2024:KER:69873

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR
&
THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

FRIDAY, THE 13TH DAY OF SEPTEMBER 2024 / 22ND BHADRA, 1946

DSR NO.3 OF 2018

CRIME NO.702/2013 OF CHOTTANIKKARA POLICE STATION, ERNAKULAM ARISING OUT OF THE JUDGMENT DATED 15.01.2018 IN SC NO.597/2015 OF ADDITIONAL DISTRICT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN), ERNAKULAM

COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE C.I OF POLICE, CHOTTANIKKARA POLICE STATION.

BY ADV PUBLIC PROSECUTOR S.AMBIKADEVI

ACCUSED:

1 **RAJITH**
AGED 29/13, S/O.NADESAN, KONNAMPARAMBIL HOUSE, MAR PAKWAVASE MOUNT BHAGOM, MEEMBARA KARA, AIKARANADU SOUTH VILLAGE.

2 **RANI**
AGED 24/13, W/O.VINOD, ALUNKAL HOUSE ATHANI BHAGOM, MARANGATTULLI KARA THIRUVANIYOOR VILLAGE, NOW RESIDING AT RENTED HOUSE OF MANI, VAZHAKKALAYIL VEETTIL, AMBADIMALA BHAGOM, KANAYANOOR VILLAGE

3 **BASIL.K.BABU**
AGED 19/13, S/O.BABU, KURIKKATTIL HOUSE NEAR NADUKURISU, MARANGATTULLI KARA THIRUVANIYOOR VILLAGE

THIS DEATH SENTENCE REFERENCE HAVING BEEN FINALLY HEARD ON 21.08.2024, ALONG WITH CRL.A.NO.90/2018 AND CONNECTED CASES, THE COURT ON 13.09.2024 DELIVERED THE FOLLOWING:

2024:KER:69873

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR
&
THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

FRIDAY, THE 13TH DAY OF SEPTEMBER 2024 / 22ND BHADRA, 1946

CRL.A NO.90 OF 2018
CRIME NO.702/2013 OF CHOTTANIKKARA POLICE STATION, ERNAKULAM

ARISING OUT OF THE JUDGMENT DATED 15.01.2018 IN SC NO.597/2015 OF ADDITIONAL DISTRICT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN), ERNAKULAM

APPELLANT/ACCUSED NO.1:

RAJITH
S/O.NADESAN, KONNAMPARAMBIL HOUSE, MAR PAKWAVASE MOUNT BHAGOM, MEEMBARA KARA, AIKARNADU SOUTH VILLAGE, ERNAKULAM DISTRICT.

BY ADVS.
SRI.BABU S. NAIR
SMT.PRIYADA R MENON
SRI.P.A.RAJESH
SMT.SMITHA BABU
SRI.SURESH SUKUMAR PISHARADY
SMT.SHAMSEERA. C.ASHRAF

RESPONDENT/STATE:

THE STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA, ERNAKULAM, KOCHI-682031,FOR THE CIRCLE INSPECTOR OF POLICE, CHOTTANIKKARA POLICE STATION, ERNAKULAM DISTRICT.

BY ADV SMT.AMBIKA DEVI S, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21.08.2024, ALONG WITH DSR.3/2018 AND CONNECTED CASES, THE COURT ON 13.09.2024 DELIVERED THE FOLLOWING:

2024:KER:69873

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR
&
THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

FRIDAY, THE 13TH DAY OF SEPTEMBER 2024 / 22ND BHADRA, 1946

CRL.A NO.492 OF 2018

CRIME NO.702/2013 OF CHOTTANIKKARA POLICE STATION, ERNAKULAM

ARISING OUT OF THE JUDGMENT DATED 15.01.2018 IN SC NO.597/2015 OF ADDITIONAL DISTRICT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN), ERNAKULAM

APPELLANT/ACCUSED NO.2:

RANI
W/O.VINOD, ALUNKAL HOUSE,ATHANI BHAGOM, MARANGATTULLI KARA,THIRUVANIYOOR VILLAGE,NOW RESIDING AT RENTED HOUSE OF MANI,VAZHAKKALAYIL VEETTIL, AMBADIMALA BHAGOM,KANAYANOOR VILLAGE, ERNAKULAM DISTRICT.

BY ADVS.
SRI.C.ANILKUMAR (KALLESSERIL)
SRI.C.C.ANOOP
SRI.P.S.SREE PRASAD

RESPONDENT/STATE:

THE STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,HIGH COURT OF KERALA,ERNAKULAM, KOCHI, PIN - 682 031
FOR THE CIRCLE INSPECTOR OF POLICE,CHOTTANIKKARA POLICE STATION,ERNAKULAM DISTRICT.

BY ADV SMT.AMBIKA DEVI S, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21.08.2024, ALONG WITH DSR.3/2018 AND CONNECTED CASES, THE COURT ON 13.09.2024 DELIVERED THE FOLLOWING:

2024:KER:69873

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR
&
THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

FRIDAY, THE 13TH DAY OF SEPTEMBER 2024 / 22ND BHADRA, 1946

CRL.A NO.748 OF 2018

CRIME NO.702/2013 OF CHOTTANIKKARA POLICE STATION, ERNAKULAM

ARISING OUT OF THE JUDGMENT DATED 15.01.2018 IN SC NO.597/2015 OF ADDITIONAL DISTRICT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN), ERNAKULAM

APPELLANT/3RD ACCUSED:

BASIL.K.BABU
AGED 24 YRS, S/O. BABU, KURIKKATTIL HOUSE,
NEAR NADUKURISU, MARANGATTULLI KARA,
THIRUVANIYOOR VILLAGE.

BY ADV SRI.K.V.SABU

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,ERNAKULAM.

BY ADV SMT.AMBIKA DEVI S, SPECIAL PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21.08.2024, ALONG WITH DSR.3/2018 AND CONNECTED CASES, THE COURT ON 13.09.2024 DELIVERED THE FOLLOWING:

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JUDGMENT

Dated this the 13th day of September, 2024

Syam Kumar V.M., J.

These Criminal Appeals and Death Sentence Reference arise from the judgment of the Additional District & Sessions Judge, Ernakulam in Sessions Case No.597 of 2015. Appellants are the 1st, 2nd, and 3rd accused in the said Sessions Case. They were charged with committing offences under Sections 120B (1), 302 and 201 read with 120 B of the Indian Penal Code. A1 was additionally charged under Section 9 (l) (m) r/w 10 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') while A2 was further charged under Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'JJ Act'). The Sessions Judge found all the accused guilty and convicted them. A1 was sentenced to death and A2 and A3 were sentenced to undergo rigorous imprisonment for life. Separate sentences of imprisonment and fine were also imposed on all the above accused for the other offences they were convicted for.

Prosecution case:

2. On 30.10.2013, at around 3.30 P.M., the body of X, the four-year-old daughter of A2, was exhumed from the property of PW10 at Kadayikkavalavu where she lay buried in a pit around 6 feet deep. X,

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who was an LKG student of MDMLP School, Karingachira was last seen alive on 29.10.2013, at around 3.30 P.M., when she was dropped off by her school van at Ambadimala bus stop, near Chottanikkara, after school. She had been picked up from the bus stop on a bike by A3 who was her mother's friend. X had a very short and difficult life. Soon after the birth of her younger sister, her parents got estranged and her mother (A2) returned to her parental house and started residing there with her daughters. PW1, the father of A2 then arranged a job for her at the Kolenchery Medical Mission Hospital as a security cum attender. While working there, A2 got acquainted with A3 who was also working in the same hospital as a security guard. A3 in turn introduced A2 to A1 who was too employed as a security guard in the same hospital. Not long thereafter, the three decided to have a queer arrangement amongst themselves. A1 took a house on rent and A2 shifted to the said house along with X and started residing there. A3 too joined them in the said house at some point and they all started residing together. To the outside world, A1 had put forth A2 as his wife and A3 as his wife’s brother. The trio along with X kept shifting their residence from place to place mostly because the respective landlords and at times the local populace, started protesting to their way of life which was alleged to be immoral and verging on sex work. Finally, around 15 days before the death of X, we find them all living in a portion of the house at Ambadimala owned by PW2 as elaborated in Ext.P4 scene mahazar. A1

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had as usual taken the portion of the said house on rent from PW2 vide Ext.P3 rent agreement to which A3 had signed as a witness. X had been enrolled at MDMLP School and in the mornings, she would be taken to the bus stop by her mother (A2) to board the school van. After her classes, she would be dropped back at the same stop in the school van wherefrom, she would be taken home either by A1 or at times by A3. The younger sister of X continued to remain with her maternal grandparents viz., PW1 and his wife, at Puthrika which is not far away from Chottanikkara. Around 15 days after thus commencing the stay at Ambadimala on 30.10.2013, at around 7.00 A.M., A2 called her mother over the telephone in a panic and informed her that X was missing from the evening of 29.10.2013. PW1 instructed A2 to approach the Chottanikkara Police Station. By the time PW1 and his wife reached the Police Station, A2 had already reached the station and was seen writing down a complaint. The SI of Police (PW 35) had some suspicion regarding the statements of A2 and questioned her in detail. Based on the same, rather than registering a man missing case based on her complaint, PW 35, convinced during his inquiry that the missing complaint is only a charade to mislead the police, registered a crime, viz., Crime No.702 of 2013 of Chottanikkara Police Station based on the FI Statement (Ext.P1) tendered by PW1. Exts.P1 and P1 (a) (FIR) were thus registered at 10.00 A.M. on 30.10.2013. In the said crime, A1, A2, and A3 were arrayed as the accused accusing them of conspiring and

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committing the murder of X and disposing of her body to cause the disappearance of evidence. Commission of other offences including those under the POCSO Act and the JJ Act were recorded in the FIR. As per the Final Report submitted by the police, the motive that led A1 to A3 to conspire and cause the murder of X was that X was proving to be an obstacle to the life of A1 and A2 who though not married, wanted to continue living together under the garb of a married couple, so as to facilitate the alleged avocation of A2 as a sex worker.

The Investigation:

3. Pursuant to Ext.P1 FI statement of PW1, A2 was questioned by PW35, the Sub Inspector of Police at the Chottanikkara Police Station. A2 confessed to the crime and the involvement of A1 and A3. In furtherance thereof, A1 and A3 were also apprehended and based on their disclosure statement, the body of X was unearthed from the property of PW 10 at Kadayikkavalavu at around 3.30 P.M. on 30.10.2013. This dichotomy of recovery of the body at 3.30 P.M., much later in the day after the FIR had already registered at 10.00 A.M., narrating the intricate details of the crime and even assigning the charges will prove to be a rallying point for the defence later during trial and hearing.

Proceedings before the Trial Court:

4. On completion of the investigation, the charge sheet was laid before the Addl. District Sessions Court, Ernakulam, being the

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designated court for the trial of cases relating to atrocities and sexual violence against women and children. It was taken on file as S.C.No.597 of 2015 and was tried by the same court. After the summoning and appearance of the accused, charges were framed and read over to them. The accused pleaded not guilty and therefore proceeded to trial.

5. On the side of the prosecution, PWs 1 to 37 were examined, and Exts.P1 to P49 were marked. MOs 1 to 13 were identified. After prosecution evidence, the accused were examined under Section 313(1)(b) of the Cr.P.C. to which they denied the incriminating evidence. After a hearing under Section 232 Cr. P.C., the accused were called upon to enter their defence. No witnesses were cited, nor any document marked, on behalf of the defence. At the conclusion of the trial, the parties were heard through their counsel, including on the aspect of sentencing. A memo was submitted by A2, as an additional statement under Section 313 of Cr.P.C. Thereafter, the impugned judgment was passed by the trial court.

Details of conviction and sentence by the trial court:

6. The conviction and sentence imposed on the various accused in the impugned judgment, read as follows:

> *"The Ist accused is sentenced to undergo rigorous imprisonment for life and to pay a fine of ₹ 50,000/- (Rupees Fifty Thousand only) u/s 120B(1) of IPC. In default of payment of fine amount, he shall undergo rigorous imprisonment for another period of one year. He is also sentenced to undergo rigorous imprisonment for 7 (seven) years and to pay a fine of 25,000/- (Rupees Twenty five thousand only) u/s 201 r/w 120B of IPC. In default of*

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payment of fine amount, he shall undergo rigorous imprisonment for another period of six months. He is also sentenced to undergo rigorous imprisonment for 7 (seven) years and to pay a fine of 25,000/- (Rupees Twenty five thousand only) u/s 9(m) r/w 10 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. In default of payment of fine amount, he shall undergo rigorous imprisonment for another period of six months. He is also sentenced to be hanged by neck till he is dead and to pay a fine of 50,000/- (Rupees Fifty thousand only) u/s 302 r/w 120B of IPC. In default of payment of fine amount, he shall undergo rigorous imprisonment for another period of one year. The substantive sentence of imprisonment shall run concurrently. Set off allowed.

