

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.255 OF 2009

**MOHD.SAMIR MOHD. JUBER SHAIKH)
Aged 20 years, Indian Inhabitant,)
R/at. Plot No.22/H/4 Bainganwadi)
Govandi, Mumbai - 400 043.)
At present at Dhule Central Prison)...APPELLANT**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

CRIMINAL APPEAL NO.1241 OF 2008

**1 ASIF MANSOORALI ANSARI)
Age.24 Years,R/at.Plot No.37/G/3,)
Bainganwadi, Govandi,)
Mumbai 400 043.)
2 MOHD.SHARIF@BADSHAHA)
SHAMIM KHAN)
Age.23 Years, R/at.Plot No.37/F/6,)
Bainganwadi, Govandi,)
Mumbai 400 043.)
3 PARVEJ AHMED @ GUDDU)
@ VASTAV SHAMIM KHAN)
Age.32 Years, R/at.Plot No.21/O/2)
Bainganwadi, Govandi,)
Mumbai 400 043.) ...APPELLANTS**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mrs.Nasreen S..K.Ayubi, Advocate Appointed for the Appellant
in Criminal Appeal No.255 of 2009 (accused no.1)

Mr.Aniket Vagal a/w. Mr.Ashish Shastri, Advocate for the Appellants in Criminal Appeal No.1241 of 2009 (accused nos.2 to 4)

Mr.Arfan Sait, APP for the Respondent - State.

CORAM : V.K.TAHILRAMANI & A. M. BADAR, JJ.

**DATE : Reserved on : 9th DECEMBER 2016.
Pronounced on: 10th JANUARY 2017.**

ORAL JUDGMENT : (PER A.M.BADAR, J.)

1 By these appeals, appellants / original accused are challenging the judgment and order dated 24th October 2008 passed by the learned Additional Sessions Judge, Greater Bombay, in Sessions Case No.680 of 2006, thereby convicting them of offences punishable under Sections 363, 366, 377, 302, 201 read with Section 34 of the IPC. For the offence punishable under Section 302 read with Section 34 of the IPC, all appellants / accused are sentenced to suffer life imprisonment and to pay fine of Rs.3,000/- each, in default, to undergo further rigorous imprisonment for 6 months. For the offence punishable under Section 377 read with Section 34 of the IPC, they are sentenced to suffer rigorous imprisonment

for 7 years and to pay fine of Rs.1,000/- each, in default, to undergo further rigorous imprisonment for 3 months. For the offence punishable under Section 363 of the IPC, appellants / accused are sentenced to suffer rigorous imprisonment for 2 years and to pay fine of Rs.300/- each, in default, to undergo further rigorous imprisonment for 15 days. For the offence punishable under Section 366 read with Section 34 of the IPC, appellants / accused are sentenced to suffer rigorous imprisonment for 4 years and to pay fine of Rs.500/- each, in default, to undergo further rigorous imprisonment for 1 month. For the offence punishable under Section 201 read with Section 34 of the IPC, they are sentenced to suffer rigorous imprisonment for 2 years and to pay fine of Rs.300/- each, in default, to undergo further rigorous imprisonment for 15 days. The learned Additional Sessions Judge directed that all substantive sentences shall run concurrently.

2 At the outset, it would be appropriate to set out the prosecution case :

 Informant / PW5 Raju Shikare is a resident of Plot No.9, Bainganwadi, Govandi, Mumbai. He was having medical

shop at Chita Camp, Trombay, Mumbai. His family was comprising of his parents, wife, two sons and a daughter i.e. the victim of the crime, who was aged about 3½ years, at the time of the incident. It is the case of the prosecution that this toddler of the informant / father was kidnapped by appellants/accused person on 7th April 2006 for subjecting her to illicit intercourse and then she was subjected to gang rape by them, apart from sodomizing her. Thereafter, according to the prosecution case, she was murdered by them and in order to conceal evidence of this crime, the dead body of the minor female victim was dumped in the water tank of a public toilet at Plot No.10 of Bainganwadi. According to the prosecutor case, the offence was committed by appellants/accused in furtherance of their common intention.

3 According to prosecution case, appellants / accused persons were wielding reign of terror in the locality. Few days prior to the incident, appellants / accused persons accosted informant PW5 Raju Shikare near Plot No.9 of Bainganwadi and demanded tablets of Restyl from him. PW5 Raju Shikare in turn replied that they should come to his shop

with a prescription from the doctor. Appellants / accused insisted him to deliver those tablets immediately without prescription from the doctor. PW5 Raju Shikare refused to accede to the demand of appellants / accused persons. This infuriated appellant / accused no.4 Parvej Ahmed @ Guddu. He extended threat to informant PW5 Raju Shikare by uttering that this refusal will prove costly. Thus, according to the prosecution case, constituted motive for commission of the crime.

4 It is the case of prosecution that minor female victim of the crime in question was kidnapped by all appellants / accused from about 7 p.m. to 8 p.m. of 7th April 2006 from the vicinity of her house. PW4 Sayyad Rehmatali had seen all appellants / accused taking the minor female victim with them and proceeding towards Plot No.10 of Bainganwadi, at about 8.30 to 8.45 p.m. of that day. When the minor female victim was found missing by her family members, informant PW5 Raju Shikare was telephonically informed about this fact by one Kamal Patil. PW5 Raju Shikare therefore returned to his house by closing his shop

and started searching his minor daughter in the locality. By visiting Shivaji Nagar Police Station of Mumbai, he orally informed the fact of missing of his minor daughter. Search of minor female victim continued even on the next day i.e. on 8th April 2006 and as she could not be traced, PW5 Raju Shikare then lodged a missing report with Police Station Shivaji Nagar, Mumbai which was recorded in the missing person register (Exh.117A) by P.W.No.20 Ashok Jadhav, Asstt. Police Inspector. On 9th April 2006, PW5 Raju Shikare along with his friend Raghunath continued search of the minor female victim by visiting Children Home, Dongri, as well as the Office of the CID Mumbai.

5 According to the prosecution case PW7 Armogam Pandurang Kondram was a labourer at construction site of public toilets on Plot No.10 at Bainganwadi, Govandi. At about 1 to 1.30 p.m., of 9th April 2006, when he went to check the water level of the tank, he found dead body of a small female child in that tank. Fire brigade and police were summoned. The dead body of that girl was taken out and the same was found to be that of the minor daughter of PW5 Raju

Shikare. He, therefore, immediately reached to the Plot No.10 of Bainganwadi. After identifying dead body of his minor daughter, PW5 Raju Shikare lodged the FIR (Exh.35) on the spot itself against unidentified accused, as police were very much present there. On the basis of the said report, Crime No.91 of 2006 came to be registered on 9th April 2006 itself with Police Station Shivaji Nagar, Mumbai, for offences punishable under Sections 302 and 201 of the IPC. After taking inquest notes, the dead body was sent for autopsy. On inspection of the spot, the spot panchanama (Exh.24) was recorded and seizures were effected vide the same panchanama.

6 During investigation, it was found that PW7 Armogam had seen four boys at the place of the incident smoking cigarettes and chitchatting on 07/04/2006 and 08/04/2006. Similarly, in the night hours of 9th April 2006 PW4 Sayyad Rehmatali Sayyad Insafali who had seen appellants / accused taking the minor female victim on 7th April 2006, disclosed this fact to PW5 Raju Shikare. It was then informed to the police. Accordingly, on 11th April 2006,

at about 11.00 p.m., appellant / accused no.1 Mohd. Samir Mohd. Juber Shaikh and appellant / accused no.2 Asif Mansoorali Ansari came to be arrested. On 19th April 2006 appellant / accused no.3 Mohd. Sharif @ Badshaha came to be arrested. On 16th May 2006, appellant / accused no.4 Parvej Ahmed @ Guddu @ Vastav came to be arrested. Their clothes came to be seized by the Investigating Officer. Appellants were subjected to Test Identification Parades (TIP). On completion of routine investigation, charge-sheet for offences punishable under Sections 354, 363, 366, 376(2)(g), 377, 302, 201 r/w 34 of IPC came to be filed.

