent their minor child for doing domestic work in a household. Therefore offence u/s 361 I.P.C. is not made out in this case against accused 1 and 3.

45. The 3rd accused is found guilty for offence under Sections 201 and 361 of I.P.C. As already stated, offence u/s 361 of I.P.C has not been proved in the case. S.201 reads as under:-

201. Causing disappearance of evidence of offence, or giving false information to screen offender.- :-48:- Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false; if a capital offence.- shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; if punishable with imprisonment for life.- and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;.....

46. In order to attract Section 201 of I.P.C., the accused should know or have the reason to believe that an offence has

been committed, he should cause any evidence of the commission of that offence to disappear, or give any information respecting the offence which he knows or believes to be false, with the intention of screening the offender from legal punishment. Apparently, the 3rd accused did not have any active participation in the crime and the prosecution has no such case as well. The allegation against her is that she has given a false -:49:-

information to PW2, that Safiya was no longer with them and she was missing even while they were residing at Goa. PW2 deposed that third accused told her that Safiya was playing with their daughter in their courtyard on 20/12/2006 and thereafter she is not seen. The trial court found her guilty and sentenced her to undergo simple imprisonment for three years and to pay a fine of `5,000/- in default of which to undergo simple imprisonment for 6

months. A3 is the wife of A1 and nothing more could be expected from her other than to conceal the actual facts to ensure that her husband is not implicated in any offence. But it is relevant to note that even before A3 informing PW2 that their daughter was missing since 20/12/2006, the first accused had already informed PW1 about the same. The first accused had even taken PW1 to the police station and Ext.P1 complaint was given to the police. It is in the evidence of PW1 that he thereafter went home and informed his wife that Safiya will be coming during festival time. From the aforesaid evidence, it is clear that the first accused had already informed PW1 that Safiya was missing since 20/12/2006. He further deposed that he had come with his wife PW2 to Masthikundu, the house of the first accused

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and when his wife enquired, she was told that the child was missing and thereafter his wife started crying. Though food was offered, he refused the same. The first accused asked them to go to the police station and thereafter they proceeded to the police station. From the aforesaid evidence, it is rather clear that PW1 and

PW2 were aware that Safiya was missing even from first accused. It was not an information supplied by the third accused alone. Therefore, the first accused is the person who had concealed the information from PW1 and PW2. Under such circumstances, when the information regarding missing of the child has already been given to PW1 by the first accused which was later found to be a wrong information, 3rd accused cannot be found guilty for the same act.

47. As far as the 4th accused is concerned, prosecution case

is that he assisted the first accused to bury the dead body of Safiya. Court below found him guilty for offence u/s 201 r/w S.34 of I.P.C. In order to arrive at such a finding, Court relied upon Ext.P51 confession statement of A4 and the excavator was traced out. According to the prosecution, it is the 4th accused who helped the first accused to bury the dead body by taking a pit for about

-:51:-

5 metres in a marshy area. But what is the role played by the 4th accused is not known. There is no evidence to support the same. There is also no evidence to prove as to whether the excavator which was seized based on Ext.P51 confession statement was used for digging the pit. Ext.P51 cannot be treated as evidence in the case. It is a confession and hence hit by Section 25 of the

Evidence Act. There is no independent evidence to prove that the pit was taken by A4. Only the excavator was recovered. As to who was responsible for digging the pit was not known. Under such circumstances, we are of the view that 4th accused could not be convicted u/s 201 of I.P.C.

48. Now coming to the sentence of the first accused, he

had been given death penalty. Taking into account the facts of the case, this case cannot be categorized as the rarest of rare case. Of course, it is shocking that a girl child who was a domestic worker was murdered and her body was buried. In a recent

judgment of the Apex Court in Viran Gyanlal Rajput v. State

of Maharashtra, (2019) 2 SCC 311), it is held as under:

23. We now turn our attention to the issue of quantum of sentence, particularly the sentence of death awarded to the appellant. Before proceeding further, it would be -:52:- pertinent to recall that life imprisonment is the rule and the death penalty is the exception, and the death penalty is to be imposed only when the alternative of life imprisonment is totally inadequate, and therefore unquestionably foreclosed i.e. if it is the only inevitable conclusion, as per the well-settled legal proposition first enunciated in *Bachan Singh v. State of Punjab*. While determining the sentence, it is equally important for the Court to consider the aggravating circumstances of the crime and the mitigating circumstances of the criminal. Moreover, since the decision in *Machhi Singh v. State of Punjab*, a balancing approach of such aggravating and mitigating circumstances has been adopted, to see if the crime is among the rarest of rare cases.

24. The trial court and the High Court, on an evaluation of

the aggravating and mitigating circumstances of the case, have arrived at the conclusion that the death sentence is warranted in this case. Undoubtedly, the courts were correct in giving weight to the dastardly nature and manner of the crime i.e. kidnapping a girl of the tender age of 13 years, taking her to a secluded area and committing the act of rape and subsequently murdering her by strangulation and burying her body in a field, having disrobed her completely, and also in giving weight to the youth and helplessness of the victim, and to the fact that the appellant proceeded to target her to satisfy his lust. 26. Thus, neither the circumstances of the crime nor the circumstances of the criminal i.e. the appellant, would go to show that the instant matter falls into the category of -:53:- the rarest of rare cases, or that the sentence of life imprisonment is unquestionably foreclosed and grossly

disproportionate. Therefore, in the totality of the facts

and circumstances of this case, we find it fit to commute the death sentence of the appellant to life imprisonment.

49. In Viran Gyanlal Rajput (supra), the minor girl was

raped and murdered. Apex Court while commuting the sentence to life imprisonment directed that the accused shall not be released for a period of 20 years. But in this case, the accused did not have any criminal antecedents. Having come to know about the injury caused to the girl, the idea of the accused was to hide it, probably to avoid any legal complications. True that the action of the first accused is brutal, and so are most of the murders, especially against minor girls. However taking cue from the aforesaid judgment, we are of the view that the death penalty need not be imposed on the first accused and interest of justice will be served in commuting the death sentence of the first accused/appellant to life imprisonment.

In the result,

(i) In DSR No.1/2015 filed by the State, the death sentence is commuted to life imprisonment. -:54:-

(ii) Crl.Appeal No.808/15 filed by first accused is allowed in

part. The conviction under Section 302 is sustained. The death sentence of the appellant is commuted to life imprisonment. The conviction and sentence under Section 361 of I.P.C. is set aside. The conviction and sentence under Section 201 of I.P.C. is sustained.

(iii) Crl.Appeal No.770/15 filed by 3rd accused and Crl.Appeal No.783/2015 filed by 4 th accused are allowed. The conviction and sentence of accused 3 and 4 are set aside. Their bail bonds shall stand cancelled. Sd/- A.M.SHAFIQUE JUDGE
Sd/- N.ANIL KUMAR Rp True Copy JUDGE PS to Judge