

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 18TH DAY OF JULY, 2023

PRESENT

THE HON'BLE MR JUSTICE K.SOMASHEKAR

AND

THE HON'BLE MR JUSTICE RAJESH RAI K

CRIMINAL APPEAL NO. 1234 OF 2017

C/W

CRIMINAL APPEAL NO. 836 OF 2017

IN CRL.A.NO.1234 OF 2017

BETWEEN

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...APPELLANT

(BY SRI. VEERANNA G. TIGADI, ADVOCATE)

AND

STATE OF KARNATAKA,
BY HALEBEDU POLICE
STATION,
HALEBEEDU HOBLI,

BELUR TALUK-573 115
HASSAN DISTRICT.

...RESPONDENT

(BY SRI. VIJAYAKUMAR MAJAGE, ADDL. SPP)

THIS CRL.A. IS FILED U/S.374(2) OF CR.P.C PRAYING TO SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE DATED 25.04.2017 AND ORDER DATED 27.4.2017 PASSED BY THE II ADDL. DIST. AND S.J., HASSAN IN S.C.NO.215/2012 - CONVICTING THE APPELLANT/ACCUSED FOR THE OFFENCE P/U/S 120(B), 302 AND 201 R/W 34 OF IPC.

IN CRL.A.NO.836 OF 2017

BETWEEN

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...APPELLANT

(BY SMT. BUDRUNNISA, ADVOCATE)

AND

STATE OF KARNATAKA,
BY HALEBEDU POLICE STATION,
HALEBEEDU HOBLI,
BELUR TALUK-573 115
HASSAN DISTRICT.
REP.BY SPP, HIGH COURT,
BANGLORE.

...RESPONDENT

(BY SRI. VIJAYAKUMAR MAJAGE, ADDL. SPP)

THIS CRL.A. IS FILED U/S.374(2) OF CR.P.C PRAYING TO SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE DATED 25.04.2017 AND ORDER DATED 27.4.2017 PASSED BY THE II ADDL. DIST. AND S.J., HASSAN IN S.C.NO.215/2012 - CONVICTED THE APPELLANT/ACCUSED NO.3 FOR THE OFFENCE P/U/S 201 R/W 34 OF IPC.

THESE APPEALS HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 26.06.2023, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **RAJESH RAI.K J.**, DELIVERED THE FOLLOWING:

JUDGMENT

These appeals filed by the convicted accused Nos.1 and 3 are directed against the judgment of conviction and order of sentence passed in S.C.No.215/2012 dated 25.04.2017 by the II Additional District and Sessions Judge, Hassan for the offence punishable under Sections 302, 120(B), 201 r/w Section 34 of IPC wherein, accused No.1 was directed to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.10,000/- for the offence punishable under Section 120(B) r/w Section 34 of IPC in default of payment of fine, he shall undergo further simple imprisonment of three months. Further, accused No.1 was directed to undergo imprisonment for life i.e., till his last breath and to pay a fine of Rs.50,000/- in default of payment of fine, he shall undergo imprisonment for a period of 2

years for the offence punishable under Section 302 r/w Section 34 of IPC. Accused Nos.1 and 3 were directed to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.10,000/- each in default of payment of fine, they shall undergo three months simple imprisonment for the offence punishable under Section 201 r/w Section 34 of IPC. It is also ordered that accused No.1 shall pay sum of Rs.3,00,000/- to both the children of deceased under the provisions of 357 Cr.P.C., in default, they are entitled to recover the said amount from accused No.1 under Section 357(2) of Cr.P.C. Further, it directed to run the entire sentence concurrently.

2. The brief facts of the prosecution case are that on 29.03.2012, one Radha/accused No.2, who is the wife of the deceased-D.R.Kumar in this case, lodged a complaint before the respondent-police alleging that on 16.02.2012 around 9.00 p.m., her husband-D.R.Kumar had been to the field near Chollemarada village and from that relevant point of time, her husband was not returned to the home and was missing. Based on the said complaint, FIR has been registered for man missing in Crime

No.44/2012. During the course of investigation, the respondent-police arrested accused No.1 on 13.06.2012 and recorded his voluntary statement as per Ex.P43 wherein, accused No.1 revealed that he and accused No.2 i.e., wife of deceased had illicit affair and the same was opposed by her husband i.e., the deceased and as such, in order to eliminate the deceased, himself and accused No.2 hatched a conspiracy and accordingly, on 16.02.2012 at about 8.00 p.m., while the deceased was working near Chachatanna Village road in Sy.No.121, accused No.1 assaulted him with the wooden rod (MO.5) on his head and thereby, the deceased fell down and at that time, accused No.1 kicked on his neck and chest and committed his murder. Thereafter, he called his brother accused No.3 to bring the goods auto rickshaw bearing registration and they both shifted the dead body in the said auto from Devappanahalli village to the land of Rathnamma bearing Sy.No.155 and buried the dead body of the deceased in the pit which already dugged in the JCB. Later, accused No.2 gave the missing complaint that her husband was missing from 29.03.2012 in order to mislead the investigation. Based on the same, the dead body of the

deceased recovered by exhumation proceedings vide Ex.P7-Mahazar and subsequently, another FIR was registered for the offence punishable under Sections 120 (B), 302, 201, r/w Section 34 IPC against accused Nos.1 to 3 based on the *suo moto* complaint lodged by the Deputy Superintendent of police as per Ex.P35. Later, the respondent-police investigated the matter, drew up the spot mahazar as per Ex.P7, conducted the inquest proceedings over the dead body as per Ex.P27 and after recording the statement of witnesses, the investigation officer laid the charge sheet against accused Nos.1 to 3 for the offence punishable under Sections 120(B), 302, 201 r/w Section 34 IPC before the committal Court. On committal of the case to the Sessions Court, the learned Sessions Judge framed the charges against the accused and read over to them. However, they denied the charges and claimed to be tried.

3. In order to bring home the guilt of the accused for the charges levelled against them, the prosecution examined in total 30 witnesses i.e. PW.1 to PW.30 and 44 documents as per Ex.P1 to Ex.P44 and also got marked 12 material objects as

MO.1 to MO.12. After closer of the prosecution evidence, the incriminating portion of the evidence of the witnesses read over to the accused under Section 313 of CR.PC and the accused denied the same. However, the accused examined one witness on their behalf as DW.1 and also got marked one document as Ex.D1.