7 On committal of the case, necessary Charges were framed against appellants / accused and the trial started. In order to bring home the guilt to appellants / accused, in all 23 witnesses were examined by the prosecution. Defence of appellants / accused persons was that of total denial. However, they did not enter in defence. After hearing the parties, by the impugned judgment and order, the learned Additional Sessions Judge was pleased to convict and sentence appellants / accused as indicated in the opening paragraph of this judgment.

8 For recording conviction, the learned trial court culled out the following circumstances and was pleased to hold that those are proved by the prosecution. It is held that those proved circumstances establishes guilt of appellants / accused in respect of offences for which they are convicted. Circumstances against appellants culled out and held to be proved by the learned trial court are thus :

- a) Motive. The learned trial court held that few days prior to the incident, appellants / accused demanded Restyl tablets from PW4 Raju Shikare and were infuriated by his refusal to oblige them. This is considered as motive by the trial Court.
- b) The fact of missing of daughter of PW5 Raju Shikare on 7th April 2006.
- c) The circumstance that minor female victim was lastly seen with appellants / accused at about 8.30 – 9 p.m. of 7th April 2006 by PW4 Sayyad Rehmatali.
- d) The circumstance that dead body of the minor female victim was found in the septic tank of the public toilet by PW7 Armogam on 09/04/2006.

- e) The circumstance that PW7 Armogam had seen appellants / accused at the corner of the septic tank on 7th and 8th April 2006.
- f) The circumstance that butt of cigarettes of Goldflake brand was found in the dry portion of the septic tank where the dead body of minor female victim was found.
- g) The circumstance that there were injuries on private parts of appellant / accused no.1 Mohd. Samir Mohd. Juber Shaikh and appellant / accused no.2 Asif Mansoorali Ansari as noted by PW11 Dr.Damawale.
- h) The circumstance that appellant / accused no.4 Parvej Ahmed @ Guddu @ Vastav made a telephonic call on cell phone of PW21 Juned Ahmed Lal Mohd. Khan (hostile witness) in the afternoon of 9th April 2006 i.e. when the dead body of the minor female victim was traced out. Proved contradiction from the police statement of this witness was read in evidence for concluding that appellant / accused no.4 Parvej Ahmed @ Guddu @ Vastav had inquired from this hostile witness PW21 Juned Ahmed as to whether his name is under suspicion for committing the murder.

- i) The circumstance that during the relevant period there were no incoming or outgoing calls from the cell phone of appellant / accused no.4 Parvej Ahmed @ Guddu @ Vastav.
- j) The circumstance that appellant / accused no.3 Mohd.Sharif @ Badshaha and appellant / accused no.4 Parvej Ahmed @ Guddu @ Vastav were absconding up to 19th April 2006 and 16th May 2006 respectively.
- k) The circumstance that appellant / accused no.2 Mohd. Samir made a judicial confession before the Metropolitan Magistrate, Mumbai. It was held that the confessional statement though inadmissible in evidence under Section 30 of the Evidence Act, can be said to be a statement of an accomplice before the Metropolitan Magistrate before tendering the pardon to him making it a corroborative material to infer guilt of appellants.
- l) The circumstance that appellant / accused no.1 Mohd.Samir was subjected to polygraph, brain mapping and Narco analysis test conducted by PW15 Dr.Malini Subramanyam. The Report thereof was considered to

be an additional link in the chain of proved circumstances.

It was held that these circumstances are proved and they are sufficient to establish guilt of Appellants for offences alleged against them except that of a gang rape. The learned Additional Sessions Judge, however, rejected reports of the chemical analyses of seized articles by holding in paragraph 37 of the judgment that they do not establish any circumstance against appellants / accused. According to the learned trial Court, appellants kidnapped the minor female victim for subjecting her to illicit intercourse, subjected her to carnal intercourse against the order of nature, then murdered her and destroyed the evidence of the crime by dumping her dead body in the septic tank.

9 We have heard learned counsel appearing for the appellants / accused. By taking us through the entire evidence adduced by the prosecution, it was argued by the learned counsel for appellants / accused that the case of the prosecution is purely based on circumstantial evidence and the prosecution has not firmly established any of the

circumstance which leads to infer guilt of appellants / accused in the crime in question. It was argued that evidence of PW4 Sayyed Rehmatali is doubtful and he has not assigned any reason as to why he had not disclosed the fact of witnessing appellants / accused taking the minor female victim of the crime, to her parents, till late night hours of 9th April 2006. It is further argued that evidence of PW7 Armugam who had allegedly seen appellants / accused in the spot of the incident at the time of the incident is wholly unsatisfactory to to infer guilt of appellants / accused. If really appellants / accused had committed the crime in question on 7th April 2006, then there was no reason for them to go near the spot of the incident on 8th April 2006, as deposed by PW7 Armugam. The motive is also not proved by the prosecution. It is argued that inadmissible evidence was accepted by the learned trial court and therefore the impugned judgment and order needs to be set aside.

10 Learned APP supported the impugned judgment and order by submitting that gruesome murder of the minor

female victim was committed after assaulting her sexually. Therefore, in submission of the learned APP, the broader probabilities of the prosecution case are required to be taken into consideration. The learned APP argued that only that part of the evidence of the hostile witness PW21 Junaid was accepted which was supporting the case of the prosecution. The learned APP further argued that correct use of confessional statement of appellants / accused no.1 was made by the learned trial court. He argued that at about the time of the incident, there were no incoming and outgoing calls from the cell phone of appellant / accused no.4 Parvej which shows that he had actively participated in the crime in question. The learned APP prayed for dismissal of appeals.

11 We have carefully considered the rival submissions and also gone through the record and proceedings. We are aware of the fact that the case in hand is that of a serious crime of kidnapping and sexual assault on tiny tot victim, and thereafter, commission of her murder. Way back in the year 1957, the Hon'ble Apex Court in the matter of **Sarwan Singh v. State of Punjab** reported in **AIR**

1957 SC 637 has cautioned that before a conviction could be sustained the prosecution has to establish that its case 'must be true' and not 'may be true'. At the same time we are also aware that an unmerited acquittal encourages wolves in the society being on prowl for every prey more so when victims of crime are helpless females. Let us therefore examine whether the prosecution has succeeded in making out a convincing case against appellants/accused for recording a finding of guilt against them in the heinous and barbaric crime. For this purpose, considering the nature of the crime and its enormity we propose to appreciate evidence of the prosecution by applying our mind afresh in order to find out whether there are sufficient ground for interference in the finding of guilt of appellants/accused recorded on the basis of circumstantial evidence adduced by the prosecution.

12 Case of prosecution is based purely on circumstantial evidence, as there is no eye witness to the crime. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such

circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. It is also well settle that the prosecution has to establish each circumstance by independent evidence and the circumstances so established should form a complete chain without giving room to any other hypothesis and should be consistent with his guilt and are inconsistent with his innocence. It may be stated here that while appreciating the circumstantial evidence in criminal cases, strict scrutiny of each of the facts placed by circumstantial evidence and their cumulative effect has to be taken into consideration and if they are of such nature as to be incompatible with the innocence of the accused then only conviction can follow.

