

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 55 OF 2017.

Central Bureau of
Investigation, Special
Crime Branch, A-2 Wing, 8th
Floor, CGO Complex, CBD
Belapur, Navi Mumbai-
400614.

..... Appellant.

Versus

1 Shri Samson D'Souza,
House No. 1020, Grand
Peddem, Anjuna,
Bardez, Goa.

2 Shri Placido Carvalho
@ Shana boy House
No.1812, Gaonwadi,
Anjuna, Bardez, Goa.

..... Respondents.

Mr. Ejaz Khan, Special Public Prosecutor for appellant.

Mr. S. G. Bhohe and Mr. R. Menezes, Ms. G. Almeida and Mr. Nigel Fernandes, Advocates for the respondent no.1.

Mr. S. Pinto and Ms. D. Tulkar, Advocates for the respondent no.2.

Mr. Vikram Varma, Advocate for mother of Victim Ms. Fiona Mackeown.

**Coram:- R. D. DHANUKA &
PRITHVIRAJ K. CHAVAN, JJ.**

Reserved on:-26 April 2019.

Pronounced on:- 17th July, 2019

JUDGMENT (Per Prithviraj K. Chavan, J.)

Feeling aggrieved with and dissatisfied by the impugned judgment and order of acquittal dated 23.9.2016 passed by the President, Children's Court, Panaji in Special Case No.15/2008, the Central Bureau of Investigation (for short "CBI") has preferred this appeal under Section 378(2) of Code of Criminal Procedure, 1973 (for short "Cr.P.C.") amongst following facts and grounds.

2. Respondents/original accused nos.1 and 2 have been acquitted by the learned Trial Court of the offences punishable under Sections 328, 354, 304(ii), 201, 109 of Indian Penal Code (for short "IPC") read with Section 8(2) of the Goa Children's Act, 2003.

3. The prosecution case, as emerged from the record, is as follows:-

A British minor girl (victim) came to India as a Tourist alongwith her mother and 8 siblings. She was aged about 15 years and 8 months at the time of incident. She was residing in Silolim, Bardez Goa with her Indian boy friend namely Julio Lobo. On 17.2.2008 her mother and other siblings left for Gokarna in Karnataka. On the same day at about 8.30 p.m victim went to *Bean Me Up Restaurant*, Vagator, Anjuna to meet Ms. Ruby Caso, a

Spanish girl and a friend of victim. Ruby and victim spent the evening together. They visited number of restaurants where both consumed alcoholic drinks. They returned to *Bean Me Up Restaurant* around 00.30 hours of 18.2.2008. Victim left *Bean Me Up Restaurant* by informing Ruby that she was returning to Siolim. The victim was thereafter seen in front of *Luis Cafe*, a shack, Govekar wada, Anjuna around 03.00hours. When she reached *Luis Shack* she was intoxicated and her gait was not steady. She was wearing red sleeveless vest and blue shorts. She requested those who were present at the shack that she did not have money to go to Siolim. It is the case of the prosecution that despite knowing the fact that the victim was in an intoxicated condition and was minor, respondent no.1 Samson D'Souza offered her an alcoholic drink which she had consumed on the spot. The intention of respondent no.1-Samson was to commit rape/child abuse/sexual assault upon the victim. It is alleged by the prosecution that both the respondents and one Murli Sagar were sniffing cocaine lines and were consuming alcoholic drinks. The intention of the respondent no.1-Samson to administer intoxicating drug to the victim was to incapacitate her so that he could commit crime in which respondent no.2 Placido Carvelho alias Shana aided and abetted the commission of said crime.

4. It is alleged by the prosecution that in pursuance of the same, respondent no.1-Samson and respondent no.2-Shana had spread cocaine lines on the plate kept uncovered on the table and made the victim sniff the cocaine lines. The victim thereafter had consumed beer. Respondent no.1- Samson had carried two Ecstasy tablets from the bar counter of the shack and went to kitchen which he intended to give to the victim in order to commit rape/sexual assault/grave sexual assault upon the victim. PW14 Murli Sagar, who was in the shack at the relevant time assured the victim to drop her at *Curlies Restaurant*, however, respondent no.1-Samson, with the criminal intention of sexually abusing the victim, made PW14 Murli Sagar to believe that he would drop her at *Curlies Restaurant*. He took disadvantage of an intoxicated condition of the victim due to the consumption of cocaine lines, Ecstasy tablets and drinks, outraged her modesty and committed grave sexual assault. After committing the offence, respondent no.1-Samson hurriedly left his orange coloured chappals at the scene. He subsequently destroyed the said evidence.

5. According to the prosecution the respondent no.1-Samson was seen committing crime at the wee hours on 18.2.2008 behind *Luis shack* and in front of the chapel situated near *Luis*

Restaurant at Govekar Wada, Anjuna by PW14 Murli Sagar. Respondent no.1-Samson abandoned the victim to lie near the water line. Due to intoxicated condition the victim was unaware of the happenings around her. She was left in such a condition near the beach by respondent no.1-Samson with the knowledge that it would likely to cause her death due to asphyxia and drowning in the beach sand water. As such, respondent no.1-Samson had administered a stupefying, intoxicating or unwholesome drug to the victim with an intention to commit crime and thereby respondent no.1- Samson committed grave sexual assault on her. He had committed culpable homicide not amounting to murder. The respondent/accused no.1- Samson had also destroyed the evidence by removing the chappals from the spot with an intention to screen himself as an offender from legal punishment.

6. PW28 PI Nerlon Albuquerque who was incharge of Anjuna Police Station at the relevant time received a phone call from PW25 PSI Laxi Amonkar who was a Duty Officer at Anjuna Police Station that Head Constable Krishna Naik telephonically informed PW25 PSI Laxi Amonkar that he had received a phone call from an unknown person about a dead body of a female found floating in sea water near *Shore Bar* Anjuna. PW28 Nerlon Albuquerque directed Head

Constable Naik to lodge an UD and verify the information received. After verification of the information Head Constable Naik called PW28 Nerlon Albuquerque and informed that it was a dead body of a female foreigner who was brought out of the water and kept on the shore. PW28 Nerlon Albuquerque and PW25 Laxi Amonkar proceeded to the spot. PW25 Laxi Amonkar conducted inquest panchanama and sent the body to the Goa Medical College, Bambolim, for post mortem. PW28 Nerlon Albuquerque visited the spot and conducted inquiries about the deceased. By that time PW25 Laxi Amonkar who had received the autopsy report from the Goa Medical College, Bambolim produced the same before PW28 Nerlon Albuquerque. Around 21.30 hours PW15 Fiona Mackeown, mother of the victim approached the police station and informed this witness that it could be the body of her daughter. From the photographs she identified the same to be of her daughter. On 19.2.2008 PW15 Fiona Mackeown, after visiting Goa Medical College, Bambolim, identified the body of her daughter which was kept in the morgue. The statements of the witnesses came to be recorded. PW28 Nerlon Albuquerque had discussed the case with Sub-Divisional Police Officer (SDPO). During investigation it revealed that the victim was staying with one Julio Lobo(PW13). It revealed during the course of the investigation that when the victim reached *Luis Shack* at around

4.00am on 18.2.2008 she was drunk.

7. On 22.2.2008 PW15 Fiona Mackeown supplied a copy of a letter which was addressed to the Inspector General of Police, Panaji, Goa wherein she had suspected foul play in the death of her daughter.

8. A second autopsy over the dead body of the victim was conducted as PW15 Fiona Mackeown and one Advocate Varma expressed their doubts about first autopsy which was conducted by PW21 Dr. Silvano Sapeco. Meanwhile during investigation it revealed that respondent no.1-Samson was with the victim on 18.2.2008 at around 4.00 a.m. He thereafter, took the victim behind the shack near the pathway. They hugged and kissed each other. It further revealed during investigation that respondent no.1-Samson indulged in sexual act with the victim. They walked towards the beach. On reaching the beach they sat on sun bed near Catamaran. Thereafter, respondent no.1-Samson left the shack around 5.15 a.m leaving the victim behind in an intoxicated state.

9. Some part of the investigation was conducted by PW29 Braz Menezes who was posted as a Police Officer at Bicholim Police

Station. The case dairy and correspondences of Anjuna Police Station bearing UD No.5/2008 under Section 174 of Cr.P.C., dated 18.2.2008 were handed over to this witness by PW28 Nerlon Albuquerque. Meanwhile PW15 Fiona Mackeown lodged a complaint on 8.3.2008 alleging that death of her daughter was homicidal. As such, as per the instructions of Superintendent of Police, North this witness registered an offence under Section 302 of IPC on 9.3.2008 at Police Station Anjuna vide FIR No. 21/2008. The said complaint is at Exh.72. On the basis of the said complaint he arrested the respondent no.1-Samson and respondent no.2-Shana whose involvement was found in the commission of the offence during interrogation. They were referred for medical examination. PW29 Braz Menezes, had also recorded the statements of some of the witnesses and seized the clothes of the respondents which were on their persons at the time of commission of the offence. A panchanama of scene of occurrence was drawn in the presence of panch witnesses. On 16.4.2008 chemical analysis report of second autopsy was received. After investigation PW29 Braz Menezes filed a chargesheet before the Children's Court against respondent no.1-Samson and respondent no.2-Shana under Sections 302, 376, 328, 201, 109 of IPC and Section 8(1) (2) of the Goa Children's Act 2003.

10. Subsequent to the notification under Section 6 of the Delhi Special Police Establishment Act 1946 (for short "DSPE Act") by Government of Goa dated 6.5.2008, the Department of Personnel and Training, New Delhi vide notification No.228/33/2008-AVD-II dated 28.5.2008 under Section 5 of the DSPE Act had transferred the investigation of FIR No.21/2008 under Sections 302, 376, 328 read with Section 34 of IPC and Section 8 of the Goa Children's Act, 2003 registered at police station Anjuna Goa relating to murder of a British national victim to the CBI. Accordingly, CBI, SCB, Mumbai registered a case No.RC-BS1/2008/S/0001-CBI/SCB/Mumbai on 5.6.2008 and conducted further investigation.

11. PW30 Pramod Mudbhatkal conducted further investigation into the crime. He also recorded the statements of the witnesses, visited the scene of occurrence alongwith his team and also scrutinized the documents furnished to him by the earlier Investigating Officers. After completing the further investigation he filed a supplementary chargesheet in the Children's Court, against respondent no.1-Samson and respondent no.2-Shana under Sections 304(ii), 354, 328, 201, 109 of IPC and Section 8(1) and (2) of the Goa Children's Act 2003.

12. The learned Trial Court after hearing the prosecution, defence and after going through the record by an order dated 8.3.2010 framed a charge against respondent no.1-Samson and respondent no.2-Shana under Section 328 read with Section 8(2) of the Goa Children's Act, 2003. He framed charge against respondent no.1- Samson under Sections 304(ii), 354 and 201 of IPC and read with Section 8(2) of the Goa Children's Act, 2003. He framed charge against respondent no.2-Shana under Section 109 of IPC and read with Section 8(2) of the Goa Children's Act, 2003.

13. It was read over and explained to the respondents/accused to which both of them pleaded not guilty and claimed to be tried. The prosecution has examined as many as 31 witnesses in order to substantiate its case.

14. The defence of the respondents/accused, as emerged from the line of cross examination as well as from their statements under Section 313 of Cr.P.C is that it is a false case and that whatever the witnesses have testified is false or they are not aware of certain part of the evidence which has come on record. It is stated by respondent no.1- Samson that he has been wrongly framed and a case is created to enable the mother of the victim to receive monetary gains. No

defence evidence has been adduced on their behalf.

15. The learned President, Children's Court for the State of Goa, after recording the evidence of witnesses and hearing the prosecution and the defence found that the prosecution has failed to prove the charge against the respondents beyond reasonable doubts and, therefore, acquitted them of all the offences.

16. The sum and substance of the impugned judgment of acquittal reveals that the learned Trial Court came to a conclusion that chargesheet filed by CBI is a fresh chargesheet rather than a supplementary chargesheet. None of the notifications empowered CBI to register a fresh FIR/Crime in Mumbai and start the investigation afresh. It is also observed by the learned Trial Court that there was delay in recording the statements of the witnesses, and further there was no prior permission of the Court sought before commencing the investigation afresh. She observed that these technical discrepancies in the prosecution case diminishes its credibility. The learned Trial Court in the impugned judgment has also observed that testimonies of PW10 Luis Coutinho, PW14 Murli Sagar and PW16 Chandru Chavan are not free from shadow of doubt as Goa Police and CBI have not taken any action against PW10 Luis

Coutinho and PW14 Murli Sagar for their acts in violation of law. She disbelieved the testimonies of the witnesses mainly on the ground that they themselves cannot escape criminal liability under NDPS Act and breach of licences issued by Tourism and Excise Department. However, the learned Trial Court observed that there was presence of cocaine and ethyl alcohol in the stomach of the victim and that the victim was not in a normal condition as she was under the influence of alcohol. Thus, the learned Trial Court gave benefit of such technical lapses to the respondents/accused.

17. We have extensively heard Shri E. Khan, learned Special Public Prosecutor for the appellant and Shri S. G. Bhohe and Shri S. Pinto, learned Counsel for the respondent nos.1 and 2 respectively. We have also meticulously gone through the evidence of the prosecution witnesses, oral and documentary, adduced by it and also the written synopsis on behalf of the respective parties.

18. The learned Special Public Prosecutor Shri E. Khan, at the outset, assailed the impugned judgment of the Trial Court by contending that the Trial Court has grossly erred in holding that the First Information Report(for short "FIR") lodged by CBI in Mumbai is a fresh one and thus beyond the scope of notification no.RC-BS

1/2008/S/0001-CBI/SCB/Mumbai. According to the learned Special Public Prosecutor it is not a fresh FIR nor there is a fresh investigation but what has been filed by CBI subsequent to the investigation of the Goa Police, is a supplementary chargesheet under Section 173(8) of Cr.P.C. In support of his contentions he placed reliance on the following two case laws:-

- i. Vipul Shital Prasad Agarwal Vs. State of Gujarat and another¹.***
- ii. Vinay Tyagi Vs Irshad Ali alias Deepak and others²***

Thus, according to the learned Special Public Prosecutor the Trial Court had, from the very beginning, demonstrated her prejudiced approach against CBI and she failed to appreciate the ratio laid down in the aforesaid two rulings.

19. The Prosecution case revolves around the circumstantial evidence. The law is well settled by the Hon'ble Supreme Court in catena of decisions, more particularly in case of ***Sharad Birdhichand Sarda Vs State of Maharashtra,³*** The golden principles culled out based on circumstantial evidence can be enumerated as follows:-

¹ (2013)1 SCC 197

² (2013)5 SCC 762

³ (1984) 4 SCC 116.

- “1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.
2. The facts so established should be consistent with the hypothesis of guilt and 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.
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.”

20. We have gone through the ratio laid down in the below mentioned rulings which are identical and there is no different view in any of the rulings than the one that has been taken by the Supreme Court in case of **Sharad Chandra** (supra).

21. The learned counsel for the respondent no.1 pressed into service the following judgments:-

(i) Rishipal Vs State of Uttarakhand,⁴

(ii) Sharad Birdhichand Sarda Vs State of Maharashtra.

(iii) Hanumant, Son of Govind Nargundkar Vs State of Madhya Pradesh⁵

(iv) Jaharlal Das Vs State of Orissa⁶

⁴ (2013) 12 SCC 551

⁵ AIR 1952 SC 343

⁶ (1991) 3 SCC 27

(v) Hanma@ Hanmanta Ishvarappa Budane Vs State of Maharashtra⁷

(vi) Rajiv Singh Vs State of Bihar and another⁸

vii. State of Goa Vs Sanjay Thakran and another.

viii. Ravindra Jha Vs State⁹

ix. Paramjeet Singh @ Pamma Vs State of Uttarakhand¹⁰

22. In the latest judgment of **Pattu Rajan Vs State of Tamil Nadu¹¹** the Hon'ble Supreme Court has, in detail surveyed the well established case laws including the ratio laid down by the said Court in **Sharad Birdhichand Sarda's** (supra) case has reiterated the well settled principles on the point of appreciation of circumstantial evidence.

23. The main thrust of the prosecution was on the testimonies of PW10 Luis Coutinho, PW14 Murli Sagar and PW16 Chandru Chavan, who, according to the prosecution, are the prime witnesses of the prosecution whose unshattered and unrebutted evidence proved beyond reasonable doubt the complicity of the respondents/

⁷ 2011 ALL MR(Cri) 2168

⁸ (2015) 16 SCC 369

⁹ 2019SCC Online Bom 274(High Court of Bombay at Goa)

¹⁰ 2010 ALL MR(Cri) 3624 (S.C.)