4. After hearing learned counsel appearing on both the side and on assessment of the oral and documentary evidence available on record, learned Sessions Judge convicted the accused for the charges levelled against them as stated supra. The said judgment is challenged under these appeals.

5. We have heard the learned counsel Sri. Veeranna G Thigadi for the appellant/accused No.1 in CrI.A.No.1234/2017, Smt.Budrunnisa, learned counsel for the appellant/accused No.3 in CrI.A.No.836/2017 and Sri. Vijaykumar Majage, learned Additional SPP for the respondent-State.

6. Sri Veeranna G.Tigadi, learned counsel for the appellants, vehemently, contended that the judgment under the

appeals suffers from perversity and legality since the learned Sessions Judge failed to appreciate the evidence on record properly and convicted the accused based on assumption and presumption which caused miscarriage of justice to the accused. He would further contend that the entire case of the prosecution rests on circumstantial evidence and the prosecution failed to prove all the circumstances in this case. In spite of that, the learned Sessions Judge convicted the accused. He would contend that the prosecution failed to prove the homicidal death of the deceased-Kumar in this case. Though the post mortem report marked at Ex.P18 and the doctor, who conducted the post mortem examination, gave his opinion that the death is due to head injury and asphyxia as a result of chest injury, much evidentiary value cannot be attached to the evidence of the doctor for the reason that the dead body was totally decomposed and only bones were recovered by way of exhumation proceedings. Hence, on perusal of the same, the doctor cannot give such opinion that the death is due to head injury. Learned counsel would further contend that the dead body was not identified by the family members of the deceased since the same

was totally decomposed. The prosecution failed to obtain DNA profile of the blood sample. The same is very much forthcoming in Ex.P44 and by the evidence of PW.30. As such, according to the learned counsel, the prosecution failed to prove the homicidal death of the deceased.

7. Learned counsel would further contend that the prosecution also failed to prove the charges levelled against the accused by connecting them in the alleged crime by leading cogent evidence. According to the prosecution, accused No.1 used to visit the house of the deceased in connection with watering of his land from the bore well belongs to the deceased. At that time, the wife of the deceased (accused No.2) developed illicit intimacy with accused No.1 and later, accused Nos.1 and 2 along with accused No.3 hatched a conspiracy to eliminate the deceased and accordingly, accused No.1 committed the murder of the deceased. But the prosecution failed to prove such motive by adducing proper evidence. It is admitted case of the prosecution that the mother of the deceased, who was residing in the house along with the deceased and accused No.2, was not

examined by the prosecution to prove the motive for the commission of the incident in spite of she being a material witness. Even otherwise, accused No.2 herself lodged a complaint before the police about missing of her husband and the FIR was registered in Crime No.44/2012 by the police. Subsequently, accused No.2 made an attempt to commit suicide twice and insisted the police to trace out her husband. Hence, the police instead of tracing the real culprits implicated accused Nos.1 and 2 in the case. Hence, according to the learned counsel, the prosecution theory in respect of motive is concerned totally unsustainable. Learned counsel would further contend that the recovery of the dead body, based on the voluntary statement of accused No.1, cannot be relied for the reason that the voluntary statement of accused No.1 was recorded by the police on 13.06.2012 and at that time, no crime has been registered against the said accused. Though a missing complaint/FIR has been registered, the police have not recorded the voluntary statement of the accused based on the same. Hence, according to the learned counsel, recording of the voluntary statement of the accused is totally illegal and the

recovery cannot be sustained since the same is not within the ambit of Section 27 of Indian Evidence Act. He would further contend that the exhumation proceedings as per Ex.P7 conducted in the land of accused No.1 as per the evidence of PW.9. But, the case of the prosecution is that the dead body was recovered in the property of one Rathnamma i.e., in Survey No.155/1. As such, there is a clear contradiction in respect of the place of recovery of the dead body and the exhumation proceedings. He would contend that by perusal of the evidence of PW.1, i.e., the sister of the deceased that after the death of her brother, they filed a civil suit at Beluru Court against accused No.2. As such, there is a possibility of false implication of the accused in this case by PW.1. He would further contend that the conduct of accused Nos.1 and 2, after the incident, has to be looked into for the reason that after missing of the deceased, accused No.2 made an attempt to commit suicide twice and finally after conviction, she committed suicide in the central prison. Moreover, accused No.1 was not absconded after the incident and he was arrested in his farm house. In such

circumstance, an adverse inference cannot be drawn against accused.

8. Learned counsel would further contend that the recovery of wooden club i.e., MO.5 under Ex.P3-mahazar is not proved beyond reasonable doubt. Except PW.4, the other witnesses have not supported the case of the prosecution. He would further contend that there is an inordinate delay in conducting the exhumation proceedings. Though the voluntary statement of accused No.1 was recorded on 13.06.2012 in the evening hour, the dead body was recovered by way of exhumation on the next day. Such inordinate delay creates doubt in the version of the prosecution. Hence, according to the learned counsel, the prosecution totally failed to prove the charges against the accused by leading cogent evidence and also by proving all the chain of circumstances in this case. He also contended that the learned Sessions Judge failed to consider the defence evidence adduced by the accused and the defence of the accused is quite probable one. Accordingly, he prays to allow the appeal.

9. Refuting the above submissions of the learned counsel for the appellants, the learned Additional SPP Sri Vijayakumar Majage vehemently contended that the judgment under appeals does not suffer from any perversity or illegality. According to him, the learned Sessions judge, by considering all the circumstances, has rightly convicted the accused for the charges levelled against them. Learned Additional SPP would submit that the prosecution proved the circumstances like homicidal death of the deceased, motive for commission of the incident, recovery of the dead body at the instance of accused No.1 by way of exhumation proceedings, recovery of the weapon said to have been used for the commission of the crime and also the conduct of accused No.2 after commission of the incident i.e., lodging of missing complaint and also making an attempt to commit suicide only to misguide the police and to deviate the investigation. He would further submit that to prove the homicidal death of the deceased, the prosecution examined the doctor-PW.14 and Ex.P18 i.e., the PM report. The doctor-PW.14 categorically deposed that the cause for the death is due to head injury and asphyxia as a result of chest injury on assault. In his

evidence, the doctor stated that he observed the injuries on the skull portion and the blood clotted on the head portion. PW.14 being the medical expert, there is no reason to disbelieve his version. The evidence of PW.14 corroborates with the inquest panchnama conducted as per Ex.P27. The witness for the said mahazar clearly stated about the recovery of the skull and the bones of the dead body of the deceased. Further, the prosecution also sent the same for DNA examination and obtained the report as per Ex.P44 wherein, the conclusion arrived by the Scientific Officer is that the bones which sent for examination are human in origin and of male sex. As such, the prosecution proved the homicidal death of the deceased beyond reasonable doubt.