13 At the outset it needs to put on record that the fact that the minor female victim of the crime in question died homicidal death is not seriously disputed by the defence. P.W.No.5 Raju Shikare, father of the minor female victim had

seen her dead body on the spot. He deposed that her daughter was seen to be strangled by means of a handkerchief which was still found tied around her neck. The dead body of the victim was sent for autopsy after taking inquest notes which are at Exhibit 23. Inquest panchnama proved by PW2 Prabhakar Yeshwante shows that a handkerchief was tightly wrapped around the neck of the dead body of the minor female victim. This indicates violence. PW10 Dr.Dr.Sunil Mohanrao Jawale conducted postmortem examination on the dead body of the minor female victim. The report of postmortem examination is at Exhibit 59. That report shows that there was ligature mark encircling neck of the dead body of the minor female victim. Underlying muscle of neck so also vessels were showing contusion at corresponding level of the ligature mark. The evidence of the autopsy surgeon coupled with contemporaneous document i.e. report of postmortem examination shows that the minor female victim died due to strangulation associated with perianal abrasion and contusion on the forehead. This evidence is sufficient to conclude that the prosecution has proved a fact that the minor female

victim of the crime died homicidal death.

14 The learned trial Court has considered the last seen theory preponderated by the prosecution in paragraph 22 of the impugned Judgment and Order and concluded that from evidence of P.W.No.4 Rehmatali, the prosecution has proved that the deceased minor female victim of the crime in question was lastly seen in the company of appellant/accused. The last seen theory comes into play where time gap between the point of time, when the accused and the deceased were seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. While considering this theory, the Court is also required to eliminate the possibility of other person coming into between the accused and the deceased in the intervening period. (See ***State of U.P. v. Satish, 2005 (3) SCC 114.***) The prosecution case to a large extent is based upon this theory there being no direct evidence to show that the minor female victim of the crime in question was sodomized and subsequently killed by appellants after

kidnapping her from lawful guardianship of her parents. The incident in question allegedly happened at plot No.10 of Bainganwadi. Therefore, let us understand the topography of Bainganwadi area. At this juncture, it is opposite to note that the spot panchanama (Exh.24) proved by P.W.No.2 Prabhakar Yashwante as well as cross-examination of this panch witness Prabhakar goes to show that the spot from where the dead body was recovered is surrounded by several hutments in a populous area. There were 100 to 150 huts near the spot. The dead body of the minor female victim was found from the underground water tank with opening of 20 x 24 inches of 20 public latrines located at plot No.10 of Bainganwadi. It is seen from cross-examination of P.W.No.2 Prabhakar Yeshwante that the area where the incident happened is a slum having several small lanes with hutments on both sides. Between plot No.8 and plot No.10, as seen from his evidence, there were 10 lanes and for going to plot No.9, there were 10 lanes. The toilet blocks near which the incident allegedly took place is between plot No.8 and plot No.9 of Bainganwadi. Even cross-examination of informant P.W.No.5 Raju Shikare shows that there are several chawls parallel to respective lanes and

each chawl consists 9 to 11 rooms. Public toilets are at the center of plot Nos.8,9,10,11 and 12. PW5 Raju further disclosed in his evidence that public at large from that slum is attending those public toilets. Suffice to mention that the slum of Bainganwadi where the incident in question is took place is thickly populated area of Mumbai.

15 On this factual background, let us see what P.W.No.4 Sayyad Rehmatal, resident of Bainganwadi, states in his evidence. It is in his evidence that on 07/04/2006 at about 8.30 p.m. to 8.45 p.m., when he was chitchatting with Abdul Gafoor at plot No.9 of Bainganwadi, he saw appellants proceedings towards plot No.10, where public toilets were situated and at that time appellant/accused No.4 Guddu @ Vastav was having daughter of P.W.No.5 Raju Shikare in his arms. P.W.No.4 Sayyad Rehmatali claims to know all appellants, as they were also resident of Bainganwadi. Thereafter, as per version of P.W.No.4 Sayyad Rehmatali upon hearing commotion and gathering of public at plot No.10 of Bainganwadi at 2.00 p.m. of 09/04/2016 he and Abdul Gafoor went to the spot to see presence of police personnel and fire

brigade personnel there. P.W.No.4 Sayyad Rehmatali stated that dead body of daughter of P.W.No.5 Raju Shikare was being taken out from the water tank. He and others were called for identifying that dead body and accordingly he participated in the process of identification of the dead body of the minor female victim. Thereafter, according to P.W.No.4 Sayyad Rehmatali, he was scared and therefore he left the spot.

16 Cross-examination of P.W.No.4 Sayyad Rehmatali reveals that he was knowing P.W.No.5 Raju Shikare prior to one and half years from the incident and that he was also knowing all his family members as well as location of house of P.W.No.5 Raju Shikare. As per his version in the cross-examination, persons from the crowd were acquainted to him and he was on the spot for about 20 minutes. P.W.No.4 Sayyad Rehmatali further stated in his cross-examination that P.W.No.5 Raju Shikare with his family members was also present on the spot and police personnel were making inquiry from the people gathered on the spot and were also effecting writing. He stated that from 07/04/2016 to 09/04/2016 he

was very much present at Mumbai itself and on 08/04/2016 he had taken his wife for treatment.

17 In order to ascertain whether the last seen theory preponderated by the prosecution is firmly established from evidence of P.W.No.4 Sayyad Rehmatali, one will have to look into the evidence of informant P.W.No.5 Raju Shikare also, as it is claimed by P.W.No.4 Sayyad Rehmatali that he had disclosed the fact of having lastly seen the minor victim of the crime in company of appellants to her father/informant P.W.No.5 Raju Shikare. Evidence of this informant further shows that upon getting telephonic information about missing of his three and half years old daughter, he closed his shop of medicine located at Chita camp area, Trombay and returned to his house at Baiganwadi, Mumbai in the night hours of 07/04/2016. P.W.No.5 Raju Shikare stated that he searched his minor daughter in the locality and orally informed the fact of her missing to the Shivaji Nagar Police Station, Mumbai. He then lodged missing report on 08/04/2006 with Shivaji Nagar Police Station, Mumbai. P.W.No.20 Ashok Jadhav, the then API of Shivaji Nagar Police Station took entry of disclosure made

by P.W.No.5 Raju Shikare in the diary of the missing person (Exh.117 and 117A). P.W.No.5 Raju Shikare continued search of his missing daughter even on 09/04/2016 and had visited Children Home at Dongari, Mumbai as well as CID office for searching her. His evidence shows that at about 1.30 p.m. of 09/04/2006, he got information that his missing daughter is found and, therefore, returned to his home, where he came to know that his minor daughter is dead. He deposed that he then went to Plot No.10 of Bainganwadi and found police personnel preparing panchanama and saw dead body of his minor daughter. P.W.No.5 Raju Shikare then lodged FIR (Exh.35) on the spot itself.

18 P.W.No.5 Raju Shikare has stated in his evidence that after postmortem examination of dead body of his daughter on 09/04/2006, her burial took place in night hours. Then P.W.No.4 Sayyad Rehmatali with Abdul Gafoor came to his house and told him that they had seen appellants taking his deceased daughter with them at about 8.00 p.m. to 8.30 p.m. of 07/04/2006. P.W.No.5 Raju Shikare claims that P.W.No.4 Sayyad Rehmatali and Abdul Gafoor disclosed him

that as there was terror of appellants/accused in the area, they did not disclose this fact to him earlier.

19 Cross-examination of P.W.No.5 Raju Shikare on last seen theory is material. His cross-examination reveals that news of missing of his minor daughter was known to everybody from the locality and he had searched her by making inquiry from his close friends during those three days. This obviously indicates that being the resident of the very same slum, P.W.No.4 Sayyed Rahmatali might be knowing this fact. If that is so then his belated disclosure to P.W.No.5 Raju Shikare puts a cloud of doubt on his version.

