

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.
CRIMINAL APPEAL NO.546 OF 2018**

Mohd. Kutubuddin Kamruddin Ansari	]	
Aged about 30 years,	]	
Occupation : Tyre Puncture repairing	]	
Work, R/o. Dorli Janta Nagar,	]	
Maisar Chowk, Sioni,	]	
Madhya Pradesh .	]	APPELLANT

VERSUS

The State of Maharashtra,	]	
through Police Station Officer,	]	
Police Station, Jaripataka,	]	
Nagpur.	]	RESPONDENT

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Shri R.M. Patwardhan, Advocate for the appellant.

Shri M.K. Pathan, APP for the respondent/State.

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CORAM	: V.M. DESHPANDE AND G. A. SANAP, J.J.
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RESERVED ON	: 10th January, 2022.
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PRONOUNCED ON	: 12th April, 2022.
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JUDGMENT [Per G.A. Sanap, J.]:

1. In this appeal filed at the behest of the accused/appellant Mohd. Kutubuddin Kamruddin Ansari challenge is to the judgment and order dated 30th July, 2018 in Special Child Criminal Case No.67 of 2016 passed by learned Special Judge under Protection of Children from Sexual Offences Act, 2012, Nagpur, whereby the learned Judge convicted the appellant for the offences punishable under section 302, 363 and Section 201 of the Indian Penal Code (for short 'I.P.C') and sentenced him to suffer imprisonment for life for commission of murder of Kumari Akbari Khatun and to pay fine of Rs.25,000/- and in default to pay fine, to suffer rigorous imprisonment for one year and sentenced him to suffer imprisonment for life for murder of Noorain and to pay fine of Rs.25,000/-, and in default to pay fine of Rs.25,000/- to suffer rigorous imprisonment for one year. For the offence under section 363, the learned Judge sentenced him to suffer imprisonment for seven years and to pay fine of Rs.5,000/- and in default to pay fine, to suffer imprisonment for three months. For the offence under section 201, the learned Judge sentenced him to suffer imprisonment for five years and to pay a fine of Rs.2,000/- and in default to pay fine, to suffer rigorous imprisonment for one month. Learned Judge directed that the life imprisonment awarded for murder of Akbari Khatun and life imprisonment awarded for murder of Noorain to run consecutively. The sentence under sections 363 and 202 of the I.P.C have been ordered to run concurrently with sentences under section 302 of the I.P.C.

2. The facts leading to this appeal are as follows:-

P.W.3-informant -Mohd. Iliyas Ansari resides at Nari Road, Kamgar Nagar, Nagpur with his wife and children. Deceased Akbari Khatun aged 13 years was his daughter and deceased Noorain aged 10 years was his son. P.W.3 – Mohd. Iliyas at the time of the incident was running a Tyre Shop at *Uppalwadi*. The appellant is brother-in-law of the brother of P.W.3- Mohd. Iliyas by name Mohd. Shakil. They have acquaintance for last 20 years. Initially, the appellant was running a shop at *Pardi Naka* and thereafter he shifted his shop at Automotive Square, *Teka Naka, Nagpur*. He was dealing in the business of Tyre. P.W. 3 – Mohd. Iliyas would purchase old Tyre from the appellant. P.W.3 – Mohd. Iliyas owed Rs.50,000/- to the appellant out of business transactions. There was dispute about the actual quantum. According to the appellant, the outstanding amount was Rs.1,50,000/-. The appellant repeatedly demanded the amount of Rs.1,50,000/- from P.W.3 – Mohd. Iliyas. P.W.3 – Mohd. Iliyas requested him for time to pay the outstanding amount.

3. The appellant stopped his business at *Nagpur* and started working at his brother's Tyre remoulding shop at *Seoni Madhya Pradesh*. Fifteen days before the incident, the appellant made a phone call from his mobile number 9589319248 on the mobile of P.W.3 – Mohd. Iliyas being No.9421542536 and made the demand of the outstanding amount. P.W.3 – Mohd. Iliyas assured him to pay the amount between 5th and 10th dates of the next month. According

to the prosecution, this was the motive for the appellant to commit the crime.

4. It is the case of the prosecution that on 26th November, 2015, the appellant made a phone call to P.W.3 – Mohd. Ilyas from his mobile No.9589319248 at about 7.30 to 8.00 p.m. and requested P.W.3 – Mohd. Ilyas to make his motorbike available for visiting *Tajbag*. P.W.3 – Mohd. Ilyas told the appellant to come to take the motorbike from his shop. On the next day i.e. on 27th November, 2015, the appellant made a phone call to P.W.3 – Mohd. Ilyas from his mobile No.8446971690 and made inquiry about his whereabouts. The appellant informed P.W.3 – Mohd. Ilyas that he had arrived at Nagpur and he would need the motorcycle. P.W.3 – Mohd. Ilyas requested him to come between 2.00 and 2.30 p.m. to his shop, as he was out of station. He requested the appellant to make wait at shop of PW-2 Mohammad Sajjad at *Pili Nadi, Kamptee Road, Nagpur*. On arrival at Nagpur from Wardha, P.W.3 – Mohd. Ilyas went to the shop of P.W.2 - Mohammad Sajjad and from there the appellant accompanied him to his shop at *Uppalwadi*. The appellant took motorcycle of P.W.3 – Mohd. Ilyas bearing registration No. MH-31-DY-2752. P.W.3 – Mohd. Ilyas requested the appellant to come back before closing of his shop at 8.00 p.m.

5. The appellant did not return till 8.00 p.m. P.W.3 – Mohd. Ilyas repeatedly contacted him on his mobile phone. However, it was switched off. P.W.3 – Mohd. Ilyas, therefore, closed the shop

and went to his house at 9.30 p.m. On reaching the house, he came to know from his wife that the appellant had come to his house and insisted to send her children alongwith him to Tajbag. She further informed that due to repeated requests made by the appellant, she allowed daughter Khatun and son Noorain to accompany the appellant. P.W.3 – Mohd. Ilyas anxiously made wait for the appellant till 10.00 to 10.30 p.m., but the appellant did not return. P.W.3 – Mohd. Ilyas with other relatives took search of the appellant and the children. They tried to contact the appellant on his mobile phone but it was switched off. P.W.3 – Mohd. Ilyas contacted the brother of the appellant and made inquiry but he could not get his whereabouts. P.W.3 – Mohd. Ilyas with his nephew went to *Tajbag* in search of the appellant and children. In the midnight, he called his brother Mohd. Shakil and also cousin of the appellant to know the whereabouts of the appellant. The appellant could not be traced out. P.W.3 – Mohd. Ilyas with one Firoz went to shop of Mohd. Sajjad. They came to know from Sajjad that at about 3.00 p.m. on 27th November, 2015, the appellant with the children of P.W.3 – Mohd. Ilyas had come to his shop and informed him that he would first visit *Pardi* and after coming back would go to Tajbag. Sajjad informed that accused did not return till 6.00 p.m. The appellant's mobile was switched off when he called him. P.W.3 – Mohd. Ilyas could not trace out the appellant as well as the children. P.W.3 – Mohd. Ilyas sensed some mischief at the behest of the appellant and therefore, on 28th November, 2015 at about 9.30 a.m went to *Jaripatka* Police Station, Nagpur and lodged report which is marked

as Exh. 25. The police recorded the First Information Report. Narendra Bais ASI, Kalamana Police Station published *Shodh Patrika* with photographs, physical description and descriptions on the person of the children of P.W.3 – Mohd. Iliyas and also the details of physical description and description of the clothes on the person of the appellant by e-mail in Nagpur Region and throughout Maharashtra.

6. It is the case of the prosecution that on 29th November, 2015 at about 8.00 to 8.30 p.m., P.W.16 – Mohanlal Methulal Banjara, a labour informed the Police Station, Chapra that the fisherman had informed him that dead body was floating in the river bed of *Vainganga* river. On the basis of this information, the dead body was fished out from river vide *panchanama* at Exhibit 80. It was dead body of male. The Inquest *panchanama* was drawn. It is at Exhibit 84. P.W.34 – Murlidar Hiralal Patel, P.S.I Police Station Chapra recorded the oral report of PW-6 - Mohanlal Banjara in this respect. Marg was registered vide Marg No.66/2015 at *Chapra* Police Station. Dead body was sent for postmortem. P.W.15 – Dewashish Banerjee conducted postmortem on the dead body. On receipt of the dead body, after postmortem, it was buried on 3rd December, 2015. The articles namely the clothes on the dead body, sandal and samples were received from the Medical Officer.

7. On 1st December, 2015, P.W.32 – Rabhuvir Bharti, *Sarpanch* of *Gram Panchayat, Chhapara* at about 12 noon noticed a dead body

floating in the riverbed of *Vainganga* River. He informed about it to the Police Officer, *Chapra* vide written intimation Exhibit 145. On the basis of report, Marg No.67/2015 was registered. Police went to the spot with *panch*. They fished out dead body from water. It was dead body of a female. The photographs of dead body were snapped. The dead body was sent for postmortem. P.W.25 - Dr. Neha Pateria conducted postmortem on the dead body of girl. On 3rd December, 2015, dead body of the girl was buried being unclaimed. The articles found on the dead body namely clothes, two earrings and samples namely one femur bone, two glass slides were handed over by the Medical Officer to Chapra Police Station. The articles were seized.

8. In the meantime, P.W.3 – Mohd. Ilyas and his relatives had continued the search of the children. On 3rd December, 2015, P.W.3 – Mohd. Ilyas came to know that two dead bodies were found at *Chapra* in *Vainganga* River. He went to *Jaripatka* Police Station. In the Police Station, Police Officer showed him the dead bodies on the computer screen. P.W.3 – Mohd. Ilyas identified the two dead bodies being of his daughter Akbari Khatun and his son Noorain. P.W.3 – Mohd. Ilyas, therefore, with other persons went to *Chapra* Police Station. The articles seized by *Chapra* Police Station were shown to P.W.3 – Mohd. Ilyas. P.W.3 – Mohd. Ilyas identified the articles and clothes being of his children. On getting this information, P.W.3 – Mohd. Ilyas alongwith photos of children and the appellant went to *Seoni*, Police Station in State of *Madhya Pradesh*. He submitted there the copy of the report lodged by him in *Jaripataka*, Police

Station, Nagpur and the photographs of the children and the appellant.

9. By the time, P.W.3 – Mohd. Iliyas came to know about it, the dead bodies were buried. P.W.3 – Mohd. Iliyas on 3rd December, 2015 made written application to *Tahsildar Chapra* and demanded the custody of dead bodies. On 4th December, 2015, both the dead bodies were exhumed from burial ground in the presence of *Tahsildar* and Medical Officer. P.W.3 – Mohd. Iliyas identified the dead bodies of his son and daughter. P.W.3 – Mohd. Iliyas brought the dead bodies in Nagpur and performed the last rites.

10. The investigation with this development got the momentum. P.W.2 - Mohd. Sajjad gave information to Police Sub Inspector Shri Budhan Sawant that the appellant had fled to State of Bihar. Police Sub Inspector Wakde and Police Staff went to State of Bihar. They made search of the appellant. Finally, they located whereabouts of the appellant at *Begusarai* (Bihar). They found appellant at *Subhash Chowk* at *Begusarai* (Bihar). PSI Wakde arrested him. In the personal search of the appellant, PSI Wakade found mobile of Micromax company, ATM Card of Bank of India bearing No.5264951702108840, driving licence in the name of the appellant and cash of Rs.4,160/-. The articles were seized. The appellant on the transit warrant was brought to *Jaripataka* Police Station, Nagpur.

11. Investigating Officer procured the postmortem reports and other articles from *Chapra* Police Station. During the course of investigation, the appellant expressed desire to show all the places visited by him with two children from the point of leaving house of the appellant till spot of the incident i.e bridge of *Vainganga* River in State of *Madhya Pradesh*. His statement was recorded in the presence of *Panchas*. The appellant took Police to all the places visited by him on the way to spot namely the house of P.W.3 – Mohd. Iliyas, Tyre puncture shop of Mohd. Sajjad PW-2, Tyre puncture shop of P.W. 3 - Mohd. Illiyas, Petrol Pump at Dongari Kanhan, Mansar Toll Naka, Bank of India ATM at *Deolapar*, Flower Vendor Shop near *Morphata Dargah*, the snacks Corner at *Dargah*, the Forest Area in Madhya Pradesh, *Katedara* Tea Point in State of Madhya Pradesh where he had tea and snacks with children, *Dhaba* near petrol pump in Madhya Pradesh where he had tea and procured polythene bags, *Vainganga* River Bridge which is at 10 k.m from Dhaba near Petrol Pump and *Amit Dhaba* on *Jabalpur* high way where he abandoned motorcycle. He pointed out the motor cycle at *Amit Dhaba* which was recovered. The Police simultaneously recorded the statements of the concerned witnesses and collected contemporaneous documentary evidence to get confirmation to the statements of the appellant.

12. The appellant was medically examined on 15th December, 2015. His blood samples, nail clippings and pubic hair were collected by the Medical Officer. The Investigating Officer recorded

the statements of the witnesses. He recovered the CCTV Footage from Petrol Pump at Kanhan. The Investigating Officer also collected the call detail record of the mobile number used by the appellant as well as P.W.3 – Mohd. Iliyas and others who spoke with the appellant during this period. The DNA Report was obtained to confirm the identity of the children of P.W.3 – Mohd. Iliyas. On completion of the investigation, the Investigating Officer filed a charge-sheet against the appellant.

13. Learned Special Judge framed the charge against the appellant. The appellant pleaded not guilty. The defence of the appellant is that children accompanied him on the motorcycle up to MHKS Mohammed Ali Petrol Pump, Kanhan. At the said petrol pump, he went to attend nature's call, but when he came back, he found that the children were missing. He made search but could not find the children. Therefore, from the mobile phone of stranger, he tried to contact P.W. 3 - Mohd. Illiyas but his mobile was switched off. He communicated P.W.3 – Mohd. Illiyas after 15 minutes by using mobile of other person and informed him that the children were missing. P.W. 3 - Mohd. Illiyas scolded him. He got frightened and left the spot.