¹¹ (2019)4 SCC 771

accused in commission of the offences with which they have been charged. It is contended that there was absolutely no delay in reporting the matter to the police which is evident from the complaint of PW15 Fiona Mackeown Exh.68 dated 22.2.2008 which she had written to the Inspector General of Police, Goa and the copy of which has been given to the police station, Anjuna, within whose jurisdiction the offence took place. PW15 Fiona Mackeown had been pursuing the matter rigorously with various Authorities and, therefore, there can be no question of any delay. The learned Special Public Prosecutor also drew our attention to a fact that the testimonies of aforesaid three witnesses corroborated each other substantially on material particulars. Even the statements recorded by Judicial Magistrate, First Class, Mapusa, under Section 164(5) of Cr.P.C. are also consistent with the evidence of these witnesses in the box.

24. According to the learned Special Public Prosecutor the respondents have not disputed their presence at *Luis Shack* as well as presence of the victim at the relevant time. There is also no dispute that the victim was already under the influence of liquor. The respondents in their statements under Section 313 of Cr.P.C., have failed to discharge the burden as per Section 106 of the Evidence Act

as they were the persons who had knowledge of a fact as to how the victim was found lying at the sea shore. This, according to the prosecution, is a strong incriminating circumstance in the chain of circumstances. He, therefore, placed reliance on a judgment of this Court in the case of ***State of Maharashtra, through Karveer Police Station Vs Babu alias Ravindra Suresh Kamble***¹² and in the case of ***Janardhan Kokre Vs State***¹³. In both the authorities the principles laid down for appreciation of circumstantial evidence have been reiterated in view of ***Sharad Birdhichand Sarda*** (supra). It is strongly contended by the learned Special Public Prosecutor that the respondents gave the victim not only Ecstasy tablets but allowed her to sniff cocaine and consume beer with an intention to exploit her sexually. Respondent no.2 indeed, abetted the said act which is evident from the testimonies of the witnesses. The act of respondents clearly falls within the purview of Section 328 of IPC as they had caused the intoxicant/drug to be taken by the victim with an intent to commit an offence and had full knowledge that the victim who was already under the influence of alcohol would be more intoxicated due to consumption of narcotic drug which may result in causing hurt to the victim. It is especially in the light of the fact that victim was a child in view of Goa Children's Act, 2003. Medical reports confirm

¹² 2011(2) Bom.C.R.(Cri) 372

¹³ Criminal Appeal No. 36 of 2013 dated 25.1.2019.

the fact of alcohol and narcotic drug found in the body of the victim.

25. Prosecution admits that there is no charge under Section 302 of IPC nor it is their case though, earlier investigation by the Goa Police resulted in filing a chargesheet under Section 302 of IPC alongwith other sections.

26. It is further contended by Shri Khan that there is ocular version of PW10 Luis Coutinho and PW16 Chandru Chavan who had witnessed the orange chappals of respondent no.1-Samson .Though the prosecution has failed to recover and produce the orange chappals of respondent no.1-Samson, yet, it is submitted that testimonies of these witnesses, which remain unrebutted should not be discarded. It is further contended that the respondents had knowledge that the victim was a minor girl and therefore, it was their duty to take her proper care in the sense that they ought not to have allowed her to consume narcotic drug and alcoholic drink and should not have left her on the beach. The learned Special Public Prosecutor has also brought to our notice that the omissions have been incorrectly recorded by the Trial Court which is totally against the ratio laid down by the Hon'ble Supreme Court in the case of ***Tahsildar Singh and Another vs The State Of Uttar Pradesh***¹⁴.

¹⁴ AIR 1959 SC 1012

27. As such, the learned Special Public Prosecutor strongly urged to quash and set aside the impugned judgment of acquittal of the respondents and submits that respondent no.1-Samson be convicted under Sections 328, 304(ii), 354, 201 read with Section 8(2) of the Goa Children's Act, 2003 and accused/respondent no.2-Sana of the offences under Sections 328, 109 of IPC read with Section 8(2) of the Goa Children's Act, 2003.

28. Per contra, Shri S. G. Bhohe, learned Counsel for the respondent no.1- Samson contended that the victim was already inebriated and intoxicated due to consumption of alcohol and narcotic drug which is apparent from the evidence of PW10 Luis Coutinho and PW14 Murli Sagar. Therefore, there is no question of respondent no.1-Samson inducing her to sniff cocaine line or consume alcoholic drink. The learned Counsel contended that one Michael Manion @ Masala, a British citizen, whose statement came to be recorded under Section 164(5) of Cr.P.C. as well as PW14 Murli Sagar were the only persons who already knew the victim. The Investigating Officer has not investigated into the aspect as to whether they could have been the persons responsible for causing her death. The learned Counsel took us through the evidence of

PW10 Luis Coutinho, owner of the *Luis Shack* and PW16 Chandru Chavan. It is contended that PW10 Luis Coutinho had already left the shack at about 3.30a.m whereas PW16 Chandru Chavan was sleeping in the shack. He woke up at 4.30 a.m for toilet. The testimonies of these witnesses, according to the learned Counsel are not free from doubt. The prosecution has ignored the evidence of PW16 Chandru Chavan. The learned Counsel however, admits presence of the accused/respondents at the *Luis shack* as incidental for the reason that respondent no.1- Samson was working there as a bartender. There is no active role attributed to him so far as Section 304(ii) of IPC is concerned.

29. As far as the theory of “last seen together alive” is concerned, it is contended that there is no *sequitur* further as others were also present in the *Luis shack* at the relevant time. There is no clear finding as to the cause of death of the victim. The learned Counsel, therefore, has placed reliance upon various authorities which we shall refer hereinafter.

30. It is further contended by the learned Counsel Shri Bhobe that it has come on record that one Shanti who was ex-boy friend of victim was harassing her. He was throwing stones of which one

Charlie is the witness who has not been examined. There was enmity between the victim and Shanti and even PW15 Fiona Mackeown had also suspected Shanti. Why said Shanti has not been examined by the prosecution.

31. So far as orange chappals of respondent no.1- Samson are concerned, it is contended that they are freely available in the market. The prosecution has neither seized nor produced the chappals, during the trial. Therefore, there is no question of respondent no.1- Samson being guilty of the offence under Section 201 of IPC. Thus, it is the contention of the learned Counsel that the investigation is quite defective. It is also contended that it was not the duty of respondent no.1- Samson to take care of the victim being a minor girl. It is contended that alleged acts of negligence are unknown to the scope and ambit of Sections 299 and 304(ii) of IPC particularly in view of the fact that the victim and the accused were neither related to each other nor respondent no.1- Samson had any duty to take care of the victim.

32. On the aspect of Section 354 read with Section 8(2) of the Goa Children's Act 2003, it is contended that victim was already intoxicated and inebriated. Respondent no.1-Samson had held her

from behind only to give a support and to prevent her from falling down. It does not mean that respondent no.1-Samson intended to outrage her modesty. The learned Counsel also tried to bring forth on record the contradictions and omissions in the testimonies of PW10 Luis Coutinho, PW14 Murli Sagar and PW16 Chandru Chavan by contending that these are material omissions and contradictions on record. According to the learned Counsel no motive has been established by the prosecution which assumes important in the case on circumstantial evidence. The prosecution case, therefore, falls to the ground on this aspect itself. Lastly, it is contended that while exercising the power of the Appellate Court in cases arising against the judgment of acquittal, what is important is to see whether the view taken by the Trial Court is just and possible view, and if it is so then the Appellate Court cannot interfere in the said judgment. The prosecution has not shown the impugned judgment to be perverse or that it cannot be a possible view. The reliance is placed on a judgment of the Hon'ble Supreme Court in case of ***Hakeem Khan and others Vs State of Madhya Pradesh***¹⁵ The learned Counsel has therefore supported the impugned judgment and order.

33. Shri Pinto, learned Counsel for the respondent no.2 contended that there is nothing against respondent no.2-Shana in so

¹⁵ (2017) 5 SCC 719

far as main witnesses namely PW10 Luis Coutinho, PW14 Murli Sagar and PW16 Chandru Chavan are concerned who have not stated anything against respondent no.2-Shana. There is no question of holding him guilty under Section 328 of IPC. The prosecution has failed to prove that respondent no.2-Shana abetted the commission of the offence of causing the death of the victim by intentionally aiding respondent no.1-Samson in causing the victim to sniff cocaine or Ecstasy tablets.

34. At the outset, the learned Trial Court in the impugned judgment observed that the second crime/FIR registered at Navi Mumbai was consequent upon notification No.16/05/2008-HD(G) dated 6.5.2008 issued by Government of Goa and Notification no. 228/33/2008-AVD-II dated 28.5.2008 issued by the Central Government, Ministry of Personnel Public Grievance and Pensions(Department of Personnel and Training) New Delhi.

35. Undoubtedly, by virtue of aforesaid notifications, investigation into the original crime no.21/2008 dated 9.3.2008 under Sections 302, 376, 328 read with Section 34 of IPC and Section 8 of the Goa Children's Act 2003 registered by PW29 Braz Menezes at Anjuna Police Station came to be transferred to CBI with the consent

of the Government of Goa, by the Central Government.

36. The learned Trial Court however, observed that CBI, through PW30 Pramod Mudbhatkal, did not continue with the earlier investigation in crime no.21/2008, but registered a fresh FIR on 5.6.2008 on the basis of the complaint lodged by PW15 Fiona Mackeown registered on 9.3.2008. According to the learned Trial Court, PW30 Pramod Mudbhatkal did not do much during further investigation save and except re-recording the statements of the witnesses whose statements have already been recorded by the Officer Anjuna Police Station. Recording of a fresh statements and filing of fresh chargesheet are two different and distinct things. What has been done by the CBI in the instant case is further investigation of the case and not fresh investigation and fresh chargesheet. What has been filed by CBI subsequent to the filling of the first chargesheet by Goa Police is a supplementary chargesheet as contemplated in Section 173(8) of Cr.P.C. The learned Trial Court misread the notification dated 6.5.2008 issued by Government of Goa. By the said notification, Government had then extended powers to CBI to conduct further investigation. The notification clearly depicts that the Under Secretary Home, State of Goa accorded consent to the extension of power and jurisdiction to investigate the

death of British National (the victim) in respect of FIR no.21/2008 dated 9.3.2008 registered at Anjuna Police Station and subsequent events in connection with the said matter and any other offence/offences committed in the course of same transaction or arising out of the same facts.

37. It is apparent from the findings of the learned Trial Court that she committed a grave error in jumping to a conclusion that it is a fresh investigation and a fresh chargesheet by ignoring the scope of Section 173(8) of Cr.P.C. vis-a-vis notification referred herein above.

38. The learned Special Public Prosecutor has, therefore, rightly placed useful reliance on following two judgments of the Supreme Court.

39. In the case of **Vipul Shital Prasad Agarwal** (supra) the Hon'ble Supreme Court observed in paragraphs no.20,21,22 and 23 thus:-

20. Section 173 of the Code of Criminal Procedure, 1973 (for short "the CrPC") obligates the police investigating a case to make a report to the Magistrate to take cognizance of the offence which is subject-matter of the investigation. Sub-section (2) indicates the various pieces of information

which are required to be contained in the said report. Section 173(2)(i)(d) stipulates that the said report should state whether any offence appears to have been committed and, if so, by whom. If the Investigating Officer opines in the said report that an offence appears to have been committed by the persons named therein, he is also obliged to forward to the Magistrate all documents on which the prosecution proposes to rely along with the statements recorded under Section 161 CrPC of all persons whom the prosecution proposes to examine as witnesses. Sub-section (8) recognizes the authority of the Investigating Officer/Agency to make any further investigation in respect of any offence notwithstanding the fact that the report contemplated under sub-Section (2) of Section 173 had already been submitted. It may be worthwhile noticing that under sub-Section (3), even a superior police officer appointed under Section 158 CrPC could direct the Investigating Officer to make a further investigation pending any orders by the Magistrate concerned on the report submitted. It is settled law that a Magistrate to whom report is submitted under Section 173(2) can direct the Investigating Officer to make a further investigation into the matter.

21. In my opinion, the mere undertaking of a further investigation either by the Investigating Officer on his own or upon the directions of the superior police officer or pursuant to a direction by the Magistrate concerned to whom the report is forwarded does not mean that the report submitted under Section 173(2) is abandoned or rejected. It is only that either the Investigating Agency or the Court concerned is not completely satisfied with the material collected by the investigating agency and is of the opinion that possibly some more material is required to be collected in order to sustain the allegations of the commission of the offence indicated in the report.
22. Therefore, the submission of Mr. Sushil Kumar, learned senior advocate appearing for the petitioner, that the directions given by this Court earlier in *Narmada Bai V. State of Gujarat* (2011) 5

SCC 79 would necessarily mean that the charge-sheet submitted by the police stood implicitly rejected is without any basis in law and misconceived. Even the fact that the CBI purported to have registered a "fresh FIR", in my opinion, does not lead to a conclusion in law that the earlier report or the material collected by the Gujarat Police (CID) on the basis of which they filed the charge-sheet ceased to exist. It only demonstrates the administrative practice of the CBI.

23. In my view, notwithstanding the practice of the CBI to register a "fresh FIR", the investigation undertaken by the CBI is in the nature of further investigation under Section 173(8) of the CrPC pursuant to the direction of this Court.

40. In the case of **Vinay Tyagi** (supra) the relevant paragraphs nos. 20,21 and 22 of the said judgment read thus:-

"20. Having noticed the provisions and relevant part of the scheme of the Code, now we must examine the powers of the Court to direct investigation. Investigation can be ordered in varied forms and at different stages. Right at the initial stage of receiving the FIR or a complaint, the Court can direct investigation in accordance with the provisions of Section 156(1) in exercise of its powers under Section 156(3) of the Code. Investigation can be of the following kinds:

- (i) Initial Investigation.
- (ii) Further Investigation.
- (iii) Fresh or de novo or re-investigation.

21. The initial investigation is the one which the empowered police officer shall conduct in furtherance to registration of an FIR. Such investigation itself can lead to filing of a final report under Section 173(2) of the Code and shall take within its ambit the investigation which the empowered officer shall conduct in furtherance of an order for investigation passed by the court of competent jurisdiction in terms of Section 156(3) of the Code.

22. *'Further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173(8). This power is vested with the executive. It is the continuation of a previous investigation and, therefore, is understood and described as a 'further investigation'. The scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as 'supplementary report'. 'Supplementary report' would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a 'reinvestigation', 'fresh' or 'de novo' investigation."*

41. Thus, it can be seen that in the case at hand, after issuance of notification by the Under Secretary to the Government of India which was published in the Gazette of India in view of sub-section 1 of Section 5 read with Section 6 of the DSPE Act and with the consent of State of Goa, powers and jurisdiction were extended to investigate FIR no.21/2008 already registered with Anjuna Police Station on 9.3.2008. By no stretch of imagination it can be said to be

a fresh FIR or a fresh chargesheet by the CBI. It was indeed a "further investigation" and filing of "supplementary chargesheet" as stated herein above.

42. Unless a constitutional Court sets aside earlier investigation, it can't be said that the further investigation by the CBI or any other agency is without jurisdiction or is not lawful. Here is the case where CBI has simply entered into the shoes of Goa police.

43. The learned Trial Court returned the findings mainly on the following circumstantial evidence namely:-

- (i) Presence of Victim and both the respondents in the *Luis Shack* which belongs to PW10 Luis Coutinho just before the incident.
- (ii) Physical as well as mental state of mind of the victim to the knowledge of accused/respondents when she arrived at *Luis Shack*.
- (iii) Availability of Cocaine, Ecstasy Tablets and alcohol at the *Luis Shack*.
- (iv) Presence of ethyl alcohol and cocaine in the stomach of the victim.
- (v) Respondent/Accused no.1-Samson was last seen together with victim at 4.30 a.m and dead body was found at about 6.00a.m at the beach.
- (vi) A pair of orange chappals of accused/respondent no.1-Samson found near desk bed and its removal by him.

(vii) Post crime conduct of respondent no.1- Samson i.e. nervousness, drinking quickly and found scared.

44. As already stated, the prosecution has mainly relied on the evidence of PW10 Luis Coutinho Exh.59, PW14 Murli Sagar Exh.64 and PW16 Chandru Chavan Exh.98 in order to substantiate its charges against respondents.

45. All these three witnesses are important in the sense that they had seen the victim alive in the company of respondent no.1- Samson, lastly. Even respondent no.1-Samson too has not disputed this aspect in the light of the fact that admittedly respondent no.1-Samson has been working as a barman in *Luis Shack* which belongs to PW10 Luis Coutinho. His evidence indicates that he runs the said shack in the name and style as *Lui Cafe*, situated at Goveker Waddo, middle Anjuna. Admittedly the said business is in his name and one Mahanand Mandrekar who is his partner in the business. It is also not in dispute that PW10 Luis Coutinho conducts the said business on the basis of licences issued by the Tourism Department as well as Excise Department of Government. He was duly permitted by Village Panchayat to run the said business. Such documents are proved at Exh.60 to 62.

