

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 27 OF 2020

Deepak Kumar Ganesh Rai Manto,
s/o Ganeshrai Manto,
Age 21 years, Labour Work,
c/o. Gloria Rodrigues,
Igramol, Quepem-Goa.
N/o. Village Pachamba, Suhidnagar,
Bebusrai District, Bihar
(Presently Lodged at Central Jail,
Covale)

..... Appellant/
(Original Accused)

V e r s u s

1. S T A T E

(Through Police Inspector)
Quepem, Police Station,
Quepem, Goa).

2. THE PUBLIC PROSECUTOR,

High Court of Bombay at Goa,
Panaji – Goa.

..... Respondents

Mr. Pavithran AV, Advocate for the Appellant.

Mr. Pravin Faldessai, Additional Public Prosecutor for the State-
Respondents.

CORAM : M. S. SONAK &
SMT. M. S. JAWALKAR, JJ.

Reserved for Judgment on : 22nd September, 2020

Judgment Pronounced on : 7TH October, 2020.

JUDGMENT (*Per Smt. M. S. Jawalkar, J.*)

1. The present appeal is filed by the accused being aggrieved by the Judgment and Order dated 06/04/2018 passed by the Children's Court in Special Case No.52 of 2012 convicting the appellant under Section 363 of Indian Penal Code ("IPC", for short) sentencing him to undergo simple imprisonment for a term of 3 years with a fine of ₹5000/- in default simple imprisonment for 3 months. He further convicted the appellant under Section 376 of IPC r/w. 8(2) of the Goa Children's Act, 2003 sentencing the appellant to undergo rigorous imprisonment for a term of 10 years with a fine of ₹2,00,000/- in default to undergo simple imprisonment of 3 months. He further convicted the appellant under Section 302 of IPC and sentenced him to undergo life imprisonment and to pay a fine of ₹10,000/- in default to undergo simple imprisonment for a term of 6 months. Children's Court also convicted the appellant under Section 201 of IPC sentencing him to undergo simple imprisonment

for a term of 3 years and to pay a fine of ₹3,000/- in default to undergo simple imprisonment for a term of 2 months.

2. The case of the prosecution before the Children's Court was that on 20/05/2012 between 14.30 to 15.00 hours at Quepem, the accused kidnapped the minor daughter of Motiurrehman Khan from the lawful guardianship of her parents. The accused is also alleged to have committed rape and grave sexual assault on the minor girl and thereafter committed murder of the said minor girl. The accused thereafter dumped the body of the deceased in a lift void of the under construction building at Zoglamoddi, Quepem and thereby tried to destroy the evidence by putting an empty cement bag and sand on the dead body of the deceased.

3. As prima facie involvement of the accused was made out by the prosecution the Children's Court after hearing the prosecution as well as the Counsel for the accused framed charges which are produced as below:

CHARGE

(Sections 221, 222, 223 of Cr.P.C.)

I Smt. Anuja Prabhudessai, President, Children's Court for the State of Goa, at Panaji, hereby frame charge against you

Deepak Kumar Ganesh Rai/Manto, s/o. Ranesh Rai/Manto, aged : 21 years, Occupation : Labour work, c/o. Gloria Rodrigues, Igramol, Quepem- Goa, n/o. Village Pachamba, Suhidnagar, Bebusrai, District – Bihar, as under :

That on 20.05.2012, between 14.30 to 15.00 hours, at Quepem, you kidnapped the minor girl (name disclosed to the accused), aged 4, d/o.Motiurrehman Khan, from the lawful guardianship of her parents and thereby committed an offence punishable under Section 363 of IPC r/w. Section 8 of the Goa Children's Act, 2003 ad within my cognizance.

That on the above, date time and place, you committed rape / grave sexual assault on the minor girl(name disclosed to the accused. You have thereby committed a offence under Section 376 of IPC and Section 2(y)(i) punishable under Section 8(2) of the Goa Children's Act,2003 and within my cognizance

That on the above date, place and time, you committed murder of intentionally causing the death of said minor girl (name disclosed to the accused), and thereby committed an offence punishable under Section 302 of IPC and within my cognizance,

That on the above date, place and time mentioned hereinabove, knowing that you had committed rape and murder of the minor girl (name disclosed to the accused) punishable with Section 376 and 302 IPC and Section 8(2) of the Goa Children's Act, 2003 has been committed, did cause evidence of said offence to disappear by dumping the body of the deceased minor in a lift void of the under construction building with the intention of screening yourself from legal punishment

and thereby committed an offence punishable under Section 201 IPC and within my cognizance.

And I hereby direct that you be tried by this Court on the said charges.