14. In order to bring home guilt of the appellant, the prosecution examined 36 witnesses. The prosecution relied upon relevant documents to substantiate the oral evidence. Learned Special Judge on analysis and appreciation of the evidence found the appellant guilty of all the above offences and accordingly, awarded the

sentence. Learned Special Judge acquitted the appellant for the offence punishable under Section 376(2) (f)(i) of the Indian Penal Code and offence under Section 5(n)(i) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012. The State has not challenged this part of the order. The appellant being aggrieved by the impugned judgment and order has come before this Court in appeal.

15. We have heard Shri R.M. Patwardhan, learned Counsel for the appellant and Shri M.K. Pathan, learned APP for the respondent/State.

16. Mr. Patwardhan, learned Advocate for the appellant submitted that the prosecution has failed to establish the motive for the crime. In the submission of the learned Advocate, genesis of the incident has not been stated by P.W.3 – Mohd. Iliyas. The case of the prosecution that there was a dispute between the appellant and P.W.3 – Mohd. Iliyas about money transaction has not been established, inasmuch as when the appellant came to Nagpur and accompanied P.W.3 – Mohd. Iliyas to his shop, there was no talk between them about money transaction. It is claim of the P.W. 3 – Mohd. Iliyas that he owed money to the appellant. The learned Advocate submitted that in a case based on circumstantial evidence, the motive for commission of the crime assumes importance. The learned Advocate further submitted that investigation in the case is tainted. The Investigating officer did not take pains to collect concrete

material which would unerringly prove the guilt of the accused. The learned Advocate submitted that the prosecution has relied upon evidence of more than one witnesses who claimed to have seen the victim children in the company of the appellant at multiple places. The Investigating Officer did not conduct the Test Identification Parade of the appellant inasmuch as the witnesses have had an occasion to see the appellant for the first time. The learned Advocate submitted that the learned Judge without concrete evidence of the Test Identification Parade of the appellant from the witnesses has placed reliance on the evidence of the witnesses who have identified the appellant in the Court at the time of their respective evidence. The learned Advocate submitted that, therefore, the substantive evidence is missing. No reliance can be placed on the evidence of those witnesses who have claimed to have seen the victim children in the company of the appellant.

17. The learned Advocate further submitted that footage of the C.C.T.V installed at Kanhan Petrol Pump has not been properly proved. It cannot be said to be a conclusive proof to accept the case of the prosecution on the last seen theory. The learned Advocate further submitted that this C.C.T.V footage would be insignificant in view of the defence of the appellant that from the said petrol pump, the children ran away from his custody. The learned Advocate submitted that there was delay on the part of P.W. 3 – Mohd. Iliyas to give a missing report to the Police. No serious efforts were made to inform the Police as early as possible. On the basis of this fact,

learned Advocate submitted that on getting the postmortem report on 4th December, 2015, P.W.3 – Mohd. Iliyas and the Investigating Officer created the evidence to involve the appellant. The learned Advocate submitted that C.C.T.V footage at Mansar Toll Plaza was not collected. There is no concrete evidence on record to prove beyond doubt that after petrol pump at Kanhan, the children accompanied or seen in the company of the appellant. The learned Advocate submitted that the evidence of P.W. 7 – Amolkumar Sorle - Security Guard at A.T.M Centre, Deolapar, P.W. 6 – Halim Farid Sheikh, the flower vendor at Morfata Dargah and P.W. 10 – Sharikkhan Shadikkhan, Tyre puncture repairing shop owner at Dhaba of Nirmal Singh, who claimed to have seen the deceased children in the company of the appellant does not inspire confidence. Their evidence cannot be accepted in the absence of the Test Identification Parade to bring on record the substantive evidence. The learned Advocate submitted that all these witnesses are got up witnesses and, therefore, the last seen theory propounded by the prosecution with the help of these witnesses cannot be accepted.

18. The learned Advocate while commenting upon the evidence of the Medical Officers P.W. 15 – Dewashish Kamakshaprasad Banerjee and P.W 25 – Dr. Neha Hariprakash Pateria submitted that time of death before postmortem of the children stated by these two witnesses does not fortify case of the prosecution that before morning of 28th November, 2015, the children were murdered. The

learned Advocate further submitted that no candid opinion as to cause of death has been stated in the postmortem reports. The learned Judge in the submission of the learned Advocate for the appellant in the absence of the concrete opinion by the Medical Officers as to the cause of death has wrongly recorded a finding that the victim children died homicidal death. While commenting upon the conduct of the victim children in the course of alleged journey of 320 k.m from Nagpur to *Vainganga* river, learned Advocate submitted that the children were fully grown up and, therefore, they would have definitely doubted conduct and intention of the appellant. The children would not have accompanied the appellant outside the limit of Nagpur. There is no evidence on record about behaviour of the children. Learned Advocate submitted that discovery of the motorcycle alleged to have been made at the instance of the appellant is another connected piece of evidence. P.W.12 – Mohammad Phiroz examined to prove discovery of the motorcycle is the close relative of P.W.3 – Mohd. Ilyas. No reliance can be placed on the evidence of the interested witness.

19. Mr. Pathan, learned A.P.P submitted that the prosecution has proved beyond doubt all the circumstances to establish complicity of the appellant in the crime. There is concrete evidence to establish the motive. In the cross-examination of P.W.3 – Mohd. Ilyas, money transaction between him and the appellant has not been seriously denied. All the circumstances and particularly the circumstance that the victim children were last seen in the company of the appellant

have been fully established. All these proved circumstances unerringly lead to the only hypothesis of the guilt of the appellant. The learned A.P.P submitted that the appellant in his 313 statement categorically admitted that the children accompanied him on the motorcycle till the petrol pump at Kanhan and from the said petrol pump, the children ran away. The learned A.P.P submitted that in view of this defence of the appellant, the appellant was required to explain other circumstances proved against him. In the submission of the learned A.P.P, conduct of the appellant is not consistent with his defence. The defence cannot be accepted inasmuch as the appellant has not placed on record the plausible explanation. The learned A.P.P submitted that the evidence of the witnesses P.W. 6 – Halim Farid Sheikh, P.W.7 – Amolkumar Sorle and P.W.10 – Sharikkhan Shadikkhan has proved beyond doubt that victim children were last seen by them in the company of the appellant. The learned A.P.P pointed out that the place where P.W.10 – Sharikkhan saw the victim children in the company of the accused is hardly at the distance of 10 to 15 k.m from the spot of the incident namely *Vainganga* river in the State of Madhya Pradesh, where two bodies of the children were found. The learned A.P.P submitted that evidence of these witnesses cannot be discarded because of the mistake on the part of the Investigating Officer not to conduct the Test Identification Parade. The learned A.P.P submitted that in connection with some or the other work at the respective places, these three witnesses had an occasion to interact with the appellant and observe him and victim children for considerable time. In the

submission of the learned A.P.P, therefore, the evidence of these witnesses cannot be discarded.

20. The learned A.P.P submitted that the argument advanced by the learned Advocate for the appellant on the point of uncertainty of time of death on the basis of the postmortem report cannot be accepted inasmuch as other proved and admitted circumstances are sufficient to draw a reasonable judicial inference of the guilt of the accused/appellant. The learned A.P.P submitted that tainted investigation at the hands of the Investigating Officer cannot be made a ground to give benefit to the appellant inasmuch as there is concrete evidence to establish the circumstances relied upon by the prosecution. The learned A.P.P submitted that in this case the prosecution has proved identity of the victim children on the basis of the cogent and reliable evidence. Similarly, cause of death in case of both the children has been fully established.

21. The appellant has been convicted and sentenced for kidnapping the victim children under section 363 of the I.P.C. This conviction and sentence has also been questioned. The main ground of challenge is that the oral and documentary evidence adduced to prove the age of the victim children is not sufficient. Similarly, it is submitted that the offence of kidnapping in the teeth of the evidence adduced by the prosecution has not been proved. As far as the age of the victim children is concerned, their parents P.W.3- Mohd. Iliyas and P.W.4 -Sahajahan Khatun have deposed about the same. P.W.3

– Mohd. Iliyas, father of the victim children has deposed that his daughter Akbari Khatun on the date of the crime was 13 years old and son Noorain was 10 years old. Same is the evidence of P.W. 4 – Sahajahan Khatun - mother of the victim children. In their evidence, they did not state birth dates of the victim children. In their evidence, they have provided the particulars of the School in which the victim children were admitted and recorded birth dates of the victim children in the School record. P.W. 21 – Khurshid Ansari – Head Mistress of Kamgar Nagar Urdu Uccha Primary School, Nagpur has been examined to prove the birth dates of the victim children recorded in the school registers. P.W. 21 – Khurshid Ansari has deposed that during the course of investigation, the Investigating Officer had collected the certified copies of the relevant entries of the School record pertaining to the victim children. In her evidence, she has stated that the victim boy Noorain was admitted in the School in July, 2012 in second standard and the victim girl was admitted in the School on 8th July, 2009 in first standard. She has categorically stated that birth date of Noorain recorded in the School register is “28th July, 2006” and the birth date of Akbari Khatun recorded in the school register is “10th August, 2003”. She has produced in the Court extract of the admission register of the School. She has specifically deposed that at the time of admission of the victim children in the School, their parents had provided their birth dates. The relevant entry from the admission register pertaining to the birth date of victim Noorain is at Sr. No.1718 and entry pertaining to birth date of Akbari Khatun is at Sr. No.1569.

22. Exhibit 113 is the certified copy of the admission register in respect of the victim Noorain, whereas Exhibit 114 is the certified copy of the admission register of the victim girl Akbari Khatun. These documents are in Urdu language. Their translated copies are at Exhibit 115 and 116 respectively. P.W. 21 – Khurshid Ansari has further deposed that P.W.3 – Mohd. Iliyas - father of the victims on 19th December, 2015 collected the school leaving certificates dated 16th December, 2015 of both the victim children. Those certificates have been proved on the basis of the evidence of P.W. 21- Khurshid Ansari. The same are at Exhibit 119 and Exhibit 118. On minute perusal of the oral and documentary evidence, we do not find any reason to discard and disbelieve the same. On the basis of the evidence, the prosecution has proved that on the date of commission of the crime, the victim Akbari was 12 years, 3 months and 70 days old and the victim Noorain was 9 years, 4 months and 7 days old. The oral evidence has been fully corroborated by the documentary evidence. We do not see any reason to doubt the contemporaneous documentary evidence. Based on this evidence, the learned Judge came to the conclusion that on the date of the commission of crime both the victim children were minor. We do not find any reason to take a view different from the one taken by the learned Judge on this point.

23. A submission has been made that considering the evidence of P.W.4 -Sahajahan Khatun and particularly statement that she granted permission to the appellant to take the children with him, the offence

of kidnapping would not get attracted. In order to appreciate this defence, we have minutely perused the evidence of P.W.3 – Mohd. Iliyas – father of victim children and P.W. 4 – Sahajahan Khatun – mother of the victim children. It is necessary to note at the outset that if it is established that the consent is based on misconception of facts or obtained fraudulently, in our view, such consent could not be said to be the ground to come out of clutches of the offence of kidnapping. It is undisputed that the appellant is the brother-in-law of brother of P.W.3 – Mohd. Iliyas (brother of wife of his brother). He was a close relative. There is an ample oral and documentary evidence to prove that he had business relations with the family of P.W.3 – Mohd. Iliyas as well. In her evidence, P.W. 4 – Sahajahan Khatun has deposed that the appellant came to their house on their motorcycle and requested her to allow her two children to accompany him. When she did not consent, he pretended to have made a phone call to P.W.3 – Mohd. Iliyas to take children to Tajbag. He persuaded P.W. 4 – Sahajahan Khatun to allow the children to accompany him as he had already sought permission of P.W.3 – Mohd. Iliyas. He pretended that he was going to Tajbag Dargah for offering prayer and, therefore, he wanted to take the children with him to Tajbag Dargah. P.W. 4 – Sahajahan Khatun has stated that the appellant was having their motorcycle in his custody and believing his statement, she allowed the children to accompany him. It is the case of the prosecution that the appellant took the victims with him under the guise of taking them to Tajbag Dargah. Even if it is assumed that consent was given in the facts situation, in our view,

the same would not help the appellant to come out of the clutches of the law. In this case, it has been proved that the appellant took the children with him up to Vainganga river where their dead bodies were found in the riverbed of Vainganga river. The said place is at a distance of 300 to 315 k.m from the house of P.W.3 – Mohd. Iliyas. This fact would clearly reflect upon the intention of the appellant. In this case, it has been proved that the appellant by adopting fraudulent means obtained consent of P.W. 4 – Sahajahan Khatun. In our opinion, such fraudulent consent could not be said to be a licence to the appellant to come out of the clutches of the provisions of law. In our opinion, therefore, the finding recorded by the learned Judge on this point is unassailable.