46. His evidence further reveals that in the year 2008 there were six workers in his shack namely Vikas (Cook), Ramesh and Ashok(helpers), one Kaji (dish washer), Chandru (PW16) as a waiter and respondent no.1- Samson D'Souza as a bar man. This witness used to purchase grocery and other miscellaneous items for his shack. Respondent no.1-Samson has been working in the shack of PW10 Luis Coutinho and he knew him since last 10 years. Respondent no.1-Samson was married with a French National.

47. It has come in the evidence of PW10 Luis Coutinho that on 17.2.2008, as usual, he visited the shack between 11.00 to 12.00 hours. He kept the items purchased by him in the shack and went home for lunch. He returned back within half an hour. Around 8.30 p.m when he was in the shack there were some customers including one Michael Manion @ Masala, a British national, who was a regular visitor of his shack. He also admits presence of respondent no.2 Shana (Placido Carvalho) in the shack who had a side business of matka gambling. Respondent no.2 Shana used to come to the shack and used to sit in the kitchen as he had liking for sitting in the kitchen only. It is testified that respondent no.2 Shana is a drug addict of cocaine. He further testified that around 2.30p.m PW14 Murli Sagar also came to the shack and was also sitting with

respondent no.2 Shana whereas respondent no.1-Samson was talking with his friend Michael Manion @ Masala.

48. According to PW10 Luis Coutinho he was in the shack till around 2.30 a.m. PW14 Murli Sagar was sitting with respondent no.2 Shana in the kitchen. Respondent no.2-Shana and Murli Sagar were enjoying drinks and also cocaine lines which were placed on a plate.

49. Around 3.00 to 3.30 am when this witness was on the steps of his shack he noticed the victim lying on the beach in the sand near his shack. She got up on her own and walked towards his shack. Her gait was not normal. PW10 Luis Coutinho thought that she must be under the influence of alcohol. She came near this witness and started talking with him and told him that she wanted to go to Anjuna. PW10 Luis Coutinho told her that the same place is known as Anjuna. Thereafter, the girl told him that she wanted to go to Siolim. She was asked by this witness to hire a taxi which will be available in the market. However, the said girl did not have money for hiring a taxi. Thereafter, she came inside the shack and went to the bar counter. She was followed by this witness. The victim introduced herself by telling her name and told that she had never visited this place and came for the first time. She was a regular

visitor of *Curlies Bar and Restaurant* It reveals from the evidence of PW10 Luis Coutinho that respondent no.1-Samson was at the bar counter when this discussion was going on which necessarily means that respondent no.1-Samson was hearing the conversation. Michael Manion @ Masala was also standing by the side of the counter at that time. The victim was wearing red coloured sleeveless top and blue coloured shorts. The witness noticed one stud pierced below the lower lip of the victim.

50. The evidence of PW10 Luis Coutinho further indicates that the victim started talking with respondent no.1-Samson. Respondent no.1-Samson asked her as to whether she knew anyone from *Curlies Bar and Restaurant*. Thereafter respondent no.1-Samson took her in the kitchen where respondent no.2 Shanna and PW14 Murli Sagar were already sitting. After sometime respondent no.1-Samson came out. It is specifically testified by PW10 Luis Coutinho that respondent no.1-Samson offered beer to the victim. Thereafter PW14 Murli Sagar came out of the kitchen and took one beer bottle for himself and consumed the same. After 15 minutes victim came out of the kitchen, sat on the stool, opposite the bar counter and started talking with respondent no.1-Samson and Michael Manion @ Masala.

51. Around 4.00am PW10 Luis Coutinho collected the cash from the counter, counted the same and left for his house. Around 11.00a.m of 18.2.2008 when his wife woke him up he noticed several missed call from the Sarpanch of Anjuna by name Edwin Nunes who is also an owner of *Curlies Bar*. PW10 Luis Coutinho could not contact Edwin on his mobile since there was no balance. Thereafter, he came to know that dead body of victim was found near his shack. It is also his evidence that when he reached the shack, he noticed orange coloured chappals of respondent no.1-Samson kept near the deck bed. According to this witness respondent no.1-Samson came to the shack at around 6.00p.m though he normally used to come between 2.30 to 3.00p.m.

52. It is testified by this witness that respondent no.1-Samson inquired with him about the victim upon which he told him that she was found dead. When PW10 Luis Coutinho asked respondent no.1-Samson as to how his orange coloured chappals were found near the spot where dead body was found, respondent no.1-Samson replied that during last night he was searching for his chappals and could not find it. This is what PW10 Luis Coutinho has deposed on oath in so far as respondent no.1-Samson was last seen together with the victim on the earlier night when he left the shack around 4.00p.m

53. Statement of PW10 Luis Coutinho also came to be recorded by JMFC, Mapusa under Section 164(5) of Cr.P.C. which is at Exh.60.

54. During cross examination of this witness on behalf of respondent no.1-Samson, certain omissions were brought on record which are not material in the sense that they do not make any substantial dent in the testimony of this witness which is otherwise reliable, cogent and inspires confidence. It is interesting to note that though investigation was conducted not only by the Goa Police but also by CBI after further recording the statements of the witnesses, attention of the witness was drawn to the statement recorded by Anjuna Police Station and not with respect to the statements recorded subsequently by Bicholim Police Station and by CBI. As a matter of fact there is absolutely no discussion in the impugned judgment as to whether so called omissions of almost all witnesses were brought to the notice of the Investigating Officer in order to prove the same and in order to evaluate the evidence with respect to their police statements as contemplated by the Supreme Court in a case of **Tahsildar Singh and Another** (supra). Unless omissions or contradictions are duly proved through Investigating Officer, such

omissions or contradictions, unless they are material and are duly proved cannot be taken into consideration. Statements recorded by police under Section 162 of Cr.P.C are inadmissible in evidence except for the purpose of contradictions and omissions which are to be proved as per Section 145 of the Evidence Act.

55. Cross examination of PW10 Luis Coutinho further fortifies the fact that respondent no.1-Samson was working as barman and his place was behind the bar counter. If that being so, respondent no.1-Samson had no business to offer beer to the victim who was already under the influence of liquor.

56. It is clear from the evidence of this witness, being the owner of the said shack, that his barman respondent no.1-Samson offered beer to the victim after taking her to the kitchen. In his statement under Section 164(5) of Cr.P.C. before JMFC Mapusa, PW10 Luis Coutinho has also testified on oath about the presence of PW14 Murli Sagar, respondent no.1-Samson and respondent no.2-Shana and Michael Manion @ Masala in his shack at about 2.30 hours on 18.2.2008. He also testified about the arrival of the victim who appeared to have consumed lot of liquor and was unable to stand properly. He further testified about the conversation between

him and the said foreign girl(victim). PW10 Luis Coutinho had also deposed on oath before the JMFC that respondent no.1-Samson took her to the kitchen. He came to the counter ten minutes after leaving the victim in the Kitchen and started talking with Michael Manion @ Masala. Thus, the testimony of PW10 Luis Coutinho has been substantially corroborated with respect to his statement under Section 164(5) of Cr.P.C.

57. Another important witness examined by the prosecution is PW14 Murli Sagar. He was working in *Curlies Shack* as he wanted to start his own restaurant at Bangalore. He was working as a helper in *Curlies Shack* to get experience in the said field. He used to visit *Luis Shack* twice or thrice a month. He knew PW10 Luis Coutinho, respondent no.1-Samson and other locals who used to visit *Luis Shack*. PW14 Murli Sagar testified that he used to consume cocaine. Said drugs were offered by foreigners. According to PW14 Murli Sagar he used to consume beer at *Luis Shack*. He had also tried cocaine in *Luis Shack* alongwith Michael Manion @ Masala and respondent no.1-Samson. According to him both the respondents were also consuming cocaine. He knew the respondent no.1-Samson for last two years as they hail from the same place. They also used to play cards. Respondent no.1-Samson used to attend *Curlies Bar*

with his wife and children. He knew wife of respondent no.1-Samson who is a foreign citizen. According to this witness respondent no.1-Samson used to look after the accounts and orders in the shack. He was also acquainted with Respondent no.2-Shana as he met him once or twice. As regards Michael Manion @ Masala it is testified by PW14 Murli Sagar that though he didn't know much about him, the said Michael Manion @ Masala used to have drinks, smoke chilly/hashis and used to sniff cocaine.

58. Evidence of PW14 Murli Sagar further reveals that he knew the deceased by face as she was regular visitor of *Curlies Shack* with her family. She used to drink from the glasses left over by the other customers as she was fond of consuming alcohol. He had seen her once or twice literally shaking under the influence of drugs in *Curlies Shack*.

59. On 17.2.2008 he came to *Curlies Shack* at around 4.00 pm and was doing his regular work till 2.30a.m. Thereafter he went to *Luis Shack* with one Fursu as he was called by respondent no.1-Samson. When he entered *Luis Shack* at about 2.40 am he noticed PW10 Luis Coutinho playing pool with two other persons. He talked with PW10 Luis Coutinho for two to three minutes and went to the

main bar where he met respondent no.2- Shana and Michael Manion @ Masala. Respondent no.2 Shana offered him a beer and then both of them proceeded inside the kitchen. Respondent no.2 Shana was sitting in a kitchen with a glass of Whisky. It has come in the evidence of PW14 Murli Sagar that there was a plate in front of him on which three or four lines of cocaine were drawn. PW14 Murli Sagar took a currency, rolled it and sniffed one line. Respondent no.1-Samson too sniffed one line of cocaine and one by respondent no.2-Shana. Thereafter respondent no.1- Samson was busy in his work. PW14 Murli Sagar either heard respondent no.1-Samson or Luis Coutinho(PW10) saying "Do you know anyone from Curlies?" At that time he saw respondent no.1-Samson, victim and PW10 Luis Coutinho entering into the Kitchen. The victim recognized this witness as he too recognized her. The victim asked PW14 Murli Sagar whether he had number of her boy friend Julio Lobo(PW13) upon which this witness told her that he did not have Julio's number. The victim asked him whether he would drop her at Julio's house upon which PW14 Murli Sagar replied that he did not know the way to the house of Julio but he would drop her to the *Curlies Bar* where the victim used to stay sometimes with her brothers.

60. The evidence of PW14 Murli Sagar further reveals that

thereafter the victim had a drink which he had kept and then she rolled a note and sniffed the cocaine which was on the table. PW14 Murli Sagar thereafter got up to bring beer. The victim occupied the chair. She was unable to speak properly and was fumbling. He further testified that when he came out he met respondent nos.1- Samson and 2-Shana. Michael Manion @ Masala had told PW14 Murli Sagar that victim had already consumed lot of drinks. Michael Manion @ Masala had made this witness aware about the condition of the victim. By that time PW14 Murli Sagar went out for toilet. When he returned after two minutes he noticed Michael Manion @ Masala shouting as to how can these people give Ecstasy tablets to her? "Ecstasy" is in the form of tablet. PW14 Murli Sagar informed Michael Manion @ Masala that he had no idea as he was outside. When he was talking with Michael Manion @ Masala he noticed respondent no.1- Samson and the victim coming out. The victim was talking with respondent no.1 Samson and Michael Manion @ Masala. PW14 Murli Sagar went to the kitchen where respondent no.2 Shana was present. After sometime PW10 Luis Coutinho tapped the shoulder of this witness and said that he is going home. It was around 4.30 am.

61. In order to prove an offence under Section 328 of IPC the

prosecution is required to prove that the substance in question was stupefying, intoxicating, or unwholesome drug which is evident from the Autopsy reports in the case in hand. The prosecution is required to prove that the accused administered such substance to the victim or caused the victim to take such substance and further he did so with intent to cause hurt or knowing it to likely to cause hurt or that the intention to commit or facilitate the commission of an offence. All these ingredients are precisely attracted in this case qua respondent no.1. There is direct, reliable and cogent evidence on record. We shall discuss the autopsy reports and the medical evidence in the subsequent paragraphs.

62. The testimony of PW14 Murli Sagar further reveals that respondent nos.1- Samson, respondent no.2-Shana, Michael Manion @ Masala, victim and he were in the bar. As he received an SMS from his girl friend Katherine, he was about to leave the *Luis Shack* and, therefore, asked the victim whether she would come with him. The victim was about to join him when PW14 Murli Sagar asked Samson/ respondent no.1 to give him less than ½ gms of cocaine for his personal consumption. Respondent no.1-Samson gave the same to PW14 Murli Sagar. Thereafter they left the shack from the chapel side stair case. The victim followed PW14 Murli Sagar but when she

reached near the sand, she sat down and started talking about stars and wanted music. Then PW14 Murli Sagar asked the victim whether she would accompany him, she did not bother and lied down. PW14 Murli Sagar, therefore told respondent no.1-Samson that he wanted to leave immediately as he was getting late. The victim, all of a sudden, ran between them towards the bushes. She was followed by respondent no.1-Samson who held her from behind. As PW14 Murli Sagar was leaving the said place by his scooter, respondent no.1 Samson told him that victim had lost her slippers and requested him to find it out. PW14 Murli Sagar could not find it out, however, he noticed respondent no.1-Samson standing and holding the victim from behind. When PW14 Murli Sagar returned, he saw respondent no.1-Samson sitting down with the victim and it appeared to him that she was comfortable with him. He saw the victim talking with respondent no.1-Samson. She had folded her legs and went down with respondent no.1-Samson. She was found relaxed and was singing. Respondent no.1-Samson told PW14 Murli Sagar that he would drop her. This is the last time, according to PW14 Murli Sagar that he saw the victim and respondent no.1 Samson who was holding her.

63. During the course of his statement under Section 164(5)

of Cr.P.C. by the JMFC Mapusa (Exh.84) PW14 Murli Sagar had categorically testified by supporting his version in the Court about the arrival of the victim in *Luis shack*, alongwith respondent no.1-Samson, the conversation between the victim and the respondent no.1-Samson. He had also testified on oath before the Magistrate as to how the victim sniffed one line of cocaine without asking anybody. He also testified as to how the victim was fumbling and was continuously talking as if she knew respondent no.1-Samson and respondent no.2-Shana before she came to *Luis shack*. He had also stated before the Magistrate that he went to the toilet and after returning from the toilet he heard Michael Manion @ Masala asking loudly as to how these people could give a ecstasy tablet to a minor girl and was very angry. In his statement before the learned JMFC PW14 Murli Sagar had also stated and we quote:-

"At that time Scarlett moved towards Shana and sniffed one line of cocaine without asking anybody. At that time I was standing there, Shana was sitting and Samson was also standing. After sniffing the Cocaine she sat down on the plastic chair and she was continuously talking and fumbling and thereafter, I am to know that she was drunk. Scarlett was continuously talking as if she knew Samson and Shana before she came to Luis Shack. At the moment I took a chance and came out of the kitchen and came to the bar. My kingfisher beer was on the table and Sacrllett drank it without asking anybody. She was also in a habit of drinking anybody drinks without asking as to whose it was. I knew this as she used to regularly come to Curlies Shack. At the bar I opened another small bottle of beer and Masala was standing at a counter. I

had conversation with Masala at the Counter. I came out of the Shack and Scarlett walked with me till the side steps of the shack and thereafter she sat down in the sand folding her legs and looking at the sky she said that she wanted to listen to the music. I told her whether she wanted to stay or to come with me. At that time she insisted that she wanted to listen some music and she fell down on the sand. Looking at Scarlett I came to know that she was not in a position to sit on the Activa scooter which I was supposed to drive to go back to home. I decided to leave from there. I went to the parking place which is on the rear side of the shack. At that time I saw Samson who came from the other side of the shack which also reached the parking area. I was surprised on looking a Samson as I had seen him at the bar counter talking with Masala and Shana. Samson told me to stay back and why you wanted to go now. I saw Scarlett coming running and she went towards the open area where there were some bushes trees. Samson also ran after her and caught her very firmly as she was out of control. Samson was coming back holding Scarlett from behind and I started my bike. Samson was holding Scarlett and at that time I came to know that Scarlett was not in a condition to sit on my bike. Samson told me to go and that he would drop Scarlett."

64. It has come in the evidence of PW14 Murli Sagar that after noticing respondent no.1-Samson and the victim he left the *Luis shack* and when he reached at a distance of about ½ kms to talk to his girl friend Katherine on mobile, Michael Manion @ Masala was passing by the side on his bike. He turned around and asked PW14 Murli Sagar about the victim. When PW14 Murli Sagar told him that respondent no.1-Samson had promised to drop her, Michael Manion @ Masala got very angry by saying that he(PW14 Murli

Sagar) does not know what was happening. He then took a turn and went away. After reaching home PW14 Murli Sagar gave a call to respondent no.1- Samson but he did not pick up his phone. He sent a sms to respondent no.1-Samson. Around 6.00am i.e after about one hour respondent no.1-Samson gave him a call. PW14 Murli Sagar informed respondent no.1-Samson that Michael Manion @ Masala was very angry with him.