Sd/-

(Anuja Prabhudessai)

Panaji-Goa

President

14.1.2013
Goa

Children's Court for the State of

4. Accused pleaded not guilty of the offences he was charged with and claimed for trial. Accordingly trial proceeded further. The prosecution examined in all 33 witnesses to prove the prosecution's case. After recording evidence, a statement of the accused under Section 313 of CrPC was recorded. No witnesses were examined by the accused in his defence. Thereafter the matter was finally heard by the learned Children's Court and passed the order which is impugned in the present appeal.

5. The learned Advocate for the appellant Shri A.V. Pavithran submitted that the impugned judgment is contrary to law and evidence on record. The learned Children's Court

ought to have held that the prosecution failed to prove its case beyond reasonable doubt against the appellant. The learned Children's Court relied on inadmissible circumstances and has disregarded admissible circumstances. The learned Children's Court wrongfully and illegally held that the appellant has committed child abuse when none of the ingredients as defined in Goa Children's Act are made out. The impugned sentence is harsh and disproportionate and need interference. The learned Children's Court failed to consider that the evidence of witnesses of the prosecution does not inspire confidence and such evidence cannot be relied upon. The learned Children's Court ought to have held that the evidence on record is not sufficient to link the appellant with the crime.

6. The learned Advocate Shri Pavithran further submitted that :

i) Charge is not framed as per the provisions of law. Time and place of kidnapping as well as committing offence of rape and murder shown as one and the same [contrary to the provisions of Cr.P.C. i.e. Sections 211 to 215 of Cr.P.C.]. The accused is seriously prejudiced due to non-framing of charge in accordance with law. The ingredients

which are required to defend are not made out to effectively defend the same. No exact location and place, date and time are mentioned. [(2010) 10 SCC 130] in the case of ***Main Pal vs State of Haryana***. Specifically when the prosecution's case is that the minor girl was kidnapped from one place and raped and murdered at another place.

ii) The extra judicial confession before Pw.24, Mithun Kumar, by the accused is not reliable.

iii) A recovery of clothes of the accused and button of shirt is not proved beyond doubt. It raises doubt about genuineness of investigation.

iv) Half pant recovered from the spot is not proved beyond doubt as that of the accused.

7. It is submitted that the learned Children's Court failed to appreciate the evidence on record and wrongfully held that the prosecution proved charges beyond reasonable doubt against the accused. The learned Counsel in support of his contention about last seen theory turned our attention to the evidence of Pw19, Pw20, Pw22, Pw23 and Pw25.

8. As per the deposition of mother Pw21 the victim girl went to play after lunch with other children precisely 6 to 7 in number. At around 2.30pm afternoon, as she did not return she searched for her and also enquired with other children. Then she realised that her child is not there. As she was not found even on enquiry and after searching her in the evening at around 6.35pm missing report was filed. It is submitted that none of the children playing along with the victim girl was examined by the prosecution.

9. It has come in the evidence of Pw19 and Pw20 that they saw the accused person sitting on the water tank near the playground and also saw him distributing chocolates to all children and after distributing chocolates to all children he went away along with the victim girl. On 21st also family members of victim girl were searching for her and on 22nd body was found. Thus, even after these witnesses have seen the victim girl along with the accused there is a long gap from 20th to 22nd May when the body was recovered. Pw19 deposed that he was not aware who was the girl with the accused but he deposed that he went to the house of the victim. All the witnesses without any discrepancy deposed so perfectly while

describing the clothes of the victim as well as the accused in very clear terms which raises doubt about the genuinity of the investigation. Though these witnesses i.e. Pw19 and Pw20 saw the accused, they have not informed the police till their statements were recorded.

10. It is further submitted that the prosecution has not examined any of the children otherwise this would be the best witness to establish really minor girl was kidnapped by the accused. Non-production of material or non-examination of material witnesses may result in miscarriage of justice.

11. Learned Counsel for the appellant has relied on the citation reported in *(2002) 7 SCC 317* in the case of ***Ashish Batha Batham vs. State of M. P.*** , wherein the Hon'ble Apex Court has held that :

Where suppression of relevant documents, materials and witnesses by the prosecution alleged, court should first ascertain whether prosecution has come before it with true facts and what would be the impact of such allegation on the very proof of existence of the circumstances.”

12. Learned Counsel relied on the citation reported in *(2007) 3 SCC 755* in the case of **State of Goa vs. Sanjay Thakran & anr.**, in support of his contention that failure to establish last seen theory, wherein the Hon'ble Apex Court held that :

“Thus, normally such evidence would be taken into account where the prosecution establishes that the said time gap was so small that possibility of any other person being with the deceased could completely be ruled out. But, it cannot be said that in all cases where there is a long time gap between the above two points, the evidence of last seen together is to be rejected. Even in such cases the proof of last seen together would be relevant if the prosecution establishes that in the intervening period there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime. In the present case, there being a considerable time gap between the persons seen together and the proximate time of crime, the circumstance of last seen

together could not be taken into account to fasten the guilt on the accused.”

