Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 64 OF 2021

SIJU KURIAN …APPELLANT

VERSUS

STATE OF KARNATAKA …RESPONDENT

J U D G M E N T

Aravind Kumar, J.

1. This appeal under Section 2(1)(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 by the sole accused in Sessions Case No.96 of 2012 on the file of the Fast Track Court, Sagar Taluk, arises from a judgment rendered by the High Court of Karnataka in Criminal Appeal No.335 of 2014 filed by the State of Karnataka against the judgment of the Fast Track Court reversing the order of acquittal and convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code (for short 'the IPC'), 201 of IPC, 404 of IPC and 419 of IPC and sentencing him to simple

imprisonment for life and also sentencing to undergo simple imprisonment for a period of 3 years/2years for the respective offences which has been ordered to run concurrently and also fine.

2. Brief facts of the case as putforth by the prosecution are: accused was working as a labourer in the farmhouse of Mr. Jose Kafan (deceased) in Kerodi village of Sagar Taluk (Karnataka State) and on 02.12.2011 between 6:00 am to 6:30 am, said accused had entered the room of the deceased through the eastern side of the farm house while he was sleeping there and murdered him by hitting with iron rod on his face, upon his left eyebrow and on his left chin with force, then stole the articles in the farm house and sold the same and also sold the land of said farm house to others to make undue monetary gain. In order to conceal the act and with a deliberate intention to destroy the evidence, the accused then hid the dead body in a pit meant for storing ash manure in the garden land located at a short distance from the farm house in the western side of the farm house. The iron rod used for committing the murder, waist belt of the deceased person, his pant, shirt were also concealed below the upper crust of soil in the garden after which, he had sold the equipments stolen from the farm house to Sunil Kumar (CW-18) for consideration and likewise he had sold other items to Mr. Denis C Thomas (CW20). It was alleged that said amount released by way of sale

was dishonestly misappropriated by the accused. It is further alleged by the prosecution that accused impersonating himself as the son of the deceased person had also attempted to sell the land of the deceased to others and to substantiate his false claims had also handed over the documents of the farm house of the deceased to CW-15 Mr. Lizo and thereafter he had absconded.

3. Mr. Sajid, son of the deceased lodged a missing complaint and in the backdrop of information regarding the accused, inquiry was conducted and accused confessed to the crime and showed where the dead body was concealed in the presence of witnesses. Hence, the prosecution alleged in this manner accused had murdered the father of the complainant, sold the belongings of the deceased and handed over the documents of the land owned by the deceased, proclaiming himself to be the son of the deceased and had made attempts to sell the land illegally to others. On completion of investigation the charge-sheet came to be filed against the accused for the offences punishable under Sections 302, 201, 404 and 419 of IPC for committing a cognizable offence. Charge came to be framed against the accused and same having been denied resulted in trial being held and in order to drive home the guilt of the accused prosecution got examined 25 witnesses as PW-1 to PW-25 and got exhibited material evidence as per Ex.P-1 to P-51 and the

material objects as MO1 to MO47. On conclusion of prosecution evidence, the statement of the accused person under Section 313 of Code of Criminal Procedure, came to be recorded and accused pleaded not being guilty and also reiterated his stand of being innocent. Learned Sessions Judge after having heard the arguments on both the sides formulated six points/issues of determination. The learned Trial Judge acquitted the accused by arriving at a conclusion that prosecution had failed to prove its case beyond reasonable doubt, by judgment dated 08.08.2013. State being aggrieved by the same filed Criminal Appeal No.-335 of 2014 assailing the said order of acquittal contending *inter alia* that Sessions Judge had failed to appreciate the evidence and/or there is erroneous appreciation of evidence and as such the accused had to be convicted. It was also contended that though recoveries of the articles, namely, material object was at the instance of the accused and the testimony of the witnesses clearly supported the case of the prosecution, yet learned Sessions Judge had erroneously disbelieved the case of the prosecution. It was also canvassed that on account of non-consideration of the evidence of the doctor PW-22 in proper perspective it had resulted in an erroneous order of acquittal being passed by Sessions Court. On these amongst other grounds as urged in the appeal memorandum the State sought for reversal of the Order of acquittal passed by the Trial Court. After considering the arguments advanced by

the respective learned advocates appearing for the prosecution as well as the accused the High Court reversed the finding recorded by the Trial Court and convicted the accused for the offence punishable under Sections 302, 201, 404 and 419 of IPC and sentenced him to life imprisonment as already noticed herein supra. Hence this appeal.