10. Learned Additional SPP would contend that the recovery of the dead body by way of exhumation proceedings is based on the voluntary statement of accused No.1. In such circumstances, the death must be homicidal one. He would further contend that the dead body was identified by PW.1-the sister of the deceased and also PW.3-the brother-in-law of the

deceased. They being the relative of the deceased, based on the clothes and the shoes worn by the deceased, identified the dead body. As such, the prosecution proved beyond reasonable doubt that the dead body is of the deceased-Kumar and his death was homicidal one. He would further contend that the motive for the alleged incident is clearly stated in the evidence of PWs.1 and 3. PW.3 categorically stated that accused No.2 had illicit relationship with accused No.1 before the death of the deceased so also after commission of the incident. According to PW.3, a Panchayath was held in connection with the said aspect of the matter and accused No.2 by confessing her act of illicit relationship, promised PW.3 and others that she will not continue the same. Further, PW.1 also categorically deposed about the illicit relationship of accused Nos.1 and 2. Hence, the reason behind commission of the crime was illicit relationship between accused Nos.1 and 2. Learned Additional SPP would further contend that the recovery of the dead body at the instance of accused No.1, based on his voluntary statement, is very much proved. The exhumation proceedings conducted as per Ex.P7 on 14.06.2012 in the presence of the Assistant Commissioner of

Police and others wherein, accused No.1 shown the place where he buried the dead body and on exhuming the dead body, the skeleton was recovered. This exhumation proceedings conducted in the presence of PW.5, PW.1 and PW.3. These witnesses were supported the case of the prosecution. Thereafter, an inquest proceedings also held in the said spot and the said witnesses were very much present in the said spot and PW.1 and PW.3 identified the dead body of the deceased based on the clothes and shoes of the deceased. Hence, the said aspect of the matter is proved beyond reasonable doubt. He would contend that the recovery of the club i.e., MO.5 which said to have used for the commission of the crime is also seized based on the voluntary statement of accused No.1. PW.4 is the witness for the said mahazar and he clearly deposed before the Court to that effect. Further, all the inquest and exhumation proceedings were video graphed by PW.12 and the CD was marked as per MO.9. To that effect, PW.12 clearly deposed before the Court. Hence, according to learned Additional SPP, in such circumstances, the prosecution proved all the circumstances beyond reasonable doubt and

hence, the appeals filed by the appellants are liable to be rejected.

11. We have bestowed our anxious consideration on the oral and documentary evidence placed before us and also meticulously perused the material available on record including the trial Court records.

12. Having heard the learned counsel for the appellants and the learned Additional SPP for the State, the point that would arise for our consideration are:

*(i) Whether the judgment under these appeals suffers from any perversity and illegality?
and*

(ii) Whether the learned Sessions Judge is justified in convicting the appellants for the offence punishable under Sections 120(B), 302, 201, 203 r/w Section 34 of IPC?

13. This Court being the Appellate Court, in order to, re-appreciate the entire material on record, it is relevant to consider the entire prosecution witnesses and the documents

relied upon. The cursory glance of the evidence of the witnesses available on record are as under:

(i) PW.1-Chandrakala is the sister of the deceased and the circumstantial witness in this case. She deposed about the illicit relationship of accused No.2 with accused No.1 and also stated that she advised accused No.2 not to indulge in such activities. She further deposed that the missing complaint lodged by the accused No.2 was written by her and accused No.2 insisted her not to express any doubt against accused No.1. This witness also deposed about the exhumation proceedings and she identified the dead body of the deceased is that of her brother based on the clothes and shoes of the deceased. She identified the mahazar to that effect as per Ex.P1. In the cross examination, she admitted that there is a civil dispute pending at Beluru Court between her family members and accused family.

(ii) PW.2-Ajjegowda is the neighbour of the deceased and the accused. He stated that deceased used to provide water for the poultry farm of the accused and as such, accused No.1 used to visit the house of the deceased and thereby, he

developed illicit intimacy with accused No.2, who is the wife of deceased. Further to that effect, the deceased and accused No.2 used to quarrel.

(iii) PW.3-Shivaswamy, who is the brother of accused No.2, deposed about the illicit relation of accused Nos.1 with accused No.2, before the incident and after the incident also. According to him, a panchayath was held to that effect and he advised accused No.2 not to continue the said relation. In the cross-examination, he also admitted that there was a civil dispute was pending between accused No.1 and the deceased.

(iv) PW.4-Kumar is a witness for exhumation proceeding where the dead body recovered at the instance of accused No.1 i.e., in the property of one Rathnamma. He is also the witness for the recovery mahazar of wooden rod-MO.5 which is used by accused No.1 for the commission of the crime so also MO.6 i.e., the auto used to transport the dead body. MO.5 and MO.6 were seized under Ex.P4 mahazar and he identified the same. However, in the cross-examination, he admitted that the

deceased used to go out of the house for about 4 to 5 months and he was having such habit.

(v) PW.5-Huligowda is the witness for recovery of the dead body by way of exhumation proceedings as per Ex.P7 and he also identified the clothes of deceased as per MO.1 to MO.4.

(vi) PW.6-Javaregowda is a witness for the recovery of the wooden rod at the instance of accused NO.1 and he identified MO.3-Wodden rod and also MO.6 i.e., the auto rickshaw used for the commission of the crime by shifting the dead body of the deceased for burial of the same.

(vii) PW.7-Harish is a witness for seizure of the mobile phone belongs to the accused under Mahazar Ex.P12 and the said mobile phone was marked as MO.7 and in the said MO.7, the SIM card was inserted.