65. On 19.2.2008 in the morning one Baptist, a friend of Murli Sagar knocked the door and informed about the dead body which was found near the *Luis Shack*.

66. PW14 Murli Sagar was extensively cross examined on behalf of both the respondents. As already stated herein above that certain omissions which were brought on record were only in respect of first statement recorded by Anjuna Police Station and not in respect of subsequent statement recorded by CBI. Moreover, unless the omissions are duly proved through Investigating Officer, they cannot be termed as omissions in the real sense and the improvement by the witnesses during the course of evidence. In cross examination as already stated herein above, the presence of victim as well as respondent no.1-Samson and respondent no.2-Shana in the *Luis*

Shack at the relevant time has not been disputed at all. As a matter of fact the manner and the mode in which the learned Trial Court recorded the omissions in the form of complete paragraphs is unknown to the well established procedure for bringing omissions and contradictions on record as per the ratio laid down by the Hon'ble Supreme Court in ***Tahsildar Singh and Another*** (supra). In their statements under Section 164(5) of Cr.P.C. witnesses have given categorical and vivid account of what they had seen at the relevant time in *Luis Shack* during the course of their evidence in the Trial Court. Substantive part of their statements under Section 164(5) of Cr.P.C. corroborates with their testimonies before the Trial Court.

67. The Supreme Court in the case ***R. Shaji Versus State of Kerala***¹⁶ while discussing the scope of Sections 164 and 161 of Cr.P.C., its object and whether they can be regarded as substantive evidence has observed at paragraphs 26, 27 and 28 thus:-

“26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 Cr.P.C. can be used only for the purpose of contradiction and statements under Section 164 Cr.P.C. can be used for both corroboration and contradiction. In a case where the magistrate has to perform the duty of recording a statement under Section 164 Cr.P.C., he is under an obligation to elicit all information which the witness wishes to disclose, as a

witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 Cr.P.C. Hence, the magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

27. *So far as the statement of witnesses recorded under Section 164 is concerned, the object is two fold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in Court should be discarded, is not at all warranted. (Vide: Jogendra Nahak & Ors. V. State of Orissa & Ors., AIR 1999 SC 2565; and Assistant Collector of Central of Central Excise, Rajamundry Vs. Assistant Collector of Central Excise, Rajamundry Vs. Duncan Agro Industries Ltd. & ors., AIR 2000 SC 2901).*
28. *Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Cr.P.C., such statements cannot be treated as substantive evidence."*

68. The ratio laid down by the Hon'ble Supreme Court squarely applies to the present set of facts wherein the learned Magistrate had performed the duties of recording the statements of these witnesses in order to elicit all information which the witnesses desired to disclose. Such statements can be used for the purpose of corroboration and contradiction both. The witnesses herein have not changed their stand denying the contents of their previously

recorded statements. The evidence of these two witnesses including the evidence of PW16 Chandru Chavan is perfect in what has been deposed to by them in the box vis-a-vis before the learned JMFC under Section 164 of Cr.P.C. Even though the statement under Section 164 of Cr.P.C. is not a substantive evidence in the sense that there was no opportunity for the defence to cross examine the witnesses, yet, in view of the ratio laid down by the aforesaid case law, such statements can be used for the purpose of corroboration under Section 157 of the Evidence Act. We are mindful of the fact that in criminal case, life and liberty of a person is involved and therefore, higher degree of proof is a sine qua non for the purpose of establishing the guilt against the accused.

69. There is no effective cross examination of PW 14 Murli Sagar and nothing could be elicited from his mouth which would render his testimony unworthy of credit in so far as presence of both the respondents at the shack as well as availability of cocaine and ecstasy tablets and alcohol at *Luis shack*.

70. The following circumstances have been established which can be deduced as under from the evidence of PW10 Luis Coutinho, and PW14 Murli Sagar. Respondent no.1-Samson had heard the

conversation between the victim and PW10 Luis Coutinho. She was already intoxicated and under inebriated condition which was very much to the knowledge of respondent no.1-Samson. His duty was behind the bar counter. However, he took her to the Kitchen. He had no business to leave the counter and to take the victim to the Kitchen which exhibits his conduct and *mens rea*. It is further evident that respondent no.1-Samson offered beer to the victim who was already under the influence of liquor. This had aggravated the influence of alcohol in her body. What else could be the reason for the respondent no.1-Samson to offer beer to the victim other than to seduce and exploit her sexually? PW10 Luis Coutinho could have exaggerated the facts, had he been willing to support the police. He testified what he had seen at the time and therefore his evidence is credit worthy which inspires confidence. On the following day respondent no.1-Samson, who normally used to attend the shack at 2.30p.m reached at 6.00p.m which conduct is also relevant as according to PW10 Luis Coutinho, it is unusual. Further, there was no reason for respondent no.1-Samson to inquire about the victim with PW10 Luis Coutinho. The conduct of respondent no.1-Samson speaks volume. There is every reason to believe that victim who was minor had been administered over dose of alcohol, drugs/cocaine lines. Her gait was not steady, she was fumbling which is inductive of both of her

physical and mental state. Respondent no.1-Samson had admitted that he held her from behind on the beach only to give support and that there was no intention of outraging her modesty. If this was so, respondent no.1-Samson could have brought her back in the shack. He could have called PW14 Murli Sagar on his phone and could have asked him to take her to *Curly's Bar* as they were acquainted with each other. Even the victim could have been provided with timely medical aid in which respondent no.1-Samson failed. The victim was indeed in the custody of respondent no.1-Samson as it was he who seduced her by taking her outside the shack near the beach where they were found in a comfortable situation by PW14 Murli Sagar. Respondent no.1-Samson, instead, abandoned her having full knowledge that there is likelihood of victim drowning in the sea water. Had she not been under the influence of drug and alcohol, she would not have died. This is particularly in the light of the fact that her mother PW15 Fiona Mackeown testified that victim was a very good swimmer.

71. PW14 Murli Sagar, respondent no.1-Samson and respondent no.2 - Sana sniffed one of the three to four lines of cocaine spread in the plate. The victim who was already under the influence of alcohol would obviously sniff a cocaine line which she

did. There was an illegal omission on the part of respondent no.1-Samson and others who had deliberately and purposefully kept the plate of cocaine before her. Respondent no.1-Samson who already had in his mind to take disadvantage of her condition did not forbid the victim from sniffing a cocaine line which had further aggravated her condition. The motive of respondent no.1-Samson to give effect to his nefarious design to exploit the victim sexually is apparent. Had it not been so, he would not have taken her to the beach, instead of allowing her to accompany PW14 Murli Sagar who could have dropped her at *Curlies Bar*. The victim wanted PW14 Murli Sagar to call her boy friend PW13 Julio Lobo from which it is evident that she wanted to go back, but, due to the insistence of respondent no.1-Samson who assured to drop her at *Curlies Bar*, PW14 Murli Sagar left the place.

72. PW5 Reshma Naik is a lady police constable who was a witness to the inquest panchanama. Her evidence indicates that on 18.2.2008 after receiving a phone call from PSI Anjuna at about 7.30 am, she alongwith police staff went to Anjuna beach in a police jeep. She noticed a body covered with bed sheet lying near the sea shore. As per the instructions of the PSI Laxi Amonkar (PW25) she removed the bed sheet. It was naked body of a female. There were scratch or

abrasion on the left forehead above the eyebrow and on the left eyelid. There were abrasion on both knees. There was only brassiere on the dead body but it was above the breast and near the neck. There were studs in both ears. She noticed piercing near the chin portion below the lower lip. She did not notice any injury to the private part of the said lady. Testimony of this witness is corroborated in material particulars by PW25 PSI Laxi Amonkar.

73. PW7 Agnelo Lopes is the owner of *Agnelo shack* situated at Anjuna beach. On that day he woke up around 6.30 am and was routinely cleaning his shack. He was informed by a boy namely Chotu about the dead body near the *Luis Shack*. He went there and noticed the dead body of the victim which was naked with only a brassiere on her person. He testified that he contacted Anjuna Police Station. He was told that the police party had already been sent to the spot. Similar is the evidence of PW8 Fidelis D'Souza and PW9 Nyneshwar Talawnekar.

74. PW8 Fidelis D'Souza is a retired Head Constable of Central Industrial Security Force. He was on his usual morning walk at around 5.30 am when he noticed the dead body on the beach in the shallow water. Water was splashing on the body. There were no

clothes. He went home and he too contacted Anjuna Police station and informed about the naked dead body near the *Luis Shack*. Similar is the evidence of PW9 Nyneshwar Talawnekar who had also noticed the dead body lying on the beach. Time gap is hardly 1 ½ hours when the respondent no.1- Samson was last seen together with the victim at the beach at about 4.30 am and the body was noticed by these witnesses around 6.00 a.m. The Supreme Court in case of ***Sk. Yusuf Vs State of West Bengal***¹⁷ has stated in paragraphs 14,15 and 17 which read thus:-

“14. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last 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. (Vide: Mohd. Azad alias Samin v. State of West Bengal, (2008) 15 SCC 449; and State thr. [Central Bureau of Investigation v. Mahender Singh Dahiya](#), (2011) 3 SCC 109).

15. From the above, it is evident that neither Abdul Majid Mallick (PW.4) nor Abdul Rashid (PW.5) had stated that either of them had seen Sahanara Khatun (deceased) alongwith Yusuf, near the place of occurrence in close proximity of time. All the witnesses deposed that appellant alone was seen near the place of occurrence with spade as he had gone there for catching the fish. Thus, there is no evidence to the extent that the deceased and appellant were seen together at the place of occurrence or nearby the same in close proximity of time.

17. We fail to understand as no witness had deposed seeing Sahanara Khatun, deceased talking with

the appellant/accused, how such a question could be put to the accused."

75. The ratio laid down by the Supreme Court is squarely applicable in this case. The time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead should be so small that possibility of any person other than the accused being the author of the crime becomes impossible. In this case there were no possibilities of intervention by any third person in view of the fact that there was hardly any scope for any third party coming to the beach other than respondent no.1-Samson. Time gap is too small. It was the time when no one would go to the beach.

76. PW14 Murli Sagar as well as PW10 Luis Coutinho and PW16 Chandru Chavan are the best witnesses who had last seen the victim alive with the respondent no.1-Samson. PW8 Fidelis D'Souza had seen the body at 5.30 a.m. There is no question of Michael Manion @ Masala remaining at the shack who had already left the place which is evident from the testimony of PW14 Murli Sagar.

77. There is no clear answer given by respondent no.1-

Samson in his statement under Section 313 of Cr.P.C. This indeed attracts Section 106 of the Evidence Act by which it was incumbent on the part of respondent no.1-Samson to explain about the said fact which was especially within his knowledge. It is significant to note that respondent no.1-Samson admits that he was holding the victim at the beach from behind as she was losing her balance. Respondent no.1-Samson cannot shirk his responsibility by not explaining as to what had happened to the victim who was a minor girl and who was with him. Apart from a burden under Section 106 of the Evidence Act, the respondent no.1 has failed to discharge additional burden under Section 32(1)(l) of the Goa Children's Act.

78. When it was specifically asked to him in his statement under Section 313 of Cr.P.C. about the bruises and scratches on the person of dead body as well as on knees he simply answered as false. In case of ***State of Goa Vs. Sanjay Thakran and another***¹⁸ after taking a survey of various ruling, in paragraphs 37 and 38 the Supreme Court observed thus:-

37. It is urged by Mr. Mahendra Anand, the learned senior counsel for the appellant(s), that the accused have not explained as to in what circumstances the victims suffered the death in their statements under [Section 313](#) Cr.P.C. and thus would be held to be liable for homicide. The learned senior counsel for the appellant(s)

¹⁸ (2007)3 SCC 755

placed reliance on the following observations of this Court made in *Amit alias Ammu v. State of Maharashtra* (2003) 8 SCC 93 :

- "9. The learned counsel for the appellant has placed reliance on the decision of this Court by a Bench of which one of us (Justice Brijesh Kumar) was a member in *Mohibur Rahman v. State of Assam*, (2002) 6 SCC 715 for the proposition that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. In the decision relied upon it has been observed that there may be cases where, on account of close proximity of place and time the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. The present is a case to which the observation as aforesaid and the principle laid squarely applies and the circumstances of the case cast a heavy responsibility on the appellant to explain and in absence thereof suffer the conviction. Those circumstances have already been noticed, in which case such an irresistible conclusion can be reached will depend on the facts of each case. Here it has been established that the death took place on 28th March between 3 and 4 p.m. It is just about that much time that the appellant and the deceased were last seen by PW 1 and PW 11. No explanation has been offered in the statement by the appellant recorded under [Section 313](#) Cr.PC. His defence is of complete denial. In our view, the conviction for offence under [Sections 302](#) and [376](#) has been rightly recorded by the Court of Session and affirmed by the High Court."
38. We have noticed the decision. However, the circumstances in the present case are not similar to the case where the event of the last seen together has very close proximity with the

time and place of the commission of the crime and other circumstances also favour the hypothesis of guilt and consequently the fact that no explanation or false explanation offered by the accused was taken as a link in the chain of circumstances. [See also : [Birbal v. State of M.P.](#), (2000) 10 SCC 212; [Raju v. State of Haryana](#), (2001) 9 SCC 50; and [Babu S/o Raveendran v. Babu S/o Bahuleyan and Another](#) (2003) 7 SCC 37]. Thus, in the circumstances of the case, the accused persons not giving any explanation in their examination under [Section 313, Cr.P.C.](#) could not be taken to be a circumstance pointing towards irresistible conclusion that they are involved in the commission of the crime.”

79. In the aforesaid case the Supreme Court has referred its judgment in case of **Amit Vs State of Maharashtra**¹⁹ The ratio laid down therein squarely attracts and is applicable to the present set of facts.

80. The defence of respondent no.1-Samson is of complete denial despite there is clinching and trustworthy evidence of last seen together before the death of the victim.

81. The act of respondent no.1-Samson by holding the victim from behind amounts to use of criminal force to outrage her modesty and not to simply hold her to keep her balanced. It is evident as her naked body was found early in the morning by the passers by namely

¹⁹ (2003) 8 SCC 93.

PW8 Fidelis D'Souza, PW7 Agnelo Lopes and PW9 Nyneshwar Talawnekar. It is also clear that the victim was totally ignorant and unaware due to intoxication, as to what was happening to her on that fateful night.

82. It is argued by the learned Counsel for the respondent no.1 that victim was already drunk and was habituated of consuming drinks. The accused no.1 was incidentally present over there, however, there is no active role attributed to him in so far as Section 304(ii) is concerned. As such the learned Counsel contend that Section 299 of IPC would not be applicable in view of the fact that accused has not done any positive act. It is also submitted that one Mr. Shanti who was an ex-boyfriend of the victim, was harassing her, throwing stones, which has come in the evidence of the Investigating Officer. Charlie was the witness to the same who has not been examined. There was enmity between the victim and Shanti. Even the mother of victim PW15 -Fiona Mackeown had first suspected the said Shanti. It is pertinent to note that merely because there were some trifle quarrels between Shanti and Victim does not *ipso facto* lead to any inference that he was the person responsible for causing her death when there is clear evidence that he was nowhere present near the scene of occurrence nor it is the case of the prosecution that

he was responsible for causing the death of the victim.

83. The case in hand squarely falls within the purview of second part of Section 304 of IPC. In view of the discussion herein above, respondent no.1-Samson not only made the victim consume the liquor but also allowed her to sniff cocaine line which had resulted in victim totally inebriated under the influence as is evident from the medical evidence. The respondent no.1-Samson thereafter took the victim to the seashore at the wee hours and thereafter abandoned her near the seashore after outraging her modesty. The victim was totally under his control and custody. Respondent no.1-Samson had full and complete knowledge that if the victim is deserted in such a condition at the seashore it may likely to cause her death by drowning, though, he had no intention to cause her death. The offence, therefore, squarely falls within the ambit of Second part of Section 304 of IPC.

84. There is no clear evidence in so far as respondent no.2-Sana is concerned as to whether he had any intention to cause hurt to the victim by allowing her to sniff cocaine lines spread in a plate. There is also no evidence in the sense that he wanted to take disadvantage of the victim or that he in any manner abetted the act

of respondent no.1-Samson. There is no evidence forthcoming as to any instigation or any conspiracy being hatched by respondent no.1-Samson and respondent no.2-Sana to seduce the victim.