The accused A-2 is sentenced to undergo rigorous imprisonment for life and to pay a fine of 50,000/- (Rupees Fifty thousand only) u/s 120B(1) of IPC. In default of payment of fine amount, she shall undergo rigorous imprisonment for another period of one year. She is also sentenced to undergo rigorous imprisonment for 7 (seven) years and to pay a fine of 25,000/- (Rupees Twenty five thousand only) u/s 201 r/w 120B of IPC. In default of payment of fine amount, she shall undergo rigorous imprisonment for another period of six months. She is also sentenced to undergo rigorous imprisonment for life and to pay a fine of 50,000/- (Rupees Fifty thousand only) u/s.302 r/w 120B of IPC. In default of payment of fine amount, she shall undergo rigorous imprisonment for another period of one year. She is also sentenced to undergo rigorous imprisonment for 6 (six) moths u/s.23 of the Juvenile Justice (Care and Protection of Children) Act, 2000. The substantive sentence of imprisonment shall run concurrently. Set off allowed.

The accused A-3 is sentenced to undergo rigorous imprisonment for life and to pay a fine of 50,000/-(Rupees Fifty thousand only) u/s.120B (1) of IPC. In default of payment of fine amount, he shall undergo rigorous imprisonment for another period of one year. He is sentenced to undergo rigorous imprisonment for 5 (five) years and to pay a fine of 25,000/- (Rupees Twenty five thousand only) u/s.201 r/w 120B of IPC. In default of payment of fine amount, he shall undergo rigorous imprisonment for another period of six months. He is also sentenced to undergo rigorous imprisonment for life and to pay a fine of 50,000/- (Rupees Fifty thousand only) u/s.302 r/w 120B of IPC. In default of payment of fine amount, he shall undergo rigorous imprisonment for another period of one year. The substantive sentence of imprisonment shall run concurrently. Set off allowed."

The trial court has referred the death sentence imposed on A1 to this

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Court for confirmation, as envisaged under Section 366 of the Cr.P.C.

Submissions before us:

7. We have heard the learned Counsel Sri.Babu S.Nair on behalf A1, Sri.Anil Kumar on behalf of A2 and Sri.K.V.Sabu on behalf of A3 and the learned Special Public Prosecutor Smt.Ambika Devi on behalf of the State.

8. ***Summary of the contentions of the Appellants:***

- Death of X was not a homicide. An accidental death has been projected as one of sexual exploitation and murder by the police with oblique motives.
- As revealed by the anti-timing of the FIR, the police case is concocted and unreliable. Right from the time the FI statement was tendered and the FIR was lodged, the police had indulged in manipulation and fabrication of evidence.
- The purported motive put forth by the prosecution for A1 to A3 to cause the death of X is quixotic and illogical. The prosecution story that A1 to A3 had conspired and caused the death of X so as to facilitate A1 and A2 to live together as a husband and wife and thus to enable A2 to pursue her life as sex worker, is unbelievable and revolting to common sense.
- The purported motive is devoid of any logical basis since X had all along been living with A1 to A3 without causing any trouble to the alleged wayward life of A2. Further, X had a younger sister who

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was already living with the parents of A2. PW1 had deposed that he had asked A2 to leave X with him and his wife to be taken care of along with her younger sister who was already under their foster care. If X was found to be a liability, A2 could have simply handed over her to her father as requested by him and there was no need to cause her death as alleged. This simple logic was overlooked by the trial court.

- The missing complaint preferred by A2 before the Chottanikkara Police Station in the morning of 30.10.2013 was suppressed from the trial court. In the said complaint, A2 reported that X had been missing from the house at Ambadimala since the evening of 29.10.2013. The same was reiterated by A2 while she was examined under Section 313 Cr.P.C. and had filed a statement pointing out the same.
- In Exts.P1 and P1 (a), FI statement and FIR, respectively, recorded by PW35 (SI of police), it has been stated that the information about the crime was received in the Police Station at 10 A.M. on 30.10.2013 vide the statement of PW1 (the father of A2) who had come to the Police Station accompanied by A2. However, the said FIR was despatched to the court only at 11 A.M. on 30.10.2013.
- On 30.10.2013, at 10.00 A.M., when Ext.P1(a) FIR was registered, all that could have been revealed was as contained in the

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statement of A2 who had come to register a man missing complaint since X had been missing since the evening of 29.10.2013. Nothing even remotely pointing towards the death of X was discernable at that time. However, PW35 had purportedly based on a hunch, recorded Exts.P1 and P1(a) at 10.00 A.M. arraying A1, A2 and A3 as accused charging them under Sections 302, 34, 120B of IPC as well as for offences under the POCSO Act and the JJ Act. Exts.P1 and P1 (a) viz., the FIS and FIR respectively are anti-dated, shrouded in suspicion and unreliable. The prosecution is also guilty of concealing the missing complaint/ the first FIR from the court and hence an adverse inference deserves to be drawn against the prosecution (On behalf of A1, reliance is placed on **Ramesh Baburao Devaskar and others v. State of Maharashtra** [(2007)13 SCC 501], **Ravindra Alias Ravi Bansi Gohar v. State of Maharashtra** [(1998) 6 SCC 609], **Arjun Marik v. State of Bihar** (1994 ICO 77), **Dharam Singh and others v. State of Punjab** [(1993) Supp (3) SCC 532]; **Allarakha Habib Memon Etc. v. State of Gujarat** (2024 SC OnLine SC 1910)]

- That the FIR has been anti-timed, is established from the fact that even though the body of X had not been recovered and A1 and A3 had not been apprehended or questioned at the time of lodging Exts. P1 and P 1 (a), it contained graphic details of the murder of

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X and had arraigned the accused for offences under Sections 302, 34, 120B of IPC as well as for offences under the POCSO and the JJ Act.

- Though the bedrock of the prosecution case is the alleged criminal conspiracy between A1 to A3, no evidence to prove such conspiracy between A1 to A3 thus to attract a charge under Section 120B IPC has been proved by the prosecution in evidence. Since the charge under Section 120B has not been substantiated, the charges under Sections 302 and 201 IPC cannot be attributed against each of the accused, especially against A2 against whom no overt act has been alleged even by the prosecution.
- No evidence to incriminate A1 for the commission of offences u/s 120B(1) of IPC, Sections 302, 201 r/w. 120B of IPC and u/s 9(l)(m) r/w 10 of the POCSO Act has been tendered. A1 has never been seen with X at any point of time prior to her going missing on 29.10.2013. There is no reliable proof regarding the presence of A1 at the scene of occurrence. His culpability in the entire episode has not been proved by any tenable evidence. No article of A1 has been seized from the house except for a shirt which he himself had handed over to the police and the same tested by FSL has not revealed any blood stain or incriminating evidence.
- A1 has been implicated in the crime solely based on the sketchy evidence presented by the mobile phone call location data, CDR

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details and the statements of neighbours PW3 and PW5.

- The case put forth by the prosecution based on mobile phone data and CDR details is not legally reliable. PW32 (Nodal Officer) has admitted in his deposition that the average coverage area of a mobile tower is 3 km aerial distance and that Ext. P33 call details do not disclose the exact location tower of the mobile phone. This discredits the entire story of criminal conspiracy put forth by the prosecution solely based on mobile phone call details
- The deposition of PW3, stating that he had seen A1 and A3 talking near the well at 7:30 P.M. on 29.10.2013, is unsubstantiated and in its very nature improbable. The prosecution has not pointed out any source of light, so as to enable PW 3 to identify A1 and A3 from a distance after dusk. No Test Identification parade had been conducted to identify A1 and A3 who had only recently shifted resident to the neighbourhood of PW3. Hence identity of A1 and A3 has not been proved beyond reasonable doubt and the deposition of PW3 in the said respect is legally unreliable. [On behalf of A1, reliance is placed on the dictum in **Noorahammad and others v. State of Karnataka** [(2016) 3 SCC 325]; **State of Uttarpradesh v. Ashok Kumar and another** (1979) 3 SCC 1; **State of Rajasthan v. Bhola Singh and another** (1993 ICO 401), **Ashoksinh Jayendrasinh v. State of Gujarat** [(2019) 6 SCC 535)]; **Bollavaram Pedda Narsi Reddy and others v.**

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State of Andhra Pradesh [(1991) 3 SCC 434]; **Ankush Maruti Shinde and others v. State of Maharashtra** (AIR 2019 SC 1457). **Tamil Selvan v. State** (2008) 7 SCC 755; **State of UP v. Hardeo and others** (1993 Supp (1) SCC 473); **Arokia Thomas v. State of Tamil Nadu** (2006) 10 SCC 542)].

- Reliance placed on the evidence of PW8 (declared hostile) that he had on the early morning hours of 30.10.2013 seen A1 coming with the JCB from the site at Kadayikkavalavu to the main road is unreliable and cannot be used to implicate A1.
- The purported recovery based on the disclosure statement of A1 in Ext.P17 (inquest report) and Ext.P17(a), which is the relevant portion of the statement of A1, are not sustainable in law and hence cannot be relied upon to fix the culpability of the accused. Admittedly, the statement does not reveal the place where the body is buried nor the authorship of concealment. The absence of panchnama and independent witnesses discredit the reliance placed on Ext.P17 (a), which at the most shows that A1 is aware of the place of burial. Such knowledge by itself is insufficient to attract mandates of Section 27 as against A1. (On behalf of A1 reliance is placed on the dictum laid down in **Subramanya v. State of Karnataka** (AIR 2022 SC 5110) ; **Pohalya Motya Valvi v. State of Maharashtra** [(1980) 1 SCC 530)].
- No evidence to prove the direct involvement of A2 in the alleged

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criminal conspiracy or in the act of murdering X or in destroying the evidence has even been alleged by the prosecution. Her involvement has been attempted to be substantiated solely on the basis of mobile phone location and CDR details of her mobile numbers and from the self-same details of the mobile numbers of A1 and PW4. The said evidence is imprecise, not legally reliable, and insufficient to fix the culpability of A2 regarding the charges levelled against her.

- No reliable evidence has been tendered to substantiate the charges against A3. Chance fingerprints of A3 found on MO 1 glass recovered from the place of occurrence and Ext.P27 report and the deposition of PW29 and PW30 are not sufficient to fix culpability upon him. His presence at the place of occurrence on 29.10.2013 even if established by said evidence, does not incriminate him of the offences charged. The deposition of PW6 that he had seen A3 pick up X from the bus stop on his bike when she was dropped off by the school van does not by itself meet the mandates to mulct him with the presumptions under the last seen together theory. The statement of PW8 that he had seen A3 following the JCB driven by A1 from Kadayikkavalavu to the main road at 4.30- 5.00 am on 30.10.2013 is unreliable since PW8 has not stated that he had seen A3 and also since PW8 was declared hostile.

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- A3 has sufficiently explained out his burden, if any, based on the last seen together theory. [On behalf of A3, reliance is placed on **Dinesh Kumar v. State of Haryana** (2023 SCC OnLine SC 564), **Nanhi Devi and another v. State of UP** (2023 Crl.L.J. 250)]
- A3 is not a party to the alleged conspiracy and no legally sustainable evidence has been put forth to prove a conspiracy. An agreement between A1 to A3 to do the unlawful act has not been proved by the prosecution. (On behalf of A3 reliance is placed on the decisions reported in **Maghavendra Pratap Singh alias Pankaj Singh v. State of Chhattisgarh** (2023 SCC OnLine SC 486), **State of Maharashtra v. Damu, S/o Gopinath Shinde and others** (2000 SCC OnLine SC 842), **Parveen @ Sonu v. State of Haryana** (2021 SCC OnLine SC 1184) **K.Velu v. State** (2015 SCC OnLine Mad 13893)]
- The death of X by homicide has not been proven by the prosecution. PW19's (Assistant Professor of Forensic Medicine) testimony is not conclusive and does not rule out that the injuries reported in Ext.P19 postmortem certificate cannot be caused by an accidental fall.
- Ext.P45, the seizure mahazar of the rent agreement (Ext. P3), is dated 18.02.2014. Ext. P3, the rent agreement, is thus under a cloud of suspicion. The prosecution has not validly explained the delay in producing the same. Similarly Ext. P40 arrest memo does

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not state the time of arrest. This assumes relevance in the context of ante-timing of the FIR,

- There are no occurrence witnesses to the case and the prosecution story relies solely on circumstantial evidence. The prosecution has not met the onus to prove that the chain of circumstances is complete, so as to meet the *panchseel* mandate as laid down in **Sharad Birdhichand Sarda v. State of Maharashtra** [(1984) 4 SCC 116; (On behalf of A1 reliance is also placed on the dictum laid down in **Sattatiya alias Satish Rajanna Kartalla v. State of Maharashtra** (AIR 2008 SC 1184) ; **Satish Nirankari v. State of Rajasthan** [(2017) 8 SCC 497]; **Roop Singh @ Rupa v. State of Punjab** [(2008) 11 SCC 79]; **Tomaso Bruno and another v. State of Uttar Pradesh** [(2015) 7 SCC 178]
- Capital punishment imposed on A1 is illegal and unsustainable. None of the essential mandates to be satisfied before proceeding to impose a death sentence in a case solely based on circumstantial evidence has been met. The settled law on the point as laid down by the decisions of the Supreme Court has not even engaged the attention of the trial judge and the death sentence was imposed mechanically and with no valid application of mind. (Reliance is placed on **Bachan Singh v. State of Punjab** [(1980) 2 SCC 684], **Machhi Singh and others v. State of**

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Punjab [(1983) 3 SCC 470]; **Swamy Shraddananda (2) v. State of Karnataka** [(2008) 13 SCC 767]**; Ramnaresh and others v. State of Chhattisgarh** (2012) 4 SCC 257**; Rajendra Pralhadrao Wasnik v. State of Maharashtra** [(2019) 12 SCC 460]; **Shankar Kisanrao Khade v. State of Maharashtra** [(2013) 5 SCC 546] **; Rajesh Kumar v. State through Government of NCT of Delhi** [(2011)13 SCC 706]**; Manoj and others v. State of Madhya Pradesh** (2023) 2 SCC 353**; Union of India v. Sriharan @ Murugan and others** [(2016) 7 SCC 1]; **Shiva Kumar @ Shiva @ Shivamurthy v. State of Karnataka** [(2023) 9 SCC 817)].

