

M.V. Mahesh Vs. the State of Karnataka

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Court : Karnataka

Decided On : Jul-14-1995

Reported in : 1996CriLJ771; ILR1995KAR2752; 1995(5)KarLJ712

Judge : M.B. Vishwanath and ;M.M. Mirdhe, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 201, 302 and 316; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 164, 306 and 394; Evidence Act - Sections 25, 26 and 27;

Appeal No. : Criminal Appeal No. 374 of 1993

Appellant : M.V. Mahesh

Respondent : The State of Karnataka

Advocate for Def. : A.B. Patil, Additional State Public Prosecutor

Advocate for Pet/Ap. : R.B. Deshpande, Adv.

Judgement :

Mirdhe, J.

1. This appeal is preferred by the appellants against the judgment dated 12th August 1993 passed by the II Additional Sessions Judge. Bangalore, convicting the appellants-accused for the offence punishable under Section 302 read with S.

34, I.P.C. and sentencing to imprisonment for life and a fine of Rs. 3000/- each and in default R.I. for 4 months each and convicting for the offence punishable under Section 316 read with S. 34, I.P.C. and sentencing to R.I. for 10 years and a fine of Rupees 2000/- in default R.I. for 3 months and also convicting for the offence punishable under Section 201 read with S. 34, I.P.C. and sentencing to R.I. for seven years and fine of Rs. 1000/- in default R.I. for 2 months.

2. After preferring the appeal, appellant No. 2 died. One Putta Thayamma w/o appellant No. 2 filed I.A. No. IV under Section 394, Cr.P.C. to grant her leave to continue the appeal. The said I.A. was heard. The Addl. S.P.P. had no objection to allow the said I.A. and the Court by exercising its power under Section 394, Cr.P.C. granted leave to the applicant Putta Thayamma, who is the wife of appellant No. 2, to continue the appeal. Hence, in view of the said order, the appeal preferred by appellant No. 2 also has continued.

3. We have heard the learned counsel for appellant No. 1 Sri R. B. Deshpande, and Sri P. Srinivasaiah, the learned counsel for the appellant No. 2 and the learned Additional State Public Prosecutor Sri. A. B. Patil for the respondent. State fully and perused the records of the case.

4. The case of the prosecution is as follows :- Appellant No. 1 is the only son of appellant No. 2. He fell in love with one girl by name Beena, who was belonging of Kodavva community. Appellant No. 1 and Beena got married in spite of the objections of appellant No. 2. Beena and appellant No. 1 were living separately from accused-appellant No. 2 in a house bearing door No. 816. First floor, 61st Cross, V Block, Rajainagar, Bangalore, and they were leading a married life there from January, 1988 to 28-11-1998. During that period Beena became pregnant. On 28-11-88 at about 8.30 p.m. appellant No. 1 took Beena for dinner in the car bearing No. MED 5805 belonging to appellant No. 2 to Hotel Imperial situated in Residency Road, Bangalore. After dinner, appellant No. 1 gave some poisonous substance to Beena, as a result of which Beena collapsed in the car. Accused No. 1 appellant No. 1 brought her in an unconscious state to the house of appellant No. 2 and handed over her to appellant No. 2 at about 11.30 p.m. On 29-11-88 the accused carried four bags full of flesh in the same car and scattered the flesh in

the forest area situated in the campus of Agricultural University near Hebbal and G.K. V.K. Campus. Beena was found missing from 28-11-88 at 11.30 p.m. and she was 20 years of age when she married appellant No. 1 Both the appellants-accused in furtherance of their common intention to murder Beena while she was pregnant caused her death by cutting her body to small pieces and scattered those pieces as mentioned above. The complaint in this case is filed by P.W. 32 Md. Khalander as per Ex. P-14, P.W. 46 Nagaraj registered the complain and both the appellants were arrested. They made voluntary statements after their arrest by the police and in pursuance of the voluntary statements made by the accused, the bones were recovered from the Agricultural University Campus, Hebbal, and also the G.K. V.K. Campus. The police after completion of the investigation filed charge-sheet against the appellants.

5. There are no eye witnesses to connect any of the appellants with the offences alleged against them in this case. The case of the prosecution is based on circumstantial evidence. An accused can be convicted even on the basis of circumstantial evidence. But, the standard of circumstantial evidence required for the conviction of the accused is that the circumstances alleged by the prosecution against the accused must be proved beyond reasonable doubt and the chain of circumstances must be so close so as to exclude all the reasonable hypothesis of the innocence of the accused. In other words, the circumstances must be consistent only with the guilt of the accused and not with his innocence. The trial court has convicted the appellants finding that the circumstantial evidence led by the prosecution comes to this standard of proof and the prosecution has proved the guilt of the appellants beyond reasonable doubt.

6. In : 1984 CriLJ1738 (Sharad Birdhichand Sarda v. State of Maharashtra) the Supreme Court has held as follows :-

'The following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.

(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.'