85. However, the aforesaid discussion clearly indicates that the respondent no.1-Samson by offering beer to the victim and caused her to sniff cocaine line which is stupefying or unwholesome drug with an intention to exploit her sexually and he had a knowledge that because of such act he would cause hurt to the victim. The offence under Section 328 of IPC is complete even if no hurt is caused to the person to whom such stupefying, intoxicating, or unwholesome drug is administered. This Section is merely an extension of provision of Section 324. In order to prove an offence under Section 328 the prosecution is required to prove that the substance in question is any stupefying or intoxicating or unwholesome drug which is evident from the Autopsy Report in the case at hand. The prosecution is required to prove that the accused administered such substance to the victim or cause the victim to take such substance and further he did so with an intent to cause hurt or knowing it to likely cause death or with the intention to commit or facilitate the commission of an offence. All these ingredients are precisely attracted in this case qua respondent no.1-Samson. There

is direct, reliable and cogent evidence on record. We shall discuss the autopsy reports and medical evidence in the subsequent paragraphs.

86. The Hon'ble Supreme Court in a latest judgment reported in the case of **Pattu Rajan** (*supra*), after taking a survey of several decisions on the said point observed thus:-

"30. Before we undertake a consideration of the evidence supporting such circumstances, we would like to note that the law relating to circumstantial evidence is well settled. *The Judge while deciding matters resting on circumstantial evidence should always tread cautiously so as to not allow conjectures or suspicion, however strong, to take the place of proof. If the alleged circumstances are conclusively proved before the Court by leading cogent and reliable evidence, the Court need not look any further before affirming the guilt of the accused. Moreover, human agency may be faulty in expressing the picturisation of the actual incident, but circumstances cannot fail or be ignored. As aptly put in this oft-quoted phrase: "Men may lie, but circumstances do not".*

31. *As mentioned supra, the circumstances relied upon by the prosecution should be of a conclusive nature and they should be such as to exclude every other hypothesis except the one to be proved by the prosecution regarding the guilt of the accused. There must be a chain of evidence proving the circumstances so complete so as to not leave any reasonable ground for a conclusion of innocence of the accused. Although it is not necessary for this Court to refer to decisions concerning this legal proposition, we prefer to quote the following observations made in Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 (SCC p. 185 para 153154):*

"153. *A close analysis of this decision would show that the following conditions must be fulfilled before a case*

against an accused can be said to be fully established:

- (1) *the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra 1973 CriLJ 1783 where the following observations were made: "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
 - (2) *the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
 - (3) *the circumstances should be of a conclusive nature and tendency,*
 - (4) *they should exclude every possible hypothesis except the one to be proved, and*
 - (5) *there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human 25 probability the act must have been done by the accused.*
154. *These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."*

87. In order to ascertain the worth and value of the circumstantial evidence, we have meticulously considered the evidence on record in its entirety in the light of the aforesaid principles. We would not reiterate the deposition of all the witnesses on record in detail, thereby unnecessarily burdening the judgment,

we deem it fit to evaluate and discuss important aspect of the prosecution witnesses qua their testimonies.

88. On the aspect of alleged delay it is vehemently argued by the learned Special Public Prosecutor that there was absolutely no delay on the part of the complainant who has been chasing the matter and significantly, she being a foreigner was unaware about Indian laws and the procedure. There is a substance in the argument of Mr. E. Khan, learned Special Public Prosecutor. Nevertheless, it is manifest from the evidence of mother of the victim PW15 Fiona Mackeown that at the time of death of her daughter she was at Gokarna, Karnataka where she had gone with her other children. She wanted the victim to accompany her but the victim preferred to stay back in Goa. She had a last conversation with her daughter at about 7.30 p.m on 17.2.2008 which was on the phone of PW13 Julio Lobo. She talked to her daughter and informed that they would be going back to England upon which the victim was happy. However, on 18.2.2008 at about 3.00 p.m she received a message on her mobile from PW13 Julio Lobo. When she called PW13 Julio Lobo, he informed her that he does not know whether the victim was in hospital or met with an accident. Subsequently, he informed that the victim was found murdered on the beach and asked PW15 Fiona

Mackeown to come back to Anjuna immediately. She left Gokarna around 4.00p.m and reached Anjuna at about 10.00p.m. She immediately reached Anjuna Police Station where she met PW28 Nerlon Albuquerque who was incharge of Anjuna Police Station. She spoke to PW28 Nerlon Albuquerque who showed her the photographs from which she identified her daughter. On 19.2.2008 she was taken to Morgue of Goa Medical College where she noticed bruises on the forehead of the victim. When she inquired with PI Nerlon Albuquerque he told her that those bruises were due to post mortem.

89. On 21.2.2008 she visited *Curlies Shack* and thereafter *Luis Shack* to inquire whether any one knew about the tragedy. Thereafter when she walked half way between the Luis Shack and other bar she was surprised to see her daughter's sandals, underwear and shorts at that place which she collected. She could recognize the under garments and sandals. She has testified that she had washed her underwear many times and, therefore, she could recognize it. She had picked up those articles. It was on 21.2.2008 someone told her to consult a lawyer and, therefore, she met one Mr. Varun Varma.

90. Exh. 68 is the letter written by PW15 Fiona Mackeown on

22.2.2008 to the Inspector General of Police stating therein that she was shocked to read in the press report about the cause of death of the victim due to drowning. She expressed her doubt that there was foul play in the death of her daughter. Thereafter, she addressed another letter to PI, Police Station Anjuna to give her the copy of the autopsy report. By letter Exh.70 she again asked the Inspector that as she came to know about the victim's body is likely to be removed and sent to Mumbai for onward transportation, she had requested the Inspector to hold the body back until adequate inquiry is completed. By her letter Exh.71 dated 3.3.2008 she wrote to the Superintendent of Police, North Goa, requesting him for a second autopsy as she was convinced about some foul play.

91. PW15 Fiona Mackeown by her communication dated 8.3.2008 to the Superintendent of Police, North vide Exh.72 informed about the conduct of the Police Officer from the Police Station, Anjuna who tried to cover up the death by showing that it was a case due to drowning. It is important to note the grounds raised by PW15 Fiona Mackeown which are as follows:-

1. *They have lied to me about the body being found floating in the sea.*
2. *They have lied to me, that she was wearing her swimwear, and had gone for a swim in the middle of the night.*
3. *They have lied to me as well as the media about her*

- body having no bruise marks.
4. They have lied to me about their being no signs of any struggle marks.
 5. They have fabricated the panchanama and misinformed the Pathologist about the circumstances of the body and the possible cause of her death.
 6. They have cajoled and convinced me that it is a simple case of drowning and I must take her body back home quickly.
 7. They sent four male officers to stare at my daughters naked body while I identified her and spent that half an hour with her dead body of the first time.
 8. They have attempted to remove the body of my daughter from the morgue at the GMC Bambolim, and ship it to Mumbai, hours before I was authorised by the Incharge P. S. Anjuna to go and re-examine the body of my daughter on Saturday the 23rd February 2008 at 2.00 p.m.

92. On this letter it appears that Superintendent of Police, North has put his endorsement as below:-

PI Bicholim/SDPO Bicholim

PI Braz Should register offence regarding homicidal death in Anjuna PS UD/No 5/08 u/s 174 Cr.P.C. upon this complaint in view of the findings of 2nd Autopsy dt. 8.3.2008.

As regards allegations made by the complainant SDPO Bicholim to conduct enquiry and submit report.

Sd/- 8.3.2008
S.P.(N)

93. The aforesaid evidence on record clearly indicate that there was absolutely no delay and it was quite justified in making over the investigation to the CBI in the light of the aforesaid facts. No mother would delay in reporting such matter or pursuing the case when there is question of investigating the cause of death of her daughter. Even otherwise, what is to be investigated is the crime and it is not the technical reason of so called delay.

94. As like other witnesses PW15 Fiona Mackeown was extensively cross examined on behalf of respondent nos.1 and 2. However, there is no rebuttal during cross nor anything could be elicited which would be of any advantage to the defence. However, it has been reiterated in cross examination that shorts found by her were of blue colour. She found pair of sandals and an underwear. It appears that earlier investigating officer had not made any serious attempts to collect the relevant articles from the spot.

95. PW1 Gurunath Naik, is a police constable who was attached to Anjuna Police Station at the relevant time. He received a phone call around 7.15 am on 18.2.2008 from an unknown person

informing about dead body lying on the seashore. He alongwith PC Chandan and Driver Vishant Chopdekar proceeded to the spot. He noticed body of a female lying at the sea in the shallow water. Water was splashing on her dead body due to the tide. There was nothing on her person except brassier which was on the right shoulder. The body was lying in a prone manner. He testified that eyes and mouth were partly open. He also noticed orange colour chappals at a distance of 2 to 3 mts from the said dead body which again confirms the fact that chappals of respondent no.1-Samson were lying near the body about which he could not give any explanation.

96. PW29 Braz Menezes, who conducted some part of the investigation deposed that after registration of an FIR on 9.3.2008 bearing No.21/2008 he interrogated respondent no.1-Samson. It is deposed by PW29 Braz Menezes that respondent no.1-Samson, while in custody, voluntarily disclosed that he had thrown his orange colour chappals near his house which were seen at the scene of offence on 18.2.2008. The respondent no.1-Samson showed his willingness to show the place where he had thrown the chappals. Accordingly panchanama was drawn. It is proved at Exh.211 in the presence of panchas. However, it appears from the perusal of the said panchanama that though the respondent no.1-Samson led the police

to the spot where he had alleged to have thrown the chappals, they could not find the chappals. This does not mean that he is absolved from charge of Section 201 of IPC, though there is no discovery under Section 27 of the Evidence Act. Section 201 of IPC does not contemplate discovery of evidence. If the evidence caused to be disappeared, there is no question of finding it.

97. PW2 Vishant Chodekar, is also a police constable who accompanied PW1 Gurunath Naik and spoke in tune with PW1 Gurunath Naik. He specifically testified about the presence of orange coloured chappals lying at a distance of about 2 to 3 mts from the dead body.

98. PW3 Kishor Kumar Naik was head constable of Police Station Anjuna. After receiving the information about the dead body he made a station diary entry no.10 at 7.50 am which is proved at Exh. 51. There is no effective cross examination of any of these witnesses.

99. PW13 Julio Lobo was a boy friend of a victim. According to him he got acquainted with victim in the third week of December 2007. He met her at Curlies Shack where she used to visit with her

family i.e. mother, brother etc.

100. His evidence reveals that deceased was interested in enjoying the parties, dancing, music etc. However, this witness does not know whether she was consuming drugs. He testified that one Shanti was also a friend of victim. Sometimes he used to harass her and therefore parents of the victim left their residence and shifted from Harambol. According to this witness on 17.2.2008 at about 2.00 pm he met the victim who requested him to drop her to *Curlies Shack*. Around 4 to 5 p.m victim approached him when he was playing pool. He thereafter accompanied with her to a shop to buy a clothes. Thereafter, this witness dropped her at *Curlies Shack* around 6.00p.m. He testified that the victim was wearing blue shorts however, he does not remember colour of the top she was wearing. He dropped her finally at *Bean Me Up Restaurant* at about 7.30 pm. Till next day morning he was not aware about location of the victim. On the next day he searched for her at *Curlies Shack*. Thereafter, he came to know from one Baptist about a dead body lying near the shack. One Roy informed him that dead body of victim was found near the *Luis Shack*. He tried to contact PW15 Fiona Mackeown on her mobile but he could not. He sent a message to the PW15 Fiona Mackeown. The evidence of this witness, as a matter of fact, would

not be of much use to the prosecution except in proving the fact that the victim had blue shorts on her person and sandals, on that day.

101. It has come in the cross that victim used to drink beer. The learned defence counsel tried to bring on record that since one Shanti was fighting and throwing stones at the victim, the family probably thought he might be involved in the crime, however, there is no such suggestion given as regards involvement of said Shanti in the alleged offence.

102. PW17 Naresh Phadte acted as a panch witness of the spot panchanama dated 19.3.2008 which is at Exh.106. According to this witness the spot of incident was shown by Michael Manion@Masala. PW18 Mahesh Corjuenkar was the Sub-Divisional Magistrate, who on the complaint of PW15 Fiona Mackeown ordered second autopsy over the dead body of the victim. The letter is at Exh.124. There is no effective cross of PW17 Naresh Phadte and PW18 Mahesh Corjuenkar. Inquest Panchanama is proved at Exh.132.

103. PW24 Pundalik Harmalkar was called by Anjuna Police on 21.2.2008 to act as a panch witness. They were led to Govekar Wado by PW13 Julio Lobo. He had shown a pair of sandals, a blue and pink

coloured shorts and the underwear lying in the sandy portion. PW13 Julio Lobo had identified the said shorts and sandals to be of the victim. Those articles were attached under panchanama at Exh.62. In the box the witness had duly identified those articles.

104. PW26 Ramrai Pol also acted as a panch witness on 18.2.2008 when he had gone to see the dead body of a female foreigner at the beach. He was also a chance witness like other witnesses. He categorically deposed that a pair of orange coloured chappals lying on the beach near the dead body. Similar is the evidence of PW27 Vasant Naik who was another panch and was a chance witness. Their testimonies remained unshattered during cross examination.

105. PW21 Dr. Silvano Sapeco who was Head of Department of Medicine and Toxicology, and is qualified as an MD in Forensic Medicine conducted the first autopsy on the dead body of victim on 18.2.2008. At about 12.00 noon he examined dead body in the presence of Dr. Sujata, from Goa Dental college. He noticed the left lower labial sulcus at muco gingival aspect had $\frac{3}{4}$ X $\frac{1}{2}$ cm red bruise. On Section it was $\frac{1}{4}$ cm deep. There was coarse beach sand particles present over whole body. He also noticed following external injuries:-

Surface wounds and injuries:

<i>Sr. No.</i>	<i>Nature of injuries</i>	<i>Size</i>	<i>Site</i>	<i>Causative Weapon</i>	<i>Ante /Post mortem</i>
1	<i>Abrasional area</i>	<i>7 x 2 cms.</i>	<i>On left side of forehead & upper eyelid</i>	<i>Blunt</i>	<i>Fresh and ante-mortem</i>
2	<i>-do-</i>	<i>4 ½ x 2 cms.</i>	<i>On left inner aspect of forearm</i>	<i>-do-</i>	<i>-do-</i>
3	<i>Pink bruise</i>	<i>6 x 4 cms. (on section ½ cm. deep)</i>	<i>On right shin front just below knee cap region</i>	<i>-do-</i>	<i>-do-</i>
4	<i>-do-</i>	<i>7 x 4 cms. (on section ½ cm. deep)</i>	<i>On left shin front just below knee cap region</i>	<i>-do-</i>	<i>-do-</i>
5	<i>-do-</i>	<i>5 x 4 cms. (on section ½ cm. deep)</i>	<i>On left shin front along mid & lower aspects</i>	<i>-do-</i>	<i>-do-</i>

106. It is opined by PW21 Dr. Silvano Sapeco that approximate time since death was within 24 ours of Autopsy examination from 12.00 noon of 18.2.2008. The cause of death, according to this witness, was due to drowning in the beach sand water. It is testified by this witness that if a head of a person is pushed down in the water that would cause the sand particles to enter the respiratory system. Injuries in Column 12(d) of the report was ante mortem. Blood

group of the victim was "O" rh negative. The post mortem report is proved at Exh.13. PW21 Dr. Silvano Sapeco had also received CFSL report from Directorate of Forensic Science Laboratory, Kalina, Santa Cruz which is at Exh.143. From the said report it reveals that cocaine and morphine was detected in Exhs.1 to 4 i.e sample of stomach fluid, stomach with its contents and loop of small intestine with its contents: pieces of liver spleen, kidney, lung and brain: and sample of blood. The report further indicates that the samples at Exh. 1, 2 and 3 contained 92, 103 and 98 miligrams of methyl alcohol, per 100 grams respectively. The blood contained 110 mg of methyl alcohol per milliliter.

107. This witness on the basis of the said report gave his final opinion on 22.3.2008. He opined that the cause of death to the best of his knowledge and belief and on the basis of the report of Chemical analyzer was due to drowning in the beach sand water of the person intoxicated with alcohol and hypnotic drugs (cocaine and morphine) and having injuries on her body including a bruise on left lower labial sulcus at muco gingeval aspect. It is also stated by PW21 Dr. Silvano Sapeco that it is a case of shallow water drowning. However, he does not rule out the possibility of homicidal drowning in shallow water as per Forensic Medicine literature. The

presence of bruises and abrasion on the body are suggestive of signs of struggle. The presence of alcohol and hypnotic drugs in blood are suggestive of "a person is taken unaware or rendered senseless and defenceless by alcohol or hypnotic drug, the head is submerged in water for five to ten minutes."