24. The next important aspect is the identity of the dead bodies of the victim children. At the outset, it is necessary to state that the case of the prosecution is based on the circumstantial evidence. The appellant kidnapped the victim children on 27th November, 2015. It is a categorical case of the prosecution that the appellant took the victims on motorcycle of P.W.3 –Mohd. Iliyas from Nagpur to the spot where their dead bodies were found in the riverbed of Vainganga in Madhya Pradesh. Dead body of Noorain was found in the riverbed of Vainganga river near Chapra on 29th November, 2015. The dead body of the victim girl was found on 1st December, 2015 in the riverbed of Vainganga river. The witnesses who had seen the dead bodies for the first time have been examined. P.W.16 – Mohanlal Banjara on 29th November, 2015 saw the dead body

floating in the riverbed of Vainganga. He conveyed the information to the Police. Police came to the spot. Inquest *panchanama* was drawn in his presence. Inquest *panchanama* is at Exhibit 83. P.W. 16 – Mohanlal Banjara has deposed about the clothes on the dead body and seizure of the same in his presence. P.W. 32 – Rabhuvir Parsadi Bharti on 1st December, 2015 saw the dead body of the girl floating in the water of Vainganga river. He conveyed the information to the Police. The Police Officials from Chapra Police Station came to the spot. The inquest *panchanama* was drawn. Description of the clothes and other articles has been mentioned in the inquest *panchanama*. So, these two witnesses had the first opportunity to see the respective dead bodies in the riverbed of Vainganga river. In their evidence before the Court, they have identified the photographs of the respective dead bodies seen by them. Similarly, they have identified the clothes and other articles seized in their presence.

25. Postmortem on the dead body of the victim girl was conducted by P.W. 25 – Dr. Neha Pateria. Postmortem of the dead body of the victim boy was conducted by P.W. 15 – Dr. Dewashish Banerjee. The Medical Officers before conducting the postmortem, removed clothes and other articles found on the respective dead bodies and the same were handed over to the Officials of Chapra Police Station. Both the Medical Officers have identified the clothes and the articles found on the respective dead bodies.

26. It is to be noted that after postmortem, the dead bodies of the victim children being unclaimed were buried by the Police. P.W.3 – Mohd. Iliyas on 28th November, 2015 had lodged the report at *Jaripataka* Police Station at Nagpur and informed the Police that the appellant had taken the victim children with him and he did not come back. The information of missing children with photographs and other particulars was circulated by *Jaripataka* Police Station, Nagpur. P.W.3- Mohd. Iliyas after two to three days came to know that two dead bodies were found within the jurisdiction of *Chapra* Police Station. He, therefore, went to *Jaripataka* Police Station, Nagpur for inquiry. By that time, the photographs of the dead bodies were circulated by *Jaripataka* Police Station to all the Police Stations in Maharashtra. In the Police Station, the Police Officer had shown the photographs of the dead bodies to P.W.3 – Mohd. Iliyas. P.W.3 – Mohd. Iliyas identified the same. However, by that time the dead bodies were buried. P.W.3 – Mohd. Iliyas with other relatives went to *Chapra* Police Station at *Chapra*. He made inquiry. The Police Officials at *Chapra* Police station had shown him the photographs of the dead bodies as well as clothes and articles. It has come in the evidence that on 3rd December, 2015, he made written application to *Tehsildar Chapra (Madhya Pradesh)* for obtaining custody of the dead bodies. *Tehsildar*, after following due procedure exhumed the dead bodies. P.W.3 – Mohd. Iliyas identified the dead bodies being of his son and daughter. In the evidence of P.W.3 – Mohd. Iliyas and P.W.4 – Sahajahan Khatun, they have not only identified the photographs of the dead bodies but also identified the

clothes and the articles found on the dead body. Photographs of the dead bodies have been identified by the other witnesses, *pancha* witnesses as well as by the Medical Officers. The evidence, in our opinion, is sufficient to establish the identity of the victim children.

27. In our opinion, the defence of the appellant would also fortify the identity of the victim children. In his 313 statement, he has stated that the children Akbari and Noorain accompanied him on the motorcycle up to MHKS Mohammad Ali Petrol Pump, *Kanhnan*. It is his defence that from the said petrol pump, the children ran away from his custody. He did not make a phone call to P.W.3 – Mohd. Ilyas because he was scared after the children ran away. The C.C.T.V footage at the petrol pump has been scientifically analysed. Report is at Exhibit 140. Other witnesses namely Salesman at the Petrol Pump and the Manager who had collected the charges for filling the petrol by the appellant have testified about description of the children. Similarly, they have identified the children from the C.C.T.V footage. Description of the clothes recovered from the dead bodies and the one seen in the C.C.T.V footage is identical. P.W.3 – Mohd. Ilyas and P.W.4 – Sahajahan Khatun, parents of the victim children specifically identified other articles found on the person of the victim children. The evidence, in our view, is sufficient to establish the identity. A perusal of the cross-examination of the above witnesses would show that the same has not been seriously disputed.

ORAL AND DOCUMENTARY EVIDENCE LED BY THE PROSECUTION TO PROVE THE GUILT OF THE ACCUSED:

28. Case of the prosecution mainly rests on the circumstantial evidence. The main circumstances relied upon are;

- (1)Motive for commission of crime;
- (2)The victim children being last seen with appellant.
- (3)Recovery of motorcycle;
- (4)The previous and subsequent conduct of the appellant;
- (5)Other contemporaneous material.

MOTIVE:

29. The motive for commission of crime proved in a criminal case is the relevant fact. It is undisputed that the appellant is the brother-in-law of brother of P.W.3–Mohd. Iliyas. According to the prosecution, out of business transaction between the appellant and P.W.3 – Mohd. Iliyas, father of the victims, money was due and payable by P.W.3 – Mohd. Iliyas to the appellant. P.W.3 – Mohd. Iliyas has deposed that the appellant was dealing in the business of purchase and sell of old tires. P.W.3 – Mohd. Iliyas used to purchase old Tyres from the appellant. He has stated that according to him, Rs.50,000/- were due and payable by him to the appellant. He has stated that the appellant demanded Rs.1,60,000/- being due and payable by him to the appellant. He has deposed that he was intending to settle the account of the appellant. The appellant was repeatedly demanding the amount. He has deposed that since he could not pay the amount as demanded by the appellant, the

appellant made up his mind to take revenge and for the said purpose, came to Nagpur on the given date. Except P.W.3 – Mohd. Ilyas, there is no other witness examined by the prosecution to substantiate the motive.

30. In this background, it would be essential to peruse the relevant part of cross-examination of P.W.3 – Mohd. Ilyas. The relevant cross-examination is at paragraph No.10 and 11. Paragraph No.11 refers to *Bhishi* group of 20 members. It has come on record in his cross-examination that he as well as appellant were members of the *Bhishi* group and contributing Rs.5,000/- each per month. Monthly *bhishi* was auctioned. P.W.3 – Mohd. Ilyas took the amount of first monthly *bhishi* of the appellant. Out of *Bhishi* transaction, a sum of Rs.1,10,000/- was due and payable to the appellant. Further cross-examination would show that P.W.3 – Mohd. Ilyas has categorically stated that some amount was due and payable by him to the appellant. He has further stated that amount payable was Rs.50,000/-. He has further confirmed and reiterated in the cross-examination that the appellant was repeatedly asking him to pay the amount. In our view, this part of the cross-examination clearly indicates that out of business transactions between P.W.3 – Mohd. Ilyas and the appellant, some amount was due and payable by P.W.3 – Mohd. Ilyas to the appellant. He has stated that 15 days before the incident, the appellant made a phone call to him from Sioni and inquired as to when his amount would be paid. P.W.3 – Mohd. Ilyas has stated that he assured the appellant that he would pay him the

entire amount between 5th and 10th day of the next month. He has further deposed that one day before coming to Nagpur on 26th November, 2015, the appellant called him and made a request to provide him his motorcycle for going to Tajbag Dargah. P.W.3 – Mohd. Ilyas agreed to provide the motorcycle. The appellant came to Nagpur on 27th November, 2015. P.W.3 – Mohd. Ilyas has deposed that the appellant had come to his shop after 2.30 p.m and took his motorcycle. As far as this statement of P.W.3 – Mohd. Ilyas about amount due and payable by him to the appellant, there is no serious dispute in the cross-examination. In an attempt to test the veracity of this witness on this point, some other facts have been brought on record to indicate that out of *Bhishi* transaction an amount of Rs.1,10,000/- was due and payable by P.W.3 – Mohd. Ilyas to the appellant. Be that as may, the fact that the amount of Rs.50,000/- was due and payable by P.W.3 – Mohd. Ilyas to the appellant as stated by him in his substantive evidence has been confirmed and reiterated by him in his cross-examination. It is the case of the prosecution that due to failure on the part of P.W.3 – Mohd. Ilyas to clear the outstanding dues of the appellant, the appellant took his motorcycle and by fraudulent means kidnapped the victim children from his house and killed them. It is pertinent to note at this stage that it is not the case of the appellant that there was enmity between him and P.W.3 – Mohd. Ilyas. On the contrary, the appellant in his 313 statement admitted that he took the children with him but the children ran away from him at the petrol pump. In our opinion, the evidence of the motive adduced by P.W.3 – Mohd.

Ilyas cannot be discarded in the absence of the proper explanation by the appellant. In the backdrop of his defence as to the reason for taking away the children with him, evidence of P.W.3 – Mohd. Ilyas gets an assurance. In this case, the prosecution has, therefore, proved the motive for commission of a crime.

31. Before switching over to the next point, it is necessary to state that the motive is not a *sine qua non* for the proof of the guilt of the accused. However, in the cases resting on circumstantial evidence, proof of the motive assumes importance. It is stated that motive is always locked in the mind of the accused. The motive locked and hidden in the mind of the accused can be unlocked by leading the evidence. In this case, P.W.3 - Mohd. Ilyas has categorically deposed about his business transaction with the appellant and the amount due and payable by him to the appellant. He has also categorically stated that there was delay on his part to make the payment. He has further stated that he had assured the appellant that between 5th and 10th day of the next month, the due amount would be paid to him. It is stated that because of failure on his part, the appellant developed a grudge against him and in order to take the revenge, the appellant kidnapped his children and murdered them. We do not see any reason to disbelieve and discard this evidence.

VICTIM CHILDREN LAST SEEN TOGETHER IN THE COMPANY OF THE APPELLANT:

32. This circumstance relied on by the prosecution is the most crucial and vital circumstance. The fate of this appeal, in our

opinion, by and large, hinges on this circumstance. Before proceeding to appreciate numerous circumstances and oral and documentary evidence on this last seen theory, it is necessary to note down the principles. In the case of **Sharad Sarda Vs. State of Maharashtra**¹, the Hon'ble Supreme Court of India has categorically held that before placing the reliance on the circumstantial evidence, following paramount conditions must be established to the satisfaction of the Court. The conditions are;

- (a) The circumstances from which the conclusion of guilt is to be drawn should be fully established;
- (b) 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;
- (c) The circumstances should be of a conclusive nature and tendency;
- (d) They should exclude every possible hypothesis except the one to be proved, and
- (e) 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.

33. In order to prove and establish the chain of circumstances from the point the appellant took the victim children in his custody at the

¹ 1984 (4) SCC Page 166

house of the appellant till the place where their dead bodies were found, the prosecution has relied on the evidence of P.W.2 – Mohammad Sajjad Mohammad Hasim Ansari, P.W.3 – Mohammad Iliyas Mohammad Yusuf Ansari, P.W.4 – Shahajahan Khatun Mohammad Iliyas Ansari, P.W.6 – Halim Shaikh, P.W. 7 – Amolkumar Tulsiram Sorle, P.W.9- Akash Tikam and P.W.10- Sharikkhan. Before proceeding to appreciate the evidence of these witnesses, it is necessary to mention that the distance from the house of P.W.3 – Mohd. Iliyas situate at Nagpur to the bridge of Vainganga river in Madhya Pradesh where the dead bodies were found in the riverbed is around 300 to 330 k.m. The appellant has disclosed his defence while answering question No.740 in his statement under section 313 of the Code of Criminal Procedure. In our view, this defence of the appellant would to a great extent reduce the burden of the prosecution to establish his involvement in the commission of the crime. While answering this question, it is his defence that the victim children accompanied him on a motorcycle up to Mohammad Ali petrol pump, *Kanhan*. At the said petrol pump, he went to attend the nature's call but when he came back after attending the nature's call, he found that the children were missing. He made search but he could not found the children. Thereafter from the mobile of the stranger, he tried to contact P.W.3 – Mohd. Iliyas but his mobile was switched off. He communicated P.W.3 - Mohammad Iliyas after 15 minutes from mobile of other person that the children went missing. P.W.3 – Mohd. Iliyas scolded him. Therefore, he got frightened and left the spot. In the context of this defence, it is necessary to

mention that he is silent as to what he did to the motorcycle of P.W.3 – Mohd. Iliyas. He is also silent as to where he went from the said spot and his whereabouts till the time of his arrest on 8th December, 2015. In our view, if the other evidence is found sufficient to accept the case of the prosecution then in that event, this defence and conduct of the appellant would weigh in favour of the case of the prosecution.

34. The appellant was arrested by P.W.28 – Santosh Wakde, P.S.I attached to Gittikhadan, Nagpur on 8th December, 2015 at *Begusarai*, State of Bihar. P.W.28 – Santosh Wakde, has deposed about the procedure followed at the time of the arrest. Exhibit 180 is the extract of a station diary entry made by P.W.28-Santosh Wakde before proceeding to State of Bihar. Exhibit – 181 is the intimation to the local Police Station at Begusarai given by P.W.28 -Santosh Wakade. Exhibit 183 is the arrest *panchanama* of the appellant. Exhibit 184 is the seizure memo of the articles found on the person of the appellant. Exhibit 187 is the station diary entry made at *Jaripataka* Police Station on 10th December, 2015 by P.W. 28 – Santosh Wakde after coming back to the Police Station with the appellant. The appellant was absconding from 28th November, 2015 till his arrest on 8th December, 2015. On his arrest, he was interrogated. The investigation conducted transpired that from Nagpur the appellant carried the victim children with him on motorcycle and had thrown them from the bridge in the water of *Vainganga* river near Chapra in State of *Madhya Pradesh*. The

investigation revealed that the appellant first visited the shop of P.W.2 – Mohammad Sajjad after coming to Nagpur. P.W.3 – Mohd. Iliyas came back from Wardha and took the appellant to his shop and handed over motorcycle to him. On the pretext of going to offer prayer at Tajbag Dargah, the appellant instead of going to Tajbag Dargah went to the house of the appellant and persuaded his wife P.W.4 – Sahajahan Khatun to allow the victim children to accompany him from his house. He proceeded towards Madhya Pradesh. On the way at *Dongari Kanhan*, he filled petrol in motorcycle at MHKS Mohammad Ali Petrol Pump. After petrol pump, he passed through Mansar Toll Plaza. After Mansar Toll Plaza, at *Deolapar*, he went to the A.T.M centre of Bank of India for withdrawal of the amount of Rs.5,000/-, which he did with the help of the Security Guard. Thereafter, he went to *Tajbag Dargah*. He purchased flowers and with the children had snacks at one Snacks Corner. The investigation revealed that after this spot, he entered State of Madhya Pradesh. He took the children in the forest. From the forest at *Katdara*, he visited a tea shop where he had tea and snacks with the children. In the night of 28th November, 2015 at about 1.30 to 2.00 a.m, he stopped at a *Dhaba* near the petrol pump at *Bandol Bypass*. There he demanded polythene bag to cover his chest to save him from cold. He had tea there. From this place, spot of the incident namely *Vainganga* river bridge is at the distance of 10 k.m. During the course of investigation, the appellant had shown all these places to the Investigating Officer. The Investigating Officer recorded statements of the witnesses who have had an occasion to see the

appellant and the victim children together. The Investigating Officer has also collected the contemporaneous record to corroborate the relevant aspects.