In : AIR 1990 SC79 (Padala Veera Reddy v. State of Andhra Pradesh) the Supreme Court has held that failure of prosecution to prove guilt of the accused decisively and when the prosecution has failed to prove its case against the accused, an accused cannot be convicted merely on the ground of suspicion. The prosecution case is that appellant No. 1 administered poison to Beena and thereafter the person of Beena was handed over to appellant No. 2, who cut her into pieces and on the next day the cut pieces of the body of Beena were scattered throughout the campus of U.A.S. and G.K. V.K. When the prosecution case is the case of murder by poisoning what are the circumstances to be established for an accused to be convicted is laid down by this Court in : ILR 1995 KAR368 (State of Karnataka v. H. Koroji Naik and others) as follows :-

'In the cases of murder by administration of poison the Court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction :

(1) there is a clear motive for an accused to administer poison to the deceased.

(2) that the deceased died of poison said to have been administered.

(3) that the accused had the poison in his possession.

(4) that he had an opportunity to administer the poison to the deceased.'

The trial court has convicted both the appellants finding that the circumstantial evidence led by the prosecution comes to the standard as required by law proving the guilt of the appellants beyond reasonable doubt.

7. In a case of murder the first point that is required to be proved by the prosecution is that the victim died a homicidal death. In this case the prosecution asserts that Beena died a homicidal death at the hands of the two appellants. The body of Beena was not found at all. What is recovered by the Investigating Agency are M.Os. 12 to 20 - which are the bones and the skull of a female person which are alleged to have been recovered from the campus of U.A.S. and G.K. V.K. in pursuance of the voluntary statements of the accused. It is also the case of the prosecution that these bones were sent to P.W. 35 who tested the bones and certified that the bones were of a female person and thereafter they were sent to P.W. 52 Dr. V. K. Kashyap for D.N.A. test and P.W. 52 after the test opined that the bones were of a person aged between 18 and 28 years. The trial court has held on the basis of the evidence led by the prosecution that the said bones and the skull were those of Beena and also she died a homicidal death. Now, this finding of the trial court will have to be assessed by this Court to find out whether it is sustainable in view of the evidence on record.

8. P.W. 47 A. Abdul Majeed is the Circle Inspector of Police who arrested the accused and who has deposed that both the appellants made a voluntary statements before him as per Exs. P-78 and P-79 and led them to the said campus and M.Os. 12 to 20 were recovered from those places and he seized them under Exs. P-26 and P-27. So far as recovery of the bones in pursuance of the alleged voluntary statements of the appellants is concerned we will deal with this aspect of the case later. But the prosecution case is that these are the bones of Beena. The bones were sent to P.W. 35. He has deposed that he received the requisition Ex. P-46 from the C.P.I. Rajajinagar along with a sealed box containing bones for examination and he has given the details of the bones received by him. He has further stated that the above bones belong to a human female but the cause of death could not be furnished from the bones examined. Thereafter the bones were sent to P.W. 52 the expert in Deoxyribo Nucleic Acid test P.W. 42 Rathidevaiah is the mother of Beena. P.W. 43 is the younger sister of Beena and

P.W. 50 is the younger brother of Beena. They have deposed that they came to the hospital and their blood samples were taken. P.W. 49 Dr. Balakrishna M.A. has deposed that he took the blood samples of Rathidevaiah, Leena and Nanjappa to Hyderabad. P.W. 52 Dr. V. K. Kashyap has deposed that he received the bones and also the blood samples. He has also deposed that he conducted the examination and investigation on the bones sent to him and he has opined that the bones sent to him belonged to a female who was the biological child of P.W. 42 Rathidevaiah. This is the basis for the trial court to come to the conclusion that the prosecution has been able to prove beyond reasonable doubt that the bones were the bones of Beena.

9. P.W. 52 is Dr. V. K. Kashyap. He has deposed about his qualifications and also about his experience as a teacher and he has also deposed that for the last five years prior to his deposition his field of specialization was developing D.N.A. (Deoxyribo Nucleic Acid). He has further deposed that he received the letter and also a parcel containing bone pieces and after studying the anatomical and anthropological of the bones marked at Ex. A to I and also conducted immunological examinations he found that all the bones belonged to a single human of age group between 20 to 25 years + or - two years. He has also deposed that he took D.N.A. from a known person of M/s. C. D. Rathidevaiah and Gangamma and Nanjappa and he has further deposed that from the matching of profiles it can be inferred that bones forwarded to him should be of a female - a biological child of Mrs. C. D. Rathidevaiah and closely genetically related to Mr. C. D. Nanjappa and C. D. Gangamma. It will be proper to make it clear that C. D. Gangamma is none else than Leena examined as P.W. 43 in this case.

10. P.W. 52 has deposed as follows :-

'It is the genetic material which encodes the characteristic of individual which is responsible for its structure and function. 60% of the part of the D.N.A. in an human function can be attributed for the remaining 40% part so far scientists are not aware of its role in the body.'

He has admitted that in D.N.A. analysis the most important criteria are No. 1 availability of suitable D.N.A. i.e. high molecular weight of D.N.A. approximately 10

microgram in quantity is required. He has further admitted in his cross-examination that most of the D.N.A. was degraded except 5 microgram approximately which were used for the test. So one thing that becomes clear from the evidence of P.W. 52 is that though 10 micrograms of D.N.A. was required for the test, the available quantity of the D.N.A. was only 5 micrograms and the most of the D.N.A. was degraded. So, the material that was available to this expert for his investigation and examination was not sufficient for conducting the D.N.A. test. The expert also admits that there is no national standard set or established for this examination in our country. He has further volunteered as follows :-

'..... We follow the standards established by us for DNA profiling.'