108. Level of ethyl alcohol detected in the said case was not enough to cause coma and death. There is no effective cross examination of this witness barring certain suggestions given by the defence during cross which were denied and which were quite insignificant. However, he admits that drowning could be accidental, suicidal or homicidal. Accidental drowning could be caused by intoxication due to alcohol or drug. A question was asked whether injuries found in accidental drowning can be similar to the injuries of homicidal drowning, to which he answered that it would depend upon the evidence on record.

109. Fresh abrasions and bruises on the forehead, fore arm and both shins clearly indicate that the victim had struggled though she was intoxicated but must have been aware that something wrong was happening to her. The nature and the parts of the body where the injuries could be seen suggest something more.

110. Since the mother of the victim PW15 Fiona Mackeown was not satisfied with the finding of the first Autopsy report, she had requested the police for second autopsy in order to remove the possibilities of any foul play. PW22 Dr. E. J. Rodrigues who is also a professor, Forensic Medicine and Toxicology, Goa Medical College Bambolim, constituted a panel to conduct second Autopsy. He received an order dated 4.3.2008. Dr. Andre Fernandes Asst. Professor, Forensic Medicine, Goa Medical College and Dr. Mandar Kantak, Asst. Lecturer Forensic Medicine Goa Medical College were the two others members of the panel. The second Autopsy was conducted on the dead body on 8.3.2008 between 10.30 am to 2.30 p.m. Body was identified by PW15 Fiona Mackeown. This team had also preserved the viscera and material for serological examination. It was sent to CFSL Hyderabad. The panel had also kept tissues for histopathological examination. Opinion of the panel on cause of death is as under:-

The approximate time since death is 24 hours prior to the examination on 18.02.2008 at 10.20 a.m.

- (1) In view of formalization of dead body after first autopsy and after examination of dead body during 2nd autopsy, the possibility of cause of death due to drowning cannot be ruled out.*
- (2) There are multiple ante-mortem and post-mortem injuries over the dead body.*
- (3) In view of formalization and hardening of the genitalia, opinion about vaginal opening cannot be*

commented upon. However, there is evidence of hymenal tear at 6 o'clock position. Materials preserved for serological examination.

- (4) Viscera for chemical analysis. Tissues for histopathological examination and other materials preserved.*
- (5) In view of the above, it is unanimous opinion of all the panel members that Sub-Divisional Magistrate/Investigating Officer is requested to investigate this case as homicidal in nature.*

111. The said report is proved at Exh.148. In cross PW22 E. J. Rodrigues admits that number of injuries mentioned in second autopsy report are more than the injuries mentioned in the first autopsy report. He also admits that he did not mention the age of injuries in his report. He admits that no opinion could be given as regards rigor mortis since body was formalized. He also could not give time of death due to formalization of the body. He denied the suggestion that it is not possible to have hymenal tear at 6.00 clock position. According to this witness hymenal tear at 6.00 clock position is most common. He had denied the suggestion that none of the injuries could be caused due to struggle.

112. PW21 Dr. Silvano Sapeco has relied upon an extract from "SHORT TEXT BOOK OF MEDICAL JURISPRUDENCE" authored by C. C. Malik, MD, LLB.

113. The relevant extract of the said book as regards drowning in shallow water and whether it is accidental, suicidal or homicidal is reproduced as under:-

“Drowning in shallow water

It may appear confusing to lay people as to how drowning is possible without immersion of the whole body. As already stated, sufficient water to cover the mouth and the nostrils will cause death from drowning. Hence if the face alone is submerged in a few inches of water, death will follow as a result of drowning. A layer of water or mud, not more than an inch or two in depth, will cause death from drowning in children, infants, imbeciles, epileptic persons under the influence of alcohol or other narcotic drug, and in persons who are helpless from natural causes. Drowning in all such cases is mostly accidental.

Not infrequently suicides drown themselves in very shallow water. Suicidal drowning is not uncommonly preceded or accompanied by ingestion of poison, cutting the throat or other attempts at committing suicide.

It should also be noted that shallow water drowning might as well be homicidal. The assailants might hold the victim's head in shallow water in such a position that death occurs due to drowning as a result of submersion of the mouth and nostrils. Marks of violence on the body of the victim are expected in such cases or signs of struggle might be evident, if the subject was conscious and was in a position to offer resistance. But there might not be any injury at all, if the head of an unsuspecting person is held all on a sudden into shallow water. The victim is thereby rendered incapable of offering resistance and hence no injury might be caused. This is illustrated by the well-known English case, known as 'Brides of the bath' case. The accused in this case was George Joseph Smith who had murdered no less than three women by drowning them in a

bath. He had married the three women one after another. While each woman was taking a bath, the murderer grasped and elevated her legs, thus causing the head to go under water. Only in one of the three cases, marks of injury were found, viz. Three bruises on the arm. This case would have gone unnoticed but for the chance reading in the newspaper of the same nature of accident occurring in succession and involving the same man.

Whether Drowning was Accident, Suicidal or Homicidal?

As already stated, the finding of a body in water does not necessarily mean that death was due to drowning. After a careful and searching autopsy, the cause of death will have to be established as drowning. The next question crops up: whether drowning was accidental, suicidal or homicidal?

Death from drowsing is usually accidental, not infrequently, suicidal and very rarely homicidal. It is difficult to conclude as to the nature of death from the autopsy appearances alone. Circumstantial evidence will furnish a lot of information in this respect.

Accidental drowning is rather common during the summer season. The victims are mostly non-swimmers who out of sheer enthusiasm go beyond their depth in ponds, rivers, lakes, etc. Female sometimes fall accidentally into well while drawing water from it, unmindful of their precarious position due to their feet resting close to the edge of the well. This is more likely to happen when the level of water in the well is lying low. Children, while playing on the banks of ponds, rivers, lakes, etc may fall accidentally into them and get drowned.

Accidental drowning in shallow water is sometimes found amongst children, insane persons, epileptics and person under the influence of alcohol."

there is not much difference in the same in so far as cause of death is concerned which is drowning in the beach water. The only exception given by the panel is that they had requested the investigating agency to investigate the cause as homicidal in nature. The presence of ante mortem injuries on the person of the deceased as opined by the panel as well as PW21 Dr. Silvano Sapeco is established to be due to struggle. The opinion on the injury report given by PW21 Dr. Silvano Sapeco clearly indicates about the struggle due to which there were bruises and abrasions on the body coupled with the facts that there were presence of alcohol and hypnotic drug in the blood and viscera of the deceased. Possibility of homicidal drowning in shallow water also cannot be ruled out. It is, therefore, essential to consider as to whether the death of the victim was a culpable homicide not amounting to murder.

115. Thus, there is no second thought in our mind that it was respondent no.1-Samson who made the victim to sniff cocaine before which he had offered her beer. The traces of which were found in the body of the victim as per the report of Forensic Science Laboratory as testified by PW21 Dr. Sapeco Silvano. There is no medical evidence as to forcible sexual intercourse with the victim at the time of incident.

116. So far as Section 354 IPC is concerned, the essential ingredients of the offence are as under:-

1. *That the person assaulted must be a woman.*
2. *Accused must have used criminal force on her intending thereby to outrage her modesty.*
3. *What constitutes an outrage to female modesty is nowhere defined- The essence of a woman's modesty is her sex.*
4. *Act of pulling a woman, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman.*
5. *Knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object.*

117. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of a woman is very relevant, but its absence is not always decisive. Modesty is an attribute associated with female human beings as a class. It is virtue which attaches to a female owing to her sex. The ultimate test for ascertaining whether the modesty of woman has been outraged or, assaulted or insulted is that action of the offender should be such that it may be perceived as one which is capable of shocking the sense of decency of woman. This is the meaning of modesty as described in 33rd addition of IPC by Rathanlal and Dhirajlal at page 2310.

118. We have already discussed in the evidence of PW14 Murli Sagar who had noticed the manner in which the victim was held from behind by respondent no.1-Samson when she was totally out of control due to severe intoxication. Respondent no.1-Samson indeed had a knowledge that because of such act he would be outraging the modesty of victim. This aspect has been buttressed from the testimony of PW7 Agnelo Lopes, PW8 Fidelis D'Souza and PW9 Nyneshwar Talawnekar who had noticed the naked body of the victim at the beach in the morning of 18.2.2008 when they had gone for a morning walk. The shorts, top and underwear of the victim were missing of which only respondent no.1-Samson could give explanation. Thus, it can be said that intention is not the sole criteria of the offence under Section 354 of IPC and an offence under Section 354 can be committed by a person by assaulting or by using criminal force to any woman, if he knows that by such act the modesty of woman is likely to be affected.

119. The prosecution, has, thus succeeded in establishing the charge under Section 354 of IPC. This is the case in which an offence had been committed against the victim who was a child as her date of birth is 17.10.1992 as indicated in her passport. It is quite clear

from the record and the evidence that the offence has been committed by the accused/respondent no.1-Samson and therefore, he has to discharge the burden of not having committed the offence by him as per Section 31(1)(l) of the Goa Children's Act, 2003.

120. Section 32(1) (l) of the Goa Children's Act, 2003 places a burden of proof upon the accused that he has not committed the offence which is a reverse burden. The definition reads thus:-

Burden of Proof: *Whenever any offence is alleged to have been committed against a child, the burden of proving that such offence has not been committed by the accused shall lie on the accused if the child was in his custody at the time of his arrest or at the time of committal of offence or at the time of rescue or removal of the child victim, as the case may be.]*

121. Respondent no.1-Samson has committed the offences punishable under Sections 328 and 354 of IPC. Since, it has been proved to the hilt that he was responsible for offering alcohol to the victim as well as cocaine and then outraged her modesty when the victim was in his custody and, therefore, it was incumbent upon him to discharge the said burden in which he had totally failed. The learned Trial Court was oblivious of this provision as she has not discussed this crucial aspect in the impugned judgment. Respondent no.1 committed child abuse as contemplated in Section 8(2) of Goa

Children's Act as he abused the victim by outraging her modesty. Prosecution has succeeded in establishing that it is case of child abuse as provided under 8(2) Goa Children's Act 2003. The relevant definitions provided in the Goa Children's Act 2003 are as under:-

(i) Section 2(d) defined **“Child”** means any person who has not completed eighteen years of age unless any other law in force specifies otherwise or unless otherwise indicated in specific provisions in this Act; [Provided that in so far as a victim in an offence of rape is concerned, “child” shall mean any person who has not completed sixteen years of age;]

(ii) Section 2(1)(l) (ii) **Child in difficult circumstances** means a child in need which is exposed to or is likely to be exposed to child abuse or sexual offences or child trafficking or commercial sexual exploitation or violation of his or her rights”;

(iii) Section (m) **“child abuse”** refers to the maltreatment, whether habitual or not, of the child which includes any of the following:—

- (i) psychological and physical abuse, neglect, cruelty, sexual abuse and emotional maltreatment;
- (ii) any act by deeds or words which debases, degrades or demeans the intrinsic worth and dignity of a child as a human being;
- (iii) unreasonable deprivation of his basic needs for survival such as food and shelter; or failure to immediately give medical treatment to an injured child resulting in serious impairment of his growth and development or in his permanent incapacity or death;

- (iv) Section (s) **“Offence”** means an act or omission made punishable under any law for the time being in force;
- (v) Section (x) **Sexual offence** covers all forms of sexual abuse which constitute offences under this Act.

122. The victim was a child as per the Section 2(d) of the Goa Children's Act, 2003, as indisputably, she had not completed 18 years of age. She was a child in difficult circumstances who was exposed to child abuse. She was abused not only by allowing her to sniff cocaine lines but also by giving her beer and then taking her to the beach for the purpose of sexual exploitation. There was physical as well as sexual abuse by the respondent no.1- Samson who failed to give immediate medical assistance to the victim. These acts amount to an offence as provided in clause 2(s) of the said Act.

123. Section 8 of the Evidence Act contemplates motive, preparation and previous or subsequent conduct.

“Principle and Scope - *There is hardly any action without a motive. The absence or presence of motive and evidence of preparation, opportunity, previous attempt &c, are relevant, as they not only go to show the mens rea of a crime, but may also furnish elements in establishing its commission. They are circumstantial evidence. In Section 7 it has been laid down that facts which are the occasion, cause or effect of relevant facts, or which constitute the state of things under*

which they happened, or which afforded an opportunity for their occurrence are relevant. Section 8 is an amplification of Section 7 embracing a wider circle of facts. In the consideration of the facts embraced by Section 7, it may sometimes be important to know whether a man charged with an offence had any interest or motive in its commission. In the consideration of the question whether a man charged with an offence committed it or not, it is important to know whether previous to the act he took measures calculated to bring it about, i.e. whether he did acts constituting preparation. Previous attempt to commit a crime is akin to preparation. Every voluntary act has a motive and the absence of any motive is generally a circumstance in favour of the accused. But although in many cases motive may be found out, there are cases where all attempts to discover motive become fruitless.”
 (Extract from Sarkar on evidence 15th Edition page 174)

124. In the case at hand there is ample evidence of preparation as well as motive of the respondent no.1-Samson for administering drugs and alcohol to the victim in order to exploit her sexually. There is clear proof that he had committed crime of outraging the modesty of victim. Even his subsequent conduct in taking away his orange coloured chappals is relevant factor in view of Section 8 read with Section 14 of the Indian Evidence Act.

125. PW16 Chandru Chavan (Exh.98) was working as a “waiter” in *Luis shack* since 2006. His evidence indicates that he used to get up at 7.00 am in the morning and after doing work of

cleaning he would go to buy vegetables. Thereafter, he would return to the shack around 9.15 hours and after taking his breakfast he used to attend customers. He testified that respondent no.1-Samson was working as a bartender. One Vikas was working as a cook and one Khaji was working as a dishwasher who were assisted by Ashok and Ramesh. He used to attend the customers till 23.00 hours. He used to sleep in the store room located behind the counter of the shack. The shack would remain open till 2 to 3.30 am and respondent no.1-Samson and PW10 Luis Coutinho used to work till then. He stated so as accused no.1-Samson, PW 10 Luis Coutinho used to wake him up while closing the business. He then used to sleep over the freeze where liquor is stored. Respondent no.2 Shana was also a regular customer of the shack who used to run matka gambling. He used to consume alcoholic drinks by sitting in the kitchen. Respondent no.2 Shana who used to come alongwith One Michael Manion @ Masala, British national, and who used to reside in the house of respondent no.1-Samson.

126. It is testified by PW16 Chandru Chavan that on 17.2.2008 he got up as usual and did his daily routine work. The respondent no.1-Samson came to the shack around 4.30 to 5.30 hours(evening) and thereafter Michael Manion @ Masala and respondent no.2-Shana

came around 18 to 18.30 hours. PW16 Chandru Chavan served drinks to respondent no.2 Shana till 21.00 hours. PW10 Luis Coutinho was managing the counter at that time while respondent no.1-Samson was serving drinks in the bar and Michael Manion @ Masala was playing music. After serving the customers till 23 hours, PW16 Chandru Chavan went to sleep in the store room behind the counter. Obviously, there was no reason for him to notice the victim coming to the shack and consuming beer, sniffing cocaine etc. as she came quite late thereafter.

127. He woke up around 4.30 am to answer nature's call, when he noticed respondent no.1 Samson, Michael Manion @ Masala and a foreign girl aged about 15 to 20 years near the counter. She was sitting outside the counter whereas respondent no.1-Samson and Michael Manion @ Masala were sitting inside. PW16 Chandru Chavan came and slept over the sofa inside the shack. On the next morning around 6.00 to 6.30 am one Chotu who was working in the shack woken him up and informed about a dead body of a female lying in the sea water. PW16 had also noticed the dead body of the said female which was lying with face side ways. He noticed that all the lights in the shack were on. Whisky glasses were on the counter. Normally PW10 Luis Coutinho used to switch off the lights at the

time of closing the shack at around 2 to 3.00 hours. PW16 Chandru Chavan switched off the lights and kept the glasses in place. Meanwhile, police arrived at the spot and made inquiries with the persons who were present. Lights were not switched off by respondent no.1-Samson which is also an additional circumstance indicating that his whole attention was towards committing the crime.

128. It is testified by PW16 Chandru Chavan that he saw a orange pair of chappals lying near the body over the sand in disorderly manner. He also noticed pair of lady's chappals ("Foot wear") at some distance from the body. Dead body was placed on a stretcher. One of the police personnel picked up orange coloured chappals and left it near the sun bed. Though there was no occasion for this witness to minutely notice the features of the said girl, however, he could recollect that on the earlier night respondent no.1-Samson, Michael Manion @ Masala and the said girl were present in the shack till 3.40 hours.