35. PW-2 – Mohammad Ansari, PW-4 – Sahajahan Ansari, PW-5 – Shahanaj Pravin Sattar Sheikh, PW-6 – Halim Farid Sheikh, PW-7 – Amolkumar Sarole, PW-9 – Akash Tikam and PW-10 – Sarikkhan Shadikkhan are the main witnesses examined by the prosecution to prove that the victim children were last seen together in the company of the appellant. It has come on record that the appellant was not known to these witnesses before the concerned date on which they claimed to have seen him in the company of the victim children. The Investigating Officer though expected to conduct the test identification parade in such serious matter did not conduct the same. The witnesses identified the appellant during the course of investigation when he was taken to the respective spots on the basis of information provided by him. The witnesses second time identified the appellant in the Court at the time of their evidence. The main objection on behalf of the appellant is that in the absence of test identification parade to establish the identity of the appellant beyond doubt, the learned Trial Judge ought to have rejected their evidence in entirety. In order to make his submission good, learned Advocate took us through the evidence of these witnesses and submitted that in absence of test identification parade, the evidence of all these witnesses cannot be made the basis to prove the last seen theory and ultimately, convict the appellant.

36. In this context, before proceeding to appreciate the evidence of the witnesses and to decide the reliability of their evidence, it would be appropriate to consider the settled legal position. We may usefully refer the decision of the Apex Court in the case of *Roni Alwaris vs. The State of Maharashtra*². In this case, the Hon'ble Supreme Court has held that relevant piece of evidence under Section 9 of the Evidence Act where the evidence consists of identification of the accused person at his trial, the statement of the witness made in the court, a fortiori identification by him of an accused is substantive evidence but from its very nature, it is inherently of a weak character. The evidence of identification in the Test Identification Parade is not a substantive evidence but is only corroborative evidence. It falls in the realm of investigation. It is held that the purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what he has seen earlier, strength or trustworthiness of the evidence of the identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time after a long time, the probative value of such uncorroborated evidence becomes minimal, so much so that it becomes unsafe to rely on such piece of evidence. It is held that the identification of the accused by witness if he had an opportunity to interact with him or to notice his distinctive features lends assurance to his testimony and absence of corroborative evidence by way of test identification parade could not be material. In the case before the

² (1998) 3 SCC 625

Hon'ble Supreme Court two witnesses had an opportunity to interact for about 7-8 minutes with the accused person. In that case, test identification parade was not conducted. Their evidence of identification of the accused at the trial without corroboration of test identification parade was accepted.

37. Admittedly, in this case test identification parade was not conducted. Witnesses on the last seen theory have identified the appellant during the course of investigation as well as in the Court at the time of trial. Witnesses have specifically stated that they saw the victim children with the appellant on the given date and time.

38. The learned A.P.P on being confronted with the factual situation submitted that this could be a case of defective investigation by the Investigating Officer and for the same witnesses cannot be blamed. He further submitted that such a defective investigation cannot be made a ground to reject the evidence of the witnesses. In order to substantiate his submission learned APP relied upon a decision in the case of *Karnel Singh Vs. The State of Maharashtra*³. In this case the Hon'ble Supreme Court has held that in the case of defective investigation, the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect. It is held that to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. In our opinion, in order to consider the applicability of law laid down in the cases of

3 (1995) 5 SCC 518

Roni Alwaris and Karnel Singh (supra) it would be necessary to minutely appreciate the evidence of the witnesses.

39. At this stage, it is necessary to note that the appellant in his defence has admitted that till Mohd. Ali petrol pump at *Kanhan* which is at a distance of about 18-20 k.m. from the house of P.W.3 – Mohd. Ilyas, the victim children were with him and from the petrol pump when he went to attend nature's call, children ran away. Keeping this fact in mind, we may start from the witnesses who had seen the victim children in the company of the appellant on the motorbike at Mohd. Ali petrol pump.

40. PW-9 -Akash Tikam was on duty at Mohd. Ali petrol pump, *Kanhan* at the relevant time. He has deposed that on the request of the appellant, he filled petrol in his motor cycle. He saw boy aged about 10 years and a girl aged about 11 years with the appellant. PW-9 – Akash Tikam has specifically stated the reason for identifying the appellant. He has deposed that after filling two liter petrol, the appellant wanted to make payment by debit card. He, therefore, directed the appellant to go to the Manager of the petrol pump, Mr. Harish Madame and bring receipt of payment. He has deposed that the appellant went to the cabin of Mr. Madame and after making the payment by card came back with the receipt. He has further stated that after 8-10 days from this date, the police had come to the petrol pump with the appellant. He informed the police that on 27th November, 2015, he had seen the appellant and the

victim children together at the petrol pump. He has specifically deposed that after making payment, the appellant along with the boy and girl went towards Mansar through Jabalpur road by motor cycle.

41. In order to seek corroboration to the evidence of this witness, the prosecution has relied upon the CCTV footage of the cameras installed at the petrol pump. CCTV footage has been proved. PW-9 – Akash Tikam, during the course of investigation as well as in the Court pointed out the appellant-accused and two children from the CCTV footage. It is, therefore, apparent that this witness had an opportunity to interact with the appellant. Specific reason for keeping the facts in his mind was that he was accompanied by two children on motorcycle. His evidence would show that in this process of filling petrol the appellant and the children were at the petrol pump for at least 6 to 8 minutes.

42. PW-11 -Harish Madame, who was the manager at petrol pump deposed that the appellant made payment by using his debit card. PW-11 – Harish Madame has deposed that he filled petrol of Rs.200/-. He made the payment by using the card. He gave receipt to the appellant. He has identified the said receipt which is at Exhibit 59. Exhibit 60 is the computerized receipt. Perusal of this receipt would show that the payment was made by him by card. Time of payment of Rs.200/- is 16.10.50 hours in the receipt. PW-11 – Harish Madame has categorically deposed that on 12th December, 2015, the police had come to the petrol pump along with the

appellant. At that time, he narrated the incident to the police. He had also shown the CCTV footage of the relevant date to the police. The CCTV footage was sent to the Forensic Analysis. Report of Forensic Science Laboratory, Nagpur is dated 29th September, 2016. Report at Exhibit 140 has been proved by examining P.W.24 - Pranjal Ghawde. Exhibit 99 is the certified extract of the bank account of the appellant. This statement reflects the debit entry of Rs.200/- on 27th November, 2015. It further proves that the amount was credited in the account of MHKS Fuel. The documentary evidence at Exhibit 59, 60 and 99 and the CCTV footage is contemporaneous evidence. Same corroborates the evidence of PW-9 – Akash Tikam and PW-11 – Harish Madame. Their evidence also gets fortified by the defence of the appellant.

43. During the course of investigation, the appellant took police to Mansar Toll Naka. C.C.T.V footage was collected by the Investigating Officer from Toll Naka. It was sent for scientific analysis. The report of scientific analysis of the said footage is at Exhibit 140. The analysis of the footage was inconclusive. It, therefore, cannot be said that the C.C.T.V footage at Mansar Toll Naka was not collected by the Investigating Officer. The next important witness is PW-7- Amolkumar Sorle, who at the relevant time was serving as security guard at ATM center of Bank of India at Deolapar, Taluka. Ramtek, District. Nagpur. It is the case of prosecution that after passing through Toll Naka at Mansar, the appellant with the children went to the ATM center for withdrawing

money. This witness has been examined to substantiate the last seen theory. In our view, the evidence would assume great importance to the case of prosecution as well as to the defence of the appellant. It would, therefore, be necessary to minutely scrutinize his evidence. He deposed that on 27th November, 2015, he was on duty as security guard at the ATM of Bank of India, Taluka Ramtek, District Nagpur. He has deposed that at about 5.00 p.m., one person entered the ATM center. After 2-3 minutes, the said person called him inside the ATM center and requested him to help him to withdraw the money. He has deposed that he, therefore, went inside the ATM center and helped the said person in withdrawing the money from ATM machine. They came out of the ATM center together. He has further deposed that he observed that the said person after withdrawing the money went towards the motorbike parked on road. He saw one girl aged about 11-12 years and a boy aged about 10-11 years standing near the motorbike. He has further deposed that he saw the said person along with two children went towards Madhya Pradesh on his motorcycle. He has further deposed that during the course of investigation after 15 days of the incident, Police had come to the ATM center with the appellant. He identified the appellant being the same person to whom he had extended the help for withdrawal of money from ATM machine. He has stated in his evidence that the CCTV cameras were installed at the ATM center. It has come on record that during the course of investigation, the investigating officer saw CCTV footage of the relevant date. However, the same was not collected because it was blur. PW.7 –

Amolkumar Sorle is commerce graduate. This clarification has been brought on record in his cross examination. It cannot be said therefore that PW.7 – Amolkumar Sorle did not possess proper understanding to take mental note of certain facts. During the course of investigation, he confirmed the identity of two victim children when photographs were shown to him. He has identified the appellant when he was taken there during the course of investigation as well as at the time of trial.

44. Perusal of his evidence in entirety would show that his evidence is natural. Since CCTV footage is not collected, it would be necessary to see whether any contemporaneous evidence is produced on record by the prosecution to support his contention. According to this witness he helped the appellant to withdraw the cash of Rs.5000/- from the ATM. Exhibit 99 is certified extract of the Bank Account of the Appellant. Debit entry of Rs.5000/- is dated 27th November, 2015. It is further pertinent to note that this entry is immediately after the entry of Debit of Rs.211/- in the account of MHKS Fuel. Next debit entry of Rs.5000/- is dated 4th December, 2015. It is the case of the prosecution that at the time he had absconded and was in the State of Bihar. There is other documentary evidence in the nature of call detail record of his mobile phone which clearly indicates that on 27th November, 2015 at 16.31.23 hours his location was in the State of Maharashtra. It is the case of prosecution that for considerable time thereafter his mobile was found switched off. His location on 28th November, 2015 from 06.46.23 hours to

06.48.37 hours was in the State of Madhya Pradesh. PW-9 – Akash Nikam as well as PW-7 -Amolkumar Sorle have deposed that the appellant with two children on motorcycle went towards Madhya Pradesh. PW-7 – Amolkumar Sorle in his evidence has categorically stated the specific reason to make a mental note of the identity of the appellant. The appellant according to PW.7 – Amolkumar Sorle was finding it difficult to withdraw the amount. Therefore, he helped him to withdraw the cash. Withdrawal of the cash has been proved by the contemporaneous document at Exhibit 99. PW-7 0 Amolkumar Sorle has categorically stated the reason for identifying the appellant. It is further pertinent to note that the investigating Officer in ordinary circumstances had no reason to locate this ATM center. The appellant took the investigating Officer to the said ATM center. Presence of the appellant at the ATM Centre and the fact that he had withdrawn Rs.5000/- from ATM Center has been specifically deposed by PW.7 – Amolkumar Sorle. It is pertinent to note that PW.7-Amolkumar Sorle while dealing with the appellant had an opportunity to observe the appellant for about 5-7 minutes. It is true that in the ordinary course of nature if the witness PW-7 – Amolkumar Sorle had not interacted with the appellant for said reason it would not have been possible for him to identify the appellant. PW.7 – Amolkumar Sorle also confirmed the identify of the appellant when he took the police to ATM center. This, in our view, could reflect on the conduct of the appellant. Evidence of PW-7– Amolkumar Sorle has been corroborated by the contemporaneous evidence. Perusal of his evidence would show that there are no

omissions or inconsistencies in his evidence. In our view, therefore, identification of the appellant by PW.7 – Amolkumar Sorle has been fully justified by him. The presence of two children in the company of the appellant is another important factor to keep the identity of the appellant in mind by this witness. So this witness P.W.7 – Amolkumar Sorle has categorically deposed that he saw victim children in the company of the appellant. He has identified the photographs of the children in the Court.