13. Pw.24, Mithun Kumar, friend of accused, was examined by the prosecution to prove extra judicial confession. The statement before Judicial Magistrate was recorded after 15 to 20 days. It is the case of the prosecution that on 28.05.2012, witness was having holiday. In the evening at around 5.30 p.m., he proceeded to buy ration and handed over the list to the shopkeeper. He went to the hotel to have tea. The accused was present in the same hotel eating something. He sat near him. The accused told him that on the same day in the noon, he has done a wrong thing. He had killed a child of four to five years old. He did not give him the details. After breakfast, he left the hotel and collected the ration. On 22nd when police had come to the room to make enquiry, he told the police what the accused told him in the hotel. He further deposed that he thought that the accused was just joking when accused told him about the said thing in the hotel. It is the contention of the appellant, that the name of the hotel is not given by the said witness. He deposed that accused was sitting alone in the hotel and having breakfast,

whereas while recording his statement before the Magistrate, he deposed that there was one more person besides the accused and the witness. Therefore, the witness is not reliable. The prosecution has not examined the other persons namely Gautam Vikas who was claimed to be present in room when the said Mithun Kumar and accused went to the room of Mithun Kumar to ascertain when the accused left the room. It is submitted that this witness kept mum for two days which raises doubt about credence of this witness.

14. Recovery of clothes i.e. half pant from the spot is not at all proved belonging to the accused. The shop owner was examined to establish that half pant was purchased from his shop by the accused.

15. In deposition of Pw.14, (who is shop owner), from whose shop it is alleged that accused purchased half pant, which was recovered from the spot. He deposed that in the month of April, accused person present in the Court came to his shop. He deposed that he remembers the transaction as he bargained and purchased the pant at ₹70/-. After about a month, police came to his shop with a person whose face was covered. Police showed the short and asked whether he can

identify. He identified the short as sold by him. Thereafter, he received a letter from Mamlatdar for identification parade and he identified the accused there. It is the contention of the appellant that there are so many people coming to the shop and how he recollected the accused. He has also deposed in cross examination that the accused was not his regular customer and he had visited once only on that particular day. In such circumstances, finding that recovered half pant on the spot was of accused, is perverse.

16. He further submitted that it also needs to be noted that the labour working there used to leave the construction site and nobody used to stay there. While leaving, they used to collect their belonging. In such circumstances, it is improbable to hold that the said half pant was lying at the spot and recovered two days thereafter. Therefore, recovery is not beyond suspicion.

17. Learned Counsel also submitted that there is no question put to the witness under Section 313 of Cr.P.C. disclosing the time and place of the offence as specific place of kidnapping and offence of rape and murder are different. It

causes serious prejudice to accused as no opportunity to understand the case of prosecution. As such, whole trial vitiates on this ground. He relied on the citation reported in (2008) 16 SCC 328 in the case of ***Asraf Ali vs. State of Assam***, the Apex Court held that :

“The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity. Where no specific question has been put by the trial Court on an inculpatory

material in the prosecution evidence, it would vitiate the trial. Non- indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise. In certain cases when there is perfunctory examination under Section 313 of the Code, the matter is remanded to the trial Court, with a direction to re-try from the stage at which the prosecution was closed.”

18. Learned Counsel for the appellant stated that as case is based on circumstantial evidence, prosecution must prove each circumstance connecting to each other and to complete the chain of circumstances. If any link is found broken, the chain of circumstances cannot be said to be complete and accused must get the benefit of doubt. Learned Counsel relied on the citation reported in **(2019) 7 SCC 773**, in the case of **Baiju Kumar Soni & anr. Vs State of Jharkhand**, wherein the Hon'ble Apex Court held at paras 15 and 16 thus :

“15. The law on the point is very well settled that in a case based on circumstantial evidence, every circumstance must be fully proved and all the circumstances must form a chain of evidence so complete as to exclude every hypothesis other than the guilt of the accused. It was stated by this Court in Sharad Birdhichand Sarda v. State of Maharashtra¹:

“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 vs. State of Maharashtra(1973) 2 SCC 793, where the following observations were made:

(1984) 4 SCC 116 "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

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

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

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

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”
(emphasis in original)

16. In Nizam and another vs State of Rajasthan, the law on the point was reiterated while acquitting the accused of the charges under Section 302 read with 201 IPC.

19. In the said judgment, Hon’ble Apex Court also referred to the case in ***Trimukh Maroti Kirkan v. State of Maharashtra (2006) 10 SCC 681***, wherein the Apex Court at para 12 held as under:

“12. In the case in hand there is no eyewitness of the occurrence and the case

of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.”