(viii) PW.8-Bharathkumar is the owner of the JCB in which, accused No.1 dug the pit to bury the dead body of the deceased. This witness though partially turned hostile, during the course of cross-examination by the public prosecutor,

admitted that based on the entries made in the pocket diary, it is forthcoming that accused No.1 hired the JCB belongs to him.

(ix) PW.9-Naveen Kumar is the operator of the JCB belongs to PW.8. He stated that accused No.1. by hiring the JCB of PW.8, took him to the coconut plantation and there, he dugged two pits and the same was mentioned in his pocket diary. He supported the case of the prosecution.

(x) PW.10-Rudresh is the witness for Ex.P12 i.e., the mahazar in which the mobile of accused No.1 was seized. This witness also deposed about Ex.P14 i.e., the seizure of MO.8 i.e., the hoe which is used for digging the pit and thereafter closing the same.

(xi) PW.11-Revanna Siddappa is the witness for the mahazar Ex.P15 i.e., the identification of the dead of the deceased along with the family members of the deceased. He identified his signature on Ex.P15.

(xii) PW.12-Umesh is the photographer. This witness video-graphed the entire exhumation proceedings and also

recovery of MO.5-the weapon said to have used for the commission of the crime. The video graphed CD marked as MO.9.

(xiii) PW.13-Thirthe Gowda is the witness for the seizure mahazar of the SIM card of accused No.2.

(xiv) PW.14-Dr.Shivakumar conducted the autopsy over the dead body as per Ex.P18. He gave his opinion that death is due to head injury and asphyxia as a result of chest injuries-assault. He also gave an opinion after examination of the weapons that the injuries found on the dead body of the deceased could be caused by MO.5-wooden rod. The said opinion is marked at Ex.P16.

(xv) PW.15-M.B Manjegowda is the Assistant Engineer, who conducted the sketch of the spot of incident i.e., where the dead body was found. The said sketch was marked as Ex.P19 and Ex.P20.

(xvi) PW.16-Umashankar is the Village Accountant, who issued the RTC of the land bearing Sy.No.155/1 belongs to one

Rathnamma as per Ex.P24, where the dead body of the deceased buried.

(xvii) PW.17-M.P.Shivaprakash is the Police Head Constable, who apprehended accused No.1 on 13.06.2012 and produced before the investigation officer.

(xviii) PW.18-P.K Dhanpal Nayak registered FIR against accused No.2 for making suicide attempt before the Beluru Court. The said FIR registered in Crime No.122/2017 for the offence punishable under section 309 of IPC.

(xix) PW.19-Nani.B.L is Women Police Constable, who apprehended accused No.2 in this case.

(xx) PW.20-Pallavi, the Assistant Commissioner of Sakleshapura Taluk conducted the inquest panchnama over the dead body of the deceased as per Ex.P27. She also identified the rough sketch of this spot as per Ex.P28. She also deposed that the families members of the deceased were present at the scene of occurrence and identified the dead body as per Ex.P1.

(xxi) PW.21- Somashekar K.B is the Police Constable, who transmitted the FIR to the Jurisdictional Court.

(xxii) PW.22- Dr.Chaya Kumari is the Scientific Officer, who examined the blood stains found in the clothes of the accused and wooden rod which is used for the commission of the crime i.e., MO.1 to MO.9. After examination of the articles, she issued report as per Ex.P29 stating that the weapons and clothes of the deceased stained with human blood.

(xxiii) PW.23-Ravi Kumar is the PSI. He received the missing complaint from accused No.2 as per Ex.P2 and registered the FIR for man missing as per Ex.P30. He also conducted partial investigation in the matter and obtained the call register of accused No.1 and 2 as per Ex.P31 and Ex.P32 respectively.

(xxiv) P24-B.Siddegowda Carrier of FSL items to RFSL Mysore.

(xxv) PW.25-M.N.Nagaraj is the Head Constable, who accompanied PW.15 to prepare sketch of the place of incident i.e., where the dead body was found.

(xxvi) PW.26- Rangaiah M is the ASI, who handed over the dead body of the deceased i.e., the bone parts to the relatives after conducting exhumation and inquest proceedings in the place of occurrence.

(xxvii) PW.27-Mallaiah M.D is the ASI, who registered the FIR against accused Nos.1 and 2 for the offence punishable under Sections 302, 201, 120 (B) of IPC.

(xxviii) PW.28-B.K.Manjaiah apprehended accused No.3 in this case.

(xxix) PW.29-Deepak.M.S., registered the FIR in Crime No.122/2012 for offence punishable under section 309 of IPC against accused No.2 as per Ex.P26 for the reason that she made an attempt to commit suicide at Beluru Court.

(xxx) PW.30-Rashmi, is the Investigation officer in this case. She conducted investigation by recording the statement of all the witnesses so also by collecting the documents and materials, laid charge sheet in this case.

(xxxi) DW.1-Rangaswamy is the witness examined on behalf of the accused and deposed that 3 years back, the police called him and took him to a place and dugged a pit and on the next day morning, the same was filled with soil and when he opened the same in the presence of police, the dead body of the deceased was found in the said pit. However, in the cross-examination, he categorically admitted that he deposed as per the say of accused No.1.

14. By careful perusal of the above evidence, the prosecution relied the following circumstances to prove the charges levelled against the accused

HOMICIDAL DEATH OF THE DECEASED

15. On careful perusal of the above evidence, as far as the homicidal death of the deceased is concerned, the

prosecution relied the evidence of Doctor-PW.14, who conducted autopsy over the dead body as per Ex.P18 wherein, he clearly gave his opinion that the death is due to head injury and asphyxia as a result of chest injury - assault. Further, the doctor also gave an opinion that the injuries found in the dead body could be caused by MO.5-the wooden rod seized at the instance of accused No.1. The said report of the Doctor marked as Ex.P16. The prosecution also relied on the evidence of PW.22-the Chaya Kumari i.e., the Scientific Officer who gave an opinion that the blood stains found on MO.5 i.e., the wooden rod is of human blood. Apart from the said evidence, the prosecution also relied Ex.P27 i.e., the inquest mahazar conducted by the PW.20-the Assistant Commissioner and PW.5 is the witness for the same. PW.20 and PW.5 categorically deposed about the inquest mahazar. Nevertheless, PW.1, PW.2 and PW.4, who are the family members, were present at the said spot and also deposed about the inquest panchnama and they identified the dead body of the deceased is that of Kumar based on MO.1 to MO.4 i.e., the clothes and shoes of the deceased. According to the prosecution, even PW.20-the Assistant Commissioner drawn the mahazar as

per Ex.P1 in the spot where the dead body found and all the family members of the deceased were present at the scene of occurrence and affixed their signature on Ex.P1 by identifying the dead body.