9. ***Summary of the contentions of the prosecution:***

- Evidence tendered by the prosecution conclusively proves the culpability of A1 to A3. The cumulative effect of the chain of circumstances proved, unerringly points to the guilt of the accused in causing the death of X and burying her body to conceal evidence of crime.
- Death of X was a homicide and not an accident. Homicidal death has been convincingly proved by the statement of PW 19 (Assistant Professor of Forensic Medicine). The statement of PW 19 that the pattern of injury on the body of X would show that they were not caused by an accidental fall is clear and specific. The grave injuries found all over the body of the child demonstrate that it cannot be simultaneously sustained by a fall. Homicide

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stands proved by the deposition of PW19 and from the injuries elaborated in Ext. P19 postmortem report. (Reliance is placed on the dictum in **State of West Bengal v. Mir Mohammed Omar and others** (2000 KHC 1735).

- The presence of human blood on the wall of the hall room of the house at Ambadimala, where A1 to A3 last resided along with X and the blood found on the door and floor points to the said house described in Ext.P4 scene mahazar as the place of occurrence of the crime. The said House was taken on rent by A1 vide Ext. P3 rent agreement to which A3 had affixed his signature as witness.
- The presence of A1 and A3 at the said house during the time of occurrence and that A2 joined them there subsequent to the death of X stand proved from the mobile phone location and CDR details produced.
- A3 had picked up the child from the school bus stop in the evening of 29.10.2013. This has been deposed by PW6 driver of the school van. That X was last seen alive with A3 is validly proved by the said evidence of PW6. The fact that within a short period of 2 ½ hours after X was thus picked up by A3, who had died and her body was exhumed from a plot in Kadayikkavalavu is also reliably proved. A3 has not given any explanation as to what had happened to X and how she had sustained grievous injuries found on her body during the autopsy. A3 has not given any explanation as to

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how her body was recovered from the plot at Kadayikkavalavu. A3 is bound to explain the same under Section 106 of the Indian Evidence Act, 1872. The absence of any explanation from A3 is an additional link in the chain of circumstances against him. Reliance is placed on the dictum laid down in **Trimukh Maroti Kirkan v. State of Maharashtra** [(2006) 10 SCC 681].

- The presence of A3 at the scene of occurrence viz., the house at Ambadimala where the homicidal death of X had occurred, stands proved from Ext. P27 report and from the deposition of PW 29 and PW 30. MO1 glass seized from the house had the fingerprints of A3 on it as per Ext.P27 report. Evidence tendered by PW30 (Testor Inspector, Fingerprint Bureau, Aluva) and PW29 (Fingerprint Expert, DCRB, Ernakulam Rural) proves that the chance prints collected from the glass match with the left index finger of A3. This reveals the presence of A3 at the place of occurrence.
- A1 and A3 buried X's body at Kadayikkavalavu in the early morning hours of 30.10.2013. PW 8 and PW 11 have deposed of the presence of A1 and A3 at Kadayikkavalavu. They stated that they had seen A3 on a bike following the JCB driven by A1 in the early hours of the morning of 30.10.2013 at Kadayikkavalavu.
- Although A1, A2, and A3 are not related to each other, the prosecution evidence adduced proves that they had been staying

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together along with X in various houses. Conspiracy as per Section 10 (A) of the Evidence Act stands proved by evidence tendered by the prosecution. (Reliance is placed on the dictum in **Ramachandran K.C. v. State of Kerala** (2024 KHC 126).

- The evidence of PWs 23, 24, and 25 proves that A1, A2, and A3 were residing together with X in different houses taken on rent by A1 from time to time, misrepresenting that A1 and A 2 are husband and wife, X is their daughter, and A3 is the brother of A 2. The essential immoral nature of the relationship between A1, A2, and A3 and their motive and conspiracy to murder X stand proved from the said deposition.
- The immoral life led by A2 has also been reliably proved from the deposition of PW 26 (though she was declared hostile). PW 26 was the security supervisor at the Kolencherry Medical Mission Hospital. A2 was working as a doorkeeper at the Casualty and ICU of the said hospital. A2 was terminated from service on 10.11.2012 on the allegation that many men used to come there enquiring about her. This substantiates the prosecution's case that A2 was a woman of immoral character.
- The evidence of PW 23 proves that he once noticed A2 and A3 indulging in obscene conversation and that made him suspicious of their purported relationship as brother and sister. On yet another occasion, PW23 had to call the residents of the locality

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when he saw a woman and a man inside the house wherein A1 to A3 resided on rent. The man was found hiding under the cot and the woman ran away. Since their conduct was not good, A1, A2, and A3 were evicted from the said rented house within 9 days of taking it on rent. This corroborates the prosecution's case that A2 and A3 were having an immoral relationship.

- The motive that led A1 to A3 to conspire and cause the murder of X was that X was proving to be an obstacle to the life of A1 and A2 who though not married wanted to continue living together under the garb of a married couple, so as to facilitate the alleged avocation of A2 as a sex worker. Motive has been satisfactorily proved by the prosecution through the deposition of PW1, PWs 23, 24, and 25. (Reliance is placed on the dictum in **State of Himachal Pradesh v. Jeet Singh** [(1999) 4 SCC 370]
- PW 24 has deposed that A1 to A 3 along with X had resided in her house on rent at the end of July 2013 for 2 ½ months. She has deposed that upon seeing A2 assaulting X and beating her on the head for refusing to eat food, she had confronted her and evicted them from the house. Testimony of PW 24 evidences that A2 was behaving cruelly towards X substantiating the prosecution case. The charges against A2 under the JJ Act achieve substantiation from this incident.
- PW 25 (though declared hostile) had deposed that A1 to A3 along

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with X had resided in his house on rent from 10.9.2013. He deposed that he had to demand them to vacate the house since quarrels between them were common and once police had to be called in as requested by A2. PW 25 had further deposed of an incident wherein X had fallen down from a bike and got injured. PW 25 has deposed that he harbored a doubt that X had been assaulted leading to the said injury. This substantiates the cruelty meted out by the accused towards X (Reliance is placed on the dictum laid down in **Mohammed Naushad v. State (Govt. NCT of Delhi)** (2023 KHC OnLine 6684).

- PW 18, the doctor had deposed that he had on 17.09.2013 treated X for injuries suffered by her purportedly from afall from the bike. He deposed that parents of the child had refused treatment and got her discharged at their request. He had issued Ext.P18 discharge summary stating the diagnosis as 'left temporal SAH'. A2 had signed Ext.P18 which evidences discharge against medical advice. This evidence put forth by the prosecution reveals the lack of concern and cruel attitude of A2 towards X.

- PW2 the owner of the house which is the scene of occurrence has deposed that house elaborated in Ext.P4 mahazar was rented out by him to A1 as per Ext.P3 rent agreement executed between PW 2 and A1 on 10.10.2013. A 3 was the attester to the said agreement. He has also deposed that the house has 2 portions.

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One portion was already let out to a Hindi teacher and the other portion was rented out to A1. PW2 has deposed that he had been to the house when A1 to A3 were residing there. He had on his visit seen A1 and A3 leaving the house in a red bike and had also seen A2 and a child in the same house. PW2 was also the attester to Ext. P4 scene mahazar prepared by the investigating officer and he had seen the seizure of MO 1 glass and MO 2 stick by the police. The evidence of PW2 would thus substantiate the prosecution case that A1 to A3 were staying together in the place of occurrence and that the red bike taken into custody by PW 36 is used by A1 and A3.

- A1 had as per his confessional statement soon after his arrest on 30.10.2013, led the investigating officer to the house of A2 which is the place of occurrence. This statement of A1 is admissible under Section 8 of the Evidence Act. (Reliance is placed on the decision in **Ismail v. State of Kerala** [2019 (3) KLT 1117].
- The statement of PW 28, the Scientific Assistant, DCRB, Ernakulam Rural, substantiates that on 30.10.2013, she had visited the scene along with the investigating officer and collected the blood stains from the door, the wall, and the floor. The cigarette stumps and the other incriminating items were handed over to the investigating officer as per Ext.P25 report, which substantiates the charges against the accused.

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- Evidence of stains collected from the hall room door and floor of the house where A1, A2 and A3 resided along with X were collected in A1's presence and he handed over his shirt worn on the day of occurrence from among the clothes found in the house to the investigating officer. The blood stains collected from the hall room of the house corroborate the prosecution case that the death of X had occurred at the house. Recovery of the shirt of A1 evidences that he was residing in the same house along with the other accused and X.
- The brown stains collected were sent to FSL, and as per Ext. P48, the FSL report states that the stains on the wall and the door were human blood and that on the floor was blood. The incident and the place of its occurrence stand substantiated by the said evidence tendered by the prosecution.
- MO12 red – orange colour big shopper bag recovered from the place of burial at Kadayikkavalavu upon FSL examination had revealed human blood (Ext.P48) proving that the same was used to carry the body of X.
- The soil samples collected from the motorcycle's mudguard on scientific analysis tallied with those collected from the plot at Kadayikkavalavu, from where the body of X was exhumed. This corroborates the testimony of PW8 and PW11 that in the early hours between 4.30 and 5.00 on 30.10.2013, A3 was seen riding the

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motorbike and following the JCB driven by A1 as it came down from Kadayikkavalavu towards the main road. This substantiates the conspiracy hatched between A1 and A3 in disposing of the dead body of X at Kadayikkavalavu.

- The repeated outgoing calls made by A1 to A2 in the early morning hours of 30.10.2013 which had been proved vide Exts. P29(b), P36 (b), P37(b) P38, P39 evidence the conspiracy between A1 and A2 that led to the murder of X at the hands of A1 on 29.10.2013.
- The allegation that the FIR had been anti-timed by the police is incorrect. Non-registering of an FIR upon receipt of a complaint of man missing under Section 57 of the Kerala Police Act is not illegal and does not amount to suppression of earlier information. Being only a man missing complaint and the same not being information regarding the commission of a cognizable offence to be registered under Section 154 Cr.P.C. and to be investigated under Sections 155 and 157 of the Cr. P.C., the same could have been registered only after conducting an enquiry contemplated under Section 57 of the Kerala Police Act.
- Merely for the technical reason that the SHO ought to have registered an FIR based on the purported man missing complaint, the entire investigation by the police cannot be thrown overboard. Ext. P1 (a) FIR cannot be treated as anti-timed as the details

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incorporated therein were provided by A2 upon being questioned by PW35. [Reliance is placed on the dictum laid down in **Muhammed Shiraz @ Shiraz v. State of Kerala** [2023 (3) KHC 517]; **Pappu v. State of Uttar Pradesh** (2022 KHC OnLine 6157); **State of West Bengal v. Mir Mohammed Omar and others** (2000 KHC 1735].

- Deposition of PW31 based on Exts.P29 call details and 31 decoded tower location that on 29.10.2013 from 21.3 hours till 15.2 hours on the next day, the tower location of A2 was at Chottanikkara substantiates the presence of A2 at the place of occurrence and her role in the conspiracy to murder X and bury the body at Kadayikkavalavu.
- The subscriber details and call details of the two mobile numbers used by A2 and Ext.P31 decoded cell IDs produced by PW31 who is the Nodal Officer of Bharti Airtel Ltd., Kerala Circle substantiates the prosecution case and corroborates the involvement of A2 in the conspiracy. (**Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and others** [(2020) 7 SCC 1)];
- The evidence of PW3 and PW4, who are the next-door neighbours of A1, A2 and A3 at Ambadimala, proves the presence of A1 and A3 talking to each other near the well at 7:30 P.M. on 29.10.2013. The presence of A3 at the place of occurrence from 8.21 P.M. on 29.10.2013 is proved by the fact that he had obtained the mobile

phone of PW 3 in which his mother's (PW 4's) SIM card was being used. A3 had at 8.21 pm on 29.10.2013 used the said phone to make a call to A 2. This stands proved by the evidence of PW3 and PW4 as well as from the call records of PW4 (Ext.P30 series) proved through PW31. A3s role in the conspiracy thus stands corroborated by the testimony of the said witnesses.