The same principles were reiterated in Sunil Clifford Daniel vs. State of Punjab (2012) 11 SCC 205, Sampath Kumar v.

Inspector of Police (2012) 4 SCC 124 and Mohd. Arif vs. State (NCT of Delhi) (2011) 13 SCC 621 and a number of other decisions.”

20. Learned Counsel for appellant also placed reliance on the citation reported in **1984 (4) SCC 116** in the case of ***Sharad Birdhicand Sarda vs State of Maharashtra***, wherein the Hon'ble Apex Court restated four important circumstances to be established to convict the accused on the basis of circumstantial evidence. In the matter before the Hon'ble Apex Court, there was murder by poisoning. It was held that failure to prove possession of the poison by the accused and had an opportunity to administer the same to the victim is fatal to the prosecution case. Motive also not established.

21. In view of all this evidence, learned Counsel for the appellant submitted that the appellant-accused be acquitted of the offences he is charged with and appeal be allowed.

22. As against this, learned Additional Public Prosecutor, Shri Pravin Faldessai, submitted that the order is

perfectly legal and justified and no interference is warranted in appeal. He further deposed that charge is properly framed as both the spots of offences i.e. the kidnapping and rape and murder is not far from each other. It is a part of Quepem. It is hardly 100 metres away which can also be seen from dog trail. So far as extra judicial confession is concerned, deposition of Mithun Kumar before whom accused confessed in hotel, this fact is confirmed by hotel owner i.e. Pw.9. Therefore, there is no question of raising any doubt. Apart from last seen, the prosecution duly proved recovery of clothes and medical evidence.

23. On perusal of evidence of Pw. 7, Doctor who conducted autopsy, Pw. 16, Dr. Pannag S. Kumar, examining the accused, Pw.13, Officer of CFSL, Pw.33, Chemical Analyser, Officer of CFSL and experts opinion submitted by them and other experts opinion and conclusion, report of Doctor, Pw.16, examining the accused, clearly prove beyond reasonable doubt that accused is the culprit and no other hypothesis apart from guilt of accused can be derived. There is no reason to doubt the witnesses examined on last seen. Their evidence is natural and inspire confidence. There was no

reason for these witnesses to falsely implicate the accused or to depose against him. The chain of circumstances, is complete in all respects and prosecution has proved each link beyond reasonable doubt, hence appeal be dismissed.

24. Rival contentions now fall for our consideration.

25. We have perused evidence of Pw.19, 20, 22, 23 and 25. Pw.19, Jabar Mulla and his wife Pw.20, on 20.05.2012 at around 1.00 p.m., had gone to the house of Pw.13, Subhani Shaikh, to attend “Hakika” function. After the said function, they left the house of Pw.13 at around 2.30 p.m. On their way, when they were walking towards their vehicle, near one empty water tank, they saw the accused distributing chocolates to some children and thereafter, saw accused proceedings towards the Masjid alongwith one small girl of 4 to 5 years old. Both these witnesses have identified clothes of victim girl and the clothes of accused. The accused was known to Pw.19 as he used to work as labour for him. Pw.19, is a Civil Contractor and truck owner by profession. His labourers reside at Quepem in rented rooms in Noorideen Chawl behind Farooqui masjid. He identified accused.

26. Pw.20, wife of Pw.19 was not familiar with the accused prior to the said date. However, she has identified the accused during the test identification parade. The prosecution also examined Pw.13 Subhani Shaikh, whose evidence corroborates to the evidence of Pw.19 and Pw.20. There was question put to the witness Pw.20 why they had not stopped the accused when they saw he was proceeding along with the minor girl. In reply she deposed that she thought that the said minor girl might be related to the accused. As minor girl was not resident of Quepem and from Bombay, there was no reason for these two witnesses to think about anything wrong in proceeding of the accused with the minor girl.

27. Pw.13 confirmed that there was a function "hakika" in his house on 20.05.2012 which started at 12.30 noon and concluded at 2.30 p.m. He had invited Pw.19 and his wife as he was doing work of centering under Pw.19, who is Civil Contractor. From these witnesses, i.e. Pw.13, Pw.19 and Pw.20, this fact is confirmed that Pw.19 and Pw.20 left the house of Pw.13 at around 2.30 p.m. there was no reason for these witnesses to depose falsely as neither there is any

enmity with the accused nor the victim girl was in, any way, in relation with these witnesses. Pw.13 was also acquainted with accused, as earlier accused was residing in the same chawl where Pw.13 is residing, on rental basis. Thereafter, accused shifted to Igramol, as per the knowledge of Pw.13. He was also aware that accused was working as a mason. None of these witnesses have stated anything wrong about the behaviour of accused. On the contrary, they deposed that the accused was a good person.