20 When we compare evidence of P.W.No.4 Sayyed Rehmatoli with that of informant father P.W.No.5 Raju Shikare, then it is seen that P.W.No.4 Sayyad Rehmatoli never claimed to have suppressed the information of having seen appellants/accused with minor daughter of P.W.No.5 Raju Shikare from P.W.No.5 Raju because of reign of terror wielded by appellants/accused in the area. On the contrary, P.W.No.4 Sayyad Rehmatoli in his evidence has not stated any plausible

reason for not disclosing the fact that he had seen appellants/accused taking minor female victim with them on 07/04/2006 though he was very much knowing P.W.No.5 Raju Shikare, his family members as well as location of house of P.W.No.5 Raju Shikare. We will have to keep in mind that the incident took place in a densely populated slum of Mumbai. Resident of such locality knows each other very well. News such as missing of a minor female from the locality spreads like a fire in such locality where people are closely acquainted with each other. Though P.W.No.4 Sayyad Rehmatali had claimed to have witnessed appellants/accused taking minor female victim with them in the night hours of 07/04/2006, for reasons best known to him, he had not disclosed this fact to P.W.No.5 Raju Shikare till late night of 09/04/2006. To crown this all, chief-examination of P.W.No.4 Sayyad Rehmatali itself shows that he had rushed to the spot where the dead body of the minor female victim was found at 2.00 p.m. of 09/04/2006 itself and had interacted with police by identifying the dead body of minor female victim. He was there on the spot for about 20 minutes i.e. sufficiently long time and saw P.W.No.5 Raju Shikare as well as his family members apart from police

on the spot of the incident itself. His evidence shows that at that time Abdul Gafoor was with him. Said Abdul Gafoor was with P.W.No.4 Sayyad Rehmatali also on 07/04/2006 when P.W.No.4 Sayyad Rehmatali had claimed to have seen appellants/accused taking the minor female victim with them. Natural conduct of a normal human being in such situation would be to disclose the fact of having seen appellants/accused taking the minor female victim to the police and to the father as well as family members of the minor female victim, on seeing her dead body being retrieved from water tank with injuries thereon. P.W.No.4 Sayyad Rehmatali does not claim that at that point of time appellants/accused were present on the spot making him afraid of them and that he was under the fear of ensuing serious consequences due to disclosure of this fact to police because of their terror. On the contrary, evidence of P.W.No.4 Sayyad Rehmatali does not show that he was knowing that appellants/accused were terror in the locality. He is not alleging that he was afraid of them requiring him to keep mum despite seeing the dead body of the minor female victim in brutally murdered condition. Thus conduct of P.W.No.4 Sayyed Rehmatali in

keeping mum even after claiming to have seen appellants/accused taking the minor female victim with them in night hours of 07/04/2006 and thereafter remaining silent till night hours of 09/04/2006 despite of having witnessed the fact of retrieving the dead body of the said minor female victim by police personnel and fire brigade personnel in the afternoon of 09/04/2006 in presence of relatives of the deceased casts a serious shadow of the doubt on version of P.W.No.4 Sayyad Rehmatali.

21 At this juncture, it needs to be noted that according to the prosecution case apart from P.W.No.4 Sayyad Rehmatali his companion Abdul Gafoor had also witnessed appellants/accused taking the minor female victim with them on 07/04/2006 at about 8.30 to 8.45 p.m. In fact they both were chitchatting when this alleged incident of taking the minor female victim took place. It is seen that P.W.No.4 Sayyad Rehmatali was accompanied by this Abdul Gafoor when the dead body of the minor female victim was found and retrieved from the water tank at about 2.00 p.m. of 09/04/2006. Informant father P.W.No.5 Raju Shikare in his

evidence has stated that Abdul Gafoor had accompanied P.W.No.4 Sayyad Rehmatali to his house in night hours of 09/04/2006 i.e. after burial of the minor female victim to disclose the fact that the appellants/accused had taken the minor female victim with them on 07/04/2006 i.e. the date from which she went on missing. We have already held that evidence of P.W.No.4 Sayyad Rehmatali is totally unsatisfactory and suffering from serious doubt. The last seen theory is solely based on evidence of P.W.No.4 Sayyad Rehmatali and his evidence is highly unsatisfactorily. Thus, when evidence of prosecution on the aspect of alleged taking of minor female victim by appellants/accused raises a serious doubt in judicial mind, it was incumbent on the part of the prosecution to examine Abdul Gafoor as a witness in support of the last seen theory. On this background, the unexplained omission about non-examining Abdul Gafoor assumes significance and makes the prosecution case doubtful. With such laconic and insufficient evidence it cannot be held that the prosecution has successfully established that the minor female victim was lastly seen in the company of appellants/accused. Unfortunately, it seems that the learned

trial Court lost sight of these aspects.

22 The next circumstance relied by the learned trial Court for convicting appellants/accused in this serious crime is that of motive with appellants/accused to commit the crime in question. What impels a person to commit a crime is difficult to fathom. In cases based on circumstantial evidence motive plays an important role. Motive many a times became compelling force to commit a crime and, therefore, motive behind the crime is a relevant factor for which the prosecution is obliged to adduce satisfactory evidence in such cases based on circumstantial evidence. In a case where there is a motive, it affords additional support to finding of the Court that accused persons are guilty of the offence charged with. In the case in hand, according to the prosecution case, informant P.W.No.5 Raju Shikare father of the minor female victim was owning a medical shop and that shop was located at Chita camp area of Trombay, Mumbai. It may be noted here that appellants/accused as well as P.W.No.5 Raju Shikare were resident of Baiganwadi slum in Mumbai. The motive alleged by the prosecution is refusal on the part of P.W.No.5

Raju Shikare to give restyle tablets to appellants/accused on their demand, few days prior to the incident. P.W.No.5 Raju Shikare's evidence is relied upon by the prosecution to prove the motive. It is in his evidence that few days earlier to the incident, at about 11.00 p.m., appellants/accused met him near Plot No.2 and at that time appellant/accused No.4 Guddu alias Vastav had asked him to supply restyle tablets (which he referred as '*buttons*'). P.W.No.5 Raju Shikare stated that he told appellants to come to his shop with prescription, however, appellant/accused No.4 Guddu alias Vastav insisted for Restyle tablets without prescription and that too immediately. P.W.No.5 Raju Shikare further stated that he refused to oblige appellants/accused and then appellant/accused No.4 Guddu alias Vastav threatened him by stating that the consequences will cost him heavily. It is in the evidence of P.W.No.5 Raju Shikare that appellants/accused were aware of location of his medical shop at Chita camp at Trombay and he was knowing appellants/accused since last about 10 to 12 years. Informant P.W.No.5 Raju Shikare claimed that appellants were terror in the locality.