- The call details of the mobile phones of A1 and A2 (Ext. P29, P33) reveal that there were continuous calls between them on the evening of 29.10.2013 and in the early morning of 30.10.2013, i.e., at the time when X's death was caused at Ambadimala and the next day when X's body was buried at Kadayikkavalavu. This substantiates the charge of conspiracy among them. A 2 cannot hence contend that she was unaware of and not a party to the actions of A1 and A3. She was an active participant to the conspiracy at all stages.
- PW 5 husband of the Hindi teacher who is residing in the other portion of the same building let out to the accused, wherein A1, A2 and A 3 resided along with X deposed that at around 8:25 P.M., on 29.10.2013 he had seen A 2 searching for something in the compound of the house. He had also deposed that he saw A2 speaking to A1 and A3 inside the house. This substantiates the presence of A1, A2 and A3 at the place of occurrence during the relevant time and the sharing of thoughts between them. This

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testimony corroborates the conspiracy between the three accused.

- Recovery of the dead body of X from Kadayikkavalavu was effected per the confessional statement of A1 to PW 36 while in the custody of the police. This statement of A1 clearly implicates the accused. The confessional statement of the accused to PW36 investigating officer [Ext.P17 (a)] is valid and reliable. Discovery of the dead body effected pursuant to the said statement of A1 is thus admissible under Section 27 of the Evidence Act. PW17 who is a member of the Chottanikkara Panchayat has attested Ext.P17 inquest which was conducted from 4:00 P.M. to 6:00 P.M on 30.10.2013. [Reliance is placed on the dictum in **State of Maharashtra v. Suresh** (2000 KHC 904); **Dasan and others v. State of Kerala** (1986 KHC 153)]; **Ramachandran K.C. V. State of Kerala** (2024 KHC Online 126); **State of U.P. v. M.K. Anthony** (1985 KHC 542); **NCT of Delhi v. Sunil** (2001 KHC 37); **Perumal Raja @ Perumal v. State, Represented by Inspector of Police** (2024 KHC OnLine 6011).
- Disposal of the dead body of the child is a continuation of the conspiracy hatched between A1 to A3 and is not just the causing of the disappearance of evidence under Section 201 IPC. (Reliance is placed on the dictum in **Ajayan alias Baby v. State of Kerala** (2011 (1) KHC 1).
- A2 was leading a wayward life (if not sex work) and the evidence

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of PWs 23, 24, 25 and PW12 reveals the same. The deposition of PW7 stated of he over hearing the reply of A1 during a telephone call mentioning an amount of Rs.2500/- instead of Rs.1,500/- as charges for sexual favours rendered by a woman (purportedly A2) and terms the said conversation as *res gestae* under Section 6 of the Evidence Act and submits that the said conversation happened just a few weeks before the date of occurrence. This substantiates the prosecution version.

- The conviction of A2 for the charge laid under Section 23 of the JJ Act is valid and proper. Deposition of PW 15 and Exts.P14, P15 and P16 documents which include the admission register, attendance register and the application form produced substantiate the charge leading to the said conviction. Though A2 had sent the child to school, she had not taken care to see that she attends the school regularly. Relevant pages of the attendance register (Ext.P16 for 2012-13) substantiate the statement of PW 6 that the child was not regular in attendance. Statement of PW 6 that X used to come to the school crying and wearing shabby clothes also substantiates that A2 was negligent regarding the care of the child.
- Conviction of A1 under the POCSO Act is valid and sustainable. PW 19 doctor who conducted the post-mortem examination had noted that the vaginal walls and hymenal surface were reddened

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and oozed blood-stained fluid (Ext. P19). PW19 has not ruled out an attempt at penetrative sexual assault and he has denied the suggestion that redness could have been caused by insect bites.

Discussion and Conclusion:

10. Since the prosecution case hinges on circumstantial evidence which in turn is based on the 'last seen' theory as well as on the recovery affected based on disclosure statements of the accused, we deem it relevant to examine the law pertaining to the same before proceeding to examine the appreciation of evidence by the trial court.

Nature and evidence needed to prove the 'Last seen' theory:

11. 'Last seen' theory proposes that if a person is last seen with the victim before a crime and he has no credible explanation to offer, then there is a strong presumption that the person could be responsible for the crime committed upon the victim. The proposition of 'last seen' is thus essentially based on circumstantial evidence.

12. Last seen theory obtain its statutory backing from Section 7 of the Evidence Act, which lays down that any fact related to the occasion, cause, or effect of the thing that occurred or that provided an opportunity for its occurrence will be relevant if it contributed to the circumstances in which that thing occurred. This doctrine is also intricately linked to Section 106 of the Evidence Act, which mandates that *"when any fact is especially within the knowledge of any person, the burden of proving that fact lies upon him".* Similarly, the

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presumption of fact that follows from the last seen theory can also be located in Section 114 of the Evidence Act, which allows the court to assume the existence of certain facts in matters involving natural occurrences, human behaviour, and public and private business if the existence of other facts is established.

13. Doctrine of 'last seen' has been subjected to extensive scrutiny by the higher courts in India. The nature of proof with respect to the last sighting of the victim and the accused together, the time interval between such sighting and the revelation of the commission of the crime, the nature of the explanation offered by the accused, deductions to be drawn from the behaviour of the accused during and after such sighting, his fleeing or absconding etc. have been emphasized as ingredients which have crucial relevance when it comes to the reliability of the last seen together theory **[R.Sreenivasa v. State of Karnataka** [2023 SCC OnLine SC 1132], **Jabir and others v. State of Uttarakhand** [2023 SCC Online SC 32], **Ram Gopal S/o Mansharam v. State of Madhya Pradesh** (2023 SCC Online SC 158), **Shankar v. State of Maharashtra** [2023 SCC Online SC 268], **Boby V. State of Kerala** (2023 SCC Online SC50), **Chotkau v. State of Uttar Pradesh, [(2023) 6 SCC 742]; Surajdeo Mahto and another v. State of Bihar** [2021 SCC Online SC 542], **Digamber Vaishnav and another v. State of Chhattisgarh** [2019 SCC Online SC 316], **Satpal v. State of Haryana** [(2018) 6 SCC 610], **Nizam and another v. State of**

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Rajasthan [(2016) 1 SCC 550], **Rambraksh alias Jalim v. State of Chhattisgarh** [(2016) 12 SCC 251], **Krishnan alias Ramasamy and others v. State of Tamil Nadu** [(2014) SCC Online SC 509], **Kanhaiya Lal v State of Rajasthan** [(2014) 4 SCC 715], **Jaswant Gir v. State of Punjab** [2005 (12) SCC 438], **Bodhraj alias Bodha and others v. State of Jammu and Kashmir** [2003 SCC (Cri) 201] and **Arjun Marik and others v. State of Bihar** (1994) SCC (Cri.)1551**]**.

14. The broad principles governing 'last seen' theory, as deducible from the above-mentioned precedents are as follows:

- It is generally presumed to possess the nature of a secondary evidence.
- In absence of primary or direct evidence and eyewitnesses, its application could be tested subject to the facts and circumstances of the case.
- Merely because a circumstance exists to employ this theory, does not by itself lead to an inference that it is the accused who has committed the crime.
- 'Last seen' theory can be invoked only when the same stands proved beyond reasonable doubt. The burden on the accused would kick in, only when the 'last seen theory' is established.
- '*De recenti*' or 'recently', meaning the interval between the time when the deceased and the accused were last seen alive and in

company and the time when the former is found dead, must be so short that the chance of any person except the accused being the initiator of the crime, becomes impossible.

- When the time gap between the time when the deceased was seen last with the accused and the time of murder, is wide, then application of theory has to be with circumspection.
- Once the burden shifts and the accused is not able to put forth a credible explanation or fails to place any explanation, that would then provide an additional link in the chain of circumstances.
- In the absence of any other links in the chain of circumstantial evidence, it is not possible to convict the accused solely on the basis of the "last-seen" evidence, even if the version of the witness in this regard is believed.
- The last seen theory should be applied taking into account the case of the prosecution in its entirety. The factum of last seen must not be considered in isolation. The circumstances that preceded and followed from the point of the deceased being so last seen in the presence of the accused must also be taken note of.
- Once a reasonable inference can be drawn against the accused, then the onus shifts on to him to discharge the burden as envisaged in Section 106 of the Evidence Act.
- If the accused then offers no explanation, or furnishes a wrong

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explanation, absconds, motive is established, and there is corroborative evidence available *inter alia* in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, then conviction can be based on the same.

- Each case will have to be examined on its own facts for invocation of the doctrine of 'last seen'.
- It is a theory nested in circumstantial evidence. If there be any doubt or break in the link of the chain of circumstances, the benefit of doubt must go to the accused.

Thus as reiterated by the Supreme Court in the cases referred to above, "last seen" principle is a weak form of evidence that should be used with great circumspection and care. It cannot be the sole basis for conviction unless supplemented by other substantial evidence against the accused.

Circumstantial evidence and the *Panchsheel* mandates:

15. The essential conditions that must be fulfilled before an accused can be convicted in a case based solely on circumstantial evidence has been elaborated by the Supreme Court in the landmark case of **Sharad Birdhichand Sarda v. State of Maharashtra** [(1984) 4 SCC 116] as follows:

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

> *case against an accused can be said to be fully established:*
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033: 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]*
>
> > *"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
> *(3) the circumstances should be of a conclusive nature and tendency,*
> *(4) they should exclude every possible hypothesis except the one to be proved, and*
> *(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

The *Panchsheel* principles in ***Sarda's*** *case* have been approvingly reiterated by the Supreme Court later in **Pradeep Kumar v. State of Chhattisgarh** [2023) 5 SCC 350] and in **Ramanand @ Nandlal Bharti v. State of Uttar Pradesh** [(2022) SCC OnLine SC 1396].

16. The above precedents reveal that just as with 'last seen' theory, care and circumspection should be exhibited while proceeding to convict solely based on circumstantial evidence and compliance of the mandates as evolved in the cases discussed above, should be scrupulously confirmed. Thus when circumstantial evidence forms the

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basis of conviction, such evidence must consist of proof of collateral facts and circumstances from which existence of the main fact may be inferred according to reason and common experience.

Discovery - based on Disclosure statements:

17. While Sections 25 and 26 of the Evidence Act puts in restraints on the reception of confessional statements, Section 27 envisages a relaxation on the rigour in the said respect. Section 27 is thus founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer is tainted, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted in so far it distinctly relates to a fact thereby discovered. The statement which is thus admissible under Section 27 is the one which is the information leading to discovery.

18. In **Ravishankar Tandon v. State of Chhattisgarh** [(2024) SCC Online SC 526)], the Supreme Court has reiterated the dictum as laid down in **State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru** [(2005) 11 SCC 600] which succinctly laid down the law on the point as follows:

> *"121. The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any*

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> *element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused. As pointed out by the Privy Council in Kottaya case [AIR 1947 PC 67]*

It has thus been laid down by the Supreme Court in ***Tandon's*** *case* (supra) that :

> *"As such, for bringing the case under Section 27 of the Evidence Act, it will be necessary for the prosecution to establish that, based on the information given by the accused while in police custody, it had led to the discovery of the fact, which was distinctly within the knowledge of the maker of the said statement. It is only so much of the information as relates distinctly to the fact thereby discovered would be admissible."*

19. In **Subramanya v. State of Karnataka** [(2022) SCC OnLine SC 1400]. The Supreme Court has elucidated on the process, stages and procedure to be complied with while recording disclosure statements as well as the manner as to how it should be placed before a court by the prosecution. It reads as follows ;

> *"77. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of*

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> *them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.*
> *78. If, it is the say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."*

20. In **Ramanand @ Nandlal Bharti Vs. State of Uttar Pradesh** (supra), the Supreme Court discussing the reliability of recovery based on disclosure statements under Section 27 of the Evidence Act has reiterated the above principles.

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21. The Supreme Court in **Babu Sahebagouda Rudragoudar and others v. State of Karnataka** [2024 SCC OnLine SC 561] has further elaborated on the manner holding that the investigating officer should give a description of the conversation which had transpired between himself and the accused which was recorded in the disclosure statements. It was held that the disclosure statements cannot be read in evidence and if that is all what has been done by the prosecution, then the recoveries made in furtherance thereof are *non est* in the eyes of law. When the investigating officer steps into the witness box for proving such a disclosure statement, he would be required to narrate what the accused stated to him. The investigating officer essentially testifies about the conversation held between himself and the accused which has been taken down in writing leading to the discovery of incriminating fact(s).