28. Another prosecution witness on last seen is Pw.22, Firoze Shaikh, who is a driver by profession and used to drive vehicle owned by one Pradosh Bhiso for transportation of sand from Banastarim, Cumbarjua- Amona. He used to supply the sand to the work sites of one Babu Talur (Pw.1). On 20.05.2012, in the morning, he loaded sand at Amona in the said vehicle and he reached Zoglamodi, Quepem, at the construction site of Pw.1 at around 2.30 p.m. to upload sand. At that time, he noticed one man climbing steps of the under construction building of Pw.6, Bubal Koulekar, with a minor girl of around 4 to 5 years old and he described man as of 22 to 23 years old. He described the colour of clothes, he

and the girl were wearing. He identified clothes exhibit 'U' and 'V' of the accused and exhibit 2 of victim girl in the course of deposition. As per Memorandum, exhibit C-118, of T.I. Parade, he also identified accused in T.I. Parade. He did not pay much attention as he thought the man climbing steps might be a labourer working at the said construction site going with his daughter. He just unloaded lorry sand and went away.

29. It is the contention of the learned Counsel appellant Shri Pavithran AV, that he deposed that “*he was alone in the vehicle while unloading the sand at the construction site at Quepem on the relevant day, which we used to do with the help of lift of the vehicle mechanically.*” Whereas Pw.25, neighbour shop keeper residing adjacent to construction site deposed that there were two to three persons unloading sand. He identified photograph no.9 at exhibit 17 as the photograph of same minor girl seen by him with the accused person at the same constructions site on the relevant day. In this regard there is no substance in the contention raised by the learned Counsel for the appellant.

30. In this regard evidence of Pw1 and 3 are relevant. Pw1 has specifically deposed that Sunday being holiday labourers were not there on work site. Pw3 (Plumber on site) also deposed that on Sunday his labourers do not go for work. The evidence of Pw1 and 3 corroborates each other and also to the sand supplier. In view of this deposition a driver of supplier of sand has deposed correctly. There may be some confusion in the shopkeeper's (Pw25) deposition as he used to watch labourers working daily there. However, it hardly affects any material evidence.

31. Another witness examined by the prosecution on last seen as Pw.23, Hashem Mulla, who has seen the accused with the victim girl on 20.05.2012. He deposed that on the said relevant day, he left his house at around 2.00 p.m. after lunch and went towards Farooqui masjid via Quepem market on his scooter. He had tea at the market. Thereafter, he proceeded to Farooqui masjid at about 2.25 p.m. for namaaz. There is a cemetery opposite the masjid and there is a inner road to proceed to the masjid. There is a sharp turn at that place. One person he saw along with the girl sitting in front of that person on bicycle, coming fast towards him. He

stopped his scooter and questioned him why he was riding his cycle with the minor girl in rash manner on the sharp turn. That person stared at him and took a turn and went away. He described the clothes the said person was wearing and the minor girl was wearing. He identified the accused in T.I. Parade as well as in the Court. He also identified photograph no.9 at exhibit 17 as photograph of the girl; seen by him on the relevant day. He identified the clothes of accused at exhibit 'U' and "V". He also identified clothes of victim girl at exhibit 2. In cross examination, nothing material favouring to accused was brought on record by the defence except some minor omissions.

32. It is submitted by learned Counsel for the appellant that he came to know about missing of girl. However, he did not inform to the police. However, there is no substance in this contention as at the relevant time, he was not aware that the victim girl is the same girl he saw on 20.05.2012 along with one person on bicycle. He deposed that the person went towards Pope John School along with the minor girl, there is a house of Dr. Sakow on that side. In cross, he has deposed that he used to go to the masjid everyday. His

evidence is corroborated by evidence of Pw.25, Rajesh Naik, who is having a Grocery shop and a flour mill by name 'Savitri General Stores'. On the said day, being Sunday and market day, the shop was opened at 8.00 a.m. and closed at 3.00 p.m. again open at 4.00 p.m. and closed at 7.30 p.m. Opposite to the shop, there is a under construction building of Mr. Babal Koulekar. Near his shop, there is the house of Dr. Sakow. He was knowing Deepak Kumar and identified him in the Court. He used to visit his shop for around three months prior to the incident to purchase match box, beedis bundle or chocolates. On 20.05.2012, accused visited his shop at around 8.00 a.m. He purchased chocolate, a beedi bundle and a match box and went towards the market on bicycle. At around 2.30 p.m., he saw the accused going on the bicycle in the same clothes which he was wearing in the morning with the minor girl of 4 to 5 years old sitting on his bicycle. He parked his cycle near the under construction building and walked with the girl inside the building. He also saw a brown colour pick up unloading sand near the said under construction building. He closed his shop at 3.00 p.m. On Tuesday, after returning from Margao, at around 8.30 p.m., after purchasing grocery and other articles for the shop, at that time, two to three people