16. Though the learned counsel for the appellants vehemently contended that the dead body was totally decomposed and only bone pieces were seized and in such circumstances, there is no question of identification of the dead body by the family members and also giving an opinion by the Doctor that the death is homicidal one, However, on careful perusal of the evidence of the doctor, the family members and the Scientific Officer, there is no reason to disbelieve their evidence since the Doctor being the expert in medical field, is the authorized person to give opinion in respect of the reason for the death after examination of the dead body or the available parts of the dead body. Moreover, the DNA report which marked as Ex.P44 also clearly depicts that the mandible, humerus bone, sternum and clavicle bone sent in items Nos.1, 2 and 3 respectively are of human in origin and of male sex. As such, by

considering the evidence of PW.14 along with Ex.P44 and also Ex.P27-the inquest panchnama and the evidence of PW.5 and PW.20, we are of the considered opinion that the prosecution proved the homicidal death of the deceased in this case.

CONDUCT OF ACCUSED NO.2 I.E., LODGING MISSING COMPLAINT AND ATTEMPTING TO COMMIT SUICIDE

17. On careful perusal of the evidence of PW.1, PW.2, PW.4 and PW.5, who are the relatives of the deceased, identified the dead body of the deceased based on MO.1 to MO.4 i.e., clothes and shoes of the deceased. By perusal of their evidence, they categorically deposed that accused No.2 being the wife of the deceased had illicit relationship with accused No.1 and as such, their marital relation was strained and Panchayath was also held to that effect and finally, the deceased was missing from the house. Hence, the missing complaint was lodged by accused No.2, who is none other than the wife of the deceased. However, PW.1, who is the sister of the deceased, is the scribe of the missing complaint. By perusal of the evidence of PW.1, she categorically stated that since she had doubt with accused No.1 in connection with missing of her brother and she intends

to mention the name accused No.1 in the missing complaint but, accused No.2 insisted her not to mention the name accused No.1 in the complaint. As such, she prepared the missing complaint without expressing doubt against accused No.1. After lodging the missing complaint, accused No.2 made an attempt to commit suicide by consuming poison at Beluru Court and the FIR was registered against her in Crime No.122/2012 for the offence punishable under Section 309 of IPC. PW.18-the police constable deposed about the same. By evaluating the said aspect of the matter, the conduct of accused No.2 after commission of the crime, clearly goes to show that in order to deviate/mislead the investigation, she lodged missing complaint and also made an attempt to commit suicide and thereby, the Police should not express any doubt on her.

18. It is relevant to consider at this juncture, by perusal of the missing complaint, accused No.2 intentionally mentioned the wrong colours of the clothes worn by the deceased by mentioning that he was wearing lungi on the date of missing. *Per contra*, at the time of exhumation of the dead body, it was found

that the deceased was wearing the pant, shirt and also shoes and the same were marked as MO.1 to MO.4 and identified by PW.1, PW.2, PW.4 and family members. Hence, the conduct of accused No.2, after the commission of the incident, clearly shows that she colluding with accused No.1 hatched the conspiracy to eliminate her husband since she was having illicit affair and the said conspiracy was executed by accused No.1 by committing the murder of the deceased.

MOTIVE FOR THE ALLEGED INCIDENT

19. In order to prove the motive for the alleged incident is concerned, the prosecution relied on the evidence of PW.3 i.e., none other the brother of accused No.2 in this case. PW.3 in his evidence categorically stated that accused No.2 had illicit relationship with accused No.1 before the death of the deceased so also she continued the same even after the death of the deceased i.e., after release of accused No.1 on bail. According to PW.3, the deceased was providing water for the poultry farm of accused No.1 and thereby, accused No.1 used to visit the house of the deceased and accused No.2 and thereby, developed

illicit intimacy with accused No.2 and thereafter, they both hatched the conspiracy to eliminate the deceased. The said version of PW.3 is supported by PW.1, who is the sister of deceased in this case. She also categorically stated that herself, PW.2 and PW.3 advised accused No.2 not to indulge in such act with accused No.1. In spite of that, she continued the same. A Panchayath was also held to that effect in the house of deceased in the presence of PW.3 and PW.3 advised her to stop her illegal act. Further, PW.2 who is the neighbour of the deceased and accused No.2 also deposed that accused No.1 used to visit the house of the deceased on the guise of watering to his poultry farm and thereby, developed illicit intimacy with the wife of the deceased i.e., accused No.2. Hence, the motive for the commission of this incident by accused Nos.1 and 2 is clearly proved by the prosecution by adducing cogent evidence of PW.1, PW.2 and PW.3. PW.3 being the brother of accused No.2 categorically deposed about the motive aspect. As such, there is no reason to disbelieve the version of PW.1, PW.2 and PW.3 in respect of the motive part.

RECOVERY OF DEAD BODY

20. As far as the recovery of the dead body of the deceased is concerned, the Police recovered the dead body by way of exhumation proceedings based on the voluntary statement of accused No.1 as per Ex.P38 dated 13.06.2016.

21. Learned counsel for the appellants vehemently contended that while recording the voluntary statement of accused No.1, he was not arraigned as accused for any offence. As such, the recording of voluntary statement is against law and no evidentiary value can be attached for the same. Learned counsel emphasised that though the missing complaint was registered in Crime No.44/2012 based on the complaint lodged by accused No.2 on 29.03.2012 thereafter, no FIR has been registered against accused No.1 and while recording his voluntary statement on 13.06.2012, he was in the illegal custody of the Police.