22. Having thus reminded ourselves regarding the legal tenets relevant to the case at hand, we now proceed to examine the appreciation of evidence as well as the sustainability of the conviction and sentence arrived at by the learned Sessions Judge.

Motive and its substantiation:

23. As per the prosecution, motive that led the appellants to commit the crime was that 'X' who is the minor daughter of A2 from her former marriage, was proving to be an obstacle to the wayward and immoral life led by A2. She had been leading a life as a sex worker and

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had been living together with A1 and A3 accompanied by X, faking that A1 was her husband and A3 was her brother. X was proving to be an obstacle to this arrangement between A1 to A3 and hence they conspired and caused her death. Evidence relied on by the prosecution to substantiate motive is the testimonies of PW1, PW7, PW23, PW24, and PW26.

24. PW1 is the father of A2. He has deposed that he knew that A2 was living along with A1 and A3 in a house at Ambadimala. However, in court, he deposed that he had not given any statement to the police that the motive of murdering X was the desire of A2 to live with A1. He also refuted his purported statement to the police that X was murdered by A1 to A3 and that her body was buried somewhere. PW1 was declared hostile and was cross-examined to no avail. Thus the evidence of PW1 does not help the prosecution in proving the motive put forth. Coming to PW 23, who is the landlord of an earlier tenanted premises wherein the accused had earlier stayed together, he had deposed that while staying in his house, he had once overheard A2 and A3 indulging in obscene conversation and that made him suspicious of their purported relationship as brother and sister. On yet another occasion, PW23 had to call the residents of the locality when he saw a woman and a man inside the house rented out by him. The man was found hiding under the cot and the woman ran away. Since their conduct was not good, A1, A2, and A3 were evicted by PW23 from the said rented house

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within 9 days of letting it out to them on rent. The said testimony of PW 23 remains uncorroborated. Even if substantiated the said statement does not implicate any immoral behaviour on the part of A2. It cannot also be used to substantiate the alleged motive put forth by the prosecution. PW24 is yet another landlord of an earlier tenanted premises wherein the accused had earlier stayed together with X. She has deposed that A1 to A3 along with X had resided in her house on rent from the end of July 2013 for 2½ months and that once she had seen A2 assaulting X and beating her on the head for refusing to eat food. She had purportedly confronted A2 over this and later evicted them all from her house. This testimony of PW24 does not substantiate the alleged motive put forth by the prosecution. PW26, who is the security supervisor at Kolencherry Medical Mission Hospital, where A2 had worked as a doorkeeper at the Casualty and ICU, has deposed that A2 was terminated from service on 10.11.2012 on the allegation that many men used to come enquiring about her. The deposition of PW 7 stated that he overheard the reply of A1 during a telephone call mentioning an amount of Rs.2500/- instead of Rs.1,500/- as charges for sexual favours rendered by a woman in his custody (purportedly A2). Prosecution heavily relied on this testimony and has put forth the same as a substantiation of the contention that A2 was a woman of immoral character.

25. In **Habeeb Mohammad v. State of Hyderabad** (AIR 1954

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SC 51), Supreme Court referred to Section 53 of the Evidence Act which stipulates that in criminal proceedings, the fact that the person accused is of good character is relevant and through M.C. Mahajan J. has held as follows:

> *"In criminal proceedings a man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality. Many acts of an accused person would be suspicious or free from all suspicion when we come to know the character of the person by whom they are done. Even on the question of punishment an accused is allowed to prove general good character."*

Thus the assessment of character in criminal cases and the exercise of forming an opinion regarding the same is to be carried out strictly based on the evidence tendered regarding the same. This is an exercise that has to be carried out with great care and circumspection. A person's past or his or her general reputation cannot be the sole deciding factor for snatching away fundamental rights or tagging him or her as a criminal. The testimonies of the witnesses aforesaid viz., PW1, PW 7, PW 23, PW24, and PW26, neither individually nor collectively constitute legally reliable evidence to implicate A2 as a woman of immoral character. That A2 was leading the life of a sex worker has not been proved by the prosecution in a manner acceptable in law. Isolated and uncorroborated testimonies of individual witnesses cannot be relied on for a person as of immoral character. Hence the conclusions regarding A2 arrived at by the trial court in the judgment that *"She is a shame for entire womanhood."* and that *"She is not even entitled to be called as*

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mother." lacks any basis and were unwarranted in the facts an circumstances of the case. Further, the purported motive for the crime put forth against the appellants, especially against A2, flounders if we take note of the fact that X has a younger sister who was already living with the parents of A2, and even as per PW1, (A2's father) he and his wife (A2's mother) were clamoring for X also to be returned to them for fostering along with her younger sister. If A2 had perceived X as an obstacle to their frolic as alleged by the prosecution, all that she needed to do was to hand over X too to her parents, thus obviating the need for A2 to take care of X by diligently pursuing her education and welfare as she is reveled to have been doing all along even while shifting from one resident to other. This simple logical explanation which strikes the root of the purported motive put forth by the prosecution was lost to the trial court.

26. Factual evidence being so, it now assumes relevance to examine the imperativeness of proof of motive in a criminal trial. The legal position in this respect has been succinctly explained by the Supreme Court after a survey of the precedents on the point, in **Sheo Shankar Singh v. State of Jharkhand and another** [(2011) 3 SCC 654] as follows**:**

> *15. The legal position regarding proof of motive as an essential requirement for bringing home the guilt of the accused is fairly well settled by a long line of decisions of this Court. These decisions have made a clear distinction between cases where prosecution relies upon circumstantial evidence on the one hand and those where it relies upon the testimony of eye*

> *witnesses on the other. In the former category of cases proof of motive is given the importance it deserves, for proof of a motive itself constitutes a link in the chain of circumstances upon which the prosecution may rely. Proof of motive, however, recedes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence. That is because if the court upon a proper appraisal of the deposition of the eye-witnesses comes to the conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential. Conversely even if prosecution succeeds in establishing a strong motive for the commission of the offence, but the evidence of the eye-witnesses is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused. That does not, however, mean that proof of motive even in a case which rests on an eye-witness account does not lend strength to the prosecution case or fortify the court in its ultimate conclusion. Proof of motive in such a situation certainly helps the prosecution and supports the eye-witnesses. (See* ***Shivaji Genu Mohite v. The State of Maharashtra****, (1973) 3 SCC 219,* ***Hari Shanker*** *v.* ***State of U.P.*** *(1996) 9 SCC 40 and* ***State of Uttar Pradesh v. Kishanpal and Ors.*** *(2008) 16 SCC 73.)*

27. As per Section 8 of the Indian Evidence Act, motive is a relevant fact. It is one of the circumstances that would complete the chain of circumstances. However, it is trite law that the prosecution is not always bound to prove motive. In **Perumal Raja @ Perumal v. State represented by Inspector of Police** (2024 SCC OnLine SC 12), Supreme Court has held as follows:

> *"It is a settled principle of criminal jurisprudence that in a case based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. This Court in various decisions has laid down the principles holding that motive for commission of offence no doubt assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of offence is available. It is equally true that failure to prove motive in cases resting on circumstantial evidence is not fatal by*

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> *itself. However, it is also well settled and it is trite in law that absence of motive could be a missing link of incriminating circumstances, but once the prosecution has established the other incriminating circumstances to its entirety, absence of motive will not give any benefit to the accused."*

28. In the light of the above settled legal position, the evidence put forth including the testimonies of PW1, PW 23, PW24, and PW 26 does not prove that a motive to murder X existed in the appellants. It thus assumes relevance to examine whether the prosecution has established the other incriminating circumstances to its entirety, so as to lead to a premise where the absence of motive could augur well for the appellants. If other incriminating circumstances stand proved entirely, then, the mere absence of proof of motive may not be of any consequence.

Alleged Ante-timing of the FIR and its impact:

29. Ext.P1(a) (FIR) was registered at 10.00 A.M. on 30.10.2013 by PW 35 (SI of Police) at Chottanikkara Police Station. A1, A2 and A3 had been arrayed as accused therein and were charged under Secs. 302, 34 and 120B IPC as well as under POCSO Act and the JJ Act. The said FIR was registered based on the statement given by PW1 who had along with his daughter (A2) come to the Police Station in the morning of 30.10.2013 to register a complaint with respect to the missing of X from the evening of 29.10.2013. In furtherance of the purpose of her visit to the police station, A2 had purportedly written down a complaint about her missing daughter and handed over the same to PW35. However, the

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said complaint was not recorded or registered. PW 35 had, on the other hand, based on the statement of PW1 proceeded to register Ext.P1(a) arraying A2 as an accused along with A1 and A3 and registered a crime under as mentioned above. At the time when the FIR was registered, the whereabouts of X were unknown. Neither her death nor the manner in which it was caused had been known to PW1 or to the police. That the body of X had been buried and the place of such burial was also not known at the time of registering Ext.P1(a). The details of the crime and the manner in which it was alleged to have been committed were revealed only after the body of X was exhumed from the property of PW10 at Kadaikkavalavu at around 3.30 P.M. on the same day. This being the admitted fact, the contents of the FIR validly raise doubt and suspicion as to whether it had been ante-timed. Further, the fact that the FIR lodged at 10 A.M. on 30.10.2013, was despatched to the court only at 11 P.M. that day and that it reached the court only even later read along with the statement of PW1 that the body of X had already been recovered at the time of registering Ext. P1 adds to the suspicion. In his deposition, PW35, SHO who had registered the FIS and the FIR had attempted to explain the said discrepancies. He stated that though A2 had come to the Police Station to complain about her missing daughter, he felt *"something wrong"* in the statement of A2. At the time of registering the FIR, though he never knew that X had died, he was nevertheless convinced of the death of X as he had interacted with A2 in

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detail with her at the Police Station.

30. It is trite that an FIR must form the basis of the investigation and ought not to be the outcome of the investigation. It is also settled that an FIR cannot be lodged in a murder case after the inquest. Such an infirmity in the FIR will deepen the suspicion and cast a cloud on the credibility of the prosecution story.

31. We have hence closely scrutinized the materials on record to ascertain whether Ext.P1 (a) (FIR) was the result of consultations after learning about the exhuming of X's body later in the day and whether the witnesses could have just fallen in line with the story set up in Ext. P1 (a). The non-production of the complaint preferred by A2 at the Police Station and non-registration of an FIR based on the same are omissions on the part of the police and the prosecution. The contention that upon receipt of information about man missing, the SHO is only expected to conduct an inquiry during his action to locate the missing person and that Section 57 of the Kerala Police Act does not contemplate any investigation as provided in the code and that the essential responsibility of the SHO after registering the FIR under Section 57 of the Kerala Police Act is to locate the missing person put forth on the basis of the judgment reported in **Muhammed Shiraz @ Shiraz v. State of Kerala** (2023 (3) KHC 571) does not assist the prosecution in this case.

32. Be that as it may, though the graphic precision with which

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details were recorded by PW 35 in Ext. P1 and P 1 (a) raised a doubt that the said documents had been ante-timed, the statement of PW 35 that upon hearing the version of A2 he had a genuine doubt regarding her forthrightness which led him to interact with her in detail, cannot be brushed aside. Cross-examination of PW 35 on behalf of A2 has not brought forth anything material to substantiate contention of ante timing. He had not been cross-examined on behalf of A1 and A3. Thus except for the inferences and deductions drawn on the basis of the time of registration of the FIR and the exhuming of the body of X, no tangible material has been put forth to conclude that there was ante-timing as alleged. Further, the purported discrepancies noted regarding the ante-timing of the FIR are not by themselves pivotal or sufficient enough to overturn the investigation or to throw out the prosecution case. It is especially so when we take note of the material facts that had been revealed in the course of the investigation that followed.

33. In view of the above, contentions based on the ante-timing of the FIR and consequent unsustainabilty of the entire prosecution case cannot be countenanced.

Nature of injuries and cause of death:

34. Injuries found on the body of X are explained and enumerated in Ext. P19, post-mortem report, which was marked through PW 19 (Assistant Professor of Forensic Medicine). In his deposition, PW 19 has also stated his opinion as to the cause of death. A perusal of Ext. P19

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reveals that the injuries found on the body of X were substantial. It mentions 25 injuries across the body of X. She had injuries on both her upper and lower limbs, on her chest and abdomen, multiple contusions and abraded contusions of varying size across the entire back of her abdomen, and injuries over the head and neck. The opinion of PW19 as to the cause of death can be summarised as follows: X had died of traumatic brain injury. She had sustained injuries to the chest, abdomen, and limbs prior to her death. Injury No. 25 suffered by her on her head is fatal. The said injury can be caused by a forceful hit on the head. Injury No.25 can be caused by hitting the head on a wall and the said injury is sufficient in the ordinary course of nature to cause death. From the nature of the injuries noted, the said injury No.25 was caused by hitting the head on a broad surface. Injury No.25 though can be caused by a single blow, taking note of the nature of the injury, it is suggestive of multiple blows. Injury No.11 can be caused by trauma to the upper limb due to the forceful blow. Injury Nos.12 to 16 can be caused by an assault. The said injuries were more likely to be inflicted injuries. Those injuries are possible by multiple blows like hard-hitting. Looking at the position of injuries 6 to 8 it is more likely to be inflicted injuries rather than by a fall. Injury No.1 is caused by fingernail when a forcible grip is applied in that area. Other injuries could have been caused by a fall or could be inflicted injuries. In his cross-examination, PW 19 has stated that though injury No. 25 is possible by a fall from a

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higher level in the case at hand relating to X, he does not think that it is by a fall. He also added that by considering the nature and pattern of the injuries noted, he is of the opinion that Injury No. 25 is not caused by a fall.