standing near the shop informed him that there was some murder in the under construction building. He identified clothes of the accused and that of the victim girl and bicycle of the accused. For this witness, accused was not unknown and he used to visit his shop to purchase articles like beedi bundle, match box and chocolates. His specifically deposition that on the relevant day also being Sunday, the shop was opened from 8.00 a.m. to 3.00 p.m. and the accused had visited to his shop to purchase match box, beedi bundle and chocolates. In the cross examination, it has also revealed that the construction site is at the distance of 20 metres from his shop. The house of Dr. Sakow is near his show and there is a school near his shop. Thus, what Pw.23 has deposed that the said person went towards the house of Dr. Sakow corroborated by deposition of Pw.25.

33. Pw.25, also deposed that during these three month's acquaintance with the accused, he found him to be a good person. One contradiction pointed out by the learned Counsel for the appellant that Pw.22 sand supplier deposed that he was alone while unloading the sand whereas Pw25 deposed that two or three persons were unloading sand. In our

considered opinion in this regard evidence of Pw1 and 3 are relevant.

34. The evidence of all these witnesses is having ring of truth and they are natural in their deposition. There was no reason to falsely implicate the accused specifically when there was no any enmity. The witnesses who acquainted with him, deposed that he was a good person. As such, we do not see any substance in the ground raised by the learned Advocate Shri Pavithran, to raise any doubt about the creditability of these witnesses. The learned Counsel has relied on the citation in the case of **State of Goa vs. Sanjay Thakran & anr.**, (supra)

35. With due respect to the principles laid down in the said citation, after considering the evidence of witnesses and proximate time of commission of offence, we do not see any reason to interfere in the finding in respect of last seen concluded by Learned Children's Court.

36. The evidence of this witness also supports the fact of missing of minor girl on the relevant day at 2.30 p.m. as deposed by Pw.18, Pw.21 and Pw.27, family members of

victim. This evidence of last seen further supported by evidence of Pw.2, panch witness, as he deposed that the dog was given the smell of said blue grey colour short pant and after smelling it, the dog went towards the ground floor, took left turn and went towards the main road. From the main road, it proceeds to Quepem on the right side and proceeds to Ambauli left side. The dog turned towards the right hand side i.e. Quepem side and went towards the cemetery. There the dog turned towards the left and proceeded for around 50 metres where there is a masjid. Around 10 to 15 metres away from the masjid, there is a chawl and further there is an empty water tank. The dog went up to the empty water tank and stopped.

37. Pw.31, and his staff, drew a sketch of the trail of the dog and noted the details in the panchanama and the sketches.

38. Pw.17, who is attached to Dog Unit, as Police Constable, deposed that on that day i.e. on 22.05.2012 at around 14.50 hours, he received information from Security office, Altinho, to depute dog squad at Quepem, for investigation of a murder case. Accordingly, he along with another Head Constable and dog Preethi, left for the spot. His

deposition corroborates with the deposition of Panch witness, Pw.2 and Pw.31. Thus, all the link from witnessing accused on empty water tank up to entering in the construction site along with the minor girl are completely established.

39. So far as extra judicial confession is concerned, prosecution examined Pw.24, Mithun Kumar. Pw.9 (Hotel Owner), on the said date i.e. 20.05.2012 at around 05.15 p.m., accused had visited the hotel of Pw.9 and placed order for bhaji and parotha. Pw.24 also came to the hotel after sometime and sat opposite to the accused by ordering some food items. They were talking to each other. After finishing, they paid the bill and went away. Accused was a regular customer and known to Pw.9, hotel owner, for around one year prior to the incident. He categorically deposed that at Quepem, parothas are made only in his hotel and as such he remembered the order for food placed by the accused. In cross, he deposed that, accused never misbehaved in his hotel.

40. Pw.24, is a friend of accused and both are from the same native place. Pw.24 used to stay with the maternal uncle of the accused and accused used to visit them. That is how they

both became friendly. On the relevant day i.e. 20.05.2012, at around 9.30 a.m., he had gone to the market where he met the accused. Both came to the rented room of Pw.24 where maternal uncle of accused was present in the room. Pw.24, went to his neighbour room to watch TV. While watching TV he slept. He got up at around 4.00 p.m. and went to his room and proceed to buy ration at 5.30 p.m., he handed over the list to the shop owner and went to the hotel. Accused was present in the same hotel. He sat near him. He claimed that at that time, the accused confessed the commission of crime by him to Pw.24. As he thought that he was just joking, he left the hotel after they finished the food. On 22.05.2012, when the police visited the room of Pw.24 to make inquiries, he told the police about the confession of accused. Accused had not given details to Pw.24 and had just stated that in the noon he had done a wrong thing. He had killed a child of four to five years old and he did not give him the details. He deposed that the accused was wearing blue shirt and grey pant. This witness was in fact informed by the police about arrest of accused on behest of accused. Statement of this witness is recorded under Section 164 of Cr.P.C.