45. According to the prosecution, investigation revealed that accused went to *Tajbag Dargah* with children. PW-6- Halim Farid Shaikh, a flower vendor has been examined to prove this fact. PW-6 Halim Shaikh has deposed that his shop is in front of *Dargah* which is known as *Shaki Taj* Flowers shop. Timing of shop is from 8.30 a.m. to 12.00 mid night. His house is behind the shop. He has categorically stated that on 27th November, 2015 between 5.00 and 6.00 p.m., the appellant with victim children had come to offer prayer at Dargah. The appellant, according to him, parked his motorcycle on the opposite side of the Road. The appellant purchased *prasad* and on motorbike went towards *Dargah*. PW-6 – Halim Shaikh has identified the appellant in the Court as well as on the date on which the appellant had taken police to the said place. He has stated that 10-15 minutes later the appellant with children came back to his shop on motorbike. The appellant made inquiry about availability of the snacks. PW-6 - Halim Shaikh pointed out to the appellant hotel which was at some distance from his shop. He has

deposed that he saw the appellant and the victim children taking *nasta* in the said hotel. P.W.6- Halim Sheikh specifically stated that he saw the appellant going towards jungle-forest with water bottle to attend nature's call. After 5-10 minutes, he returned and went towards Madhya Pradesh on motorcycle with children. PW-6 – Halim Sheikh has provided description of the clothes on the person of the appellant as well as on the victim children. He has identified the same in the court. He has also identified the photographs of the children shown to him at the time of his evidence.

46. Learned Advocate for the appellant submitted that the evidence of this witness cannot be relied upon in as much as this witness is a got up witness. We have minutely perused his cross examination. The cross-examination is the most important weapon to test and shake the credibility of the witness. His cross examination would show that, the facts that he saw the children taking *nasta* in the hotel and saw the appellant going in the forest for attending nature's call are proved to be omissions. However, core of his evidence that he saw one girl and one boy on the given date and given time at his shop and the appellant having parked the motorbike on the opposite side of the road. It is submitted that it was not possible for this witness to memorize the face of the appellant and the faces of the victim children because 100-150 customers pay visit to his shop for purchasing *prasad*. It is submitted that this witness is a got up witness. It is seen that the time of visit of the appellant to the shop is around 5.00 a.m. to 6.00 a.m. A tutored

witness would have narrated the exact time. It is the case of prosecution that the appellant took motorcycle from PW-3 – Mohd. Iliyas to pay visit to *Tajbag Dargah*. On the pretext of taking the children to *Tajbag Dargah*, he obtained their custody from their mother PW-4 – Sahajahan Khatun Ansari. It has come on record that the appellant travelled with the children on motorcycle towards the spot of incident and in the night of 28th November, 2015 at about 1.30 p.m. to 2.00 p.m., he was lastly seen together with the victim children. It was necessary on his part to create a confidence in the mind of children that as promised he took them to *Tajbag Dargah*. It is further pertinent to note that Police in the ordinary course of nature would not have reason to contact PW-6 -Halim Shaikh. There must be number of flower shops around *Dargah*. It is proved that the clue provided by the appellant during the course of investigation led the police to PW-6 – Halim Sheikh. The striking aspect noticed by PW-6 – Halim Shaikh was the presence of two children with the appellant. PW-6 - Halim Sheikh for considerable time had occasion to interact with the appellant. As far as PW-6 – Halim Sheikh is concerned, save and except his oral testimony, there is no other contemporaneous documentary evidence. Testimony of PW-6 – Halim Sheikh gets fortified by the conduct of the appellant as well. It is to be noted that *Tajbag Dargah* is the last place in the State of Maharashtra where the appellant was seen in the company of the children. After *Morphata*, the appellant with children entered the State of Madhya Pradesh.

47. It is the case of prosecution that during the course of the investigation, the appellant took the Police to the spot in the forest area where he had taken the children. It is to be noted that no incriminating material was found in the forest against the appellant. Similarly, in this case, the learned trial Judge has acquitted the appellant of the charge of rape on the victim girl. Be that as it may, the fact remains that according to the case of the prosecution, this was the first place in the State of Madhya Pradesh visited by the appellant with the children.

48. It is the case of the prosecution that from the forest, the appellant went ahead with the children on motorcycle. The victim children were seen in the company of the appellant last time by P.W.10 - Sharikkhan. The evidence of P.W.10 – Sharikkhan Shadikkhan is, therefore, very important. In order to place implicit reliance on the evidence of this witness, it is necessary to subject his evidence to the strict and minute scrutiny. The evidence of this witness has been challenged on the ground that no Test Identification Parade was conducted during the course of the investigation and, therefore, based on the identification of the appellant by this witness for the first time in the Court and the facts narrated by this witness cannot be accepted as a gospel truth. It would be necessary to marshal the evidence of this witness at the outset. He has deposed that he is running a tyre puncture/repairing shop at Bandol bypass road, 15 k.m ahead of Sioni. On one side of his shop, there is a petrol pump and on the other side, there is Dhaba

– Hotel of Nirmalsingh Shingarsingh. It is the case of the prosecution that at about 1.30 to 2.00 a.m on 28th November, 2015, the appellant with the children had been to *Dhaba* and there P.W.10 – Sharikkhan Shadikkhan saw the appellant and the children. While narrating the incident, he stated that on 28th November, 2015, at the midnight at about 1.30 to 2.30 a.m, he was sitting with Nirmalsingh at *Dhaba*. They were chitchatting. He has stated that at that time, one man along with one girl and boy came on motorcycle at *Dhaba*. The girl might be of 13 to 14 years old and the boy might be 10 to 12 years old. He has stated that they saw the appellant and two children in the light of the petrol pump and the surrounding lights of *Dhaba*. The appellant, according to him, ordered tea and had a tea in their presence. He has deposed that it was too cold outside. The said person/the appellant demanded a polythene bag. Nirmalsingh told P.W.10 - Sharikkhan to give a polythene bag to the said person. P.W.10- Sharikkhan gave a polythene bag to the said person/appellant. He has categorically deposed that the said person removed his shirt and covered his chest with polythene bag. He then put on his shirt. He has categorically deposed that Nirmalsingh told the said person to take polythene bags for the children as well but the said person refused to take polythene bags for the children. Thereafter, the said person along with the children went towards Chapra/Jabalpur on the motorcycle. He has stated that distance between Village Chapra and Vainganga river is about 10 k.m from this *Dhaba*. According to P.W.10–Sharikkhan, the said person/appellant had parked his motorcycle 4 to 5 feet away from

them. He has identified the appellant being the same person who had visited *Dhaba* with two children. He has identified the photographs of the victim boy and victim girl. He has also identified the clothes seen by him on the person of the victim children. He has further deposed that on 12th December, 2015, the Police had come to *Dhaba* for inquiry with the appellant. His statement was recorded by the Police.

49. The fate of the case of the prosecution to a larger extent depends upon the evidence of this witness. Similarly, fate of the appellant could be sealed with the assistance of the testimony of this witness. P.W.10 - Sharikkhan was, therefore, subjected to searching cross-examination by the learned Advocate for the appellant. His statement was recorded by the Police during the course of investigation. Not a single omission could be seen in his statement recorded by the Police and in the evidence of this witness before the Court. It was suggested to this witness that he had not seen the appellant at *Dhaba* and just to support the case of the prosecution on the say of the Police, he has made a false statement. P.W.10 - Sharikkhan has denied the suggestion. The prosecution has not examined Nirmalsingh, the owner of *Dhaba*. The learned Advocate submitted that failure to examine Nirmalsingh is a vital drawback in the case of the prosecution. In our view, failure to examine Nirmalsingh would not *ipso facto* wash out the evidence of P.W.10 - Sharikkhan. P.W. 10 - Sharikkhan has stated in his evidence that Nirmalsingh has left *Dhaba* one and half year ago. He does not

know whereabouts of Nirmalsingh. A perusal of his cross-examination would show that the credibility of this witness has not been shaken at all. A perusal of his evidence in entirety would show that he is not a got up and tutored witness. In our opinion, tutored and got up witnesses cannot stand the scrutiny of searching cross-examination. It is further pertinent to mention that this was not the only *Dhaba* or Tyre puncture shop in the vicinity of the spot. The appellant during the course of investigation provided clue to the Investigating Officer which led the Police to this place. In the ordinary circumstances, the Police had no reason to locate and make an inquiry with P.W.10 - Sharikkhan. The evidence of P.W.10 - Sharikkhan, therefore, that he had an occasion to see the appellant with the children on the given date and time cannot be discarded.

50. The next important question is whether identification of the appellant by P.W.10 - Sharikkhan for the first time in the Court could be said to be a reliable piece of evidence. A minute perusal of his evidence would show that this *Dhaba* where he saw the appellant in the company of the victim children is at a distance of 15 k.m from Vainganga river, where the dead bodies were found. A perusal of his evidence would show that the appellant with the victim children halted at the said *Dhaba* for 7 to 8 minutes. The appellant had tea at *Dhaba*. The most important reason given by P.W.10 - Sharikkhan to identify the appellant is that the appellant demanded polythene bag to cover his chest from cold. He provided polythene bag. The appellant removed the shirt and covered the chest with polythene

bag and then put on his shirt. The most important and striking aspect noticed by P.W. 10 - Sharikkhan is that when Nirmalsingh asked him to take polythene bags for the children, the appellant refused to take the same. It is true that at *Dhaba* on the highway, even during night time, there are bound to be visitors. P.W.10 - Sharikkhan has stated that at around 1.30 to 2.00 a.m on 28th November, 2015, the appellant had come to Dhaba with the children. The appellant, according to P.W.10 - Sharikkhan left with the children on the motorcycle towards Chapra Jabalpur. A perusal of this evidence would show that he has narrated cogent reasons for identifying the appellant in the Court. In our opinion, such unnatural conduct of the appellant taking care of himself and not bothering about children would have left everlasting impression on the mind of the witness. Identity of the appellant at every places visited by him has been connected with the identity and presence of the victim children and the motorcycle. P.W.10 - Sharikkhan dealt with the appellant directly for the reasons stated above and had a sufficient opportunity to make note of his identity. The evidence, in our view, is natural. We do not find any reason to discard and disbelieve this evidence simply because of the fact that the Investigating Officer has failed to conduct the Test Identification Parade. The witness was not at fault. On the basis of the evidence of this witness, the prosecution has successfully proved that on 28th November, 2015 at about 1.30 to 2.00 a.m, P.W.10 - Sharikkhan saw the victim children in the company of the appellant for the last time.

51. The spot, as stated above, is at a distance of about 10 k.m. from this *Dhaba*. After this spot, the children were not seen in the company of the appellant. Call Detail Record of the mobile of the appellant proves beyond doubt that in the morning of 28th November, 2015, his location was in the State of Madhya Pradesh. The appellant was absconding after this incident. He was arrested from State of Bihar on 8th December, 2015. The appellant has not offered any explanation about it. In our opinion, the conduct of the appellant would also assume importance. If conduct of the appellant is appreciated in the context of the evidence brought on record, we do not see any reason to disbelieve and discard the evidence of this witness. The prosecution, in our opinion, has successfully proved that P.W.10 – Sharikkhan, in the wee hours at about 1.30 to 2.00 a.m on 28th November, 2015 saw the victim children in the company of the appellant.

52. In order to establish the last seen theory of the victim children in the company of the appellant at Nagpur and more particularly before Mohd. Ali petrol pump at Kanhan, the prosecution has relied upon the evidence of PW-2-Mr. Mohd. Sajjad Mohammad Hasim Ansari and PW-4-Smt. Sahajahan Khatun Ansari, the mother of the victim children. We have considered the evidence of P.W.4 – Sahajahan Khan, the mother of the victim in the earlier part of the judgment. In the context of last seen theory, at the cost of repetition, brief narration of her evidence would be required. She has stated that on 27th November, 2015 at about 3.00 to 3.30 p.m. the

appellant came to her house and requested her to allow children to accompany him to visit *Tajbag Dargah*. The appellant being relative of P.W.4 – Sahajahan Khan was known to her. The appellant had come to the house of P.W.4 – Sahajahan Khan on the motorcycle of her husband. She has deposed that the appellant insisted her to allow her children to accompany him. She has further stated that appellant told her that for taking children with him, he had obtained consent of her husband. Her evidence would show that she did not grant permission easily to the children to accompany him. According to her when she showed reluctance, the appellant pretended to have made a phone call to her husband and informed her that phone of her husband was switched off. P.W.4 – Sahajahan Khan did not suspect any foul play and, therefore, she granted permission to children to accompany the appellant. In her evidence she has narrated in detail description of clothes on the person of the victim children when they left with the appellant. P.W.4 – Sahajahan Khan has identified the clothes of the victim children recovered during the investigation. PW-3 – Mohd. Iliyas - father of the victim has also identified the clothes and other articles in the Court. Evidence of PW-4 – Sahajahan Khan and PW-3 – Mohd. Iliyas is consistent on this point.

53. The evidence of PW-2 – Mohammad Sajjad Mohd. Hasim Ansari and PW-3 – Mohd. Iliyas has been relied upon to establish the presence of the appellant at Nagpur on the given date. It is pertinent to note at this stage that the appellant has admitted his

presence at Nagpur on the given date. Similarly, the appellant has admitted that the children accompanied him on the motorcycle upto Mohd. Ali petrol pump at Kanhan. In our view therefore the case of prosecution that the children as stated by the witnesses accompanied the appellant on the motorcycle cannot be discarded. The evidence of PW-2-Mohd. Sajjad Mohd. Hasim Ansari and the evidence of PW-5- Shahanaj Pravin Sattar Sheikh, who are the independent witnesses, proves that on the given date they saw the victim children in the company of the appellant at about 3.00 to 3.30 p.m. On the aspect of last seen theory as well as on the aspect of timing the evidence of these witnesses is consistent. The evidence of these witnesses is very important to complete the chain of the last seen circumstances/theory of the prosecution. The evidence of these witnesses lends assurance to the credibility to the evidence of other important witnesses viz., P.W.6-Hamid Farid Sheikh, PW-7-Amolkumar Sorle, P.W.9 -Akash Tikam and P.W.10 – Sharikkhan, who had seen victim children in the company of the appellant after Nagpur on the way to the spot.