22. On careful perusal of the records, it could be seen, the Police registered FIR in Crime No.44/2012 on 29.03.2012 based on the missing complaint lodged by accused No.2 in this

case. Subsequently, the Police investigated the case and they interrogated accused Nos.1 and 2 earlier occasions. Even though, they did not revealed the truth during the course of interrogation, finally, on 13.06.2012 accused No.1 revealed the truth during the course of interrogation and immediately, Section 302, 201 r/w 34 IPC was invoked in the same Crime No.44/2012 by registering another FIR based on *suo moto* requisition of the Police Officer. As such, though a separate crime was not registered against accused, it cannot be termed that the accused was in illegal custody at the time of recording his voluntary statement since the Police had a doubt in respect of accused No.1 based on the call registered of accused Nos.1 and 2, as per Ex.P31, they interrogated the accused. Though accused No.1 was not an accused of any offence but in the same time, the FIR was already registered in Crime No.44/2012 in respect of the man missing.

23. The Hon'ble Apex Court in the case of ***Dharam Deo Yadav vs. State of Uttar Pradesh*** reported in **(2014) 5 SCC 509** held that the confession of person in 'custody' under Section

27, no need of formal arrest -whether the accused in 'custody', when he had not yet been formally arrested but took the police to the place from where the buried skeleton remains of deceased were recovered -Statement so made if admissible under Section 8 as 'conduct' - Held, 'custody' in Section 27 is not formal custody - it includes any kind of surveillance, restriction or restraint. Consequently, so much of information given by the accused in 'custody', in consequence of which a fact is discovered, is admissible in evidence, whether such information amounts to a confession or not - Furthermore, even without the aid of Section 27, the statement so made by the appellant would be admissible as 'conduct' under Section 8. This proposition of law dealt in detail in paragraphs 27 and 28 of the said judgment by the Hon'ble Apex Court. As such, the voluntary statement of the accused can be relied to the extent of Section 27 of Indian Evidence Act.

24. Admittedly, in this case, accused No.1 lead the Police, the Tahsildar and also the witnesses to the place i.e., the land bearing Sy.No.155/1 belongs to one Rathnamma and there,

he shown the place where the dead body of the deceased was buried. Thereafter, the Tahsildar, PW.20 and Doctor-PW.14 and also in the presence the witnesses i.e., PW.1, PW.2, PW.4 and PW.5, the body was exhumed under exhumation proceedings and mahazar was drawn to that effect as per Ex.P7. The entire proceedings of exhumation was video-graphed by PW.12 and the CD of the same was produced and marked as MO.9.

25. Though the learned counsel for the accused argued that the place of exhumation was belongs to accused No.1 and not to the said Rathnamma as per the evidence of PW.3 but, by perusal of the evidence of DW.1 examined by the defence, he clearly stated that the dead body was recovered from the property of said Rathnamma. Hence, it is clear that based on the disclosure statement of accused No.1, the dead body was recovered by way of exhumation proceedings as per Ex.P7 and the Tahsildar conducted inquest proceedings as per Ex.P27 in the presence of PW.5 so also the Doctor-PW.14, who conducted the post-mortem of the dead body as per Ex.P18. Hence, the recovery of the dead body at the instance of the accused by way

of exhumation proceedings is the major circumstance against the accused, which is proved by the prosecution beyond reasonable doubt. Even the inquest proceedings as per Ex.P27 conducted by PW.20 and also post-mortem conducted by the Doctor-PW.14 as per Ex.P18 in the said place were witnessed by PW.1, PW.2, PW.4 and PW.5. The RTC of the said land is marked as Ex.P24 and PW.16-the Village Accountant clearly deposed that the said land belongs to one Rathnamma. Hence, the said aspect of the matter is proved by the prosecution beyond reasonable doubt.

RECOVERY OF MO.5

26. As far as the recovery of MO.5-the wooden club at the instance of accused No.1, which is said to have used for the commission of the crime is also proved by the prosecution. The MO.5 was recovered at the instance of accused No.1 based on his voluntary statement as per Ex.P38 under the mahazar-Ex.P4. PW.6, who is the witness for the said mahazar, clearly stated that accused No.1 led the panchas and the Police Officers near his poultry farm and from there, he gave MO.5 to the Police

which was kept in a shed. Moreover, the said MO.5 was stained with the human blood and PW.14-the Doctor gave an opinion as per Ex.P16 that the injuries found on the dead body of the deceased could be caused by the said weapon-MO.5. Moreover, the Scientific Officer-PW.22 also gave her opinion as per Ex.P29 that the said MO.5 was stained with human blood. As such, by conjoint reading of Ex.P4, the opinion of PW.14-the Doctor and PW.22-the Scientific Officer, the witness for Ex.P4 i.e., PW.6 and the investigation officer, the prosecution has also proved the recovery of MO.5 at the instance of accused No.1 beyond reasonable doubt. Though the learned counsel for the accused contended that there are some contradictions in the evidence of PW.6, the mahazar witness, the same does not go to the root of the prosecution case since PW.6 categorically deposed about the said recovery so also the same was video graphed by PW.12 Hence, the prosecution also proved the said circumstance.

**EVIDENCE OF PW.8 AND PW.9 IN RESPECT
TO HIRING OF JCB TO DUG THE PIT**

27. On perusal of the evidence of PW.8, who being the owner of the JCB and PW.9, who being the operator of the JCB

categorically stated that accused No.1 hired the JCB and he had taken PW.9 to the coconut plantation and there he directed PW.9 to dig two pits from JCB. The said aspect was not explained by the accused as to why the pits were dugged in the said coconut land. Admittedly the dead body was buried in the said pit and later, exhumed from the said place. In such circumstances, an inference can be drawn against accused No.1 that he dugged the pits only to bury the dead body of the deceased. Even PW.10 supported the seizure of MO.8 i.e., hoe which is allegedly used to fill the pits. Hence, this circumstance also proved against accused No.1.

CALL DETAILS BETWEEN ACCUSED NOS.1 AND 2

28. As far as the call details of accused Nos.1 and 2 are concerned, the prosecution examined PW.19-the Nodal Officer and he categorically deposed that on 16.02.2012 i.e., on the date of incident in night hours, accused Nos.1 and 2 had a conversation for about 52 minutes 46 seconds. To that effect, he produced call register as per Ex.P31. The Police recovered the mobile phones of accused Nos.1 and 2. PW.7, who is the witness

for the recovery of mobile of accused No.1 under Ex.P12 and PW.10 categorically deposed about the same. Hence, by perusal of the call register as per EX.P31, the prosecution proved the said circumstances that accused Nos.1 and 2 were discussed after committing the murder of deceased by accused No.1 on 16.02.2012.