He has further stated in his cross-examination as follows :-

'This is only first case for me to decide on the basis of bone marrow and the DNA obtained from the blood or blood relatives (in the absence of one of the parents).'

He has also stated as follows :-

'If sufficient quantity of DNA is available in the bone. I would have repeated the experiments conducted for DNA profiling from the step two i.e., the restriction digesting to the final step of auto radiogram preparation.'

He has further stated that it is always good to repeat the experiment for confirmation.

He has also admitted as follows :-

'The amount of high molecular weight DNA recovered from the bone marrows was not adequate for performing multi-locus probe analysis. So I have not conducted the same.'

From this answer given by the expert-P.W. 52 it becomes apparent that the quantity of molecules that was required for conducting the test was not sufficient and the said test could not be repeated for confirmation for want of quantity and the expert has followed not any standard procedure but the procedure set up by him only and the case reported by a P.W. 52 was a first of its kind since he has to

opine about the biological origins of the bones on the basis of bone marrow and the DNA obtained from the blood or blood relatives - i.e. from one parent. The evidence of P.W. 52 is the evidence of an expert, who has given his opinion. The point before this Court is whether it will be safe to rely on the opinion of P.W. 52 to come to the conclusion that the bones belonged to Beena. From his evidence it is apparent that the test held by him cannot be said to be a fool-proof test. Another very important circumstance to be noted is that this witness has deposed that he sought information from the police as to whether that person was limping or not, as the structure of callous shows that the person should be limping. In other words the P.W. 52 has opined that the bones belonged to a person who was limping in her life. P.Ws. 2, 3, 4, 5, 9, 19, 36 and 43 are examined to prove the marriage of appellant No. 1 with Beena. P.Ws. 2, 4, 5 and 18 are examined to prove that Beena was pregnant. P.W. 42 is the mother of Beena. P.W. 43 is the younger sister of Beena and P.W. 50 Nanjappa is the younger brother of Beena. It is significant to note that though these witnesses claim to have seen Beena in her lifetime, none of them deposed that Beena was limping. It has come in the evidence of some of the witnesses that Beena was a very beautiful girl. If a person like Beena, who was beautiful who was also limping, some of the witnesses would not have failed to mention about the draw-back in her personality. P.Ws. 42, 43 and 50 have been recalled and they have deposed that Beena was limping when she was alive. It is pertinent to note that these witnesses have not stated about the limping of Beena in her lifetime when they were first examined before the receipt of the opinion of P.W. 52. After the opinion of P.W. 52 was received, these witnesses have been recalled and they have stated that Beena was limping in her lifetime. It is obvious that these witnesses are trying to modulate their evidence to suit their evidence with the opinion of P.W. 52 Dr. V. K. Kashyap. When a witness tries to modulate his or her evidence to suit the particular aspect of the prosecution case, the Court is not required to accept his evidence on its face value. In this case the obvious attempt of the P.Ws. 42, 43 and 50 is to make the opinion of P.W. 52 acceptable to the Court by deposing that Beena was limping in her lifetime. If a beautiful girl like Beena had a defect naturally some of the witnesses who saw her in her lifetime who were concerned with her marriage with appellant No. 1, the witnesses who had deposed about her pregnancy, witnesses who had

spoken about her movement on that night would have definitely stated about this physical defect of Beena. But none of them have stated so. But her mother, her brother and sister have deposed about the limping of Beena in her lifetime when they were recalled after the receipt of the report of P.W. 52. In our opinion, these reasons are more than enough to hold that it will not be safe to rely on the evidence and opinion of P.W. 52 to come to the conclusion that the bones - M.Os. 12 to 20 that were sent to P.W. 52 for examination were the bones of a female person who was the biological child of P.W. 42 - Rathidevaiah and who was also biologically related to P.W. 43 Leena and P.W. 50 Nanjappa. The trial court has not examined and assessed the evidence properly in this record. Therefore, the prosecution has failed to prove beyond reasonable doubt that the bones M.Os. 12 to 20 were the bones of Beena.

11. The next point to be proved by the prosecution is that Beena died a homicidal death. The prosecution has not been able to prove beyond reasonable doubt that the bones were of Beena. The doctor who first examined the bones is Dr. S. B. Patil (P.W. 35), who has opined that these were the bones of a female person. He has opined that the bones belonged to human female who died recently. But the cause of the death of that person cannot be furnished from the bones examination. In Ex. P-51 the doctor has opined as follows :-

'The bone belongs to human origin of female sex, age cannot be ascertained since both ends are missing. Cause of death cannot be opined since there are no antemortem fractures. Time since death also cannot be opined since it is found in the bamboo grove.'

From the opinion that is given by P.W. 35 it is apparent that the prosecution has also failed to prove that Beena died a homicidal death.