RECOVERY OF MOTORCYCLE, CONDUCT OF THE APPELLANT AND OTHER CORROBORATIVE EVIDENCE

54. In order to complete the chain and to connect the appellant with the brutal murder of the victim children, the prosecution has relied on the above circumstance. Learned Advocate for the appellant submitted that the prosecution has not proved with cogent evidence that immediately before murder of the children, the victim children were seen in the company of the appellant. In our view, in order to

appreciate this submission, it would be necessary to take into consideration the admitted and proved facts and also other corroborative evidence. It is to be noted at this stage that in the chain of circumstances, there are bound to be weak links. The weak links in the chain of circumstances cannot be discarded. It is to be stated that the weak link in the chain is as important as strong link to hold the chain together. In our opinion, in the given set of facts, the previous and subsequent conduct of the accused could be placed in the category of the weak link in the chain of circumstances. However, if the same is sufficient to fill the little void created for want of direct evidence, in our opinion, reliance can be placed on the same. It is further pertinent to mention that while appreciating the evidence in a case totally based on the circumstantial evidence, reasonable judicial inference as to the complicity of the accused can be drawn on the basis of the proved and admitted facts and circumstances and unnatural conduct of the accused. Proved, admitted facts and circumstances, and unnatural conduct of the accused can be made use to fill the void created due to non availability of direct evidence. In this background, it would be necessary to analyze other corroborative evidence adduced by the prosecution and the previous and subsequent conduct of the appellant.

55. It is the case of the prosecution that at the instance of the appellant, motorcycle bearing registration No. MH-31-DY-2752 was recovered from *Dhaba* of P.W.8 -Satendra Patel near Village

Lakhnadon. It is the case of the prosecution that during the course of investigation, the appellant in the presence of *panchas* made a statement that he would point out the place where he had parked the motorcycle after the incident. The appellant as per the case of the prosecution, in the presence of P.W.12 – Mohd. Firoz Ansari Mohd. Jahir Ansari, one of the *panch* witnesses – Mohammad Firoz Ansari Mohd. Jahir Ansari had shown them all the places visited by him on the way to the spot of the incident and finally motorcycle which was parked by him at *Dhaba* of P.W.8- Satendra Patel. In order to appreciate the conduct of the appellant showing all the places visited by him on the way to the spot, at the cost of repetition, it is necessary to state that the accused had shown the Tyre puncture shop of P.W.2 – Mohd. Sajjad, Tyre puncture shop of P.W.3 – Mohd. Iliyas, the petrol pump at *Dongari Kanhan* where he filled petrol, Mansar Toll Plaza through which he passed, Bank of India ATM at Deolapar from where he had withdrawn a sum of Rs.5,000/- with the help of P.W.7 – Amolkumar Sorle, flower shop near Morfata Dargah where he purchased the flowers, spot in the forest, *Dhaba* of Nirmalsingh and the spot namely the bridge of Vainganga river. The prosecution in order to corroborate this conduct of the appellant relied on the evidence of the witnesses and established not only the visit of the appellant with the children to those places but also identity of the children and the appellant. We found hope that this evidence would be admissible under section 27 of the Indian Evidence Act. In our view, the same cannot be accepted as evidence within the parameters of section 27.

56. On this point, we may usefully refer to the decisions in the cases of **Pulukuri Kottayya and others vs. Emperor, Himachal Pradesh⁴ Vs. Om Prakash⁵**, and **Pandurang Kalu Patil and another Vs. State of Maharashtra, ⁶**. The decision in the case of **Pulukuri Kottayya and other** (supra) has been considered and followed by the Supreme Court in the case of **Himachal Pradesh and Pandurang Patil** (supra). It is held that a fact discovered within the meaning of section 27 must refer to a material fact to which the information directly relates. That information which does not distinctly connect with the fact discovered or that portion of the information which merely explains the material thing discovered is not admissible under section 27 and cannot be proved. Recovery or even production of object by itself need not necessarily result in discovery of a fact. It is held that it would be fallacious to treat the “Facts discovered within the section 27 as equivalent to the object produced”. However, evidence of the Investigating Officer and the *panchas* that the accused had taken them to the places visited by him and pointed out the same to the Investigating officer if corroborated by other evidence is admissible under section 8 to prove the conduct of the accused.

57. In the background of the above settled position, the statement made by the appellant which led to the discovery of the motorcycle from Dhaba would be admissible under section 27 of the Evidence Act. The statement made by the appellant which led to the

4 AIR (34) 1947 Privy Council, 67

5 AIR 1972 Supreme Court Cases, 975

6 2002 Cri. L.J, 1007

Investigating Officer to the places visited by the appellant and got confirmed by other witnesses can be made use against the appellant under section 8 of the Evidence Act.

58. It would be necessary in the above context to consider the evidence of recovery of motorcycle. P.W.12 – Mohd. Firoz Ansari is the *panch* witness to the memorandum and discovery *panchanama*. P.W.8 - Satendra Patel is an independent witness examined to prove that he noticed the parked motorcycle in front of his Dhaba near Village Lakhnadon in State of Madhya Pradesh. The most important fact proved on the basis of the evidence of above witnesses with certainty indicates that at all the places visited by the appellant from Nagpur city to *Dhaba* of Nirmal Singh, the victim children with motorcycle were seen in the company of the appellant. The appellant in his 313 statement has also admitted that up to petrol pump at Kanhan, the victim children accompanied him on motorcycle. He filled petrol in the motorcycle on MHKS Mohammad Ali petrol pump at Kanhan. This statement of the appellant needs to be borne in mind while appreciating the evidence of P.W.8 – Satendra Patel, P.W.12 – Mohammad Firoz and the Investigating Officer P.W.24 – Pranjal Ghawde, Scientific Officer. P.W.8 – Satendra Patel has categorically stated that he is running Amit Dhaba-hotel in his land near village Lakhnadon. He is residing at *Dhaba*. He has stated that on 27th November, 2015, he opened his *Dhaba* at 7.00 a.m and closed the same on the next day about 2.00 a.m. On the next day, when he woke up, he saw a motorcycle of gray colour bearing

Registration No. MH-31-DT-2752 parked in front of his hotel. The said motorcycle was lying on the same spot throughout the day. He has deposed that since nobody turned up to take the motorcycle, he took the motorcycle aside *Dhaba* and parked it there. The motorcycle was locked. Nobody came to claim the motorcycle. After 15 days, Police from State of Maharashtra came to his *Dhaba* along with one person. At the time of his evidence, he has identified the appellant being the same person who had accompanied the Police on that day. At that time, the Police informed him that the appellant had parked the motorcycle in front of his *Dhaba*. In his presence, the appellant pointed out his motorcycle to the Police. He has identified the said motorcycle from photograph Exhibit 30.

59. P.W.8- Satendra Patel has categorically deposed that Vainganga river is at a distance of 20 to 25 k.m from his *Dhaba*. He has further stated that Village Bandol is 35 to 40 k.m from his *Dhaba*. This witness was cross-examined. No material has been elicited in his cross-examination to doubt the veracity of this witnesses. He has stated in his cross-examination that his statement was recorded by the Police at the time of visit of Police to his *Dhaba* with the appellant. He has admitted that he was not aware about the person, who had parked the motorcycle in front of his *Dhaba*. In our view, this fact stated by P.W.8 – Satendra Patel would reflect upon his credibility. We may mention that if the Police wanted to plant him as a witness then the Police could have made him to make a statement that he saw the appellant while parking the motorcycle in front of his *Dhaba*.

60. The learned Advocate submitted that the conduct of this witness not informing the Police for 15 days about unclaimed motorcycle is not consistent with the conduct of the person of the ordinary prudence. It is to be noted that number of persons visit Dhaba with their two wheeler or four wheeler vehicles. The flow of the customers at Dhaba is continuous. Therefore, failure on the part of P.W.8 – Satendra Patel to inform the Police cannot be said to be unusual conduct. P.W.8 – Satendra Patel removed the motorcycle which was parked in front of *Dhaba* and kept it on the other side of Dhaba. This fact would indicate that his conduct is natural and consistent. It shows that when he found that nobody came to claim the motorcycle which was in locked condition, he removed it from the said place and kept it aside so as to avoid obstruction in front side of *Dhaba*. The evidence of P.W.8 – Satendra Patel which is otherwise credible cannot be discarded for the reasons put forth by the learned Advocate for the appellant. On minute scrutiny and appreciation of his evidence, we find that his evidence is natural. The evidence of P.W.8 – Satendra Patel is also corroborated by the statement of the appellant which led to the discovery of the said motorcycle. This fact would reflect upon the exclusive knowledge of the appellant about the places where the motorcycle was kept by him after commission of the crime.

61. P.W.12 – Mohammad Firoz Ansari is a *panch* witness to the memorandum and discovery *panchanama*. In his evidence, he has deposed that the appellant in his presence as well as in presence of another *panch* made a statement that he would point out the places

visited by him as well as the motorcycle from the place where it was parked by him. The evidence of P.W.12 – Mohammad Firoz Ansari would show that from Nagpur to *Dhaba* of P.W.8 – Satendra Patel, the appellant had shown all the places visited by him for one reason or the other while proceeding towards the spot of the incident. P.W.12 – Mohammad Firoz Ansari has deposed about those places. In our view, the evidence of P.W.12 – Mohammad Firoz Ansari and the evidence of other witnesses from those places prove beyond doubt that the visit to those places was within the exclusive knowledge of the appellant. This fact, in our view, would reflect on the conduct of the appellant. The conduct of the appellant supported by oral and documentary evidence fully corroborates this vital circumstance. As far as discovery of the motorcycle is concerned, P.W.12 – Mohammad Firoz Ansari has deposed that the appellant made a statement in their presence that he would point out the place where he had parked the motorcycle. He has categorically deposed that after pointing out the spot of the incident, the appellant led them to a hotel/*Dhaba* and pointed out that he had parked the motorcycle at the said hotel/*Dhaba*. P.W.8 – Satendra Patel confirmed that the motorcycle was parked in front of his hotel and he kept the said motorcycle behind the Hotel. The appellant pointed out the said motorcycle. Exhibit 65 is the memorandum *panchanama*. Exhibit 66 is the discovery *panchanama*. P.W.12 – Mohammad Firoz Ansari has categorically stated that the appellant pointed out the said motorcycle in their presence and the same was taken in custody by the Police. The description of the motorcycle has been mentioned in discovery *panchanama*.

62. The evidence of P.W.12 – Mohammad Firoz Ansari is assailed on the ground that he is relative of P.W.3 – Mohd. Iliyas and, therefore, to support the case of the prosecution, he has made a false statement before the Court. In other words, it is the case of the appellant that P.W.12 - Mohammad Firoz is the interested witness and, therefore, he has made a statement to support the case of the prosecution. It is submitted that on this ground, his evidence needs to be discarded. In order to appreciate the submission, we have minutely perused his cross-examination. Efforts have been made in the cross-examination by asking pointed questions touching all the aspects deposed by him, with the sole object to discredit him. A perusal of the probing cross-examination would show that not a single statement or admission has been elicited to discard the evidence of the witness and probablise the defence of the appellant. P.W. 12 – Mohammad Firoz Ansari has answered all the questions put to him in the cross-examination.

63. The evidence of the witness who is a relative of P.W.3 – Mohd. Iliyas cannot be discarded on that ground, if it is found to be credible on minute scrutiny. The evidence on minute scrutiny has passed the test of credibility. Besides, the evidence of P.W.8 – Satendra Patel, P.W.12- Mohammad Firoz Ansari and the Investigating Officer P.W.22 – Budhan Sawant, P.I is consistent. On the basis of the evidence of P.W.12 – Mohammad Firoz Ansari and P.W.22 – Budhan Sawant, the prosecution has successfully proved that the appellant led the Police and *panch* witnesses to the place where the motorcycle was parked and pointed out the said motorcycle. It is pertinent to

note that after parking the motorcycle at the said place, the appellant absconded. It is nobody's case that till the motorcycle was discovered at the instance of the appellant, P.W.3 – Mohd. Iliyas, who is the owner of the motorcycle had access to the said motorcycle. In the normal circumstances, considering the distance between Nagpur and Dhaba, where the motorcycle was parked, the Police have had no reason to go to the said place. In the given situation, keeping in mind the facts brought on record and particularly, the precaution taken by the appellant to eliminate the victim children at a distance of about 300 to 330 k.m from Nagpur, the appellant would be the only person having knowledge of the place where the motorcycle was kept.

64. It is true that *Dhaba* is open or accessible place to others. It is submitted that the discovery of motorcycle from the open and accessible place to others cannot be made use against the appellant. In our view, the submission cannot be accepted in view of the proved facts as well as on the basis of settled legal position. In the case of **State of Himachal Pradesh Vs. Jeet Singh**,⁷, the Apex Court has held that there is nothing in section 27 of the Evidence Act which indicates that the statement of the accused would be inadmissible in evidence if the recovery of the article is made from any place which is “open or accessible to others”. The Apex Court has further held that it is a fallacious notion that when recovery of any incriminating article is made from a place which is open or accessible to others, the same would vitiate the evidence under section 27 of the Evidence

7. AIR 1999 Supreme Court, 1293

Act. In our view, this proposition would squarely apply to this case. Evidence of the witnesses and the conduct of the appellant does not permit us to keep aside such an important evidence. The fact of discovery of motorcycle at the instance of the appellant corroborates the circumstances relied upon by the prosecution to establish guilt of the appellant.

65. The prosecution has placed strong reliance on the call detail record of mobile of the appellant, P.W.3 – Mohammad Iliyas and P.W. No.2 – Mohammad Sajjad Mohammad Hasim Ansari. This evidence is sought to be relied upon as a corroborative piece of evidence. According to the prosecution, the accused made phone calls to P.W.3 – Mohd. Iliyas and to P.W. 2 – Mohd. Ansari from his mobile No.8446971690. Mobile No.9665754614, at the relevant time, was with P.W.3 – Mohd. Iliyas. According to P.W. No.2 – Mohd. Ansari, his mobile number is 8446971013. On the basis of the call detail record of the above three mobile numbers, presence of the appellant at Nagpur on 27th November, 2015 is sought to be established. Similarly, his location is also sought to be established to corroborate the case of the prosecution about his presence at Nagpur and in the State of Maharashtra on 27th November, 2015 and his location/presence in the State of Madhya Pradesh on 28th November, 2015. P.W.3 – Mohd. Iliyas has deposed that on 26th November, 2015, the accused made a phone call to him and informed him that he would come to Nagpur on 27th November, 2015. He made a phone call to him from his mobile number 8446971690 and made a

request to provide him his motorcycle. It is his case that on 27th November, 2015, on multiple occasions, the appellant called him from his above number.