129. Around 3.00p.m when PW10 Luis Coutinho came to the shack and inquired with PW16 Chandru Chavan he told him about the dead body and also about the orange coloured chappals. PW10 Luis

Coutinho told PW16 Chandru Chavan that those orange coloured chappals belongs to respondent no.1-Samson. Respondent no.1-Samson came to the shack at about 19.00 hours on that day and was inquiring about orange coloured chappals. PW16 Chandru Chavan told him that they were near the sun bed upon which respondent no.1- Samson asked PW16 Chandru Chavan to bring the same. PW16 Chandru Chavan refused to bring the chappals. When PW16 Chandru Chavan asked PW10 Luis Coutinho to permit him to go home, PW10 Luis Coutinho asked him to seek permission from respondent no.1-Samson. When PW16 Chandru Chavan sought permission of respondent no.1-Samson, respondent no.1-Samson said that he would permit him only if he brings his chappals which were near the sun bed. PW16 Chandru Chavan thereafter brought the chappals and gave it to respondent no.1-Samson who put the same in a plastic bag and took it away.

130. In his cross examination on behalf of respondent no.1-Samson, the fact that he had seen respondent no.1-Samson, Michael Manion @ Masala and a girl present in the shack when he woke up around 4.30 hours to answer nature's call has been reiterated. Only because he could not give the name of the police personnel who picked up pair of orange chappals and left them near the sun bed

does not *ipso facto*, render his testimony unbelievable for the reason that the fact that there were orange chappals near the dead body has been substantiated in the cross examination also. Even the presence of pair of lady's chappals has also been substantiated in cross. We fail to understand as to why the so called omissions brought on record were not referred to the Investigating Officer namely PW25 Laxi Amonkar, PW28 Nerlon Albuquerque and PW29 Braz Menezes by the defence.

131. During his statement under Section 164(5) of Cr.P.C. by JMFC Mapusa, PW16 Chandru Chavan had given a vivid account as to what he had witnessed at about 4.30 am when he got up for answering nature's call i.e presence of respondent no.1-Samson, Michael Manion @ Masala and a foreign girl in the shack.

132. He also deposed before the learned Magistrate about the orange chappals and the fact that how respondent no.1-Samson asked him to bring the orange chappals which he first refused and then as he wanted to proceed on leave with the permission of the respondent no.1-Samson, he brought the orange chappals and gave it to respondent no.1-Samson who carried the same in a plastic bag.

133. So far as post crime conduct of respondent no.1-Samson is concerned, as already discussed herein above that PW10 Luis Coutinho noticed unusual arrival of respondent no.1-Samson at 6.00p.m on 18.2.2008 instead of 2.30 to 3.30 p.m which was his usual timings. When PW10 inquired with respondent no.1-Samson as to how his orange chappals were found near the spot where the dead body was noticed, respondent no.1-Samson is said to have replied that during last night he was searching for the said chappals but could not find it which necessarily means those were his chappals when he was with the victim. At that time when a foreigner offered them drinks, PW10 Luis Coutinho noticed that respondent no.1-Samson quickly drank the whisky one after another round. The conduct of respondent no.1 Samson thereafter to ask PW16 Chandru Chavan to bring his chappals also speaks about his post crime conduct. In normal course respondent no.1 Samson could have lifted his orange chappals however this fact indicates his mental state. The feeling of guilt can be said to have resulted in a such a strange behaviour.

134. The unusual and strange post crime conduct of respondent no.1 Samson clearly manifests his complicity in the crime to cause the evidence to disappear with an obvious intention to

screen himself from legal punishment. Had there been no *mens rea* that no offence has been committed by him, he would have himself brought his chappals, instead of asking PW16 Chandru Chavan. He knew that death of the victim was not natural. Section 201 of IPC reads thus:-

“The first paragraph of Section 201 lays down the essential ingredients of the offence under Section 201. It must be proved firstly that an offence has been committed. Secondly, the accused must know or have reason to believe that the offence has been committed. Thirdly, the accused must either cause any evidence of the commission of that offence to disappear or give any information respecting the offence which he knows or believes to be false. Fourthly, the accused must have acted with the intention of screening the offender from legal punishment. By the second, third and fourth paragraphs, a measure of the punishment is made to depend upon the gravity of the offence. The word ‘Offence, wherever used in the first, second third and fourth paragraphs means some real offence, which in fact has been committed not some offence which the accused imagines has been committed. The punishment depends upon the gravity of the offence which was committed and which the accused knew or had reason to believe to have been committed.”

135. The testimonies of PW10 Luis Coutinho, PW14 Murli Sagar and PW16 Chandru Chavan, if tested on the touch stone of law of evidence are found to be consistent, cogent and trustworthy. There was no reason for these witnesses to depose falsely before

the Court on oath and also before the learned JMFC in their statements under Section 164(5) of Cr.P.C. about the facts witnessed by them, which they could have exaggerated. Admittedly, none of these witnesses have any axe to grind against respondent no.1-Samson. All of them were natural witnesses.

136. It is quite clear from the aforesaid discussion that respondent no.1-Samson had full knowledge and reason to believe that an offence had been committed. Coming late on the following day in the shack and then asking PW16 Chandru Chavan to bring his chappals and taking away the same from the scene of occurrence so as to say to make the evidence disappears with an intention from screening himself from legal punishment. He is required to be held guilty for the offence under this Section. There is no question of recovery of said orange chappals which the prosecution could not as the sole intention of respondent no.1 was to cause disappearance or destruction of the evidence. There is no reason to suspect the testimonies of PW10 Luis Coutinho and PW16 Chandru Chavan on that point as discussed herein above.

137. The conduct of the respondent no.1-Samson in offering beer to the victim who was already in an inebriated state speaks

volume about his motive to take disadvantage of her such condition. It cannot be said that respondent no.1-Samson was not aware or had no knowledge about the physical and mental state of the victim which from the evidence on record has been proved that she was habituated in consuming liquor. When it is testified by PW14 Murli Sagar that cocaine lines were drawn/sprayed in a plate which the respondent no.1-Samson allowed her to sniff though she was a minor girl manifests *mens rea* on his part. So far as the role of respondent no.2- Shana is concerned, though he was present in the shack and also a witness to the fact that victim sniffed cocaine and also consumed beer, he was not directly responsible for the same. It is clear that it was respondent no.1-Samson who offered beer to the victim who had heard the entire conversation between the victim and PW10 Luis Coutinho.

138. Conduct of the respondent no.1 prior to the incident shows that he had prepared the plan in his mind to lure the victim so he could exploit her sexually and thereafter made her to consume beer and intoxicant. Such previous conduct of the respondent no.1 is quite relevant in view of Section 8 of the Indian Evidence Act. Lasciviousness of the respondent no.1-Samson is writ large.

139. We are constrained to observe as to how the learned Trial Court erroneously and perversely made her observations in the impugned judgment from which it appears that her approach in analysing the evidence of the prosecution witnesses was totally improper and uncalled for. We say so for the following reasons:-

140. At the very beginning of the judgment in paragraphs 34 and 39 it is observed by learned Trial Court that there was a fresh investigation conducted by CBI right from registration of fresh FIR/Crime which is a technical discrepancy at the very inception and it weakens the case of the prosecution. Without analysing the evidence of the prosecution witnesses in a serious case like this, the learned Trial Court has jumped to a conclusion that the prosecution case is weak. In paragraph 39 of the impugned judgment she went on to observe that the testimonies of material witnesses of the prosecution namely PW10 Luis Coutinho, PW14 Murli Sagar and PW16 Chandru Chavan are not seen to be free from the shadow of doubts. Even before discussing and analysing the testimonies of these witnesses, how could the learned Trial Court make such observations before touching the evidence of these witnesses and the other material on record?

141. Paragraphs 40,41 and 122 of the impugned judgment read thus:-

- “40. In addition to that, neither the Goa Police nor CBI has taken any action against PW10 and PW14 for their acts in violation of certain laws. The accused no.1 has taken a categorical stand on this aspect that these witnesses have come forward to give statements in favour of prosecution, only to save them from their criminal liability, although they had no enmity against the accused no.1 and 2.
41. Also there is considerable delay in recording the statements of all the witnesses on the part of Goa Police in Crime No. 21/2008 and on the part of CBI in Crime No. BS1/2008/S/001. The statements of these material witnesses in their subsequent statements, recorded under Sections 161 and 164 of Cr.P.C. after considerable delay, which indirectly favours the defense of accused no.1 of manipulation of case by prosecution through these witnesses, thereby resulting in the prejudice to the accused persons. Hence, the aforesaid technical lapses cannot just be ignored in this case and benefit of such lapses goes in favour of the accused persons.
122. Admittedly, there is no action taken, either against PW10 or PW12, by the Police or any other authority for violation of the conditions of the Excise licence and the permission to run the shack. At the cost of repetition, here it is material to note the defense of accused no.1 that these witnesses have falsely supported the case of prosecution with an assurance from the police that no action would be taken against them for their aforesaid illegal acts. Similar is the case of accused no.1 in respect of PW14, who himself is a drug addict and has spoken openly about the availability of drugs in “Luis Shack” and other places. As claimed by accused no.1, no action under the NDPS Act was taken against any of these witnesses by the Police only to make them support the false case of prosecution made up against the accused no.1.”

142. The aforesaid observations are ex-facie perverse and are totally in ignorance of law. It is not clear as to which law came to be

violated by PW10 Luis Coutinho and PW14 Murli Sagar and how these witnesses supported the prosecution only to save themselves from criminal liability? This is something which is unknown to the criminal jurisprudence.

143. We fail to understand what the learned Trial Court tried to convey by her observations in paragraph 41 of the Judgment. On one hand it is observed that there was delay in recording the statements of material witnesses on the part of the Goa Police, however, on the other hand she observed thus:-

“The statements of these material witnesses recorded at the first instance, by PW25, in UD No.5/2008, do not reveal the facts in detail, as narrated by these witnesses in their subsequent statements, recorded under Sections 161 and 164 of Cr.P.C. after considerable delay, which indirectly favors the defense of accused no.1 of manipulation of case by prosecution through these witnesses, thereby resulting in the prejudice to the accused persons. Hence, the aforesaid technical lapses cannot just be ignored in this case and benefit of such lapses goes in favor of the accused persons.”

144. Even if it is presumed that witnesses have violated certain provisions of NDPS Act for storing and selling of narcotic drugs to the customers, nevertheless, their testimonies, which withstood stringent cross examination, could not be said to be unworthy of credit only because police or CBI did not initiate action

against them. This is an altogether different matter, quite irrelevant with regard to present case. Even an accomplice is a competent witness on whose sole testimony an accused can be convicted, though an accomplice is also a partner in crime.

145. In the case of **R. Shaji** (supra) it is held by the Hon'ble Supreme Court in paragraphs 55 and 56 which read thus:-

55. *An argument has been advanced by Shri S. Gopakumaran Nair, learned senior counsel appearing on behalf of the appellant, that as the witnesses PW.8 and PW.11 have admitted in their cross-examination, that they have been the accused persons in certain other criminal cases, their testimony should not have been relied upon by the courts below. The argument seems to be rather attractive at the outset, but has no substance, for the reason that the law does not prohibit taking into consideration even the evidence provided by an accomplice, who has not been put to trial.*
56. *It is a settled legal proposition that the evidence provided by a person who has not been put to trial, and who could not have been tried jointly with the accused can be considered, if the court finds his evidence reliable, and conviction can also safely be based upon it. However, such evidence is required to be considered with care and caution. An accomplice who has not been put to trial is a competent witness, as he deposes in court after taking an oath, and there is no prohibition under any law to act upon his deposition without corroboration. (Vide: [Laxmipat Choraria & Ors. v. State of Maharashtra](#), AIR 1968 SC 938; Chandran alias Manichan alias [Maniyan & Ors. v. State of Kerala](#), AIR 2011 SC 1594; and [Prithipal Singh & Ors. v. State of Punjab & Anr.](#), (2012) 1 SCC 10).*

146. In paragraph 43 of the impugned judgment the learned

Trial Court has observed with regard to non production of the documents by PW29 Braz Menezes and PW30 Pramod Mudbhatkal in respect of ownership of the *Luis Shack* and employment of PW16 Chandru Chavan which is irrelevant in view of the admitted facts, as already discussed herein above. The law does not require a documentary evidence in a criminal trial of this kind to produce ownership documents of the shack or about employment of PW16 Chandru Chavan when most of the facts have been admitted by the defence. It is significant to note that respondent no.1-Samson and PW16 Chandru Chavan have admitted their employment with PW10 Luis Coutinho in the said *Luis shack*.

147. In paragraph 49 of the Judgment it is observed that though Michael Manion @ Masala was cited as a witness who is a British National, however, he was not examined by the prosecution. It has been brought on record that despite all attempts to procure the presence of Michael Manion @ Masala, even through video conference, prosecution could not succeed. Roznama of the Trial Court dated 26.4.2016 clearly indicates sincere attempts made by the prosecution to procure the presence of Michael Manion @ Masala. It is not the case that evidence of Michael Manion @ Masala was deliberately withheld by the prosecution. In paragraph 53 of the

judgment the learned Trial Court observed that PW16 Chandru Chavan subsequently gave statement about pair of orange chappals lying near the dead body at the instance of police, ignoring the fact that in his evidence and also before the learned JMFC he had stated about it. The panchanama of scene of occurrence drawn on the same day reveals presence of orange chappals near the dead body.

148. So far as physical and mental state of victim at the relevant time is concerned, the learned Trial Court in paragraph 81 of the impugned judgment observed that though the prosecution has not specifically proved that both the respondents/accused were aware of her mental and physical condition, she further observed that PW10 Luis Coutinho, Michael Manion @ Masala had noticed over all behaviour of the victim who was in an inebriated state. It is observed that since the defence had not challenged the same it has been proved that the victim was not in a fit state of physical and mental condition.

149. On one hand the learned Trial Court observed in paragraph 82 of the impugned judgment that PW14 Murli Sagar had stated that there were cocaine lines drawn in a plate kept on the kitchen at *Luis Shack* at the relevant time and that he had sniffed one

of the cocaine line, but immediately in paragraph 90 she observed that testimony of PW14 Murli Sagar is totally inconsistent and full of omissions and contradictions on material aspects. She goes on to observe that an inference can be drawn from the testimony of this witness that in order to save himself from the charge under the NDPS Act he might have resiled from his statement and, therefore, prosecution has failed to prove that cocaine and other narcotic drugs were available at *Luis Shack* at the relevant time. These observations of the learned Trial Court are irreconcilable and inconsistent.

150. On one hand it is observed that cocaine was indeed found in the plate and sniffed by PW14 Murli Sagar but again it is observed that prosecution has not proved the same. It is not even clarified what were the so called omissions and contradictions. Merely saying that there were omissions and contradictions without explaining whether they really existed and on material facts, such observations sans any basis deserves to be ignored. There is absolutely no discussion whether the so called omissions and or contradictions were referred to the concerned Investigating Officer/s by the defence counsel and whether so called omissions and contradictions have been duly proved or otherwise.

151. It has been vehemently argued by Mr. Bhobe that the view taken by the Trial Court is a possible and probable view and that the prosecution has not shown that the impugned judgment is perverse. The learned Counsel relied upon following judgments:-

- i. Hakeem Khan and other Vs. State of Madhya Pradesh.**
- ii. Basappa Vs State of Karnataka²⁰**
- iii. A. Shankar Vs State of Karnataka²¹**
- iv. Ghurey Lal Vs State of Uttar Pradesh²²**

152. The law on the aspect of two views, is no more res integra and principles for the same have been well settled.

153. In case of **Hakeem Khan** (supra) it is held by Supreme Court in as under:-

Reiterated, possible view denotes an opinion which can exist or be formed irrespective of correctness or otherwise of such an opinion--- A view taken by a Court lower in hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement- But such a conclusion of higher court would not take the view rendered by subordinate court outside the arena of a possible view ---Correctness or otherwise of any conclusion reached by a court has to be tested on basis of what superior judicial authority

²⁰ 2014(2) Bom. C.R.(cri.) 462

²¹ (2011) 6 SCC 279.

²² (2008) 10 SCC 450.

perceives to be correct conclusion --- A possible view, on the other hand, denotes a conclusion which can reasonably be arrived at regardless of the fact whether it is agreed upon or not by the higher Court- The fundamental distinction between the two situations has to be kept in mind- So long as the view taken by trial Court can be reasonably formed, regardless of whether High Court agrees with the same or not, view taken by trial Court cannot be interdicted and that of High Court supplanted over and above the view of the trial Court.