12. In this case the prosecution has not been able to prove that the bones - M.Os. 12 to 20 were of Beena or that the person to whom those bones belonged died a homicidal death. If the prosecution has not been able to prove the corpus delict in this case, it can still prove the guilt of the accused from other pieces of evidence, which if acceptable can lead to the inference that the said person was murdered. In : 1960 CriLJ682 (Anant Chintaman Lagu v. The State of Bombay) the

Supreme Court has held as follows :-

'If the evidence in a particular case does not justify the inference that death is the result of poisoning because of the failure of the prosecution to prove the fact satisfactorily either directly or by circumstantial evidence, then the benefit of the doubt will have to be given to the accused person. But if circumstantial evidence, in the absence of direct proof of the three elements, is so decisive that the court can unhesitatingly hold that death was a result of administration of poison (though not detected) and that the poison must have been administered by the accused person, then the conviction can be rested on it.'

This Court following this ruling in : ILR 1995 KAR368 quoted above has also held that the circumstantial evidence of the prosecution cannot be rejected merely because the medical evidence in the case is negatived.

13. Now, it will have to be seen whether the other circumstances alleged by the prosecution has proved the guilt of the appellants beyond reasonable doubt. The circumstances alleged against the appellant can be classified as follows :-

- (1) Marriage of appellant No. 1 with Beena;
- (2) Beena became pregnant and was expecting a child;
- (3) Movement of appellant No. 1 and Beena on that night;
- (4) Conduct of appellant No. 1 and the explanation given by him to some persons about the missing of Beena;
- (5) Seeing of A-1 and A-2 in the car by P.W. 14 on 29-11-88 at about 9.30 a.m.;
- (6) Going of appellants in their car - M.O. 10 into the campus;
- (7) Availability of poison - potassium cyanide;
- (8) After arrest of the appellants, appellants - 1 and 2 making voluntary statements and leading the police and mahazardars to the places in the campus in U.A.S. and G.K. V.K. and recovery of M.Os. 12 to 20;

(9) Extrajudicial confession made before P.W. 27 - the Reporter of Indian Express.

14. P.Ws. 2, 3, 4, 5, 36, 43, 9 and 19 had deposed that appellant No. 1 married Beena in accordance with Arya Samaj rites and they were residing together as husband and wife, but separately from appellant No. 2. This fact is also not disputed by the appellants. Therefore, it can be safely taken that the prosecution has proved beyond reasonable doubt that appellant No. 1 had fallen in love with Beena and had married her in accordance with Arya Samaj rites and both of them were leading a married life, separately from appellant No. 2.

15. The next circumstance that is relied upon by the prosecutor is that Beena had become pregnant after the marriage with appellant No. 1. We have got the evidence of P.Ws. 2, 4, 5, 7 and 8 on this point. Dr. Malathi Rao - P.W. 18 has deposed that she checked Beena and found that she was pregnant. In view of this evidence it can safely be held that the prosecution has been able to prove beyond reasonable doubt that Beena became pregnant after her marriage with appellant No. 1. The third circumstance that is relied upon by the prosecution is the movement of appellant No. 1 and Beena on that night. The evidence of P.Ws. 1, 2, 6 and 29 is required to be considered on this point. Though P.W. 1 has sought to be examined as a witness who gave information to the police about the movement of appellant No. 1, he has deposed that he was working in the T.V. shop of appellant No. 1 and he does not know anything about the movements of appellant No. 1. He has been cross-examined by the prosecution. So, the evidence that this witness has given before the court will be of no avail to the prosecution to connect any of the appellants with the offence alleged against them. But, his statement has been recorded by P.W. 33 - the III Addl. C.M.M. Bangalore city under Section 164, Cr.P.C. In that statement P.W. 1 has stated about the movements of appellant No. 1, Beena and himself on that night. Now, it will have to be seen as to whether this statement can be made use of by the prosecution against the appellants. P.W. 1 admits in his cross-examination that on 18-12-88 the police arrested him and thereafter he could not go to the shop of accused No. 1. Ex. P-40 is the F.I.R. in this case. P.W. 1 is shown as one of the accused in this F.I.R. If his statement recorded under Section 164, Cr.P.C. is perused, it is clear that he is the person who was with Beena and appellant No. 1 on the night and he was present when

appellant No. 1 gave some tablet to Beena and he was also with them when appellant No. 1 brought her in her unconscious state, left the house of appellant No. 1 and it is further his statement that thereafter he and appellant No. 1 moved through Cubbon Park and roamed about in the city in the same car on that night and the next morning at about 6 a.m. they took the car to the house of A-2 and A-2 brought four bags which were loaded and put them in the car and A-1 drove the car towards Agricultural College and G.K. V.K. campus and A-2 took those pieces of human flesh emptied from the bags and returned with empty bags. In Ex. P-40 he is shown as the accused. When an accused statement is to be recorded by a Magistrate under Section 164, Cr.P.C., the Magistrate recording the statement is required to explain to the person making it clear to him that he is not bound to make such a statement and if he does so, it may be used as an evidence against him and that Magistrate shall not record any such confession unless he has reason to believe that the confession made is voluntary. But the evidence of P.W. 33 discloses that the learned Magistrate who recorded the statement has not followed the mandatory provisions of law. He has not warned P.W. 1 before recording the statement. He has not even given some time to think whether he should make such statement. There is no certificate appended to the statement of P.W. 1 recorded under Section 164, Cr.P.C. disclosing that the learned Magistrate has followed the mandatory provisions of Section 164, Cr.P.C. before recording the statement. Therefore, statement of P.W. 1 recorded by P.W. 33 cannot be used as a confession of P.W. 1. He is not an approver. The learned Public Prosecutor submits that on the date when the learned Magistrate P.W. 33 recorded the statement of P.W. 1, P.W. 1 was not an accused. If P.W. 1 was not an accused, then he must be an approver. An accused can be made an approver by following the procedure prescribed under Section 306, Cr.P.C. with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies. The Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry or the trial of the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. If it is the case of the