66. P.W.26 – Milind Kolwadkar, is the Nodal Officer from Bhartiya Airtel Limited. He has produced and proved documents of the holder of mobile No.9665754614 and 9589319248. According to him, mobile number 9589319248 was issued to *Pannalal Sonuprasad* and mobile number 9665754614 was issued to Mohammad Liyas Mohammad Yusuf Ansari. P.W. 3-Mohd. Iliyas has deposed that he was using the mobile number 9665754614. There is hardly any dispute about this fact. Exhibit 170 is the call detail record of this mobile number. It shows that on 27th November, 2015, the appellant made call from his mobile number 8446971690 on mobile number 9665754614 of P.W.3 – Mohd. Iliyas at 13:15:03 hours and 14:22:12 hours. This documentary evidence in the form of call detail record corroborates the evidence of P.W.3 – Mohd. Iliyas that on 27th November, 2015, the appellant contacted him.

67. P.W. 31 – Dhananjay Dattatray Yadav is a Nodal Officer with Tata Tele Service Limited. He has been examined to prove the location of phone No.8446971690 on 27th November, 2015 and contact made by the appellant from his mobile number with P.W.2 – Mohd. Ansari on his mobile number 8446971013. P.W. No.31 – Dhananjay Yadav has deposed that both these numbers stand in the name of the accused/appellant. The evidence produced on record

clearly indicates that during this period, the mobile number 8446971013 was with P.W.2 – Mohd. Ansari. This fact has been established on the basis of the call detail record at Exhibit 209. A perusal of the evidence of P.W. 29 – Sachin Shinde, Nodal Officer with Idea Cellular Limited proves that on 7th December, 2015 at 12:39:51 hours call was made from mobile number 8873092969 on mobile number 8446971013. The holder of mobile number 8873092969 is Mohammad Taha Mohammad Savir from the State of Bihar.

68. It is the case of the prosecution that after commission of crime, the appellant fled to Bihar and made a phone call from this number to P.W.2 – Mohd. Ansari on his mobile number 8446971013. The documentary evidence fully corroborates this case of the prosecution. It has further come on record in the evidence of P.W. 31 – Dhananjay Yadav that IMEI numbers of both mobile numbers i.e mobile number 8446871013 and 8446971690 are different. He has categorically stated that these mobile numbers were operated from two different handsets – apparatus. P.W.31 – Dhananjay Yadav has produced the call details and location of the said numbers from 25th November, 2015 and 27th November, 2015. Call detail record would show that on 27th November, 2015, P.W.2 – Mohd. Ansari and the appellant-accused talked with each other twice. It further shows that on 27th November, 2015 at about 16:31:23 hours, location of mobile number 8446971690 was Nagpur in Maharashtra. It is the case of the prosecution that thereafter this mobile phone was switched off. It is further case of the prosecution that from Nagpur, appellant took

the children in Madhya Pradesh and thrown them in *Vainganga* river. Location of mobile number 8446971690 at 06:46:23 hours on 28th November, 2015 to 06:48:37 hours was in Madhya Pradesh. This documentary evidence, if considered in the backdrop of the defence of the appellant, clearly indicates that on 28th November, 2015, the appellant was in the State of Madhya Pradesh. In our view, this evidence corroborates the circumstances and particularly the circumstances of victim children being seen together with the appellant – accused before their death.

69. In this case, as stated earlier, test identification parade was not conducted. In the case of *Roni Alwaris (supra)* it is held that the evidence of test identification parade can be used as corroborative piece of evidence and not substantive evidence. The evidence of the witnesses identifying the accused in the Court is a substantive evidence and the same can be relied upon without conducting test identification parade at the stage of investigation provided the same is found to be credible and reliable. In this case, the witnesses who have deposed about the victim children having seen in the company of the appellant are reliable. On appreciation of their evidence, we are fully satisfied that they are not got up or tutored witnesses. The Investigating Officer came to know about these witnesses on the basis of clue provided by the appellant during the course of interrogation. The witnesses who have seen the victim children in the company of the appellant with the motorcycle have specifically stated the reason for identifying the appellant during the course of investigation as well as at the time of their evidence in the Court.

The witnesses as can be seen from the evidence interacted and dealt with the appellant for considerable time ranging from 5-8 minutes. In our view, therefore, the evidence of independent witnesses on the last seen theory cannot be discarded merely because of the mistake committed by the Investigating Officer in not holding test identification parade. Close and minute scrutiny of the evidence of these witnesses leaves no manner of doubt about their creditworthiness. The discovery of motorcycle at Dhaba of PW-8 which is at a distance of 20-25 kms from the spot of the incident i.e Vainganga river is another important circumstance to lend assurance to the other oral and documentary evidence.

70. As stated above, the subsequent and previous conduct of the appellant in this case cannot be overlooked. The Appellant obtained the custody of the children from P.W. 4 – Sahajahan Khatun Mohammad Iliyas Ansari in a fraudulent manner. He took children on the motorcycle with assurance that he would take them to Tajbag *Dargah*. It has been proved that as promised, on the way the appellant took the children to the *Dargah*. In our view this conduct of the appellant would have instilled confidence in the mind of children. The children would have believed and trusted the appellant. It is defence of the appellant that the children ran away from the petrol pump. This defence of the appellant is not probable for two reasons. Firstly, the distance between Nagpur and petrol pump at Kanan is 18-20 kms. It has come on record that the distance between Nagpur and spot at Vainganga river is about 300-

330 kms. It, therefore, goes without saying that children would not have walked such distance within 10-12 hours. In all probabilities, if the children had ran away from the petrol pump, they would have come back to their house. Secondly, if the children had ran away as stated by the appellant then he would have followed the children and if his attempts had been unsuccessful he would have immediately contacted the parents of the children. Considering the fact that the appellant is relative of the P.W.3 – Mohd. Ilyas, he would have returned back with the motorcycle to his house. Appellant, in all probabilities, would have joined P.W.3 – Mohd. Ilyas in the search of the children. The appellant neither went back to the house of P.W.3 – Mohd. Ilyas nor returned the motorcycle to P.W.3 – Mohd. Ilyas. In our view, such conduct of the appellant proved on the basis of his admission as well as on the basis of evidence makes his defence highly improbable.

71. The appellant after this incident absconded. On 27th November, 2015 at about 16:31:23 hours his location was in the State of Maharashtra and on the next date i.e. 28th November, 2015 his location from 6.46.23 to 6.48.37 was in the State of Madhya Pradesh. The evidence fully corroborates the case of prosecution that the appellant on 28th November, 2015 was in the State of Maharashtra. The spot of incident which is river bed of Vainganga river is near Chhapara, Madhya Pradesh. The appellant was expected to contact the informant if the children had gone missing. Even if it is assumed that when the children fled from his custody he got scared

and did not go back to the house of the informant, in our opinion he was expected to make a phone call to the informant. He went to Bihar. He was arrested on 8th December, 2015 from the place known as Begusarai in the State of Bihar. So from 28th November, 2015 to 8th December, 2015, the appellant was absconding. He did not disclose his whereabouts to P.W.3 – Mohd. Iliyas, which in the ordinary circumstances he was expected to disclose. In our view, this conduct of the appellant makes his defence highly improbable.

72. Besides, witnesses who have deposed about the last seen theory of the prosecution were not known to the informant as well as to the investigating officer. The appellant during the course of interrogation provided clues and details of the places visited by him and the persons to whom he met on the way. The evidence about these places and the witnesses has been found believable. The conduct of the appellant in this regard corroborated by contemporaneous material does not leave any manner of doubt in our mind about the last seen theory of the victim children in the company of the appellant.

73. Learned Advocate for the appellant relied upon a decision in the case of **Ankush s/o Laxmanrao Nikhade Vs. State of Maharashtra**,⁸ and submitted that the evidence of the witnesses on the point of last scene theory cannot be accepted. It is submitted that the evidence of these witnesses is not natural. In this case, the

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pan shop owner who had lastly seen the deceased with the accused, gave the information about it after one month when the Police made an inquiry with him. He had not given such an information to the father of the deceased when father made an inquiry with the said witness at his pan shop in the process of search for the deceased. In our opinion, the decision is not applicable to the facts in this case. There was no delay on the part of the concerned witnesses in the case at hand. Evidence of the witnesses has been found reliable.

74. Learned Advocate while commenting upon the conduct of the victim children submitted that in all probabilities the children would have raised doubt about the appellant and objected to accompany him. It is submitted that the prosecution has failed to prove the behaviour of the victim children on record. In our view, the submission cannot be accepted in view of the above evidence as well as on the basis of proved and admitted facts. It is apparent on the face of record that minor victim children with the fond hope of offering prayer at Tajbag Dargah accompanied the appellant on being satisfied that the father and mother accorded their consent for the same. It is not the defence of the accused put to any of the witnesses that the victim children were matured enough to take a decision in such critical situation on their own. The appellant was carrying motorcycle of the father of children. This fact would have assured the victim children that they were safe in the custody of the appellant. The appellant took them to Tajbag Dargah for offering prayer. The appellant took them to a shop where they had snacks.

In our view this proved fact is sufficient to conclude that this conduct of appellant would have instilled confidence in the mind of victim children about the appellant and after leaving Nagpur city and its outskirts the children had no other option than to accompany the appellant. If the children had ran away from the custody of appellant as stated by him then in all probabilities they would not have traveled such a long distance from Nagpur. In all probabilities, they would have been found within the local limits of Nagpur city. It has come on record that before sunset on 27th November, 2015, the appellant had not crossed the Maharashtra border to go to the spot. It is pertinent to note that after sunset the children would have been totally dependent on the appellant. As long as the appellant was driving the motorcycle of their father, they were bound to feel safe.

75. In the ordinary circumstances, the children would not have gone to the river where their dead bodies were found. The only possible inference in the fact situation is that the conduct of the appellant created confidence in the mind of the children that they were safe in his custody and therefore they accompanied him and second possible inference is that after sunset either the appellant would have threatened the children or the children would not have felt safe to leave the company of the appellant. In our view, the conduct of children, therefore, cannot be said to be unnatural and as such unacceptable. Children were seen in the company of the appellant lastly at 1.30 to 2.00 a.m. of 28th November, 2015. The whereabouts of the children were not known till dead bodies were found floating in Vainganga river. In the above backdrop, it was not

possible for the children to think to leave the company of the appellant. It was not possible for the victim children to join the company of any other person or a stranger. The probable timing of death stated by P.W.15-Dr. Dewashish Banerjee and P.W.25 – Dr. Neha Pateria and the victim children having been last seen in the company of the Appellant at about 1.30 to 2.00 a.m. on 28th November, 2015, in our opinion, in the teeth of other circumstances cannot make the defence of the appellant probable. The appellant, in view of the above evidence, ought to have placed on record proper explanation about the facts within his exclusive knowledge. The motorcycle which was used by the appellant to carry children was found at *Dhaba* of PW-8 – Satendra Patil on 12th December, 2015. It is nobody's case that till this period P.W.3 – Mohd. Iliyas, who is the owner of the motorcycle was having custody of the motorcycle. In our view, the proved and the admitted facts and circumstances without any doubt lead to the conclusion of guilt of the appellant.

76. We have considered in the aforesaid part of the judgment, the important circumstances relied on by the prosecution and the evidence led by the prosecution to prove the same. There is no direct evidence about actual murder of the victim children. There is no direct evidence to establish whether they were murdered before throwing them in the water or they were thrown in the water alive. In order to prove the chain of circumstances, the prosecution has relied on evidence of two medical Officers who had conducted the postmortem of dead body of the victim boy and the victim girl. The evidence of the Medical Officer would be relevant to record a finding

as to the nature of death i.e homicidal, suicidal, accidental or natural. The nature of death in this case, in our opinion, would certainly have a very vital bearing and relevance to fortify the circumstances relied on by the prosecution and also to demonstrate the conduct of the appellant. The dead bodies of the victim children were found in the water of river Vainganga. It is further pertinent to note that dead body of the victim boy was found on 29th November, 2015 and the dead body of the victim girl was found on 1st December, 2015. In this case, therefore, nature of death and the approximate time of death would be an important circumstance to complete the chain of the circumstances.

77. P.W.15 – Dr. Devashish Banerjee conducted the postmortem on the dead body of the victim boy on 29th November, 2015 at 12.00 noon. Postmortem report is at Exhibit 76. According to P.W.15 - Dr. Banerjee, cause of death was due to sudden cardio respiratory arrest due to Asphexia. Dr. Banerjee has stated that on the basis of internal examination of the organs of the dead body, he opined the cause of death. P.W.15 - Dr. Banerjee has stated that he did not find injuries over the dead body on external examination. On internal examination of the body, he has stated that the right and left lungs were congested and frothy. Left heart was empty and right heart was full of blood. Partly digested food was present in stomach. Large intestine was empty. He found that the liver and spleen and both the kidneys were congested. He has stated that Asphexia may be due to smothering, throttling, hanging and drowning, snake bite or due to

organic disease like heart attack etc. P.W. 15 - Dr. Banerjee had preserved femur bone for the purpose of conducting diatom test. In this case, Investigating Officer has not produced on record report of diatom test. This fact would clearly indicate that diatom test was not conducted. P.W. 15 -Dr. Banerjee has stated that Diatom test is carried out to ascertain whether the death has occurred before or after drowning. He has stated that in this case considering the symptoms noticed by him on internal examination, death might not have been caused due to throttling or hanging. In order to rule out the possibility of death due to drowning, he has categorically stated that in case of drowning by act of suicide, accidental or forcibly throwing by someone there would be storage of water in abdomen and some particles may be present in stomach and lungs. He has, therefore, opined that there might be possibility of death due to smothering and after death, dead body might have been thrown in water. He has stated that death might have been occurred within 48 hours before postmortem.