23 With this evidence of informant P.W.No.5 Raju

Shikare, the prosecution is trying to establish that this refusal to accede to their request prompted appellants/accused to kidnap his minor daughter for raping as well as sodomizing her and murdering her. At this juncture, it needs to mention that while lodging the FIR at Exh.35 after seeing dead body of his daughter, P.W.No.5 Raju Shikare had not mentioned that he is suspecting involvement of appellants/accused in the crime in question because of his refusal to accede to their demand for Restyle tablets. Even while lodging missing report on 08/04/2006, P.W.No.5 Raju Shikare had not suspected that appellants/accused might have kidnapped his daughter because of his refusal to oblige them by supplying restyle tablets to them. P.W.No.5 Raju Shikare was not having medical shop at Baiganwadi locality of Mumbai. His alleged meeting with appellants/accused few days prior to the incident was at 11.00 p.m. near Plot No.2 of Bainganwadi. In that meeting, as per version of P.W.No.5 Raju Shikare, Restyle tablets were demanded by appellants/accused and such demand was to be fulfilled immediately. P.W.No.5 Raju Shikare claims that appellants/accused were terror in the locality. On this background, cross-examination of P.W.No.5

Raju Shikare shows that on road going from Plot Nos.8 and 9 of Bainganwadi, there are about three to four medical shops. If appellants/accused were really in urgent need of Restyle tablets and if they were really terror in the locality, then it does not stand to reason that they would demand Restyle tablets from P.W.No.5 Raju Shikare at late night hours when he was having shop at totally different area. It was convenient for appellants/ accused, if they were really terror in locality to approach a nearby shop out of three to four shops in the locality for meeting their demand. They must be aware that no shopkeeper will carry Restyl tablet with him while returning home in late night hours after closing the shop. In this view of the matter and for the above stated reason, we are unable to conclude that the prosecution has proved that there was an incident of demand of Restyle tablets by appellants/accused to P.W.No.5 Raju Shikare and extending of threats by appellants/accused to him on his refusal. Evidence on this count is not of a standard required in a criminal trial of a serious offence. Therefore, it cannot be said that the prosecution has established that appellants/accused were having motive to teach lesson to P.W.No.5 Raju Shikare by

kidnapping his minor daughter and then murdering her brutally after sodomizing her. As such, we are unable to uphold the finding of the learned trial Court that the prosecution has proved that appellants/accused were having a motive behind commission of crime in question.

24 It is seen from the impugned Judgment and Order of the learned Additional Sessions Judge that after having held that confession of appellant/accused No.1 Mohd.Samir is exculpatory, the learned trial Court has further held thus :

“ On carefully comparing the said statement of accused No.1 before the Magistrate and other relevant facts on record I find it is materially corroborated. Though this statement of accused no.1 can not be read in evidence as contemplated under section 3 of the Evidence Act, however, as held by Hon'ble Apex Court in Ramprasad V/s State of Maharashtra, AIR 1999 SC 1969 that the statement made by an accomplice before the magistrate before the pardon was tendered to him, such statement can be relied upon as corroborative material. Of course, in the instant case none of the accused has been made an approver, however in view of this authority the statement of accused no.1 before the magistrate which is corroborated in material particulars provides

further additional link to the circumstances already proved.”

25 It is thus seen that though alive to the fact that confession of appellant/accused No.1 Mohd.Samir cannot be read in evidence, it being exculpatory in nature and though fully knowing that this appellant/accused No.1 Mohd.Samir has not been made an approver, the learned trial Court used that statement of appellant/accused No.1 Mohd.Samir as an evidence against appellants/accused for providing additional link in the chain of circumstances against them. Law on this aspect is clear and hardly needs to be restated. P.W.No.14 Madhukar Bage, Metropolitan Magistrate, Kurla had recorded confession of appellant/accused No.1 Mohd.Samir on 04/07/2006 and 05/07/2006. The same is at Exh.55. In this so-called confessional statement, appellant/accused No.1 Mohd.Samir has stated to P.W.No.14 Madhukar Bage that he had seen appellant/accused No.4 Parvez alias Guddu alias Vastav taking the minor female victim to public toilet located behind Plot No.3. He further stated that appellant/accused No.2 Asif and appellant/accused No.3 Sharif alias Badshaha pointed a knife at his neck and took him to the public toilet.

In his confessional statement, accused No.1 Mohd.Samir has further stated that thereafter appellant/accused Nos.2 to 4 namely Asif, Sharif alias Badshaha and Parvej alias Guddu committed rape on the minor female victim. Thereafter appellant/accused No.4 Parvej alias Guddu strangled the minor female victim by means of handkerchief, appellant/accused No.3 Mohd.Sharif alias Badshaha assaulted her so also appellant/accused No.4 Parvej alias Guddu. Then appellant/accused Nos.2 to 4 threw her dead body in a water tank. Thereafter he was threatened that if the incident is disclosed to anybody, they will kill his father. Bare perusal of this confessional statement of appellant/ accused No.1 shows that the same is exculpatory and the appellant/accused No.1 had not taken any blame on him.

26 Confession is a statement made by the accused which must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence (See ***Jarnail Singh v. State of Punjab AIR 2011 SC 964***). The incriminatory fact in order to be a confession should directly suggest the guilt of the crime charged and only those

statements which are direct acknowledgment of guilt are considered as confession. Merely inculpatory admission which falls short of being an admission of guilt cannot be termed as confession. What is required is admitting the commission of the crime in unequivocal terms. Confession is not evidence as defined under Section 3 of the Evidence Act and can be used in support of other evidence.

27 The position as to whether the statement of the accused amounts to confession or not is settled by an authoritative pronouncement of the Privy Council in the matter of ***Pakale Narayan Swami v. Rex reported in AIR 1939 P.C. 47***, wherein it is held thus:

“No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession *must either admit in terms the offence, or at any rate substantially all the facts which constitutes the offence.* An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a

confession, eg an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in Art. 22 of Stephen's "Digest of the Law of Evidence" as 'an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime.' If the surrounding articles are examined it will be apparent that the learned author, after dealing with admissions generally, is applying himself to admissions in criminal cases, and for this purpose defines confession so as to cover all such admissions The definition is not contained in the Evidence Act, 1872, and in that Act *it would not be consistent with the natural use of language to construe confession as a statement by an accused 'suggesting the inference that he committed, the crime'.*"

28 Section 30 of the Evidence Act reads as under :-

"Sec.30 : Consideration of proved confession affecting person making it and others jointly

under trial for same offence. - When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.”

Explanation - “Offence”, as used in this Section, includes the abetment of, or attempt to commit the offence.

29 It is thus clear that Section 30 of the Evidence Act thus allows use of the confession of one accused against co-accused on fulfilling the following conditions :-

- i) There must be a joint trial for the same offence.
- ii) The statement of the accused which is sought to be used against co-accused must be a confession.
- iii) The confession of guilt must inculcate himself as well as other i.e. co-accused. It must implicate the maker to the same extent as co-accused.
- iv) The confession of guilt must be duly proved.

30 Thus careful scrutiny of the provisions of Section 30 of the Evidence Act makes it clear that when the statement of the accused does not amount to confession i.e.

when it is wholly or partly exculpatory, it cannot be used against co-accused. Where an accused pleads innocence and throws the blame on the co-accused, such statement cannot be termed as confession of that accused and as such cannot be used against co-accused. For making use of it against co-accused the statement of accused must amount to a distinct confession of his own guilt. Self exculpatory statement of the accused as such cannot be used to infer guilt of co-accused.

31 As against this, accomplice is a person who knowingly helps another in commission of a crime. He is one of the guilty associate in the crime. One necessary condition for being an accomplice is that he must be involved in the crime by taking some part in commission of the crime.

32 Section 113 of the Evidence Act makes it clear that an accomplice is competent witness provided he is not co-accused in the same case. An accomplice by accepting a pardon under Section 306 of the Code of Criminal Procedure becomes a competent witness and may as any other witness be examined on oath. Such pardoned accused is bound to

make a full disclosure and on his failure to do so, he may be tried of the offence originally charged and his statement may be used against him under Section 308 of the Code of Criminal Procedure. Approver is a person who is an accomplice but has been tendered pardon on condition of his true disclosure of facts and circumstances of the crime by becoming a witness on behalf of the prosecution. Thus, an approver is a person who is an accomplice but has been tendered pardon on condition of his true disclosure of facts and circumstances of the crime by becoming a witness on behalf of the prosecution. The aim of the Court in granting pardon to an accused is only to obtain his evidence as witness and even if he is tendered pardon by making him an approver, the prosecution can proceed against him when he fails to perform the condition of the pardon. Evidence of approver can be accepted if it is shown that he is reliable witness and that his evidence must receive sufficient corroboration. Ordinarily it is for the prosecution to ask that particular accused out of several accused may be tendered pardon but this does not preclude the accused from directly applying the Court for tender of pardon to him. It is then

open for the prosecution to agree for tendering pardon to such accused in the interest of successful prosecution of other accused. The object is to obtain true evidence of offences, so as to prevent the escape of the offenders from punishment for lack of evidence in grave offences. The examination of an approver as a witness of the prosecution during trial is essential.