prosecution that subsequently P.W. 1 was not an accused, then the prosecution must show that he had become an approver on tendering of pardon before the competent Magistrate. But, there is no material to hold that at any time any pardon was offered to P.W. 1 and thereafter the statement was recorded by the Magistrate to P.W. 33. Therefore, the statement of P.W. 1 recorded under Section 164, Cr.P.C. by P.W. 33 cannot also be taken as a statement of approver. Ex. P-44 clearly discloses that P.W. 1 was one of the accused in this case. But, for the reasons best known to the prosecution, the police have not sent this accused for trial. His statement recorded under Section 164, Cr.P.C. could not have been made use of against him if he were to be sent as an accused for the infirmities noted by us in recording the statement under Section 164, Cr.P.C. When such a statement cannot be used against a person making that statement, it could be much less used against the other accused in that case. The statement under Section 164, Cr.P.C. is also not a statement of an approver. From that angle also the statement cannot be used against any of the accused. Therefore, the said statement of P.W. 1 under Section 164, Cr.P.C. will have to be excluded from consideration. From the evidence of P.W. 1 who has turned hostile and his statement under Section 164, Cr.P.C. being not admissible against the co-accused, for the reasons discussed above it will have to be held that neither the evidence of P.W. 1 nor his statement under Section 164, Cr.P.C. will be of any use to the prosecution to connect any of the appellants with the offences alleged against them.

16. Then there is the evidence of P.W. 2 Vijayalakshmi, who has deposed that on 28-11-88 there was a ceremony in one of their neighbour's house i.e. Kamala's house in connection with Kamala becoming pregnant and Beena attended that ceremony and told her that she was also pregnant and Beena gave a present to Kamala in that ceremony and she also expressed her desire that she would have her delivery in some of the nursing home at Bangalore itself and as she was pregnant she borrowed a shawl from her and went with appellant No. 1. She has further deposed that on 29-11-88 P.W. 1 brought the shawl and returned to her house and told that Beena had gone to her mother's house. P.W. 6 Rajendra has deposed that on 28-11-88 there was a function in the house of the occupant of the ground floor and appellant No. 1 and his wife Beena attended the function and

they went away in a car. P.W. 28 is Kamalamma. She has deposed that Beena attended her house for the function on 28-11-88 and she did not see Beena thereafter. P.W. 29 is the daughter of P.W. 2. She has stated that P.W. 1 returned the shawl to her on the next day of the function i.e. on 29-11-88. P.W. 6 is a tailor, who was working in his shop on 28-11-88 in the evening and he claims to have seen appellant No. 1 and Beena going in a car after attending the house of the occupant in the ground floor of the building. When questioned as to which side his shop faces, he says 'he cannot say'. He says that he does not remember how many persons were present in the shop when appellant No. 1 and Beena went in a car. He admits that from 5-30 onwards till the shop is closed customers will be coming. He is not able to say who were the customers who visited his shop on that day. It looks rather strange that this tailor whose shop was situated on the opposite side is not able to say to which side his shop faces. Naturally there were many persons coming and going to his shop as his shop located in a busy locality. There does not appear to be any reason for this person to mark that appellant No. 1 and Beena going in a car. There was no necessity for him to remember their going in a car on that night. Therefore, it will not be safe to rely on the evidence of such a witness to come to the conclusion that Beena and appellant No. 1 went in M.O. No. 10 on that night.

17. Then remains the evidence of P.Ws. 2, 28 and 29. P.W. 28 does not speak anything about appellant No. 1 being present with Beena on that night. But P.W. 29 has deposed that Beena borrowed a shawl from her, and that appellant No. 1's servant - P.W. 1 returned the shawl. So far as the returning of the shawl is concerned there is some discrepancy. P.W. 2 says that the shawl was returned to her by A-1 whereas P.W. 29 her daughter says that the shawl was returned by P.W. 1. There is contradiction in their evidence on this point. P.W. 3 is the landlord of the house where appellant No. 1 was staying with his wife. He has deposed that appellant No. 1 vacated the house and told him that his wife had gone to her mother's house. He has also deposed that appellant No. 1 had left luggage of his in his house even after vacating the house. In his cross-examination he has stated that it is mentioned in Ex. P-5 that a black shawl was also seized. That means the black shawl was found in the house of P.W. 3. If really shawl was borrowed by Beena and returned either by P.W. 1 or by appellant No. 1 there was no reason for

the black shawl to be found in the house of P.W. 3 and recorded to be so as per Ex. P-5. That shawl is also not produced. The evidence of P.W. 2 is to the effect that appellant No. 1 and Beena came to her house and then they left on the night. Beena was none other than the wife of appellant No. 1. There is nothing strange or unusual for Beena accompanying her husband in the car belonging to her father-in-law. Moreover, the prosecution is not able to prove in this case that Beena died a homicidal death or the time of the death of Beena. Therefore, even the evidence of P.W. 2 which is to the effect that she saw appellant No. 1 and Beena going out cannot be an incriminating circumstance against the appellants.