4. We have heard the arguments of Shri. Renjith B. Marar learned counsel appearing for the appellant along with Mr. Zulfiker Ali P.S, Ms. Lakshmi Sree P., Ms. Lebina Baby, Advocates for the appellant/accused and Shri V.N. Raghupathy, learned standing counsel appearing for the State.

5. It is the contention of Shri Renjith B. Marar, learned counsel appearing for the appellant that there is no direct evidence attributable to the role of the accused and High Court has based the order of conviction on circumstantial evidence. He has contended that prosecution has not been able to establish the chain of events on the basis of circumstantial evidence, all leading to the one and only conclusion namely the guilt of the accused. He would submit that conviction has been based solely on the basis of confessional statement alleged to have been given by the appellant to the police in terms of Section 27 of the Evidence Act. The said evidence is not reliable and ought not to have been accepted since it

was written in the Kannada Language which was not known to the accused. He contended that according to the prosecution accused had given a confessional statement at the police station in Malayalam in the presence of PW-10 who translated the same to Kannada and undisputedly PW-10 did not know how to write and read Kannada but was only able to speak Kannada language and as such the translated version of appellant's alleged confession to the police could not be acceptable evidence. There being no evidence available on record as to the person who had got it typed on a computer and who had taken the printout of the same was itself sufficient to disbelieve the said statement and there was no explanation forthcoming from prosecution. On these aspects as rightly pointed out by the Trial Court, the High Court ought not to have interfered with the well-reasoned order of acquittal passed by the Trial Court.

6. He also drew the attention of this Court to the evidence of PW-10 by contending that he is a close friend of other prosecution witnesses and his evidence ought not to have been considered. He would contend that confessional statement of the accused was in a printed format and this was not typed in the presence of the accused at the police station and even according to the prosecution it was told by PW-10, written down by the police and undisputedly the statement which was written down was

not produced and as such evidence of PW-10 could not have been relied upon by the High Court to convict the accused.

7. He would further contend that complainant PW-4 who is the son of the deceased had stated that his father had left home in Kerala lastly on 29.11.2011 and he had called his father once on 28.12.2011 to invite him to a family function which had been agreed but deceased did not visit Kerala. He would contend that according to the prosecution the deceased was murdered by the accused on 02.12.2011 as stated in the alleged confession statement and as per the post-mortem report, death had occurred 45 to 60 days prior to days of exhumation on 21.01.2012 and as such the story of the prosecution as attributed to the accused is not believable and on account of the same it caused a serious doubt and the lacuna that has crept in prosecution case has remained unexplained, which was fatal to the prosecution story.

8. He would further contend that prosecution has mainly relied upon 3 witnesses namely PW-1 (mahazar witness), PW-2 (inquest witness) and PW-10 (the person who translated the revelations of accused) to prove the recovery of material objects (MO's) allegedly stolen by the accused from the farm house of the deceased. By taking us to the deposition of these witnesses he would contend that they are close

friends residing in neighbourhood and all these three witnesses had witnessed the recoveries and attested the seizure measure and inquest report and as such they have to be treated as stock witnesses brought in at the instance of the prosecution and same ought to have been discarded as not being trustworthy. He would also contend that story of the prosecution is that accused was an employee in the farmhouse of the deceased which had not been proved. He would submit that prosecution had failed to prove the chain of circumstances including the last seen theory. He would contend that very fact of accused having denied all the allegations put against him when he was examined under Section 313 of Code of Criminal Procedure (for short 'the Cr.P.C.') including the recovery of the dead body and other material objects at his instance was sufficient to accept the stand of the accused by arriving at a conclusion that prosecution had failed to prove the guilt of the accused beyond reasonable doubt.