33 The learned trial Court, as noted in foregoing paragraphs, has used the statement of appellant/accused No.1 Samir as a corroborative link by relying on the judgment in the matter of ***Ramprasad v. State of Maharashtra, AIR 1999 SC 1969***. This reliance is totally misplaced. In the matter of ***Ramprasad*** (supra) Anil Chaudhary, one of the original accused was granted pardon as he turned to be an approver. He was examined as P.W.No.2 by the prosecution. In paragraph 12 of the said Judgment, the Hon'ble Apex Court has observed that P.W.No.2 Anil Chaudhary has narrated the story, including the incident with vivid details. With this, his evidence was accepted, but in paragraph 25 of the said Judgment, the Hon'ble Apex Court has observed that the

confessional statement given by P.W.No.2 Anil Chaudhary to the Magistrate before pardon was tendered to him, though legally can be used as a corroborative material, the same is not being given great weight, as it is only the former statement of an accomplice. Thus in the matter of **Ramprasad** (supra) what was considered was evidence of an approver. It was further held therein that initially during police investigation P.W.No.2 Anil Chaudhary did not speak anything about accused No.4, but later he changed his mind and offered to confess the entire truth. As noted by the Hon'ble Supreme Court, then P.W.No.2 Anil Chaudhary implicated himself and others and, therefore, though he did not divulge the whole truth at the outset that is of not much consequences. As against this in the case in hand, neither the prosecution nor appellant/accused No.1 had requested for tendering pardon to appellant/accused No.1 Mohd.Samir and he has not been made an approver. Therefore, his so called exculpatory confessional statement recorded by P.W.NO.14 Madhukar Bage ought not to have been used by the learned trial Court for the purpose of providing an additional link to the chain of circumstances.

34 The next circumstance relied by the learned trial court for convicting appellants / accused is presence of appellants / accused on the spot of incident i.e. near public toilet on 7th April 2006 by PW7 Armugam. The learned trial court has held that testimony of this disinterested and independent witness is fully reliable. The learned trial court further held that this witness has identified appellants / accused and as per provisions of Section 291(a) of the Code of Criminal Procedure it was not necessary for the prosecution to call the Magistrate holding the Test Identification Parade.

35 On this backdrop, let us examine what PW7 Armugam says on this aspect. As per his version, he is working as a labourer on the construction site of the public toilet where the dead body of the minor female victim was found in the water tank on 9th April 2006. He stated that on 7th April 2006 and 8th April 2006 he noticed four boys smoking cigarettes and indulging in conversation at the corner of that public toilet. As per his version, he had identified appellant / accused no.1 Samir and appellant / accused no.2 Asif in identification parade held on 27th April 2006 and thereafter

appellant / accused no.3 Badshaha and appellant / accused no.4 Guddu @ Vastav in the identification parade held on 28th April 2006. Cross-examination of this witness shows that during morning and evening time, several persons in the locality used to sit nearby the public toilet. His cross-examination further shows that huts in the locality are at distance of about 2½ to 3 feet away from the public toilets, but there is a wall in between huts and public toilets. Thus, as per version of PW7 Armugam, appellants / accused who were identified by him in the test identification parade were present on the spot of the incident on 7th April 2006 and 8th April 2006. It is case of prosecution that the incident of taking the minor female victim, raping her and commission of her murder, took place in night hours of 7th April 2006. It is case of prosecution that after committing of the minor female victim, her dead body was thrown in the water tank of the public toilets. If really appellants / accused had committed this act in the night hours of 7th April 2006, after kidnapping the minor female victim at about 8 - 8.30 p.m. of that day, then it does not stand to reason that they would again re-assemble on the same spot on the next day i.e. on 8th April

2006. Ultimately, normal human conduct would be to be far away from such place of offence, particularly when the offence is that of gang rape and murder of a toddler. Instinct of self preservation prevails and it is not expected of accused persons to re-visit the spot of incident for smoking and chitchatting while the dead body of the victim still lying there. In this view of the matter, we do not find evidence of PW7 Armugam worthy of putting reliance on it for holding that appellants/accused were seen on the spot of the incident at about the time of the incident.

36 The learned trial court also relied on telephonic call by appellant / accused no.4 Guddu @ Vastav to PW21 Junaid for ascertaining whether his name is being implicated in the crime in question. Perusal of evidence of PW21 Junaid goes to show that he failed to support the case of the prosecution. This PW21 Junaid had deposed that appellant / accused no.4 Guddu works as an electrician and on 9th April 2006, appellant / accused no.4 Parvej @ Guddu made a telephonic call to him. This telephonic call, as per version of PW21 Junaid, was for inquiring as to electric supply to the house of the witness is

restored or not. This witness was cross-examined by the APP and contradiction from his police statement was portion marked as 'A', which on being duly proved through the evidence of the Investigating Officer, was exhibited as Exhibit 150. This witness Junaid had stated to police in his police statement (Exh.150) that he had received telephonic call from appellant / accused no.4 Guddu to inquire whether his name is suspected in the murder of the minor female victim. The learned trial Judge considered this duly proved portion of police statement at Exhibit 150 to conclude that the same provides an additional link in the series of circumstances appearing against appellants / accused. In other words, duly proved portion of police statement was considered as evidence against appellants / accused. It needs to be stated that statements recorded under Section 161 of the Code of Criminal Procedure are not and cannot be treated as substantive evidence. Such duly proved portions of police statements i.e. contradictions can only make substantive evidence of the witness unreliable. Though portion marked Exhibit 150 i.e. contradiction from evidence of PW21 Junaid is proved by the prosecution through the Investigating Officer,

that does not translate such contradiction into substantive evidence and can at the most impeach the credit of witness by throwing doubt on his veracity. As such, evidence of PW21 Junaid cannot be used to establish the alleged circumstance that appellant / accused no.4 Guddu had made a telephonic inquiry to ascertain whether his name under is under scanner as suspect of the crime in question.

37 According to the prosecution case, two of appellants / accused were absconding from the date of incident i.e. 7th April 2006 and they could be arrested after a long time and this absconding is also a circumstance against them. Undisputedly, appellant / accused no.3 Badshaha came to be arrested on 19th April 2006 vide panchnama at Exhibit 79 and appellant / accused no.4 Parvej @ Guddu came to be arrested on 16th May 2006 vide arrest panchnama at Exhibit 122, i.e., after about 12 days and 1 month 10 days after the incident respectively. As per evidence of PW18 Vasant Vakhare, API, appellant / accused no.3 Badshaha was arrested by laying a trap and arrest panchnama was prepared in presence of panch witness on 19th April 2006. PW20 Ashok

Jadhav, API, had deposed that it was revealed that appellant / accused no.4 Parvej @ Guddu had gone to Azamgad and therefore he along with his team went to Azamgad, took help from local police and arrested appellant / accused no.4 Guddu, upon seeing him proceeding on a motorcycle in the Bankat Bazaar by chasing him.