18. The next circumstance that is relied upon by the prosecution is that appellant No. 1 vacated the house belonging to P.W. 3 and gave false explanation that his wife had gone to her mother's place, P.W. 3 has deposed that on 28-12-88, when he reached home at 9 p.m. his mother told him that appellant No. 1 had told her that his wife had gone for delivery and he was vacating the house. He was also stated that two days thereafter appellant No. 1 met him and told that the mother of Beena took her to Coorg for delivery and after her return he will occupy a bigger house. P.W. 17 is the mother of P.W. 3 and she has also deposed that she saw Beena last time in the function of Kamalamma and she did not see her thereafter and on the next day morning after her son left for his duties, appellant No. 1 came and told her that the mother of Beena came and took her and asked her to inform this to her son. It is not disputed in this case that Beena had become pregnant and she was in seven months of her pregnancy. It was the first child of Beena and appellant No. 1. It is not unusual for a lady to go to her parental house for the delivery of her first child. P.W. 17's evidence is that A. 1 informed her that mother of Beena took her for delivery. P.W. 17 has admitted that P.W. 3 has not stated so before her. The evidence of this witness is not safe to rely upon because she has made improvement in her evidence. When she made improvement about A-1 coming and informing that mother of Beena came and took her for delivery, the evidence of P.W. 3 is also not safe to rely. His evidence regarding accused himself informing that Beena was taken to Mercara by her mother for delivery also cannot be taken as an incriminating circumstance in view of the fact that the prosecution has not been able to prove beyond reasonable doubt that Beena has in fact died and met with a homicidal death.

19. The learned Additional State Public Prosecutor submits that the mother of Beena examined as P.W. 43 in this case has not deposed that Beena has come to her house and though Beena was missing from his house the husband of Beena has not given any complaint alleging about missing of his wife to the police and therefore the explanation offered by appellant No. 1 is false. The evidence of P.W. 19 will have to be seen in this regard to find out certain antecedents in the life of Beena. P.W. 19 is a mechanic at Rajajinagar, Bangalore. He has deposed that appellant came to his garage and told him that his lover Beena took sleeping tablets and she was admitted in Victoria hospital. He has further deposed that they went to Victoria hospital and took Beena and came to their garage. It is further his evidence that appellant No. 1 was not willing to marry and he advised him to marry her. He also admits that he took Beena to his house and kept in his house for 3 to 4 days. He admits in the cross-examination that in 1983-84 he was on the list of rowdies. He has further admitted that he continued to be in the rowdy list of Magadi Road Police Station even on the date of evidence. The evidence of P.W. 19 discloses that Beena attempted to commit suicide once before her marriage with appellant No. 1 and a rowdy person like P.W. 19 was required to intervene and advise appellant No. 1 to marry her. It also discloses that he had taken Beena to his house and kept her in his house for 3 or 4 days. In view of these antecedents of the life of Beena it cannot be said that appellant No. 1 telling some persons that his wife had gone for delivery to her mother's place was a lie. Because the possibility of Beena missing from her mother's house after going out also cannot be ruled out in this case.

20. The next circumstance that is relied upon is that seeing of appellants-1 and 2 in the car by P.W. 14 on 29-11-88 at about 9.30 a.m. The evidence of P.W. 14 is to the effect that he runs a bakery and occasionally he was borrowing money from appellant No. 2 whenever he used to face problem and that on 29-11-88 at about 9.30 a.m. while he was passing in front of the T.V. shop of appellant No. 1 he saw A-1 and A-2 coming in a car along with their servant P.W. 1 and they stopped their car there and he went to A-2 and asked for money and he found appellant No. 2 was not smiling. He has further deposed that appellant No. 2 used to tell him that his son had married a girl from other caste and so he lost his respect. He admits that there was a lot of traffic on the road at that time. He also admits that he did

not enquire with A-1 about his marriage. It looks rather strange as to why the appellant No. 2 who was working as a Professor in a college should go to the extent of sharing his feelings about the marriage of his son with a person who is running a bakery like P.W. 14. Even the conduct of P.W. 14 in not enquiring A-1 about what appellant No. 2 told him appears unnatural. If appellant No. 2 had complained to P.W. 14 about the conduct of his son in marrying a girl from another community, naturally that should have prompted P.W. 14 to ask A-1 the reason for up setting his father by marrying a girl from another community. Even the remembering of the date and time about meeting of appellants 1 and 2 on that day appears to be improbable P.W. 14's evidence is that he saw appellant No. 1 along with appellant No. 2 on 28-11-88 at 9.30 a.m. But the evidence of P.W. 10 Shambulingappa, who is a Scientist working in the same institution is that the working hours of the University are from 8.30 a.m. to 4.30 p.m. with lunch break of half an hour between 12.30 to 1 p.m. and that he is the custodian of the attendance register and all his subordinates were signing the attendance register within few minutes of 8.30 a.m. and he has also deposed that A-2 attended the office on 29-11-88. This evidence goes to show that on 28-11-1988 appellant No. 2 attended the office. P.W. 10 is the Assistant Administrative Officer. He has also deposed that Ex. P-72 is the original attendance register and it was required to be signed daily between 8.45 and 9 a.m. in the morning session and he has also deposed that appellant No. 2 has initialled on 29-11-1988. There pieces of evidence show that appellant No. 2 had attended the college on 29-11-1988 and was in the college from 8.30 a.m. to 4.30 p.m. Therefore, the evidence of P.W. 14 to the effect that he saw appellants 1 and 2 on that day going in the car at 9.30 a.m. cannot be accepted.