8.1 He would contend that the case of the accused was that when he was brought to the spot by the police there were already some people standing exactly at the spot where the dead body was exhumed and accused had not pointed out the spot to the police and the spot was known to the police even before the arrest of the accused. Hence, High Court ought not to have put the burden to disprove the prosecution case.

He would contend that the two employees who were working in the farm house of the deceased were missing and there was no explanation whatsoever forthcoming from the prosecution in this regard and this cast a serious doubt with regard to the alleged act of the deceased. He would contend that the CDR of the accused's mobile was not secured and produced by way of evidence by prosecution which was fatal to the prosecution case.

8.2 He would contend that the alleged confessional statement Ex.P-2 is to be segregated into two parts: namely recovery of dead body and articles and in which statement was undisputedly before the police and as such inadmissible. He would also elaborate the submissions by contending that when the findings of the trial court cannot be held as perverse or not possible to be arrived at, necessarily the benefit should be extended to the accused as held by catena of Judgments of this Court and as such he has prayed for affirming the order of acquittal passed by the Trial Court which has since been reversed by the High Court. He would contend that on suspicion, conviction cannot be sustained and the prosecution had failed to prove the guilt of the accused beyond all reasonable doubt and by relying upon the following judgments he prays for allowing of the appeal and restoring the judgment passed by the Trial Court:

(i) ***Sharad Birdhichand Sarda*** *v.* ***State of Maharashtra*** (1984) 4 SCC 116,

(ii) ***Sheo Swarup*** *v.* ***King Emperor*** AIR 1934 PC 227,

(iii) ***Chandrappa and others*** *v.* ***State of Karnataka*** (2007) 4 SCC 415,

(iv) ***Murugesan*** *v.* ***State through the Inspector of Police*** (2012) 10 SCC 383,

(v) ***Naresh Chandra Das*** *v.* ***Emperor*** AIR 1942 (Cal) 593,

(vi) ***Pohalya Motya Valvi*** *v.* ***State of Maharashtra*** (1980) 1 SCC 530,

(vii) ***Anvar P.V.*** *v* ***P.K. Basheer*** (2014) 10 SCC 473,

(viii) ***Arjun Panditrao Khotkar*** v. ***Kailash Kushanrao Gorantyal*** (2020) 7 SCC 1.

Per contra Shri V. N. Raghupathy, learned standing counsel appearing by the State would support the judgment passed by the High Court. He would submit that when learned Sessions Judge had failed to look into the evidence available before it or had erroneously appreciated the available evidence it had resulted in appellate court exercising its jurisdiction to reverse the said findings for which the reasonings have been assigned while recording the findings. He would submit that on reappreciation of the evidence the appellate court has formed an opinion that there had been non-appreciation of available material on record and has discussed the same threadbare.

9. He would submit that material witnesses namely the witnesses to the seizure mahazar PW-3, PW-9, PW-11 had remained unshaken and

there being no explanation forthcoming in the statement of the accused recorded under Section 313 of Cr.P.C., the High Court has rightly noticed that this material evidence had been ignored by the Trial Court and on account of said uncontroverted evidence available on record it has proceeded to accept the same and convict the accused which finding does not suffer from the vice of error. He would draw the attention of the court to the evidence of PW-5 who is the friend of the accused who has spoken about the rubble tapping machines being sold to Mr. Babu (PW-11) namely brother in law-Mr. Lijo (PW-5) under the agreement prepared by the advocate PW-15. He would contend that said witness has also spoken about Ex.P-15 under which MO23 to 32 had been seized which are said to have been given by the accused, thus supporting the case of the prosecution and by contending that the High Court has on re-appreciation of evidence had rightly formed an opinion that the Trial Court had ignored the material evidence and as such prays for sustaining the judgment of the High Court which had reversed the finding of the Trial Court whereby the accused had been acquitted. In support of his submissions he has relied upon the following judgments:

(i) ***State of Rajasthan*** *v* ***Kashi Ram*** *(2006) 12 SCC 254*

(ii) ***A.N. Venkatesh*** & ***Ors.*** *v* ***State of Karnataka*** (2005) 7 SCC 714

(iii) ***State of Karnataka*** *v Suvarnamma (2015) 1 SCC 323*

(iv) ***Pattu Rajan*** *v* ***State of Tamil Nadu*** *(2019) 4 SCC 771.*

(v) ***Arjun Panditrao Kotkar*** *v* ***Kailash*** (2020) 7 SCC 1.