SEIZURE OF THE AUTO RICKSHAW

29. Seizure of the auto rickshaw which is used for transportation of the dead body from Devappanahalli village, where the accused No.1 committed the murder of the deceased by assaulting on his head by wooden rod and also by kicking on his neck and chest, to the land of Rathnamma bearing Sy.No.155 and buried the dead body of the deceased in the pit which already dugged in the JCB by accused No.1. The seizure of the said auto i.e., Mo.6 seized under Ex.P4 mahazar is also proved by the evidence PW.4 and investigation officer.

30. On meticulously going through the above circumstances, the prosecution proved the guilt of the accused beyond all reasonable doubt. All the circumstances which the

prosecution relied against the accused are conclusively proved. Though the learned defence counsel argued that in a case based on circumstantial evidence, the prosecution has to prove its case by proving all the circumstances by hypothesis the guilt of the accused as per the law laid down by the Hon'ble Apex Court in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra*** reported in ***(1984) 4 SCC 116*** and the said principle is reiterated by the Hon'ble Apex Court in the case ***Chandrapal vs. State of Chhattisgarh (Earlier M.P.)*** reported in ***2022 SCC OnLine SC 705***.

31. But in the instant case, the prosecution proved all the above circumstances against the accused. The major circumstance of the recovery of the dead body at the instance of accused No.1 is proved beyond any doubt since accused No.1 showed the place of burial of the dead body and thereafter, the exhumation of the dead body and identification of the same by the family members and also the opinion of the experts i.e., the doctors and the scientific officer in respect of the homicidal death of the deceased and the recovery of the weapon said to have

used by accused No.1 for the commission of the crime etc., are clearly proved by the prosecution beyond all reasonable doubt.

32. The recovery of the last remains of the deceased was a relevant fact, which was, thus, admissible in evidence. The accused No.1 had pin pointed the exact place which was to be dugged up. He also made an oral statement to that effect. The entire exhumation proceedings and inquest proceedings were video graphed by PW.12 and he deposed to that effect.

(emphasis supplied)

33. The various circumstances leading to the pointing out of the guilt of accused No.1 and accused No.1 alone is the perpetrator of the crime is evident from the circumstances placed against him. It is evident that each of the circumstances had been established. The cumulative effect whereof would show that all the links in the chain are complete and the conclusion of the guilt is fully established. Further, the major circumstance of recovery of the dead body at the instance of accused No.1 by way of exhumation proceedings clearly proved in this case. In such circumstances, an adverse inference can be drawn against

the accused. Our view is fortified by the judgment rendered in the case of ***Swamy Shraddananda vs. State of Karnataka*** reported in ***(2007) 12 SCC 288***.

34. The minor contractions in the evidence of the witnesses do not go to the root of the prosecution case. The said preposition held by the Hon'ble Apex Court in catena of judgments that the minor embellishments and contradictions can be eschewed. The Hon'ble Apex Court in the constitutional Bench Judgment rendered in the case of ***Neeraj Dutta v. State (NCT of Delhi)*** reported in ***(2023) 4 SCC 731*** elaborately discussed in respect of Section 6 of the Evidence Act and discussed about the 'evidence' meaning, scope and kinds of principles elucidated and held that (i) 'evidence' is the medium through which the court is convinced of the truth or otherwise of the matter under enquiry i.e., the actual words of witnesses, or documents produced and not to facts which have to be proved by oral and documentary evidence and (ii) 'evidence' is not restricted to only oral and documentary evidence but also to other things like material objects, the demeanour of the witnesses, facts of which

judicial notice could be taken, admissions of parties, local inspection made and answers given by the accused to questions put forth by the Magistrate or Judge under Section 313 of Cr.P.C.

35. The Hon'ble Apex Court in case of **Dharma Deo Yadav (supra)** held as under:

B. Criminal Trial - Circumstantial Evidence - Clues and Tell-Tale Signs/Forensics - Crimes scene management - Need of Precautions during Importance of forensics in a case based on circumstantial evidence, stated - In present case, skeleton and some cloth were properly packed and there were no procedural lapses - No skin was found, the dead body being buried for about a year - Non-compliance with Ss.100(4) & (5) CrPC found inconsequential - Criminal Procedure Code, 1973, Ss.100 and 174.

D. Criminal Trial - Identification of dead body/corpus delicti - Identification of skeleton of deceased as daughter of complainant father, whether proved - (a) Inquest proceedings having been properly conducted by PW.16 and inquest memo prepared by Pw.15, (b) skeleton of deceased

properly kept in sealed wooden box, (c) sample for DNA test (bones and teeth extracted from the skeleton) being sent in sealed cover and PW.21 being satisfied about its authenticity, (d) post-mortem tests conducted by doctors, PW 19 and others, (e) superimposition test and blood group test conducted by PW 20, HoD Forensic Department, and (f) DNA test conducted by PW 21 - DNA test, blood group test and superimposition test identifying deceased to be the daughter of complainant father - Said forensic findings, upheld."

36. In the case on hand, the prosecution clearly proved by way of circumstantial evidence, the recovery of the skeleton of the deceased at the instance of accused No.1 and exhumation proceedings and identification of the dead body/corpus delicti, identification of the skeleton by the family member based on the dress and the shoes of the accused. Though the superimposition test and blood group test not conducted, on perusal of the DNA report as per Ex.44 clearly depicts that the mandible, Humorous bone, and sternum and clavicle bone sent in the items nos.1, 2 and 3 respectively are of Human in origin and of male sex. The amplicons from the mandible, Humorous bone and clavicle bone

and sternum, sent in the item nos.1, 2 and 3 respectively were not sufficient for DNA Profiling. Hence, it could not be possible to compare with DNA profile of the blood sample sent in item no.4. Hence, in such circumstances, when the family members clearly identified the dead body then the prosecution proved the said aspect. Nevertheless, the accused failed to explain the incriminating circumstances against him in 313 statement since the entire aspect of the matter is well within the special knowledge of the accused only in such circumstances he failed to discharge his duty.