21. The next circumstance that is relied on by the prosecution against the accused is that appellants-1 and 2 entered into the campus of the college on 29-11-1988 at 8 a.m. in their car. The evidence of P.Ws. 7 and 8 would be relevant on this point. P.W. 7 has deposed that he was working as a security guard on that day and Ex. P6 is the book in which entries are made about the entry and exist of the vehicles from the campus and Ex. P6(a) is the entry made by him and as per Ex. P6(a) a car bearing No. MEO 5805 came at the gate at about 8 a.m. and he has, further stated that he does not know who was driving the car and he also stated that he

could not identify any of the accused. From Ex. P6(a) it could be inferred that the car bearing No. MEO 5805, which obviously refers to M.O. 10, entered into that premises. But his evidence does not disclose that it is the appellants who were in the car because he has stated that he was not able to identify the persons driving the car and he was not able to identify any of the accused also. He has admitted that Rajajinagar police have given him in writing as to what he has to say in the court and he has brought it to the court and produced it and that is Ex. D2. It clearly shows that he has been tutored by police to depose in a particular manner. Not only that even a statement has been given to him in writing as per Ex. D2(a). Even the entry Ex. P6(a) is not in his handwriting though the remaining entries are in his handwriting. There are no entries pertaining to 28-11-1988. That goes to show that Ex. P6(a) is not properly maintained. Not only that if P.W. 6 were to be on duty on that day at that time certainly Ex. P6(a) would have been in his handwriting as are the other entries of that day. Moreover, he is a tutored witness as is evidenced by Ex. D2 given to him by Rajajinagar police. Even he admits that he has been tutored by Rajajinagar police to depose in a particular manner. P.W. 8 is another witness who has deposed that he has checked the entry at Ex. P6(a) by signing at Ex. P6(c). But his evidence will not take the prosecution case any further in view of the fact that P.W. 6 is found to be a tutored witness unworthy of any reliance. Added to this is the circumstance that Ex. P6(a) is not in his handwriting. Therefore, this circumstance will not be safe to be relied upon against any of the appellants.

22. The next circumstance relied upon by the prosecution is that the poison potassium cyanide was available to appellant No. 2. It is the case of the prosecution that appellant No. 2 gave some medicine or tablet to Beena after they had their food on that night. The case is that it is appellant No. 1 who administered poison to her. There is no evidence at all to lead to the inference that at any time appellant No. 2 gave any poison to appellant No. 1 to administer it to Beena. Appellant No. 2 admittedly was an Associate Professor of Entomology, which is a study of insects. It has also come in evidence that potassium cyanide is required by students to study Entomology. P.Ws. 11 and 12 deposed that potassium cyanide was available in the college. Looking to the profession of appellant No. 2 it cannot be an incriminating circumstance if potassium cyanide is available in the

college, where he was working as Professor, more so when the same is required for study purposes. There is no evidence to show that any potassium cyanide was found in the personal custody of appellant No. 2 or in his house. Appellant No. 2 was working as Associate Professor. He must have kept a cupboard or a locker in the college where he could keep his personal belongings during his working hours. There is no evidence to show that any poison was found in any cupboard or locker that was assigned to him for keeping his personal belongings. The institution is an agricultural science college and it is but natural that potassium cyanide was kept there for study purposes. Therefore, mere finding of potassium cyanide in the institution as deposed by P.Ws. 11 and 12 cannot be an incriminating circumstance against any of the appellants unless it is shown that the said poison was in the personal custody and possession of appellant No. 2 and appellant No. 2 gave it to appellant No. 1 or that appellant No. 1 had any such poison in his personal custody or possession. The prosecution has not been able to prove this aspect of the case. Hence, this also cannot be an incriminating circumstance against any of the accused.

23. The next circumstance relied on by the prosecution to drive home the guilt of the accused is the extra-judicial confession supposedly made by the accused-appellants before P.W. 27, a press reporter. The report of the confession is published in newspaper and the same is produced at Ex. P29. P.W. 27 - Alan Mendonsa is a reporter in Indian Express daily. He has stated that after learning that the appellants were in police custody he went to the Rajajinagar police station and saw the accused and he talked with them and put them certain questions and the two accused answered his questions and whatever they told him was published in the Indian Express daily on 27-8-88 and a copy of the said publication is produced at Ex. P39(a). This witness admits that he talked with the accused when the accused were in police custody. He also admits that Sub-Inspector was there with him and plain clothes police were also speaking with the accused when he went there. Sec. 26 of the Evidence Act lays down that no statement made by any person while he is in custody of police officer unless it is made in the presence of a Magistrate shall be proved against the said person. It is not the evidence of P.W. 27 that there was any Magistrate present in the police station at the time when the two appellants were alleged to have made the statements. As per the