10. Having heard the learned Advocates appearing for the parties and after bestowing our careful and anxious consideration to the rival contentions raised at the bar, we are of the considered view that the following points could arise for our consideration:

(a) Whether the judgment of the High Court reversing the finding of the Trial Court is to be set aside on the basis of there being two possible views and the one taken by Trial Court being a possible view?

(b) Whether the judgment of the High Court is erroneous and the findings recorded by the Trial Court has been erroneously reversed by High Court while re-appreciating the said evidence?

Or

(c) Whether the High Court has appreciated the evidence in proper manner or the High Court had failed to consider the evidence in proper perspective?

DISCUSSION AND FINDING

11. As the points formulated hereinabove are interlinked and findings being recorded are likely to overlap with each other, we have considered the above points conjointly and answered hereinbelow:

RE: POINTS 1 TO 3

12. One of the main contentions raised by the learned counsel appearing for the appellant is to the effect that High Court ought not to have interdicted with the judgment of the acquittal passed by the Trial Court and only in the event of judgment of the trial court was riddled with perversity and the view taken by the Trial Court was not a possible view, same could have been reversed by relying upon the judgment of this Court in case of ***Murugesan V. State through the inspector of police***[1] whereunder it came to be held as follows:

> "**33.** The expressions "erroneous", "wrong" and "possible" are defined in *Oxford English Dictionary* in the following terms:
> "*erroneous*.— wrong; incorrect.
> *wrong*.—(1) not correct or true, mistaken.
> (2) unjust, dishonest, or immoral.
> *possible*.—(1) capable of existing, happening, or being achieved.
> (2) that may exist or happen, but that is not certain or probable."
>
> **34.** It will be necessary for us to emphasize that a possible view denotes an opinion which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by a court lower in the hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement. But such a conclusion of the higher court would not take the view rendered by the subordinate court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. A possible

[1] (2012) 10 SCC 383

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

13. It need not be restated that it would be open for the High Court to re-apprise the evidence and conclusions drawn by the Trial Court and in the case of the judgment of the trial court being perverse that is contrary to the evidence on record, then in such circumstances the High Court would be justified in interfering with the findings of the Trial Court and/or reversing the finding of the Trial Court. In ***Gamini Bala Koteswara Rao*** *Vs.* ***State of Andhra Pradesh***[2] it has been held by this Court as under:

> **"14.** We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr. Rao, that interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to

[2] AIR 2010 SC 589

> whether the judgment of the trial court which has been found perverse by the High Court was in fact so.

The Appellate court may reverse the order of acquittal in the exercise of its powers and there is no indication in the Code of any limitation or restriction having placed on the High Court in exercise of its power as an Appellate court. No distinction can be drawn as regards the power of the High Court in dealing with an appeal, between an appeal from an order of acquittal and an appeal from a conviction. The Code of Criminal Procedure does not place any fetter on exercise of the power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed.

In the case of ***Sheo Swarup*** *v* ***King Emperor***[3], *it has been held by the Privy Council as under:*

> But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as:
>
> 1) The views/opinion of the trial judge as to the credibility of the witnesses;
> 2) The presumption of innocence in favour of the accused;

[3] AIR 1934 PC 227

> 3) The right of the accused to the benefit of any doubt; and
> 4) The slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

14. This Court has time and again reiterated the powers of the Appellate Court while dealing with the appeal against an order of acquittal and laid down the general principles in the matter of ***Chandrappa and Others*** Vs. ***State of Karnataka***[4] to the following effect:

> **"42.** From the above decisions, in our considered view, the following general principles regarding powers of the Appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (*1*) An Appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (*2*) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an Appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (*3*) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an Appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an Appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

[4] (2007) 4 SCC 415

> (*4*) An Appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
>
> (*5*) If two reasonable conclusions are possible on the basis of the evidence on record, the Appellate court should not disturb the finding of acquittal recorded by the trial court."