41. There is no judicial confession on record. However, considering the evidence on record, this extra judicial confession is having evidentiary value. His evidence cannot be discarded. He has also deposed that maternal uncle of the accused and the accused were of good nature and he was residing in the maternal uncle's house of the accused. At the time of arrest, accused himself in the presence of panch witness Pw.10, told that the intimation of his arrest should be given to his friend Mithun and accordingly, police approached to Pw.24, Mithun. As such, the evidence of Pw.24 cannot be discarded.

42. Now let us see what medical evidence and expert evidence brought by the prosecution to establish the charge against the accused. Pw7 Dr. Avinash Pujari carried out post-mortem examination on the dead body of the victim girl on 23/05/2012 between 12.05 p.m. To 2.35p.m. The approximate time, of death, is within 48-70 hours of preservation of the dead body in the cold storage of morgue. The opinion as to the cause of death given by Pw7 is due to asphyxia, death due to smothering and manual strangulation. He also deposed that there is evidence of genital injuries due to

vaginal penetration. Except suggestions there is nothing in the cross-examination of this witness. This witness proved Exh. 35 post-mortem examination report and contents therein. As such approximate time of death tallies with the time of offence as claimed by the prosecution. It also suggests that death due to asphyxia, smothering and manual strangulation. From his evidence, it also established that there was grave sexual assault with the victim.

43. Most important witnesses on chemical analysis are Pw30 – Mr. Satyam, Assistant Director and Scientist, CFSL Hyderabad and Pw33 Mr. P.N. Ramkrishanan. Mr. Satyam-Pw30 who is an expert witness clearly recorded that the profile generated from the semen positive stain on Exhibit C (source panty) was found matching with the profile of Exhibit D1 (source liquid blood of the accused). It is also mentioned in the report that the Y-STR profile of the semen positive stain on Exhibit C (Source panty of the victim), matches with the profile of Exhibit D1 (source liquid blood of the accused). It is also mentioned in the report that the highly degraded DNA recovered from the blood stain on Exhibit G (source half pant). It is also mentioned in the report that the highly degraded

DNA recovered from Exhibits A, C, F, W, E(V), F(V) and G(V) which were found refractory to PCR amplification, hence, no opinion could be given on the source. Based on the above observations, it can be concluded that :

- (1) The accused – the contributor of the liquid blood (Exhibit D-1) is also the source of the semen detected on the panty (Exhibit C).
- (2) The blood detected on the half pant (Exhibit G) is of human female origin.

44. Pw33 P.N. Ramkrishanan who is also an expert witness attached to CFSL, Hyderabad. He received 7 sealed parcels from the biology division of CFSL, Hyderabad. He is attached to Physics Division. He has examined Exhibits A, B, F, N and U, Exhibit 1 and N(v). As per the result of the examination the button marked Exhibit N which was recovered from the spot (white in colour having two threads blue and white in colour and having 4 holes) in the presence of panch witnesses and the button of the full sleeve shirt marked Exhibit-U, have similar physical and microscopic features. Exhibit-U is identified as the shirt of the accused worn

by him on the day of offence by the prosecution witnesses. The said clothes were recovered at the instance of the accused while carrying out the Recovery Panchanama in the presence of two panch witnesses (Exhibit C-45) the accused produced the red colour trouser and one blue colour long sleeves shirt from his house. There was blood below the pocket of the left side of the shirt and third button of the shirt was missing. The shirt was having a collar button and two more buttons on the top and two more buttons after the missing button on the collar side. There is no dent in the deposition in cross of the panch witnesses so also the expert witnesses examined by the prosecution. Expert Pw33 specifically opined that the button with loose threads (marked as Exhibit N) matches with the remaining buttons of the suspected shirt (marked as Exhibit U).

45. Another witness examined by the prosecution as Pw16 Dr. Pannag S. Kumar, Lecturer, Forensic Medicine and Toxicology, GMC, Bambolim, Goa, who has carried out medical examination of the accused on 23/05/2012. The accused was brought by police person along with the request letter from P.I. of Quepem Police Station, for examination of

the accused person. He obtained accused consent and examined the accused from 2.45p.m. to 3.05p.m. No injuries were observed over the body of the accused person, except over the genitals. His identification marks were noted in the report. On the basis of that marks he identified the accused in the Court. He deposed that as per examination carried out by him and observations he recorded, his opinion as under:

1. There was evidence of forcible sexual intercourse, having occurred within 4 days prior to the examination.
2. On physical and genital examination, there was nothing to suggest that the said accused person was incapable of committing normal sexual intercourse.
3. Urethral swabs, smear slides, pubic hair sample were preserved (in addition to the aforementioned exhibits) as exhibits for serological examination.
4. After examination, the accused person was forwarded to the blood bank of GMC for blood grouping examination.