38 Prosecution has not adduced any evidence to show that appellant / accused Badshaha was keeping away from the investigator deliberately. Nothing is pointed out to show that the investigator had visited the normal place of abode of appellant / accused no.3 Badshaha, and that, it was found that he was not available at the place of his usual residence. It needs to be noted that other accused were arrested soon after the incident. The act of absconding, even if proved, is normally considered as a weak link in the chain of circumstances used for establishing the charge. It is a matter of common knowledge that post event conduct varies from person to person. On being suspected of a grave crime, in order to evade arrest in instinct of self preservation, even innocents may resort to avoiding the investigator. This is

done for avoiding harassment so also the false charge. Thus, absconding by itself would not lead to the proof of commission of crime. When other connecting evidence is trustworthy, the court may consider the fact that the appellants / accused absconded soon after the incident, as an inculcating circumstance. In the case in hand, evidence on record does not establish that these appellants/accused absconded after commission of the crime in question.

39 The next incriminating circumstance against appellants / accused pressed into service by the prosecution is reports of Polygraph test, Brain Mapping as well as Narco Analysis Test on appellant / accused no.1 Mohd.Samir conducted by PW15 Dr.Malini Subramanyam, Assistant Director of Forensic Science Laboratory, Bangalore. The learned trial court considered these reports as well as evidence of PW15 Dr.Malini Subramanyam and held that though result of such scientific tests cannot be read in evidence and no weightage are being given to those tests but the same are considered as furnishing an additional link to the already proved chain of circumstances. This implies that

infact the learned trial court has considered reports of Polygraph test, Brain Mapping and Narco Analysis Test as an additional link in chain of circumstances against appellants / accused. Let us therefore, consider whether reports of such scientific test can be used as incriminating evidence against appellants / accused. It is in evidence of PW15 Dr.Malini Subramanyam that on 9th April 2006 appellant / accused no.1 Mohd.Samir was brought to her and he gave consent (Exhibit 90) to undergo scientific tests. Accordingly, she conducted Polygraph test and submitted report Exhibit 89 dated 3rd July 2006. This witness further deposed that on 9th June 2006 Brain Mapping Test was conducted on appellant / accused no.1 Mohd. Samir and the report thereof is at Exhibit 94. PW15 Dr.Malini Subramanyam further stated in her evidence that appellant / accused no.1 Mohd.Samir was subjected to Narco Analysis Test on 10th June 2006 by obtaining his consent and then Sodium Pentathol with dextrose diluted appropriately came to be administered to him and his revelations were videographed. The report dated 30th June 2006 of this test is at Exhibit 96. Cross-examination of this witness indicates that when an individual is brought for such

tests, consent of such individual is required to be taken. This witness admitted that no separate consent for Brain Mapping and Narco Analysis test of appellant / accused no.1 Mohd.Samir was taken. She denied that consent at Exhibit 90 was only for his Polygraph Test. It is seen from cross-examination of this witness that for conducting Narco Analysis Test, medical fitness of the subject is required to be ascertained and the subject is required to be Nil for eight hours prior to conducting the Narco Analysis Test meaning thereby that he is not permitted to have any food or drink during that period. As per version of PW15 Dr.Malini Subramanyam, during the process of conducting Narco Analysis Test, a butterfly needle is required to be set on the subject through which dextrose is required to be administered continuously intravenous. PW15 Dr.Malini Subramanyam admitted that on 9th June 2006 and 10th June 2006, physical examination of appellant / accused no.1 Mohd. Samir was not conducted but reliance was placed on result of his medical examination conducted at J.J.Hospital, Mumbai. Cross-examination of this witness shows that physical fitness or health of the person can change even within 24 hours also.

40 At this juncture, it is apposite to note guidelines given by the National Human Right Commission for administration of such tests on an accused, found in paragraph 265 of the judgment of the Hon'ble Apex Court in the matter of **Selvi and Others vs. State of Karnataka** reported in **(2010) 7 Supreme Court Cases 263.** It reads thus :

The National Human Rights Commission had published 'Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused' in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the 'Narcoanalysis technique' and the 'Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

- (i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.
- (ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the

police and his lawyer.

(iii) The consent should be recorded before a Judicial Magistrate.

(iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.

(vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(viii) A full medical and factual narration of the manner of the information received must be taken on record.

41 Bare perusal of these guidelines shows that consent of the accused is sine-qua-non for conducting such test and physical, emotional and legal implications of such tests are required to be communicated to such accused. His

consent is required to be recorded before a Judicial Magistrate. The accused is entitled to take assistance of his lawyer. The evidence on record does not show that these guidelines given by the National Human Rights Commission for conducting such tests were followed before subjecting appellant / accused no.1 Mohd.Samir for Polygraph, Brain Mapping and Narco Analysis Tests. Evidence of PW15 Dr.Malini Subramanyam on aspect of consent of appellant / accused no.1 for subjecting himself to such tests is as sketchy as it can be. She has merely stated that appellant / accused no.1 Mohd.Samir had given consent for such tests. This witness has not stated that appellant / accused no.1 Mohd. Samir was made aware about physical, emotional and legal implications of such tests and his consent was free consent not influenced by coercion, duress, undue influence or fraud. Perusal of Exhibit 90 goes to show that consent of appellant / accused no.1 Mohd. Samir was obtained by getting his signature on the consent form which is having stereotyped contents. This consent form at Exhibit 90 was meant for Polygraph test. It appears that subsequently the word scientific was added to this consent form at Exhibit 90. There

is no separate consent for Brain Mapping as well as Narco Analysis Test given by appellant / accused no.1 Mohd. Samir to the authorities of Forensic Science Laboratory at Bangalore. There is no positive evidence to demonstrate that appellant / accused no.1 was made aware about test to which he was being subjected at that laboratory. Even there is no positive evidence to show that appellant / accused no.1 Mohd.Samir had consented for such type of test before the Judicial Magistrate. PW22 Vikas Wagh, API, had taken appellant / accused no.1 Mohd. Samir to Forensic Science Laboratory, Bangalore for these scientific tests. This witness has not deposed about obtaining consent of the appellant / accused no.1 for subjecting himself to such tests before the Judicial Magistrate. The term Narco Analysis is derived from Greek word NARKCA meaning anesthesia or tarpor by administering psychotropic drug to the subject. His capacity for imagination is blocked or neutralized by leading him into semiconscious state during conducting such test on him, because a person is able to lie by using his imagination. Salutory provisions of Article 28(3) of the Constitution of India and Section 161(2) of the Code of Criminal Procedure provides that a person cannot

be compelled to be a witness against himself. No one can forcibly extract a statement from the accused and his right to remain silent during the course of investigation is vindicated by these statutory provisions. One may say that right granted under Article 20(3) of the Constitution of India can be waived by the person himself but for that purpose evidence in respect of consent of such person must be of an impeachable character. However, in the case in hand, evidence on record does not indicate that appellant / accused no.1 Mohd. Samir was subjected to scientific tests by strict adherence to the guidelines given by the National Human Rights Commission. Apart from this, in Narco Analysis Test the subject does not exercise conscious control over the responses during such tests.

42 Perusal of evidence of PW15 Dr.Malini Subramanyam, PW23 Shivaji Nehman Investigating Officer, along with transcript of Narco Analysis Test of appellant / accused no.1 at Exhibit 151 coupled with report of Narco Analysis Test at Exhibit 96 goes to show that incriminating material against appellant / accused no.1 Mohd. Samir is

sought to be brought on record from statement given in trans by appellant / accused no.1 Mohd. Samir. His revelations during such tests are inculpatory or incriminating appellant / accused no.1 Mohd. Samir as well as other co-accused. Such revelations are inadmissible in evidence. At this juncture, it is apposite to quote observations of the Hon'ble Supreme Court in the matter of **Selvi (supra)** found in paragraph 264, which reads thus :

“264 In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material

that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872.