35. The statement of PW 19 that the pattern of injury on the body of X would show that they were not caused by an accidental fall. The grave injuries found all over the body of the child demonstrate that it cannot be simultaneously sustained by a fall. Though in his testimony, PW19 stated that certain other injuries noted on the body of X can be inflicted or caused by a fall, the said statement cannot be extended to injury No.25, which he had termed fatal. He has clarified in his cross-examination that injury No.25 is not caused by a fall. PW 19s statement thus cannot be termed as inconclusive. Thus homicidal death of X stands proved by the deposition of PW19 and from a perusal of the injuries elaborated in Ext.P19 postmortem report.

Presence of A1, A2 and A3 at the place of occurrence:

36. The presence of A1 and A3 at the place of occurrence, viz., at the house of PW2 (described in Ext.P4 scene mahazar), in the evening of 29.10.2013, is deposed of by the neighbours viz., PW 3, PW4 and PW 5. PW 3, who is the next-door neighbor, has deposed that he had, at around 7.30 P.M. in the evening, seen A1 and A3 standing and talking near the well situated within the compound of the house. Though this is disputed pointing out that PW3 could not have seen them at 7.30 P.M.

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from his house due to lack of a light source in that part of the compound, no question to that effect is seen put to PW3 during his cross-examination before the trial court. The reliance placed on precedents to substantiate the relevance of the source of light though attractive at first blush, in the facts and circumstances of the case at hand, does not assume relevance. PW3 has spoken with clarity and has also identified his neighbour viz., A1 in the court. The admission in his statement that he had seen the name and photo of A1 and A3 in the new papers the next day does not diminish the reliability of the deposition of PW3. The next witness, who has spoken regarding the presence of A1, A2 and A3 in the house during the relevant time is PW5 who is the husband of a Hindi teacher and a tenant in the other portion of the same house. He stated that at 8.30 P.M., on 29.10.2013, he had seen A2 searching for something in the compound and that upon his asking as to what she was looking for she had answered in the negative and went inside the house. He stated that at that time he saw A1 and A3 too inside the house. This confirms the presence of A1, A2, and A3 at the place of occurrence at around 8.30 P.M. on 29.10.2013. That the timing mentioned by PW5 contradicts the call details (Ext.P29), which mentioned that A2 had made a call to PW4 at 8.25 P.M., thus making it impossible for PW5 to see and talk to A2 at 8.30 P.M., does not merit much importance due to the inherent lack of precision associated with call data details. PW4, who is the mother of PW3, has deposed that A3

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had, at around 8.15 P.M., on 29.10.2013, borrowed her phone in which she uses her son's (PW4) SIM card and made a call to a woman (A2), who had returned the call to the phone minutes later requesting to talk to A3. The contention that the appellants had started residing in the house at Ambadimala only 10 days back and the neighbours could not have had time to see and identify the appellants is belied by the specific and clear depositions of the concerned witnesses. The deposition of PW10 that A1 had called him by noon on 29.10.2013 and told him that the JCB work done by A1 at PW10's plot at Kadayikkavalavu has been completed augments the prosecution evidence that A1 had after work returned to the house at Ambadimala and would have reached there by the time X was brought back home from bus stop by A3. That no identification parade was held to identify A1 and A3 by the witnesses also does not take away the evidentiary worth of the deposition of the said witnesses. In addition to the deposition of the said witnesses, the evidence tendered by PWs 31, 32, and 33 who are the Nodal Officers of the respective cellular phone service providers of the SIM cards used in the mobile phones of A1 and A2 as well as that PW3 which was used by his mother PW4 corroborate the location of A1, A2 and A3 at the house at Ambadimala from the evening of 29.10.2013 to the morning of 30.10.2013. Exts.P29, P30 (b), P31, P33, P35, P36 (b), P37 (b), P38 and P39 which were marked through the respective Nodal Officers and

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relied on by the prosecution corroborate the location of A1, A2 and A3 on the said dates.

Last seen together theory and the burden on A3:

37. X was last seen alive when she was picked up from the bus stop by A3 on 29.10.2013, at around 3.45 P.M. Nobody has seen her alive subsequent thereto. PW6 driver of the school van has deposed that A3 had turned up late to pick X from the bus stop and that he waited for A3 to arrive and then the attender of the school van had crossed the road along with X and had entrusted X to A3. Though the said attender was not examined, the statement of PW6 regarding entrustment of X with A3 is clear, cogent and uncontroverted. The dead body of X was exhumed from the plot at Kadaikkavalavu on 30.10.2013, at around 3.30 P.M. The time interval between the sighting of X along with A3 and the revelation of the commission of the crime is thus around 24 hours. The purported explanation put forth by A3 as discerned from the prosecution story is that he had entrusted X to A1 and left the place of occurrence ie., the house at Ambadimala only to return later by 8.15 to find that X was missing from home. The chance fingerprints of A3 found on MO1 glass recovered from the place of occurrence and Ext.P27 report and the depositions of PW3, PW4, PW5, PW29 and PW30 confirm the presence of A3 at the place of occurrence at around 7.30 P.M. and 8.30 P.M. on 29.10.2018. The deposition of PW6 that he had seen A3 to pick up X from the bus stop on his bike when she was dropped off by the

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school van though prima facie places upon him an obligation to state her whereabouts, the long period of nearly 24 hours between then and the time of exhumation of the body of X, puts A3 beyond the presumption under the last seen together theory. As is trite per the precedents mentioned above, the nature of proof with respect to the last sighting of the victim and the accused together, the time interval between such sighting and the revelation of the commission of the crime, the nature of the explanation offered by the accused, deductions to be drawn from the behaviour of the accused during and after such sighting, his fleeing or absconding etc. have been emphasized as ingredients which have crucial relevance when it comes to the reliability of the last seen together theory. 'Last seen' theory can be invoked only when the same stands proved beyond reasonable doubt. The burden on the accused would kick in, only when the 'last seen theory' is established. The interval between the time when X and A3 were last seen alive together and the time when X is found dead is not so short to rule out the possibility of any person except A3 being the initiator of the crime. Intervention by others is open and possible. It is trite that "last seen" principle is a weak form of evidence that should be used with great circumspection and care. It cannot be the sole basis for conviction unless supplemented by other substantial evidence against the accused. Hence In the facts and circumstances as revealed from the evidence available, it could not be held that the 'last seen theory' is established as

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against A3, casting a burden on him as envisaged under Section 106 of the Evidence Act.

Incriminating evidence recovered from the place of occurrence

38. Ext.P4 scene mahazar describes house No. III/332 situated at Ambadimala, Chottanikkara, wherein appellants along with X had been residing. X had allegedly met with death in the hall room of the said house. Blood stains were found on the wall, floor, and door of the said hall room. Scrapings of each of the blood stains were taken, and FSL reports (Exts.P48 and P49) had been duly obtained. Depositions of PW27 (Witness to Ext.P4 mahazar), PW28 (scientific Assistant DCRB), PW29 (Fingerprint Expert, DCRB) and PW30 (Tester Inspector of Aluva Fingerprint Bureau) supports the prosecution case regarding the recovery effected from the place of occurrence and the samples collected therefrom. Exts.P24, P25, and P26 reports were submitted by PW28. MO1 glass seized from the house had the chance fingerprint of A3, which was recorded in Ext.P27 report by PW30. This confirms that A3 had been in the said house. FSL report produced, states that the stains on the wall and the door were human blood, and that on the floor was blood. Opinion with regard to blood grouping was not possible as the results were inconclusive. The reports thus reasonably point towards the house described in Ext.P4 mahazar as the place of occurrence.

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Evidence to substantiate charge of murder:

39. Since the death of X has been found to be a homicide, the next question to be considered is the role of the appellants in causing the same and whether the act of the appellants amounts to culpable homicide under Section 299 of IPC or as murder under Section 300 IPC justifying their conviction by the trial court under Section 302 of the IPC. If we conclude that Section 302 was not attracted and only Section 299 could be maintained against the appellants based on the facts proved, then we have to proceed to consider the question whether the appellants have committed an offence punishable under Section 304 Part I of the IPC or under Part II of the same Section.

40. A brief overview of the law relating to culpable homicide and murder would be relevant before we proceed to scrutinize the appreciation of evidence by the trial court.

41. The interplay between 'culpable homicide' and 'murder' and the question regarding the sentence to be imposed once it is proved that the accused has committed either of them has been subjected to detailed judicial scrutiny. The limited consensus arrived at in the said respect can be found in the observation of the Hon'ble Supreme Court in **Rampal Singh v. State of Uttar Pradesh** [(2012) 8 SCC 289]. In the context of applying 304 Part I and Part II, it was held by the Hon'ble Court therein that "*every case must essentially be decided on its own merits. The court has to perform very delicate function of applying the*

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provisions of the Code to the facts of the case with a clear demarcation as to under what category of cases, the case at hand falls and accordingly punish the accused."

42. The *lex classicus* on the topic remains the judgment of Vivian Bose, J. in **Virsa Singh v. State of Punjab** (1958 KHC 451) which pithily stated the essentials to be proved to decide on the applicability of Section 300 IPC as follows:

> "*To put it shortly, the prosecution must prove the following facts before it can bring a case under s. 300, "thirdly " ; First, it must establish, quite objectively, that a bodily injury is present ; Secondly, the nature of the injury must be proved; These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s. 300, 3rdly. It does not matter that there was no intention to cause death. It does not matter that there was Do intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."*

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43. The Supreme Court had in **Anbazhagan v. State represented by the Inspector of Police** [2023 KLT OnLine 1641 (SC)], considered the question whether the conviction of the appellant for the offence punishable under Section 304 Part I of the IPC should be further altered to Section 304 Part II of the IPC. After a detailed survey of the precedents on the point, the Hon'ble Court summed up the law as follows:

> "*Few important principles of law discernible from the aforesaid discussion may be summed up thus:-*
> *(1) When the court is confronted with the question, what offence the accused could be said to have committed, the true test is to find out the intention or knowledge of the accused in doing the act. If the intention or knowledge was such as is described in Clauses (1) to (4) of Section 300 of the IPC, the act will be murder even though only a single injury was caused. To illustrate : 'A' is bound hand and foot. 'B' comes and placing his revolver against the head of 'A', shoots 'A' in his head killing him instantaneously. Here, there will be no difficulty in holding that the intention of 'B' in shooting 'A' was to kill him, though only single injury was caused. The case would, therefore, be of murder falling within Clause (1) of Section 300 of the IPC. Taking another instance, 'B' sneaks into the bed room of his enemy 'A' while the latter is asleep on his bed. Taking aim at the left chest of 'A', 'B' forcibly plunges a sword in the left chest of 'A' and runs away. 'A' dies shortly thereafter. The injury to 'A' was found to be sufficient in ordinary course of nature to cause death. There may be no difficulty in holding that 'B' intentionally inflicted the particular injury found to be caused and that the said injury was objectively sufficient in the ordinary course of nature to cause death. This would bring the act of 'B' within Clause (3) of Section 300 of the IPC and render him guilty of the offence of murder although only single injury was caused.*
> *(2) Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that Section. In the*

event of the case falling within any of those exceptions, the offence would be culpable homicide not amounting to murder, falling within Part 1 of Section 304 of the IPC, if the case of the accused is such as to fall within Clauses (1) to (3) of Section 300 of the IPC. It would be offence under Part II of Section 304 if the case is such as to fall within Clause (4) of Section 300 of the IPC. Again, the intention or knowledge of the accused may be such that only 2nd or 3rd part of Section 299 of the IPC, may be attracted but not any of the clauses of Section 300 of the IPC. In that situation also, the offence would be culpable homicide not amounting to murder under Section 304 of the IPC. It would be an offence under Part I of that Section, if the case fall within 2nd part of Section 299, while it would be an offence under Part II of Section 304 if the case fall within 3rd part of Section 299 of the IPC.

(3) To put it in other words, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299 of the IPC it is punishable under the first part of Section 304. If, however, it falls within the third clause, it is punishable under the second part of Section 304. In effect, therefore, the first part of this Section would apply when there is 'guilty intention,' whereas the second part would apply when there is no such intention, but there is 'guilty knowledge'.