37. The Hon'ble Apex Court in the case of ***State of Rajasthan vs. Kashim Ram*** reported in **(2006) 12 SCC 254** held that the failure of accused to explain incriminating circumstances against him, provides an additional circumstance in the chain of circumstantial evidence against him as contemplated under the provision of 106 of Indian Evidence Act. Since the incriminating circumstances which will be within his special knowledge and failure to discharge onus which lies on accused under the said provision is an additional link in the chain

of circumstances. In the case on hand, the accused failed to explain any such circumstances proved against him.

38. In such circumstance, the theory established by the prosecution is proved in the chain of circumstances of the evidence against the accused.

39. The learned counsel contended that the non-examination of the mother of the deceased who was residing along with accused No.1 and the deceased in their house is fatal to the prosecution case. However, when the evidence of other family members very much available and the deceased of the sister and the brother of the accused No.2 himself deposed about illicit affair between accused Nos.1 and 2, in such circumstances, the Hon'ble Apex Court in the case of ***Sunil Clifford Daniel vs. State of Punjab*** reported in **(2012) 11 SCC 205** held that when other evidence are available, the non-examination of the said witness is inconsequential.

40. Hence, in our considered opinion, the learned Sessions Judge has rightly convicted accused No.1 for the charges levelled against him.

41. However, as far as accused No.3 is concerned, the prosecution failed to prove his guilt by leading any cogent evidence. In order to implicate him in the alleged crime, the prosecution totally relied on the voluntary statement of accused No.1 as per Ex.38. However, the witnesses examined before the Court i.e., the family members of the deceased so also the other circumstantial witnesses were not deposed about the involvement of accused No.3 in the alleged crime. It is the settled position of law that the voluntary statement of the co-accused cannot be base for conviction of other accused. As per the prosecution case, accused No.3 involved in the crime by way of facilitating/assisting accused No.1 to shift the dead body by an auto rickshaw from the place where accused No.1 murdered the deceased to the place where accused No.1 buried the dead body of the deceased. However, the ownership of the said auto rickshaw was not proved and more over, there is no

such evidence deposed before the Court about the shifting of the dead body by accused No.3 along with accused No.1. In such circumstances, accused No.3 cannot be convicted for the offences charged against him.

42. However, the sentence imposed against accused No.1 by the trial Court by directing him to undergo imprisonment i.e., till his last breath is concerned, in our considered opinion the said sentence is not sustainable under law for the reason that the Hon'ble Apex Court in the case of ***Union of India vs. V.Sriharan Alias Murugan and others*** reported in **2016 (7) SCC in 1** held that awarding of said special category sentence, in substitution of death sentence, that is, sentence barring remission under Cr.PC for specified term beyond 14 yrs, or life imprisonment barring remission for rest of life, held (per majority), is valid - Clarified, however power under Arts. 72 and 161, which is not the same as the statutory power of remission, is not affected - Award of non-remittable specified sentence or life imprisonment barring remission for rest of life, held, not violative of separation of powers - Such special sentence when

imposed under substantive provisions of IPC does not overlap procedural power under Cr.PC either - Considering crime situation in India (particularly nexus between hardened criminals and ill-gotten wealth, and nature of heinous crimes on the rise), delay in disposal of cases, and balancing interest of victims with those of convicts, such special category sentence is necessary. Further held (*per majority*), such special category sentence can only be imposed by High Court or supreme Court and not by trial court.

(emphasis supplied)

43. In such circumstances, the Sessions Court cannot exercise such power to impose imprisonment to accused No.1 till his last breath. Hence, learned Sessions Judge erred on that count. Nevertheless, the Hon'ble Apex Court in the case of ***Dharma Deo Yadav (supra)*** laid down three tests, namely, Crime test, Criminal test and Rarest rare test. So for the present case is concerned, both the crime and criminal tests have been satisfied against the accused but, rarest rare test is concerned, the prosecution failed to prove the same by leading cogent

evidence that the crime was committed in a barbaric manner and hence the instant case would not fall under the category of rarest of the rare case. As such, the punishment awarded by the trial Court by imposing the imprisonment to accused No.1 till his last breath has to be modified to life imprisonment instead of last breath of his life.

(emphasis supplied)

44. In that view of the matter, we answered points raised accordingly and proceed to pass the following:

ORDER

- i) Criminal Appeal No.1234/2017 filed by accused No.1 is hereby allowed-in-part.
- ii) The judgment of conviction and order of sentence passed in S.C.No.215/2012 dated 25.04.2017 by the II Addl. District and Sessions Judge, Hassan is hereby modified in respect of accused No.1 for the offence punishable under Section 302 r/w Section 34 of IPC. The rest of the order passed by the learned Sessions Judge is maintained, in respect of accused No.1.

- iii) Accused No.1 is directed to undergo life imprisonment instead of imprisonment for life i.e., till his last breath for the offence punishable under Section 302 r/w Section 34 of IPC.
- iv) Since the offence punishable under Section 302 r/w Section 34 of IPC is modified, all the sentence shall run concurrently.
- v) The bail bond and surety bond executed by accused No.1 stands cancelled and two weeks time is granted to him to surrender before the trial Court to serve the sentence, from the date of receipt of certified copy of this judgment, failing which, learned Sessions Judge is directed to secure the presence of accused No.1 and to commit him to prison to serve the sentence.
- vi) Criminal Appeal No.836/2017 filed by accused No.3 is hereby allowed.
- vii) The judgment of conviction and order of sentence passed in S.C.No.215/2012 dated 25.04.2017 by the II Addl. District and Sessions Judge, Hassan is hereby set aside, in respect of accused No.3.

- viii) Accused No.3 is hereby acquitted of the charges levelled against him.
- ix) The bail bond and surety bond executed by accused No.3 stands cancelled and the fine amount, if any deposited, before the trial Court, the same shall be refunded to him on due identification.
- x) Registry is directed to send back the trial Court records along with copy of this order to the learned Sessions Judge, forthwith.

**Sd/-
JUDGE**

**Sd/-
JUDGE**