15. In the aforesaid background the circumstantial evidence relied upon by the State to prove the circumstances which points to the guilt of the accused alone for having committed the offence as summarized by the High Court cannot be found fault with, for reasons indicated hereinbelow:

16. The death of Mr. Jose C Kafan being homicide stands proved by virtue of the Post Mortem report Ex.P-41 which was conducted on 21.01.2012. The said report would indicate the death would have occurred 45-60 days prior to the post-mortem examination. PW-22, the Doctor who conducted the post-mortem of the dead body, Doctor Keertiraj in his examination in chief held on 26.03.2013 has opined thus:

> "A lacerated wound on left eyebrow measuring 2 inches (length) X 2 ½ inches (width) was found and the edges of the said wound was found to be

> lacerated. There was commuted fracture on frontal bone that comes under the said wound. Below the left eye i.e., in the maxilla bone part, swollen wound was found that means some blood clotting mark was found measuring 2 ½ inches (length) X 1 ½ inches (width)."

PW-22 has opined that Mr. Jose Kafan had died due to brain hemorrhage that occurred because of commuted fracture on the forehead. In that view of the matter and also there being no serious dispute on this issue, the irresistible conclusion drawn by the High Court, death of Mr. Jose Kafan was by homicidal cannot be found fault with.

16.1 The contention of the learned counsel for the accused that it is not possible to state conclusively as to what had exactly happened, due to lack of eye-witnesses and therefore the possibility of the deceased having fallen and suffered an injury cannot be ruled out is an argument which cannot be accepted and finding recorded by the High Court deserves to be affirmed.

16.2 One another circumstance in the chain which came to be relied upon by the prosecution is with regard to the "last scene theory". The case of the prosecution is that deceased Mr. Jose Kafan was living in his garden land at Kerodi village and was carrying on agricultural activities in survey No.48 and 49. It is also the case of the prosecution that deceased had constructed a house in the garden land itself and was residing therein. The son of the deceased who came to be examined as

PW-4 has deposed in unequivocal terms that he had been informed by his father that an advertisement had been given in the newspaper ‘Deepika’ about the requirement of a worker and pursuant to the same accused had applied and he had been taken for work. He has identified the newspaper as Ex.P-28 and the relevant advertisement as Ex.P-8(a).

16.3 Contending that prosecution had failed to prove that accused had been employed by the deceased and neither PW-4 nor any other witnesses namely PW-5, PW-6, PW-7, PW-8, PW-9, PW-11 and PW-12 had deposed that they have seen the appellant working in the garden land of the deceased. It is contended that accused and deceased were never seen together and the finding recorded by the Trial Court is well reasoned and particularly the finding recorded at paragraphs 14, 15, 16 and same ought not to have been interfered by the High Court is an argument at first blush looks attractive but on deeper examination it belies the truth as noticed by High Court. The fact that accused was last seen in the company of the deceased is testified by PW-10 and PW-14. PW-10 in his examination in chief dated 26.02.2013 has stated to the following effect.

> “I have been residing in Sagar since 1962. I am driving auto rikshaw from the past 23 years. I have the acquaintance of Jose Kafan and he belongs to Kerala. When an auto driver, who knew Malayalam, was required in the auto stand I was shown and I and Kafan have acquaintance of nearly 5-6 years. When