78. In the cross-examination, he has admitted that he has not mentioned in the postmortem report whether death was homicidal, accidental or suicidal. In our opinion, the finding as to nature of death has to be recorded on the basis of the result of internal and external examination of the dead body and the other direct or circumstantial evidence. Based on the findings of external and internal examination, Medical Officer is supposed to record opinion as to the cause of death. The death due to Asphexia may occur even

if it is homicidal, accidental or suicidal. Therefore, in our opinion, failure to mention this fact would not be fatal to the prosecution. The fact, on appreciation of the evidence of P.W.15 – Dr. Devashish Banerjee, remains that his opinion as to cause of death has not been shattered. Even if diatoms test has been conducted, the same would have provided the best evidence as to whether death was due to drowning in the river or elsewhere. In this case, on the basis of the absence of water and mud particles in the stomach and the lungs, P.W.15 – Dr. Devashish Banerjee has opined that death was not due to drowning. In our opinion, therefore, opinion of P.W.15 – Dr. Devashish Banerjee as to cause of death namely “Due to sudden Cardio Respiratory arrest due to Asphexia”, can not be discarded. P.W.15 – Dr. Devashish Banerjee identified the clothes found on the dead body and the sandal. Description of the clothes has been mentioned in the postmortem report. Postmortem report would show that bluish and greenish colour shirt with checks, bluish colour pant and a pair of *chappal* were on the dead body. P.W. 15 – Dr. Devashish Banerjee found a chocolate inside the pant pocket. Right ferum bone was preserved by P.W.15 – Dr. Devashish Banerjee. It has come on record that in further part of the investigation, those articles were brought to Nagpur. The articles found were identical by the witnesses examined by the prosecution.

79. P.W.25 – Dr. Neha Pateria conducted the postmortem of the dead body of the victim girl on 1st December, 2015 at about 2.00 p.m. The dead body as per the case of the prosecution was found in

the riverbed of Vainganga river on 1st December, 2015. P.W. 25 – Dr. Neha Pateria has deposed that on external examination of the dead body, she found that dead body was highly decomposed. She noticed clotted blood at superior aspect of vagina. She found anti-mortem hyperemic mark above the crecoid prominence in the antero lateral aspect of neck. She has stated that on internal examination, she found that all the chambers were decomposed. There was no water in stomach. She has deposed that all the internal parts of the body were decomposed. All the chambers of heart were empty and decomposed. She preserved one femur bone of right side for diatom test. She has deposed that she preserved small yellow coloured ear ring, green coloured oval shape plastic ear ringh, green kurti and pink salwar found on the dead body. She handed over the articles to Police Constable Gopal Uikey attached to Chapra Police Station. As far as the clotted blood injury found on the superior aspect of vagina is concerned, she has opined that it was ante mortem injury. She has further deposed that hyperemic mark above the crecoid prominence in the antero lateral aspect of neck was ante mortem. According to her, this injury could be caused due to throttling, due to partial strangulation. She has deposed that the injury could be due to partial strangulation inasmuch as the mark was found over anterior and lateral aspect of neck bilaterally and the same mark was present up to angle of mandible. She has categorically deposed that in case of hanging ligature mark may be present on anterior and lateral aspect of neck bilaterally and such mark will be present up to angle of madible. She has deposed that absence of injury on posterior aspect

of neck will rule out the possibility of hanging.

80. On the aspect of death due to drowning either accidental or suicidal, she has stated that presence of water and mud particles in the stomach and lungs must be found at the time of postmortem. She has stated that in this case, she did not find presence of water and mud particles in the stomach and lung of the victim girl. She has stated that even if a dead body is thrown in water flow, mud particles and water would not be found in the lungs and stomach. She has specifically stated that absence of mud particles and water particles in the stomach and lungs of the deceased clearly indicate that the dead body was thrown in the water. She has stated that in order to get confirmation to this opinion, she had suggested diatoms test. She has deposed that she could not give a definite opinion about cause of death since dead body was fully decomposed. She has deposed that time passed after death till postmortem was 72 years. Postmortem report is at Exhibit 161. At the time of evidence, she identified the clothes, articles and photographs of the dead body. Clothes and other articles have also been identified by other witnesses. The description of the clothes found on the person of the deceased at the time of the postmortem matches with the description provided by other witnesses.

81. This witness has been thoroughly cross-examined. She has admitted that she has not specifically mentioned in the postmortem report that the injuries found on the dead body could be possible by

throttling and partial strangulation. She has stated that she has not mentioned in the postmortem report that in case of hanging, there might be injuries on posterior aspect of neck. She has specifically stated in the cross-examination that since there was no injury on posterior-superior aspect of neck, there was no possibility of strangulation. It is to be noted that this answer given by the witness could not make the evidence doubtful inasmuch as she has specifically mentioned injuries found on the dead body. We have to bear in mind that P.W.25 – Dr. Neha Pateria is an expert witness. The expert witness on the basis of the injuries found on the dead body can come to the conclusion as to the nature of injuries being either ante mortem or postmortem and cause of death. It may be mentioned that while explaining and elaborating the injuries found on the dead body, the witness can make a statement in the evidence about the difference of the injuries due to throttling or strangulation or hanging.

82. P.W.25 – Dr. Neha Pateria has stated that if she had mentioned all these facts in the report then the same would have been negative finding. She has further stated that she has not specifically mentioned the cause of injuries in the postmortem report because she was not asked about it by the Investigating Officer. It is seen that P.W.25- Dr. Neha Pateria has not given opinion as to the cause of death. However, on the basis of the injuries found on the dead body on external examination and the absence of water and mud particles in the stomach and lungs, she has given a categorical

opinion that death was due to throttling or due to partial strangulation. The symptoms noticed by P.W.25 – Dr. Neha Pateria on internal examination of the dead body would clearly indicate that dead body was thrown in the water and, therefore, water and mud particles were not found in the stomach and lung. The evidence of P.W. 25 – Dr. Neha Pateria is sufficient to conclude that death was not due to drowning. It clearly proves that the victim girl was murdered and dead body was thrown in the water.

83. In our opinion, evidence of P.W.15 – Dr. Dewashish Banerje and P.W.25 – Dr. Neha Pateria clearly indicates that the victim children after killing were thrown in the water. As stated above, diatoms test was not conducted. In our opinion, even in the absence of diatoms test, the opinion recorded by P.W.15 – Dr. Devashish Banerjee and P.W.25 – Dr. Neha Pateria would be sufficient to rule out the possibility of accidental or suicidal death. Evidence of other witnesses would be relevant to come to a conclusion as to the nature of death. As stated earlier, opinion as to the cause of death is recorded by the Medical Officer on the basis of internal and external examination of the dead body. P.W.25 – Dr. Nehta Pateria has categorically stated that the injuries found on the dead body of the victim girl were ante mortem. Considering the opinion as to the cause of death recorded by P.W.15 – Dr. Devashish Banerjee as regards death of the victim boy and cause of death deposed to by P.W.25 – Dr. Neha Pateria on the basis of the injuries found on the dead body of the victim girl, we have no doubt that both the children were killed before throwing them in the water. The evidence of the

Medical Officers and the evidence of other witnesses if read in juxtaposition would clearly indicate that both children were murdered before they were thrown in Vainganga river. We have already considered the other circumstances on the basis of the oral evidence.

84. The Medical Officers have recorded the probable time gap from death till the postmortem. Time from death till postmortem of the victim boy as stated by P.W.15 – Dr. Devashish Banerjee might be 48 hours. In case of the victim girl time might be probably of 72 hours. Learned Advocate on the basis of this time gap submitted that both the children would have died at 12.00 noon of 28th November, 2015. On the basis of this time gap, a submission was made that there is no evidence to explain or prove that the victim children and the appellant were together from 2.00 a.m to 12.00 noon of 28th November, 2015. In our opinion, this submission cannot be given much weightage inasmuch as time gap mentioned is probable. It is not the exact time. It is to be noted that dead bodies were decomposed. Similarly, there is no cross-examination of the Medical Officers on this aspect. No suggestion has been given to the Medical Officers to make the defence of the appellant probable. The circumstance of the victim children found last seen in the company of the appellant on 28th November, 2015 at 1.30 to 2.00 a.m has been fully established. It is to be noted that the probable time gap stated by the Medical Officers could not be the ground to accept the submission. In this case, what is required to be seen is the proximity

of time between the fact of the victim children being last seen in the company of the appellant and the probable time of death. In this case, by applying any standard and particularly the fact that the appellant has not offered any explanation about the custody of the children, this aspect could not go against the case of the prosecution and weigh in favour of the appellant. In the context of this aspect, it is necessary to mention that the motorcycle used by the appellant to carry the children was discovered at the instance of the appellant at Amit Dhaba of P.W.8 – Satendra Patel in the proximity of the spot of the incident. Conduct of the appellant as discussed above, if read in juxtaposition with the above stated facts and evidence, would show that it was the appellant who committed murder of the children and thrown them in the river with an intention to take revenge against father of the victim children.

CONCLUSION

85. The prosecution on the basis of the oral and documentary evidence has proved the motive for the commission of crime by the appellant. The prosecution has proved that the victim children were last seen in the company of the appellant before their death. The evidence of the witnesses who have deposed on the last seen theory is cogent and concrete. Their substantive evidence in the absence of the Test Identification Parade on being tested on the anvil of a credibility has successfully passed the test of credibility. Recovery of motorcycle has been proved at the instance of the appellant. Previous and subsequent conduct of the appellant has not been properly explained by the appellant. His previous and subsequent

conduct is consistent with the conclusion of his complicity of commission of crime. The oral evidence has been fully corroborated by the contemporaneous documentary evidence. The evidence of two medical officers proves beyond doubt that the death of victim children was not due to drowning. The chain of the evidence is complete to conclude that it does not leave any reasonable ground for conclusion consistent with the innocence of the accused. The chain in all human possibility show that murder of two victim children was committed by the appellant. In our opinion, the evidence on record fully satisfy the paramount conditions set out in the decision of **Sharad Sarda** (supra). On re-appreciation of the evidence, we are satisfied that the prosecution has proved the guilt of the appellant beyond doubt. In the facts and circumstances, therefore, the judgment and order passed by the learned trial Judge does not warrant interference except concurrent running of life sentences.

86. Learned Advocate pointed out that the learned Judge ordered sentences of life imprisonment for the murder of Noorain and for the murder of Akbari Khatun to run concurrently. In the submission of the learned Advocate it is not permissible. The learned A.P.P while countering this submission stated that considering the brutal and the grotesque crime committed by the appellant, the learned Judge was right in directing the sentence to run consecutive. We have given thoughtful consideration to the submission. On the subject, we could lay our hands to the judgment of the constitution

bench of the Hon'ble Supreme Court of India in the case of **Mathuramalingam and others Vs. State represented by Inspector of Police**,⁹ . The question that fell for consideration of the constitution Bench of the Apex Court was whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial? The Constitution Bench of the hon'ble Apex Court has held that multiple term sentences and/or multiple sentences of life imprisonment may be imposed when a person is convicted of several offences at one trial. It is held that if multiple sentences are awarded and none of them being life imprisonment then the sentences would run consecutively, unless directed otherwise by the Court. It is held that if multiple sentences are awarded some being terms sentences and one sentence of life imprisonment, then sentences can be directed to run consecutively by specifying that prisoner shall undergo term sentences) first and then life sentence. But, converse thereof cannot be directed. It is held that if multiple sentences of life imprisonment only are awarded, the same cannot be directed to run consecutively. They can only run concurrently. In law they stand superimposed on each other. It is held that if multiple sentences are awarded some being term sentences and multiple sentences of life imprisonment, then sentences can be directed to run consecutively by specifying that prisoner shall undergo term sentences first and then one life sentence which would be a superimposition of all life sentences, all such life sentences running concurrently. Again converse thereof cannot be directed. It is further held that when it is a case of multiple sentences

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of life imprisonment and they stand superimposed on each other to run concurrently then in case prisoner is granted benefit of remission or commutation *qua* one such sentence, the benefit of such remission would not *ipso facto* extend to the other sentences. While elaborating logic behind this, the Hon'ble Supreme Court has observed that logic behind life sentences not running consecutively lies in the fact that imprisonment for life is a sentence for the remainder of the life of the offender unless of course the remaining sentence is commuted or remitted by the competent authority. That being so, section 31 of the Cr. P.C must be so interpreted as to be consistent with the basic tenet that a life sentence requires the prisoner to spend the rest of his life in prison. Any direction that requires the offender to undergo imprisonment for life twice over would be anomalous and irrational, for, it will disregard the fact that humans, like all other living beings have but one life to live.

87. The learned Special Judge awarded two life sentences to the appellant. The learned Special Judge ordered two life sentences under section 302 I.P.C for the murder of Akbari Khatun and for the murder of Noorain to run consecutively. In our considered opinion, in view of the principle culled out from the decision in the case of **Mathuramalingam and others** (supra), two sentences of life imprisonment cannot be ordered to run consecutively but the same must run concurrently. In our view, therefore, this part of the orders needs to be modified. We find that there is no substance in the appeal. The submissions advanced by the learned Advocate for the

appellant, for the reasons recorded above on all the counts cannot be sustained. The appeal, therefore, deserves to be dismissed with modification as to running of the life sentences. The appeal is dismissed. It is ordered that two life sentences awarded shall run concurrently.

88. Appeal stands disposed of.

[G.A. SANAP, J.]

[V.M. DESHPANDE, J.]