(4) Even if single injury is inflicted, if that particular injury was intended, and objectively that injury was sufficient in the ordinary course of nature to cause death, the requirements of Clause 3rdly to Section 300 of the IPC, are fulfilled and the offence would be murder.

(5) Section 304 of the IPC will apply to the following classes of cases: (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.

To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring

his case within one of the exceptions to Section 300 of the IPC.

(6) The word 'likely' means probably and it is distinguished from more 'possibly'. When chances of happening are even or greater than its not happening, we may say that the thing will 'probably happen'. In reaching the conclusion, the court has to place itself in the situation of the accused and then judge whether the accused had the knowledge that by the act he was likely to cause death.

(7) The distinction between culpable homicide (Section 299 of the IPC) and murder (Section 300 of the IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.

(8) The court must address itself to the question of mens rea. If Clause thirdly of Section 300 is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Inevitably, it is a matter of inference to be drawn from the proved circumstances of the case. The court must necessarily have regard to the nature of the weapon used, part of the body injured, extent of the injury, degree of force used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack.

(9) Intention to kill is not the only intention that makes a culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary cause of nature to cause death also makes a culpable homicide a murder if death has actually been caused and intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.

(10) When single injury inflicted by the accused results in the death of the victim, no inference, as a general principle, can be drawn that the accused did not have the intention to cause the death or that particular injury which resulted in the death of the victim. Whether an accused had the required guilty intention

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> *or not, is a question of fact which has to be determined on the facts of each case.*
> *(11) Where the prosecution proves that the accused had the intention to cause death of any person or to cause bodily injury to him and the intended injury is sufficient in the ordinary course of nature to cause death, then, even if he inflicts a single injury which results in the death of the victim, the offence squarely falls under Clause thirdly of Section 300 of the IPC unless one of the exceptions applies.*
> *(12) In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient in the ordinary course of nature to cause death, the fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC."*

44. In **Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh** (AIR 2006 SC 3010) Supreme Court has held as follows:

> *"It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302."*

45. The legal position being as discussed above, we now proceed to consider the evidence as put forth by the prosecution and its appreciation by the trial court.

46. Prosecution case is that on 29.10.2013, at around 3.45 PM A3 had picked X from the bus stop and handed her over to A1. At the house while A1 was alone with X he had in pursuance of the earlier conspiracy hatched up by A1 to A3 caused her death of X by beating her

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and banging her head to the wall of the hall room. Thereafter A2 and A3 returned to the house and all the three together conspired to destroy the evidence by burying the body of X deep in the vacant plot at Kadayikkavalavu wherein A1 had been employed to work using the JCB of which he is the driver.

47. The crucial question is whether the prosecution has proved to the satisfaction of law that A1 had an intention to kill X and that he did the alleged physical acts which led to the injuries noticed on the body of X as per Ext. P19 postmortem report, in furtherance of the said intention. His presence at the place of occurrence at Ambadimala stands proved as discussed above.

48. The intention to cause death can be gathered generally from a combination of a few or several circumstances. For eg.; Whether the blow is aimed at a vital part of the body, the amount of force employed in causing injury; whether the act was in the course of sudden quarrel or sudden fight or free for all fight; whether the incident occurs by chance or whether there was any premeditation; whether there was any grave and sudden provocation, and if so, the cause for such provocation; whether it was in the heat of passion; whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; whether the accused dealt a single blow or several blows etc. The said list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual

cases which may throw light on the question of intention. In the case at hand, prosecution has not proved that A1 had the intention to kill X. It is trite that the absence of motive does not disprove a murder charge. We have already found as bald and perfunctory the alleged motive put forth by the prosecution that the appellants had deceived to get rid of X who was allegedly perceived as an obstacle to the easy and wayward life led by them. We have already found that the said motive is illogical, imaginary, and disproved. The same cannot be termed as an intention and the latter has to be proved separately and independently. The next step would be to ascertain whether the injuries noticed on X would point toward an intention in him to kill X. As we have already noted above, the injuries on X were fatal and the injury No.25, has been spoken to by PW19 as the one that caused her death. Even if the observation of PW19 that the injuries noted on X were inflicted injuries and were not caused by a fall or accident, the same is not by itself sufficient enough to lead to the conclusion that A1 had an intention to cause the death of X. Even the allegation of sexual assault committed by A1 on X, which we propose to consider in detail separately, is not sufficient nor qualifies as an intention in A1 to cause the death of X. Thus we note that the evidence tendered by the prosecution has not proved the existence of the intention or even the knowledge such as is described in Clauses (1) to (4) of Section 300 of the IPC to attribute murder on A1. Even if injury No. 25 mentioned by PW19 as fatal is inflicted, the prosecution ought to

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prove that the said particular injury was intended and objectively that injury was sufficient in the ordinary course of nature to cause death, thus attracting and fulfilling the requirements of Clause 3rdly to Section 300 of the IPC. We are of the considered opinion that the same is not met by the prosecution evidence. We are mindful of the fact that the intention to cause injury or injuries sufficient in the ordinary cause of nature to cause death also makes a culpable homicide a murder if death has actually been caused and the intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries. Evidence to meet the said requirements is also not seen put forth by the prosecution against A1.

49. In view of the above, we conclude that the essential ingredients to attract an offence punishable under Section 302 of the IPC has not been made out. The conviction and sentence of the appellants under Section 302 IPC is hence not sustainable. We note that the evidence put forth by the prosecution will, however, place the act of A1 as one that falls within the 2nd part of culpable homicide as described in Section 299 of the IPC, ie., an act done with the intention to cause bodily injury as is likely to cause death. The same qualifies as an offence punishable under the first part of Section 304 IPC.

Criminal conspiracy among the appellants :

50. The law relating to criminal conspiracy has been succinctly

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laid down by the Supreme Court in **Sajeev v. State of Kerala** [(2023 (6) KLT 288 (SC)] as follows:

> *"The ingredients to constitute a criminal conspiracy were summarised by this Court in State through Superintendent of Police v. Nalini & Ors.6 (3-Judge Bench). They are as follows: i. Conspiracy is when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. ii. The offence of criminal conspiracy is an exception to the general law, where intent alone does not constitute crime. It is the intention to commit a crime and join hands with persons having the same intention.iii. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused. iv. Where in pursuance of the agreement, the conspirators commit offenses individually or adopt illegal means to do a legal act that has a nexus to the object of the conspiracy, all of them will be liable for such offenses even if some of them have not actively participated in the commission of those offenses.*
>
> *These principles were followed in Yakub Abdul Razak Memon v. State of Maharashtra7 (2-Judge Bench), wherein this Court reiterated that to establish conspiracy it is necessary to establish an agreement between the parties. Further, the offence of criminal conspiracy is of joint responsibility, all conspirators are liable for the acts of each of the crimes which have been committed as a result of the conspiracy. [See also: Arvind Singh v. State of Maharashtra8 (3-Judge Bench); Mohd. Naushad (supra)]*

In Nalini's case itself, it has been held as under :

> *"662. ... It is not necessary that all the conspirators should participate from the inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences."*

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> *The said judgment was quoted with approval in Central Bureau of Investigation & Anr. v. Mohd. Parvez Abdul Kayuum & Ors.23. Thus, it is not necessary that A-1 should participate till the end of conspiracy as some may quit from the conspiracy but all of them would be treated as conspirators. The common intention requires a pre-arranged plan and prior concert. Thus, there must be prior meeting of minds. The common intention must exist prior to the commission of the act in a point of time."*

51. In **Ram Sharan Chaturvedi v. State of Madhya Pradesh** (2002) 16 SCC 166, the Supreme Court has held as follows:

> *"The principal ingredient of the offence of criminal conspiracy under Section 120B of the IPC is an agreement to commit an offence. Such an agreement must be proved through direct or circumstantial evidence. Court has to necessarily ascertain whether there was an agreement between the Appellant and A-1 and A-2. In the decision of State of Kerala v. P. Sugathan and Anr.2, this Court noted that an agreement forms the core of the offence of conspiracy, and it must surface in evidence through some physical manifestation:*
>
> *"12. ...As in all other criminal offences, the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt. ...A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy... 13. ...The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient..."*

52. The charge of conspiracy alleged by the prosecution against the Appellants thus must thus evidence of explicit acts or

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conduct on their part, manifesting conscious and apparent concurrence of a common design. This burden is attempted to be discharged by the prosecution mainly relying on the call details from the mobile phones of A1 and A2. Evidence tendered by PWs 31, 32, and 33 who are the Nodal Officers of the respective cellular phone service providers of the SIM cards used in the mobile phones of A1 and A2 as well as that of PW 3 which was used by his mother PW4 corroborate conspiracy between A1 to A3 from the evening of 29.10.2013 to the morning of 30.10.2013. Exts. P29, P 30 (b), P 31, P33, P35, P 36 (b), P37 (b), P 38 and P 39 which were marked through the respective Nodal Officers and relied on by the prosecution offer substantiation in the said respect. There had been repeated phone calls between A2 and A1 nearly 15 in number, after X had been picked up from the school van on 29.10.2013 by A3. Calls were made from 3.22 P.M. to 5.48 P.M. between A1 and A2 continuously. Thereafter an interregnum from 7:58 PM to 9:14 P.M. is noted. The said calls give credence to the prosecution case that A2 was fully aware of what was transpiring in the house during the relevant time on the eve of 29.10.2013. There after, repeated outgoing calls are seen made by A1 to A2 in the early morning hours of 30.10.2013. These calls point to the conspiracy hatched between A1 and A3 pursuant to which along with A3, the body of X was buried at Kadayikkavalavu using the JCB. The evidence tendered unequivocally points to the fact that A1, A2 and A3 had come together to pursue the common unlawful object.

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The existence of the conspiracy can thus be validly inferred from the circumstances and the conduct of the appellants as revealed from the said depositions satisfy the mandates of Section 120B of IPC. A1, A2 and A3 are thus found guilty of conspiring to cause bodily injury as is likely to cause the death of X and find them guilty under Section 120B of IPC.

53. Evidence tendered by PWs 31, 32, and 33 who are the Nodal Officers of the respective cellular phone service providers of the SIM cards used in the mobile phones of A1 and A2 as well as that of PW3 which was used by his mother PW4 corroborate conspiracy between A1 to A3 from the evening of 29.10.2013 to the morning of 30.10.2013. Exts.P29, P30 (b), P31, P33, P35, P36 (b), P37(b), P38 and P39 which were marked through the respective Nodal Officers and relied on by the prosecution offer substantiation in the said respect. There had been repeated phone calls between A2 and A1 nearly 15 in number after X had been taken from the school bus on 29.10.2013 by A3. Calls were made from 3:22 P.M. to 5:48 P.M. between A1 and A2 continuously. Thereafter an interregnum from 7:58 PM to 9:14 P.M. is noted. The said calls give credence to the prosecution case that A2 was aware of what was transpiring in the place of occurrence during the relevant time on the eve of 29.10.2013. Thereafter, repeated outgoing calls are seen made by A1 to A2 in the early morning hours of 30.10.2013. This points to the conspiracy hatched between them

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pursuant to which along with A3, the body of X was buried at Kadayikkavalavu using the JCB.

Conviction and sentence of A1 under the POCSO Act :

54. A1 has been found guilty and sentenced under Section 9(l)(m) r/w. Section 10 of the POCSO Act. The correctness and validity of the said conviction and sentence are assailed by the learned counsel for A1. We proceed to consider the same.

55. Ext.P1 (FI statement) and in Ext.P1 (a) (FIR), contains references to the sexual assault said to have been committed by A1 upon X, as spoken to by PW1. However, PW1 had in his deposition stated that he had only hearsay information regarding A1 sexually abusing X and he specifically denied that he made any such statement to the police as seen in Ext. P1. He was hence declared hostile and cross-examined to no avail. Thereafter, the only evidence that remained to substantiate the charges against A1 under the POCSO Act was the testimony of PW 19 who had issued Ext.P19 postmortem report. The deposition of PW 19 to the extent relevant to the charges under the POCSO Act reads as follows:

> *"Vaginal walls and bymenal suppress were reddened and oozed blood stain fluid. Hymen was intact. No gross injuries was made out in the labia."*
>
> *"The redness over the vaginal hymen surface and urethra are not normally expected in a small child. This is possible by fondling and fingering, but in this case, I am of the opinion that no sexual assault has taken place. I cannot see any evidence of penetrative sexual assault. I cannot rule out an attempt of penetrative sexual assault."*

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56. While being cross-examined by the counsel for A1, PW 19 had stated as follows:

> *"Redness on the vaginal wall and hymenal surface can be caused by insect bites (Q). This is a 4-year-old girl, if it was an insect bite the redness could have been on the vulva. So I am of the opinion that the redness noted in the genitalia is not by the insect bite."*

The legal premise in which the above evidence was appreciated by the trial court is discernible from para 62 of the judgment. It would be relevant to reproduce the same as follows:

> *"62. Going by Section 29 of the POCSO Act, there is a statutory presumption that the accused has committed the offence punishable under Sections 3,5,7 and 9 as the case may be, unless the contrary is proved. Going by Section 30 of the POCSO Act, the Special Court shall presume that the accused had the mental state, i.e., sexual intent unless the contrary is proved. Here A1 did not adduce any evidence at all though he could have rebutted the presumption from the circumstances of the case by effectively cross-examining the prosecution witnesses. There was no such circumstance that could rebut the said presumptions. Though the witnesses were cross-examined on behalf of A1, nothing could be brought out to discredit the witnesses. Since the trial court had already found that the victim was murdered by A1, therefore it is also to be held as proved that X was sexually assaulted by the 1st accused by fondling and fingering on her vagina."*

Based on the above-said reasoning, the trial court arrived at the conclusion that *"it is proved beyond reasonable doubt that the victim was sexually assaulted by A1"* and proceeded to convict and sentence A1 for the offence of sexual assault under the POCSO Act. Before proceedings to consider the correctness of the finding arrived at by the trial court, it would be relevant to consider the sustainability of the legal

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reasoning seen adopted by the trial court in para 62 of the judgment.