> he required auto rikshaw, he used to call me. I used to drop him to his farm land. I know where the land of Kafan is situated. The witness was shown Ex.P.31 and 32 and he identified the person wearing purple colour shirt as Jose Kafan. People used to go to the land for working**. I have seen the accused in the place of Kafan. The accused was a worker there.**
>
> On 21.01.2012, a Dafedar namely Sundar told me that he wants someone who knew Malayalam and requested to go with him in order to do translation from Malayalam language. I went to Sagar Rural station. I was taken to the station and Dy. S.P Was there in the station." The accused was shown to me and asked whether I have acquaintance of the accused and **I have identified the accused and stated that he was working in the garden land of Kafan.** The police showed xxx informed to the police. The accused stated that on 02.12.2011 when Kafan was sleeping at 6:00-6:30 in his house in the garden land, I killed him by assaulting on his head with an iron rod. Half an hour later when I lifted his hand and dropped, it fell downwards and later I got confirmed that he is dead and then wrapped his dead body using bedsheet and buried. He has stated that there was a compost pit behind the house and he has buried the dead body in that compost pit only. He told that after burying his dead body he was residing there only. He stated that he murdered in order to gain money by selling the equipments. He also told that he even thought of selling the land. The accused told that he would show the place where he has buried the dead body and would show the people to whom he has sold the equipments.

16.4 PW-14 is another witness whose testimony has been placed reliance by the High Court in the chain of circumstances namely last

seen theory. In his examination in chief dated 12.03.2013, PW-14 has stated to the following effect:

> "I basically xxx industries. I have the acquaintance of Deepak Gowda who works by taking JCB for rent. Deepak did not know Malayalam and Kafan did not know Kannada and therefore Deepak Gowda took me to talk about the money for JCB and about work. Then I got the acquaintance of Kafan. The witness was shown Ex.P.31 and 32 and he identified the person wearing purple colour shirt as Mr. Jose Kafan. After that we had been to his garden land. He told me that he wanted workers as there are no workers to work in his garden land. Therefore, I got a worker for him but he went back to Kerala saying he is not feeling comfortable. Later an advertisement was given in the month of September 2011 through which he got a worker. **That worker was there in the house when we went there. The witness identifies that person who was with Mr. Jose Kafan as the accused**. Mr. Jose Kafan told that he does not have any identity card of this place and asked to get a SIM for his workers by giving my own address. Accordingly I got a SIM card to him."

16.5 Apart from these two prime witnesses, PW-5, PW-7, PW-9, PW-10, PW-11 and PW-15 have also clearly and in unequivocal terms deposed that accused was last seen in the house of the deceased after his death. Even if one witness amongst these is to be believed as to what has been deposed is the truth, necessarily the onus is on the accused to provide a satisfactory explanation either in his statement recorded under Section 313 of Cr.P.C. or from the admissions elicited from these witnesses, the circumstances in which he was in the company of

deceased. When PW-10 and PW-14 have clearly stated that they had seen the accused in the company of the deceased, and there being no satisfactory explanation offered by the accused to the contrary, it has to be necessarily held that accused had failed to discharge the burden cast upon him. Section 106 of the Evidence Act clearly lays down that when any fact is specially within the knowledge of a person, the burden approving that fact is upon him namely, on such person. This Court in a case of ***State of Rajasthan*** Vs. ***Kashiram***[5] has held:

> "16. The most important circumstance that the respondent was last seen with the deceased on 3-2-1998 whereafter he had disappeared and his house was found locked and that he had offered no explanation whatsoever, was disposed of by the High Court in one short paragraph observing that there was nothing unusual if the accused was seen in the company of his own family members in his house. On such reasoning, the High Court held that the circumstantial evidence relied upon by the prosecution was not strong enough to sustain the conviction of the respondent. Accordingly, the High Court allowed the appeals preferred by the respondent and declined the death reference made by the trial court for confirmation of the sentence of death."
>
> "23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an

[5] (2006) 12 SCC 254

> explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Naina Mohd.*, *Re.* [AIR 1960 Mad 218 : 1960 Cri LJ 620]"

16.6 Thus, when PW-10 and PW-14 have in clear terms deposed to have last seen the accused with the deceased, necessarily accused must offer an explanation as to how and when he started living separately and there being no explanation offered necessarily in the chain of circumstances, the last seen theory propounded by the prosecution to drive home the guilt of the accused requires to be accepted.

17. Yet another circumstance which the prosecution has heavily relied upon is the recovery of dead body at the instance of the accused, based on voluntary statement, which statement has been disowned by the accused and the same not having been proved by the prosecution according to the learned counsel appearing for the accused. The said

statement of the accused has been marked as Ex.P-2 through PW-25. The said statement was recorded in the presence of Mr. Balakrishna Guled PW-1, Mr. Raju CW-3 and interpreter Mr. Kunjali, PW-10.