admission of the witness himself, the appellants were in police custody and the police officials were also present there. In view of these admissions, Ex. P39(a) is hit by the provisions of Sec. 26 of the Evidence Act and the alleged statement cannot be held to have been proved against the accused/appellants. It is admitted by P.W. 27 in his evidence that D.C.P. West, Bharani was present when he went there and he gave the history of the case to all the newspapers and the same was published. His admission that the papers published the history given to them by Bharani goes to show that he had known the history of the case from the D.C.P. Thus, the extra-judicial confession cannot be treated as held to have been proved against the accused.

24. The last circumstance relied on by the prosecution is the recovery of M.Os. 12 to 23 on the information of accused/appellants. P.W. 47, C.P.I. has deposed that soon after their arrest the accused persons made voluntary statements as per Ex. P78 and P79 and led police and panchas to the Agricultural Science College campus and showed the place from where M.Os. 12 to 20 were seized. He has also deposed that M.Os. 21 to 23 were also recovered from the house of appellant No. 2. So far as recovery of M.Os. 12 to 20 is concerned they are recovered from a place which is open to all and accessible to any person in the campus and G.K. V.K. It cannot also be said to be a recovery in view of the evidence of P.W. 32 who had deposed that after he questioned P.W. 1, P.W. 1 narrated to him the entire incident and throwing away of the human flesh in the Agricultural Science College campus and the G.K. V.K. premises. From this evidence it is clear that the police were in the know of the place where the bones were scattered. Thus the police knew the place where the bones were allegedly strewn even before the accused volunteered the statements as per Ex. P78 and P79. In *Makhan Singh v. State of Punjab*, : AIR 1988 SC1705 Supreme Court held that where the I.O. had earlier information about the dead bodies being buried in the field even before the accused made statement leading to the recovery, exclusive knowledge of the bodies being buried cannot be attributed to the accused on the basis of recovery of the bodies from the open field. Supreme Court further held that since the exclusive knowledge to the appellant cannot be attributed, the evidence under Section 27 also cannot be said to be a circumstance against the accused. Similarly in *Thimma v. State of Mysore*, : 1971 CriLJ1314 (Head Note B) at para

10 Supreme Court while dealing with information given by accused which led to a discovery held that once a fact is discovered from other sources, there can be no fresh discovery even if the relevant information is extracted from the accused and the courts will have to be watchful against the ingenuity of the I.O. in this behalf so that the protection afforded by the wholesome provisions of Sections 25 and 26 of the Indian Evidence Act is not whittled down by the mere manipulation of the record of the case diary. In this case the I.O. having known the fact before hand that parts of flesh were strewn in the campus of U.A.S. as is evident from the evidence of P.W. 32, the information given by accused as per Ex. P78 and P79 is inadmissible in evidence under Section 27 of the Evidence Act. It is also the case of the prosecution that M.Os. 21 to 23 were recovered from the house of appellant in pursuance of the voluntary statement of appellant No. 2. The said M.Os. are household articles and there is no evidence to show that they were blood-stained. Moreover, this recovery also will not be admissible in view of Ex. P78 and P79 not being substantive evidence. This Court in *Vijayakumar v. State* : ILR 1994 KAR491 has held as follows :

'Section 27 says that no much of the information that distinctly leads to the discovery of a fact alone is admissible in evidence and it is exception to Sections 25 and 26 of the Evidence Act. Therefore, so much of the information as leads to discovery of a fact much be proved like any other fact and recording in the deposition of the prosecution leading evidence of an Investigating Officer that he recorded a particular statement as per certain record made by him and exhibited cannot take place of substantive evidence.'

In view of the law laid down by this Court Ex. P78 and P79 cannot be considered to be substantive evidence. Therefore the alleged recovery of the bones and weapons can also not be a circumstance proved by the prosecution against any of the appellants. Hence, summing up our discussion on the evidence led by the prosecution in the case, we are of the opinion that the trial court overlooked the various infirmities in the case of the prosecution. A close scrutiny of the prosecution evidence discloses that the chain of circumstances set up by the prosecution in support of its case are not so closely linked to exclude all hypothesis of the innocence of the accused. The absence of Beena or the alleged

false explanation given by appellant No. 1 may raise some suspicion, but it has been held time and again that no accused can be convicted of any offence merely on the basis of suspicion however grave it may be. The guilt of the accused should be proved beyond reasonable doubt and suspicion, however grave, can never take the place of proof. In this case, the prosecution has failed to prove that Beena died a homicidal death or that the bones recovered were bones of Beena. The other circumstances we have referred to will not be sufficient for any court of law to convict the accused. Hence, we proceed to make the following :

ORDER

The appeal is allowed. The judgment of the trial court is set aside. Appellants - 1 and 2 are acquitted of the offences with which they have been charged. Appellant No. 1 is set at liberty forthwith.

The order regarding the confiscation of the car M.O. 10 is set aside and M.O. 10 is ordered to be returned to the appellant.

25. Appeal allowed.