46. Accordingly, Pw16 prepared report at Exhibit C-57. As observed by Pw16 there were reddish tears (lacerations) of the frenum, one at the attachment of the frenum to the glans and another at the attachment of the frenum to the base of the shaft. In his opinion, the said injuries were within 4 days duration prior to the examination. This medical evidence along with experts opinion of CFSL Officers are totally against eh accused and there is not any question of doubting the same.

47. Another objection raised by the learned Counsel for the accused is that the charge was not properly framed as there is no proper mention of date, time and place when the offence of kidnapping took place and when the offence of rape and murder took place.

48. The learned Counsel for the appellant relied on the citation **Main Pal v/s. State of Haryana** [2010(10) SCC 130] wherein the Hon'ble Apex Court held that if there is an error / omission in framing of charge and charge for offence against 'Y' but conviction for offence against 'X'. The serious prejudice caused to the accused, occasioning failure of justice. It was directed to conduct fresh trial after appropriate framing of charge. The Hon'ble Apex Court laid down principles relating

to Sections 212, 215 and 464 of Cr.P.C. i.e. framing of charge as under:

(i) The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(ii) The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge.

(iii) In judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for,

whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself.

49. In the present matter the charge is framed. It is the case of the prosecution that the minor girl was kidnapped at Quepem on 20/05/2012. In this regard the prosecution has led sufficient evidence and we do not see any reason causing prejudice to the accused due to drafting of the charge even if presuming there is any error. The learned Additional Public Prosecutor pointed out that though the kidnapping is alleged to have committed at one place and rape and murder of minor committed at different place both are in Quepem area and may be around 100 meters or so away from each other. There is no eye witness to say exact time of offence. From the post-mortem report it cannot be said that the time mentioned between 14.30 hours to 15.00 hours cannot be the time for committing rape and murder. There is no exact time of committing rape and murder but it is approximately between 14.30 hours to 15.00hours and there is no any substance in the ground raised that the charge is not property framed and caused prejudice. In the **Main Pal**(supra), charge for offence against 'Y' but

conviction for offence against 'X' and therefore the Trial Court was directed to frame proper charge to fresh trial. In our considered opinion there is substance in the arguments advanced by the learned Additional Public Prosecutor that the accused was made to know what he was being tried for. Main facts ought to be established against the accused. We do not see any substance in the arguments advanced by the learned Counsel for the appellant that serious prejudice is caused to the accused as there is no separate place and time mentioned in the charge so far as offence of kidnapping and under Sections 302 and 376 IPC is concerned.

50. If evidence in totality considered the prosecution has established each link of the circumstance beyond reasonable doubt and most important is the medical evidence against the accused which clearly establishes that no other hypothesis would be possible other than the accused had committed the offences he is charged with.

51. So far as the charge under Section 201 is concerned Pw31 carried out the investigation. Pw3 deposed that on

22/05/2012 in the morning at 9.30 hours he along with his two labourers went to the site. At the same time two electricians Mr. Santosh Pereira and Dhiraj Jadhav also came there at about 10.15 hours. Mr. Santosh Pereira informed this witness that he informed Dhiraj that there was one dead body lying in the lift void in the building. If the evidence of Pw 1, 3, 4 and 6 read with testimony of Pw2 Panch witness, it is clear that the dead body of the victim girl was in the lift void. The accused has hidden the dead body of the victim girl by dumping it to lift void and hiding her head by cement bag and by pouring some sand thereon. The evidence of the panch witness Pw2 and the Investigating Officer Pw31 also confirmed this part. As held earlier the accused is the only author of the crime and the way in which the dead body was kept the accused is guilty of offence under Section 201 of IPC and caused evidence of the commission of the offence to disappear, with an intention of screening himself from the legal punishment.

51. Considering the evidence discussed above the prosecution has established the charges against the accused beyond reasonable doubt. There is no error in the judgment in appreciating the evidence on record by the learned Children's

Court. We do not see any reason to interfere in the judgment and order convicting the accused for offences charged with. Therefore, the appeal is liable to be dismissed. Accordingly, we pass the following:

ORDER

The appeal is dismissed.

SMT. M.S. JAWALKAR, J.

M.S. SONAK, J.

arp/*/mv