57. Section 29 of the POCSO Act reads thus:

> *"Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."*

Section 29 thus stipulates a presumption that could be disproved by the accused by leading in evidence. It is a trite law that a presumption by itself is not an evidence. It is only a rule of evidence.

Presumption is a tool created to help the prosecutor carry the heavy burden imposed on the state in criminal cases. Due to constitutional constraints, it can operate only as an inference. A presumption cannot be used to transgress and whittle down the constitutionally guaranteed rights and protections of an accused in criminal proceedings. The impact of the presumption stipulated in Section 29 of the POCSO Act on the constitutional rubric, especially on the guaranteed rights under Articles 20(3) and 21 of the Constitution was touched upon by a Division Bench of the High Court of Tripura in **Sri.Joubansen Tripura v. State of Tripura** [2021 SCC OnLine Tri 176]. It was observed therein as follows:

> *"If an accused is convicted only on the basis of presumption as contemplated in Sections 29 and 30 of the POCSO Act, then, it would definitely offend Articles 20(3) and 21 of the Constitution of India. In my opinion, it was not the object of the legislature. Presumption of innocence is a human right and cannot per se be equated with the fundamental right under Article 21 of the Constitution of India. The Supreme Court in various*

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> *decisions has held that, provisions imposing reverse burden must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the Statute. [See* ***State of Bombay Versus Kathi Kalu Oghad****, (1962) 3 SCR 10: AIR 1961 SC 1808: (1961) 2 Cri LJ 856].*
> *It may safely be said that presumptions under Sections 29 and 30 of the POCSO Act do not take away the primary duty of prosecution to establish the fundamental facts. This duty is always on the prosecution and never shifts to the accused. POCSO Act has no different connotations. Parliament is competent to place burden on certain aspects on the accused especially those which are within his exclusive knowledge. It is justified on the ground that, Page 12 prosecution cannot, in the very nature of things be expected to know the affairs of the accused. This is specifically so in the case of sexual offences, where there may not be any eye witness to the incident. Even the burden on accused is also a partial one and is justifiable on larger public interest. [****State of Bombay Versus Kathi Kalu Oghad,*** *(1962) 3 SCR 10: AIR 1961 SC 1808: (1961) 2 Cri LJ 856;* ***Noor Aga Vrs. State of Punjab & Anr.****,(2008) 16 SCC 417;* ***Abdul Rashid Ibrahim Vrs. State of Gujarat*** *(2000) 2 SCC 513]"*

We have also benefited from an observation on the same subject by a Division Bench of the Gauhati High Court in **Latu das v. State of Assam** (2019 SCC OnLine Gau 5947), which reads as follows:

> *"We also take note of the presumption under section 29 of the POCSO Act which provides that when a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 9 of this Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence as the case may be, unless the contrary is proved. The above statutory presumption, which a court is bound to raise in a prosecution for offence under sections 3, 5, 7 and 9, of the POCSO Act put a reverse burden on the accused, which is an exception to the general principle of criminal justice, that burden to prove the guilt beyond reasonable doubt lies on the prosecution, and the accused has a right to remain silent. The statutory presumption under section 29 of the POCSO Act creates a restriction on the accused's right to remain silent. Because once there is adequate material for raising a presumption under section 29 of the POCSO Act, the special court is justified in recording conviction on the basis of such presumption, unless*

> *the accused rebuts, the presumption, or proves the contrary, to what was/were the basis of raising presumption."*
> *"However, one must bear in mind that presumption is not in itself evidence, it is only inference of fact drawn from other known or proved facts; and as such, in order to draw a presumption, statutory or otherwise, there must be existence of proved facts, from which a presumption can be raised. Therefore, presumption under section 29 of the POCSO Act, does not absolve the prosecution from its usual burden to prove the guilt of the accused beyond reasonable doubt. It only lessens its burden to some extent and puts a corresponding burden on the accused. Initial burden in a criminal case is always on the prosecution to bring on record reasonable evidence and materials to prove that the accusation brought against the accused is true. Once such evidence or materials are brought on record prima facie establishing the case of the prosecution, then only the court is obliged to raise presumption under section 29 of the POCSO Act and in that situation only the burden stands shifted to the accused to rebut the presumption. If the accused fails to rebut the presumption, court is justified to hold the accused guilty of offence under sections 3, 5, 7 and 9 of the POCSO Act"*

Further, this Court has in **David v. State of Kerala** [2020 (4) KHC 717], observed that :

> *"A presumption is not in itself evidence, but only makes a prima facie case for the party in whose favour it exists. It indicates the person on whom evidential burden lies. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts and when it is rebuttable, it enables the party on whom lies the duty of going forward with evidence on the fact presumed to adduce evidence to show that the fact is not as presumed [See M/s. Sodhi Transport Co. and another, etc. v. State of U.P. and another etc., AIR 1986 SC 1099]."*

58. In the backdrop of the above-settled precedents in a prosecution for an offences under Sections 3, 5, 7, and Section 9 of the POCSO Act, a finding of conviction cannot be entered into solely based on the reasoning that Section 29 of the POCSO Act stipulates that the

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Special Court shall presume that such person has committed or abetted or attempted to commit the offence and that the accused had not successfully discharged his burden to prove otherwise. The Court has the bounden duty to first confirm that the prosecution has validly discharged its usual burden to prove the guilt of the accused beyond reasonable doubt. It is only thereafter that the presumption stipulated under Section 29 would get activated. In other words, the presumption under Section 29 cannot be equated as an 'evidence' to convict the accused under the POCSO Act. In the facts of the case at hand, the evidence tendered by the prosecution does not prove beyond reasonable doubt that the victim was sexually assaulted by A1. The trial court erred in brushing aside the unequivocal statement of PW19 the Asst. Professor of Forensic Medicine that, in his opinion, no sexual assault has taken place. Further PW1 had deposed that he has not given a statement to the police that A1 had been sexually assaulting X. He has also stated that the said allegation has only been hearsay. The statements mentioned in Ext.P19 postmortem report do not lead to a conclusion that X was sexually assaulted by A1. No incriminating evidence had been produced by the prosecution to substantiate the charge leveled against A1 under the POCSO Act. The threshold from which the burden would have shifted onto A1 to prove his innocence had not been breached by the prosecution.

59. We are hence of the opinion that the factual matrix of the

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case does not call for invocation of the aforesaid statutory presumption, so as to convict the accused on the charges levelled against him. Thus the finding of the trial court that the statutory presumption would work against A1 and that he had not discharged his duty to rebut the presumption, based on the cross-examination of PW19, the same cannot be sustained. Hence the conviction and sentence of A1 under Section 9(l)(m) r/w. Section 10 of the POCSO Act is hereby set aside.

Conviction and sentence of A2 under the JJ Act :

60. A2 has been found guilty under Section 23 of the JJ Act. The trial court found that she being the biological mother and having the charge and control over X, had exposed X and subjected her to mental and physical suffering. The trial court in para 66 of the judgment concluded as follows:

> *"Here it is proved that A2 had conspired with the accused 1 and 3, to cause death of her own daughter, X. So the accused A2 is found guilty u/s 23 of the Juvenile Justice (Care And Protection Of Children) Act, 2000 and she is convicted thereunder for that offence also."*

Consequent to the said finding, the trial court sentenced A2 to 6 months of rigorous imprisonment. We now proceed to consider the legal sustainability of the said conviction and sentence. Section 23 of the JJ Act reads as follows:

> ***"Punishment for cruelty to juvenile or child.-*** *Whoever, having the actual charge of or control over, a juvenile or the child, assaults,abandons, exposes or willfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected*

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> *in a manner likely to cause such juvenile or the child unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or fine, or with both."*

Thus, an accused charged under Section 23 can be sentenced under the said provision based on independent and positive evidence of the commission of an offence as stipulated in the said section. Towards proving A2's culpability in the said respect, the prosecution had placed reliance on the deposition of PW6, PW15, PW24 and PW25. In his deposition, PW6, who is the driver of the school van, has stated that X was not regular in her attendance at school. He has also stated that on most days, she used to wear shabby clothes and used to board the van crying. Once he had seen some injury on her face and legs and upon asking he was told that she had fallen down from a bike. PW 15, a teacher at the school where X was a student, had deposed that X was not regular in attendance at school. She, however, also deposed that X was not her student. PW 24 who is the landlord of the house wherein the accused had stayed earlier along with X, deposed of an instance where she had seen A2 beating X when she had refused to eat food. PW25 who was yet another landlord of an earlier rented premises has deposed that once he had heard a commotion from the house and upon inquiring he had seen A2 standing with X lying on her shoulders. He was told by A2 that X had fits and it was only when PW25 prodded as to why she was not being taken to hospital, that X was taken to hospital by

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A2 and A3. The statements of the said witnesses along with the fact that the body of X was exhumed based on the disclosure statements of A1 and A3 are relied on by the prosecution to contend that A2 is guilty of the charge under Section 23 of the JJ Act for she had caused the child to be assaulted, abandoned, exposed and/or neglected X, leading to her death at the hands of A1.

61. Section 23 is a penal statute that defines the offence, enumerates the necessary ingredients to constitute its commission, and also lays down the penalty for the commission of the same. For maintaining a conviction under Section 23, independent and positive evidence of the commission of the offence by the accused himself, meeting the mandates of the said Section is necessary. The offence cannot be deemed to have been committed by implication. The deposition of the witnesses mentioned above does not independently or cumulatively reveal the commission of any ingredients necessary to prove the charges levelled against A2 under Section 23. The trial court however, had proceeded to convict and sentence A2 under the said Section on the premise that it has been *"proved that A2 had conspired with the accused 1 and 3, to cause the death of her own daughter, X."* Such a general finding by implication cannot be a substitute for independent and positive evidence of culpability of the person charged under Section 23 of the JJ Act. The conviction and sentencing of A2 under Section 23 of the JJ Act is thus bereft of legal reasoning,

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unsustainable and hereby set aside.

Conclusion:

62. From the above discussion, we conclude that the prosecution has established the circumstantial evidence beyond reasonable doubt. The circumstances from which an inference of guilt is sought to be drawn have been conjointly and firmly established by the evidence tendered by the prosecution. The evidence put forth does unerringly point towards the guilt of the accused/appellants. Cumulatively taken, the circumstances put forth by the prosecution against the appellants form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellants by illegally conspiring together and each working in furtherance of the common object.

63. Accordingly, we conclude that the prosecution has established beyond reasonable doubt that the appellants had conspired and committed offences amounting to culpable homicide with the intention to cause bodily injury as is likely to cause the death of X. They have also conspired and caused the disappearance of evidence of offence by hiding the dead body of X. Appellants are hence liable to be convicted under Section 304, Part I read with Section 120B IPC. Accordingly, the conviction and sentence of A1, A2 and A3 by the District and Sessions Court, Ernakulam, are hereby set aside. A1, A2 and A3 are sentenced to undergo rigorous imprisonment for life and to

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pay a fine of Rs.50,000/- (Rupees Fifty Thousand only) each u/s.304, Part I r/w 120B of IPC. In default of payment of fine amount, A1, A2 and A3 shall undergo imprisonment for another period of one year. A1, A2 and A3 are also sentenced to undergo rigorous imprisonment for a period of 7 (seven) years and to pay a fine of Rs.25,000/- (Rupees Twenty Five Thousand only) u/s 201 r/w 120B of IPC. In default of payment of the fine amount, A1, A2 and A3 shall undergo imprisonment for another period of six months. The sentence of imprisonment shall run concurrently. As we have sustained the conviction and sentence of the appellants u/s.304 r/w.120B IPC, we do not deem it necessary to separately sustain the conviction and sentence of the appellants u/s.120B IPC. The separate conviction and sentence of the appellants u/s.120B IPC is therefore set aside. Set-off is allowed.

DSR is answered in the negative. The Crl.Appeals are allowed as above.

Sd/-

DR.A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-

SYAM KUMAR V.M.
JUDGE

csl