43 In this view of the matter, as evidence in respect of consent for Narco Analysis Test is doubtful and as the result thereof are inculpatory, the same cannot be used against appellants / accused. It is not the case of the prosecution that revelations of appellant / accused no.1 Mohd. Samir has resulted in discovery of fact admissible under Section 27 of the Evidence Act, 1872. Similarly, result of Polygraph Test and Brain Mapping Test are of no assistance to the prosecution as no statement is coming out of such tests. The report of Polygraph Test at Exhibit 89 only indicates that appellant / accused no.1 was truthful in statement and no sense of deception was noticed. While conducting this test only questions are recorded and answers given by appellant / accused no.1 Mohd.Samir are not recorded. Report at Exhibit 94 in respect of Brain Mapping Test is to the effect that findings of such tests are indicative of the presence of possession of knowledge about activities listed in the report.

Both these reports do not disclose what was the information and as such, these reports are of no use for the prosecution. Suffice to say that reports of all these tests with evidence of expert witness is of no use for the prosecution even for remotely inferring guilt of appellants / accused in the crime in question.

44 The next circumstance relied by the prosecution for inferring guilt of appellants / accused is that of injuries on private parts of appellant / accused no.1 Mohd. Samir and appellant / accused no.2 Asif noted by PW11 Dr.Baburao Damawale. It is in the evidence of PW11 Dr.Baburao Damawale that on 12th April 2006 and 15th April 2006, he examined appellant / accused no.1 Mohd. Samir. Medical certificate showing result of medical examination of appellant / accused no.1 Mohd. Samir is at Exhibit 65. Evidence of PW11 Dr.Baburao Damawale as well this certificate at Exhibit 65 shows that on 15th April 2006, this witness had noted three healing lesions with crust and scales on the left side of glans-penis, extending from external urinary meatus to corona-glandis. PW11 Dr.Baburao

Damawale has stated that injuries noted on appellant / accused no.1 Mohd. Samir on 15th April 2006 are possible due to sexual intercourse or carnal intercourse and it takes one weeks time for healing such injuries. Evidence of PW11 Dr.Baburao Damawale is conspicuously silent about age of these injuries noted on private part of appellant / accused no.1 Mohd. Samir. His cross-examination reveals that such type of injury is possible if a stone or rough substance is used by the accused after urination. At this juncture, it needs to be noted that appellant / accused no.1 Mohd. Samir obviously belongs to Mohammedan religion where such practice is in vague. As such, for want of age of such injury and this type of prevalent practice in the rustic people from Mohammedan religion, no overbearing importance can be given to the fact that there was some injury on the private part of appellant / accused no.1 Mohd. Samir.

45 So far as appellant / accused no.4 Asif is concerned, evidence of PW11 Dr.Baburao Damawale coupled with medical certificate at Exhibit 67 shows that this appellant / accused was having a tiny red coloured papule (angioma) on

the ventral aspect of the penis. Chief examination of PW11 Dr.Baburao Damawale itself goes to show that this angioma could be due to viral infection and it is not an injury. Thus, this circumstance does not incriminate these two appellants in the crime in question.

46 The next circumstance relied by the prosecution is absence of any incoming or outgoing calls from mobile phone bearing number 9820912060 belonging to appellant / accused no.4 Parvej @ Guddu @ Vastav during the relevant period of commission of crime in question. To establish this circumstance, the prosecution is relying on evidence of PW16 Vikas Fulkar, an employee of Vodafone Essar Ltd. - service provider. This witness deposed that in between 19.31.21 hours of 7th April 2006 to 23.54 hours of that day, there were no incoming or outgoing calls on this cell phone. This witness has deposed that this cell phone number belongs to Parvej Ahmed i.e. appellant / accused no.4. Evidence of PW16 Vikas Fulkar as such shows that on 7th April 2006 for a period of more than four hours there were no incoming and outgoing calls on cell phone of appellant / accused no.4. However, this

cannot be treated as an incriminating circumstance against accused persons. One may understand that being busy in commission of heinous crime, an accused may not make an outgoing call, but he has no control over incoming calls on his cell phone. Therefore, nothing significant can be made out from the mere fact that for about 4 hours i.e. from 19.31 hours to 23.54 hours of 7th April 2006 there was no phone call either incoming or outgoing on the cell phone of appellant / accused no.4 Parvej Ahmed. No capital of this fact can be made out to infer guilt of appellants / accused in the crime in question.

47 According to the prosecution case, butt of cigarette was found at dry part of the water tank, as per spot panchnama Exhibit 24. PW2 Prabhakar Yeshwante proved the spot panchnama at Exhibit 24 recorded on 9th April 2006. The spot panchnama as well as evidence of this witness shows that a butt of cigarette was seized from the water tank at the spot of the incident. As noted in foregoing paragraphs, the spot was located at a thickly populous area of the slum. Evidence of PW7 Armugam shows that many people from the

vicinity visited that spot for indulging in chitchatting. There is no evidence to show that DNA on the seized butt of cigarette was matching to DNA of any of the appellants / accused. As the place was visited by many people in the vicinity, evidence of PW7 Armugam that he noticed appellants / accused smoking cigarette on the spot on 7th April 2006 and 8th April 2006 cannot be used to infer that the butt of cigarette found on the spot was from the cigarette smoked by appellants / accused. No overbearing importance can be given to the fact that while arresting appellant / accused no.4 Parvej, a packet of cigarette of Goldflake brand came to be seized.

48 These are the circumstances relied by the learned Additional Sessions Judge for convicting appellants / accused. On careful scrutiny of evidence, we do not find that these circumstances are firmly established and the cumulative effect of such circumstances leads to the sole hypothesis of guilt of appellants / accused in the crime in question. Apart from this, the prosecution has also relied on report of Chemical Analysis of seized articles, but the learned Additional Sessions Judge has rightly rejected that evidence

by holding that with 4 to 5 inches water level in the water tank from where the dead body of the minor female victim was found, Chemical Analysis Report loses its importance. We find no error in this finding recorded by the learned Additional Sessions Judge. Apart from this, the prosecution has conducted the exercise of recording confessional statement of accused in which it is alleged that spot of the incident was discovered by them. We have carefully perused this evidence adduced by the prosecution. It needs to be noted that the dead body was recovered from the water tank leading to filing of the FIR by PW5 Raju Shikare and then investigation of the crime in question commenced. As such, spot of the incident was very well within the knowledge of the investigator, prior to recording that confessional statement of appellants / accused. As such, this evidence is of no use to the prosecution as that fact was already within the knowledge of the police. It is also alleged that one handkerchief was recovered at the instance of appellant / accused no.4 Parvej and this recovery is proved by the prosecution through evidence of PW9 Rashid Baig. However, there is no connecting evidence to show that the said handkerchief was

used in commission of the crime in question and as such, it cannot be said to be a relevant fact.

49 In view of foregoing discussion, we are of the considered opinion that the prosecution has failed to prove guilt of appellants / accused in respect of any of the offences alleged against them beyond all reasonable doubts. Appellants / accused are found to be entitled for benefit of doubt as incriminating circumstances against them are not firmly established by the prosecution. Case of the prosecution may be true but we are unable to record the finding that it must be true in all probability. Resultantly, the impugned judgment and order of the learned trial court is required to be set aside. Hence the order :

ORDER

- 1) Both the appeals are allowed.
- 2) The impugned judgment and order dated 24th October 2008 passed by the learned Additional Sessions Judge, Greater Bombay, convicting appellants / accused of

offences punishable under Sections 363, 366, 377, 302, 201 read with Section 34 of the IPC in Sessions Case No.680 of 2006 between the parties is quashed and set aside.

- 3) Appellants / accused are acquitted of all offences alleged against them.
- 4) They be set at liberty if not required in any other case.
- 5) Fine amount, if any paid by them, be refunded to them.

(A. M. BADAR, J.)

(V.K.TAHILRAMANI, J.)