154. In the case of **A. Shankar** (supra) it has been held at paragraph 26 as under:-

26. *It is settled legal proposition that in exceptional circumstances the appellate court under compelling circumstances should reverse the judgment of acquittal of the court below if the findings so recorded by the court below are found to be perverse, i.e., the conclusions of the court below are contrary to the evidence on record or its entire approach in dealing with the evidence is found to be patently illegal leading to miscarriage of justice or its judgment is unreasonable based on erroneous law and facts on the record of the case. While dealing so, the appellate court must bear in mind the presumption of innocence of the accused and further that acquittal by the court below bolsters the presumption of his innocence. (Vide: [Abrar v. State of U.P.](#), (2011) 2 SCC 750; and [Rukia Begum & Ors. v. State of Karnataka](#), (2011) 4 SCC 779).*

155. In the case of **Basappa** (supra) it has held at paragraphs 11 and 12 thus:-

“11. In *Kallu alias [Masih and others v. State of Madhya Pradesh](#)*[5], it has been held by this Court that if

the view taken by the trial court is a plausible view, the High Court will not be justified in reversing it merely because a different view is possible. To quote: "8. While deciding an appeal against acquittal, the power of the appellate court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further, if it decides to interfere, it should assign reasons for differing with the decision of the trial court." (Emphasis supplied)

12. [In Ramesh Babulal Doshi v. State of Gujarat](#)[6], this Court has taken the view that while considering the appeal against acquittal, the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable and if the court answers the above question in negative, the acquittal cannot be disturbed. To quote:

"7. ... the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities

*it can then — and then only — reappraise the evidence to arrive at its own conclusions. ...”
(Emphasis supplied)”*

156. Rest of the judgments relied upon by the defence laid down the same ratio decidendi.

157. In the latest judgment reported in the case of ***Munishamappa and others Vs State of Karnataka***²³, after taking the survey of earlier decisions the Division Bench of the Supreme Court has carved out the following principles on the basis of which the judgment of acquittal rendered by the Trial Court can be interfered with and held at paragraphs 14 and 21 thus:-

“14. The High Court in the present case was dealing with an appeal against acquittal. In such a case, it is well settled that the High Court will not interfere with an order of acquittal merely because it opines that a different view is possible or even preferable. The High Court, in other words, should not interfere with an order of acquittal merely because two views are possible. The interference of the High Court in such cases is governed by well established principles. According to these principles, it is only where the appreciation of evidence by the Trial Court is capricious or its conclusions are without evidence that the High Court may reverse an order of acquittal. The High Court may be justified in interfering where it finds that the order of acquittal is not in accordance with law and that the approach of the Trial court has led to a miscarriage of justice. The High Court, however, must be satisfied that the incident cannot be

explained except on the basis of the guilt of the accused and is inconsistent with their innocence.

21. *The principal basis on which the Trial court acquitted the accused is contrary to the evidence on the record and suffers from a manifest perversity. The evidence on the record is indicative of the following circumstances:*

- (i) As a result of the incident, two persons - Kenchappa and Krishnappa suffered homicidal death in the family of the complainant and as many as six persons were injured;*
- (ii) None of the persons in the family of the complainant were armed;*
- (iii) On the contrary, it was the side of the accused which came to the house of the complainant armed with weapons such as baku, knife, cycle chains and explosives;*
- (iv) The injury sustained by the two deceased persons were on vital parts of the body namely, lungs and kidney; and*
- (v) After the initial altercation took place at 10:30 am and the survey officers had left the location, the accused returned armed with lethal weapons and during the course of the incident caused serious injuries on Krishnappa and Kenchappa resulting in their death.*

Besides the perversity in the judgment of the Trial Court noted earlier, it is evident that the judgment proceeded on the basis of surmises. The Trial court hypothesised that since the deceased was 6 ft. in height and accused No. 1 was 5 ft. in height, the injuries, if caused by a dagger, would have been slanting and not vertical in nature. This has completely ignored the vital aspects of the medical evidence on the record. The contradictions which the Trial court adverted to in the evidence of PWs 3 and 4 were not of a nature that should result in discrediting the entire case of the prosecution."

158. As already discussed hereinabove, the impugned judgment and order of acquittal rendered by the learned Trial Court

is a result of improper appreciation of evidence and is capricious. The conclusions are contrary to the evidence on record. The judgment is based on surmises and conjectures. The learned Trial Court has ignored cogent, trustworthy and reliable evidence of the witnesses coupled with medical evidence which corroborates the fact that the victim was under the influence of narcotic drugs and alcohol. The learned Trial Court has also ignored the bruises noticed by the medical expert below the knees i.e on the shin and other parts of the body. There is indeed a miscarriage of justice. The view taken by the learned Trial Court is an impossible view in the given set of facts and circumstances. We have, therefore, reappreciated and reviewed the entire evidence on record and constrained to take a different view. Decision of the learned Trial Court will have to be reversed to meet the ends of justice. We are conscious of the fact that there is presumption of innocence in favour of the respondent. However, there is absolutely no scope of any doubt creeping in, in the light of the discussion made herein above.

159. The circumstances relied upon by the prosecution are conclusive in nature. They exclude every other hypothesis except complicity of the respondent no.1-Samson in committing the offences alleged. The chain of circumstances and the evidence is complete, in

the sense there is no scope for any reasonable grounds to conclude about the innocence of the respondent no.1-Samson. All the circumstances from which the conclusion of the guilt of the respondent no.1-Samson is drawn, have been fully established.

160. We have discussed the entire evidence on record and have found that though the respondent no.2 -Shana was present at the Luis Shack at the relevant time and was a witness to the act of respondent no.1, he cannot be said to be an abettor in commission of the offence or commission of an act which would be an offence. There is no sufficient evidence on record to indicate that he too was responsible in causing the cocaine lines or beer consumed by victim alongwith respondent no.1-Samson.

161. We are, therefore, inclined to maintain the acquittal of respondent no.2 of the offences punishable under Sections 328, 109 of IPC and Section 8(2) of the Goa Children's Act, 2003.

162. A corollary of the entire discussion on facts, evidence and circumstances on record established that the prosecution has proved its case beyond all reasonable doubts against respondent no.1 Samson D'Souza for having committed offences punishable under

Sections 328, 354, 304(ii), 201 of IPC and Section 8(2) of the Goa Children's Act, 2003.

163. Accordingly, we hold respondent no.1-Samson guilty for having committed offences punishable under Sections 328, 354, 304(ii), 201 of IPC and Section 8(2) of the Goa Children's Act, 2003. Interference in the impugned judgment and order of acquittal is, therefore, expedient.

164. Before awarding sentence, respondent no.1-Samson is required to be heard on that aspect.

PRITHVIRAJ K. CHAVAN, J.

R. D. DHANUKA, J.

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JUDGMENT CONTINUED ON 19.7.2019

165. As regards the sentence to be awarded, we have heard Shri Bhobe, learned Counsel appearing for respondent no.1-Samson D'Souza. He contends that respondent no.1-Samson is the only earning member of his family with wife and a minor daughter aged about 12 years who is prosecuting her studies in 7th standard. He contends that respondent no.1 is aged about 39 years and is the only male member of the family. He was in custody during the course of investigation and trial for about six and half months. The incident in question occurred in the year 2008. Respondent no.1 was available for trial throughout and has no blemish during the last 11 years.

166. It is submitted by the learned Counsel that neither inhuman or cruel act was exhibited by him at the time of commission of the alleged offence nor there is anything to show that his conduct was unusual.

167. The learned Counsel further contends that now respondent no.1 has adopted a profession of scuba diving for his livelihood, and, therefore, an opportunity of reformation be given to him considering his age and other circumstances. It is also submitted that he has no criminal antecedent.

168. Per contra, Mr. Khan, learned Special Public Prosecutor for the CBI strongly objected for showing any leniency to the respondent no.1 especially on the ground that the offence with respect to a child for which State of Goa has enacted Goa Children's Act 2003. Learned Public Prosecutor took us through the aims and object of the said Act which, *inter alia*, contemplates protection, promotion and preservation of the best interests of children in Goa and to create a society that is proud to be child friendly. He contends that respondent ought to have informed the police or ought to have provided some assistance to the victim. He submits that it is always "a strong to protect the weak", instead, the respondent, not only provided liquor to the victim but also made her to sniff cocaine and morphine. Not only that he left her to die on the seashore without informing any one. This shows utter cruelty on his part. The conduct of the respondent, according to the learned Special Public Prosecutor, itself indicates his mental state and therefore, he does not deserve any leniency at all. It is also submitted that respondent had never co-operated with the Investigating Agency.

169. The learned Special Public Prosecutor drew our attention to Section 8(1) and (2) of the Goa Children's Act 2003 in order to

demonstrate the severity of crime and quantum of punishment to be awarded and also Section 304(ii) and Section 354 of IPC. He therefore, submits that maximum sentence provided in law be awarded to the respondent no.1.

170. On the aspect of compensation to the victim, the learned Special Public Prosecutor drew our attention to Section 357(A) of Code of Criminal Procedure Code by stating that adequate compensation be awarded to the victim by issuing necessary direction to the State of Goa.

171. He drew our attention to the definition of "Victim" as provided in Section 2(wa) of Code of Criminal Procedure which reads thus:-

““Victim” means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and expression “victim” includes his or her guardian or legal heir.”

172. He submits that a victim includes a guardian or legal heir of a person who has suffered any loss or injury caused by reason of act or omission for which the accused person has been charged.

173. When Advocate Varma commenced his submission on the issue of quantum of sentence who represented the mother of the victim, Mr. Bhobe, learned Counsel for the respondent no.1 raised objection by contending that he can be permitted only if the prosecution does not perform its duties properly.

174. Mr. Bhobe placed reliance upon the judgment of Supreme Court in the case of ***Sandeep Kumar Bafna Vs State of Maharashtra and anr.***²⁴ however, we permitted Mr. Varma to briefly make his submissions on the issue of quantum of sentence having found no merit in the objection raised by the learned Counsel for the respondent no.1.

175. Mr. Varma, learned Counsel for the victim's mother submitted that providing a narcotic substance to the victim, holding her from behind and pinning her down on the beach itself shows the conscious act on the part of the respondent who had left her at the beach. Such conduct, according to the learned Counsel, with respect to the child is very serious and therefore, should be dealt with severely.

176. We have considered the respective submissions at bar. It

is pertinent to note that at the time of commission of the offence the respondent was in his thirties and was quite matured to understand the acts which he had committed with a preplanned motive by offering intoxicated substance to the victim as well as offering her beer. The mode and manner in which he thereafter took the victim to the beach and outraged her modesty also exhibits the lasciviousness on his part. Merely because he is the only earning member of the family with a minor daughter would not be a mitigating circumstance to show leniency in his favour.

177. In view of the aims and objects of the Goa Children's Act vis-a-vis the offences which have been proved against the respondent no.1 clearly indicate that there would be no likelihood of his reformation. As such, the age and the family background of the respondent, according to us, is of no relevance in an offence of this kind.

178. We are mindful of the principles laid down by the Hon'ble Supreme Court that undue sympathy would do more harm to the criminal justice system undermining the public confidence in the efficacy of the system. It is our duty to award proper sentence having regard to the manner in which the offence is committed.

179. The Hon'ble Supreme Court in case of **Raj Bala V/s. State of Haryana & Ors.**²⁵ enunciated following few principles which reads thus :

“A Court, while imposing sentence, has a duty to respond to the collective cry of the society. The legislature, in its wisdom, has conferred discretion on the Court, but the duty of the Court, in such a situation, becomes more difficult and complex. It has to exercise the discretion on reasonable and rational parameters. The discretion cannot be allowed to yield to fancy or notion. A Judge has to keep in mind, the paramount concept of rule of law and the conscience of the collective, and balance it with the principle of proportionality, but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu, regard being had to the command of law, and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society, and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked. It is the duty of the court, not to exercise the discretion in such a manner, as a

²⁵ (2016) 1 SCC 463

consequence of which, the expectation inherent in patience, which is the "finest part of fortitude", is destroyed. A Judge should never feel, that the individuals who constitute the society as a whole, is imperceptible to the exercise of discretion. He should always bear in mind, that erroneous and fallacious exercise of discretion is perceived by a visible collective."

180. Justice Benjamin N. Cardozo said and we quote, "*Justice, though due to the accused, is due to the accuser too*".

181. Even after considering the mitigating circumstances, in view of the aforesaid discussion, we are not inclined to take a lenient view while awarding the sentence.

182. On the aspect of compensation to the victim or the survivors of sexual assault and other crimes, the Government of Goa has formulated a scheme namely, "The Goa Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes, 2018". Apart from the compensation which we propose to award to the mother of the victim under Section 357 of the Criminal Procedure Code, the mother of the victim would be entitled to apply to the

Government of Goa under the aforesaid scheme along with the Goa Victim Compensation Scheme, 2012 as provided in Section 5 of the said Scheme for getting appropriate compensation. On such application being filed by the mother of the victim, the State Government shall award such compensation as per the said Scheme within a period of eight weeks from the date of making such application.

183. In the light of the aforesaid observations, we proceed to pass the following order:

(i) The Criminal appeal is partly allowed.

(ii) The impugned judgment and order of acquittal dated 23/09/2016 passed by the President, Children's Court, Panaji in Special Case No.15/2008 is hereby quashed and set aside in respect of respondent no.1.

(iii) The respondent no.1 is convicted of an offence punishable under Section 328 of the Indian Penal Code.

He is sentenced to undergo rigorous imprisonment for 10 years and shall pay a fine of ₹50,000/-. In default of payment of fine, he shall undergo simple imprisonment for 1 year.

(iv) The respondent no.1 is convicted of an offence punishable under Section 354 of the Indian Penal Code.

He is sentenced to undergo rigorous imprisonment

for 5 years and shall pay a fine of ₹50,000/-. In default of payment of fine, he shall undergo simple imprisonment for 6 months.

(v) The respondent no.1 is convicted of an offence punishable under Section 304 (ii) of the Indian Penal Code.

He is sentenced to undergo rigorous imprisonment for 10 years and shall pay a fine of ₹50,000/-. In default of payment of fine, he shall undergo simple imprisonment for 1 year.

(vi) The respondent no.1 is convicted of an offence punishable under Section 201 of Indian Penal Code.

He is sentenced to undergo rigorous imprisonment for 2 years and shall pay a fine of ₹10,000/-. In default of payment of fine, he shall undergo simple imprisonment for 4 months.

(vii) The respondent no.1 is convicted of an offence punishable under Section 8(2) of the Goa Children's Act, 2003.

He is sentenced to undergo rigorous imprisonment for 3 years and shall pay a fine of ₹1,00,000/-. In default of payment of fine, he shall undergo simple imprisonment for 6 months.

(viii) Whole of the amount of fine be paid to the mother of the victim under Section 357 of the Code of Criminal Procedure as a compensation, if realised, subject to the decision of appeal, if preferred.

- (ix) The period of detention already undergone, shall be set off under Section 428 of the Code of Criminal Procedure.
- (x) The acquittal of respondent no.2 by the Trial Court is upheld.
- (xi) The respondent no.1 shall surrender to his bail bonds.
- (xii) The substantive sentences shall run concurrently.
- (xiii) The muddemal property shall not be disposed off until the appeal is decided by the Supreme Court.
- (xiv) Authenticated copy of the judgment and order be issued to the respondent forthwith after payment/deposit of requisite charges for the same.

184. At this stage, the learned Counsel for the respondent no.1 has moved an application for suspension of sentence and release of the respondent no.1 for a period of 12 weeks to enable him to file an appeal before the Hon'ble Supreme Court. Mr. Bhobe, learned Counsel for the respondent no.1 submits that this Court can invoke its jurisdiction under Section 482 of Cr.P.C. In support, he placed reliance on a judgment of this Court in the case of ***State of Goa Vs. Dhiraj Murari Warkar***²⁶. The facts and circumstances of that case were peculiar and there was no exercise of jurisdiction under Section 482 of Cr.P.C.

185. On the other hand, the learned Special Public Prosecutor Mr. Khan, strongly objected the prayer of respondent no.1 by contending that there is no question of invoking Section 482 of Cr.P.C. as there is neither abuse of process of Court nor there is any question of securing ends of justice.

186. Without going into the issue whether this Court can exercise power under Section 482 of Code of Criminal Procedure, we are not inclined to exercise our jurisdiction under Section 482 of Cr.P.C. in view of gravity of the offence and the findings rendered by us in the judgment. Prayer is therefore rejected and Criminal Misc. Application no.189/2019 stands disposed of accordingly.

187. Judgment be certified to the President, Children's Court Goa. The President, Children's Court Goa shall proceed further as per Section 388 (2) of Code of Criminal Procedure by issuing a committal warrant to the jailor for serving out sentence awarded by this Court to the respondent no.1.

189. President, Children's Court, Goa as well as parties to

act on the basis of authenticated copy of this Order.

PRITHVIRAJ K. CHAVAN, J.

R. D. DHANUKA, J.

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