17.1. It has been contended that procedure adopted in asking questions, eliciting answers from the appellant-accused has been spoken to by PW-10 Mr. Kunjali who states that he did not know how to read and write Malayalam and yet police had asked him questions in Kannada who in turn had translated into Malayalam and elicited answers from accused in Malayalam and said answer was translated into Tamil by PW-10 and same was typed out in Kannada by the police which is an unusual method of recording the confession of an accused and as such confession statement Ex.P-2 was not admissible evidence under Section 27 of the Evidence Act. To examine said contention we deem it proper to extract Section 27 of the Evidence Act and it reads:

> **"27. How much of information received from accused may be proved. —**Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

18. Section 27 permits the derivative use of custodial statement in the ordinary course of events. There is no automatic presumption that the

custodial statements have been extracted through compulsion. A fact discovered is an information supplied by the accused in his disclosure statement is a relevant fact and that is only admissible in evidence if something new is discovered or recovered at the instance of the accused which was not within the knowledge of the police before recording the disclosure statement of the accused. The statement of an accused recorded while being in police custody can be split into its components and can be separated from the admissible portions. Such of those components or portions which were the immediate cause of the discovery would be the legal evidence and the rest can be rejected vide ***Mohmed Inayatullah*** Vs. ***State of Maharashtra***[6]. In this background when we turn our attention to the facts on hand as well as the contention raised by the accused that the confession statement is to be discarded in its entirety cannot be accepted for reasons more than one. Firstly, the conduct of the accused would also be a relevant fact as indicated in Section 8. This court in ***A.N. Venkatesh & another.*** Vs. ***State of Karnataka***[7] has held to the following effect:

> **"9.** By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing

[6] AIR 1976 SC 483
[7] (2005) 7 SCC 714

> out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in *Prakash Chand* v. *State (Delhi Admn.)* [(1979) 3 SCC 90: 1979 SCC (Cri) 656 : AIR 1979 SC 400] . Even if we hold that the disclosure statement made by the accused-appellants (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW-4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act.

19. It is a trite law that in pursuance to a voluntary statement made by the accused, a fact must be discovered which was in the exclusive knowledge of the accused alone. In such circumstances, that part of the voluntary statement which leads to the discovery of a new fact which was only in the knowledge of the accused would become admissible under Section 27. Such statement should have been voluntarily made and the facts stated therein should not have been in the knowhow of others. In this background when the deposition of PW-10 is perused it would leave no manner of doubt in our mind that statement of the accused (Ex.P-2) having been recorded being voluntary and when the statement is being recorded in the language not known to the accused, the

assistance of interpreter if taken by the police cannot be found fault with. The ultimate test of the said statement made by the accused having been noted down as told by the accused or not would be of paramount consideration. If the answer is in the affirmative then necessarily said statement will have to be held as passing the test of law as otherwise not. Merely because the translation was made from Malayalam to Tamil and written down in Kannada would not suggest that such statement be held to be either not being voluntary or the said statement having been recorded improperly. The interpreter having entered the witness box and tendered himself for cross-examination which resulted in nothing worthwhile having been elicited for discarding his evidence, it cannot be gainsaid by the accused that said statement at Ex.P-2 is to be ignored or rejected or discarded. Merely because PW-10 did not know how to read and write Malayalam does not *ipso facto* make the contents of Ex.P-2 to be disbelieved. On the other hand, he states that he is from Kerala and he knows how to speak Malayalam. What was required to be performed by him was to pose the question as stated by the witness to the accused and the answers given to such questions are to be stated to the police for being recorded as stated by the accused. In fact, there is not even a suggestion made to PW-10 about the contents of Ex.P-2 being incorrect.

20. It is pursuant to this voluntary statement as per Ex.P-2 which lead the police to recover the body of the victim from the compost pit, which has been proved through PW-1, PW-2, PW-4, PW-10 and PW-25. Their admissions read as under:

> **PW-1:** "I will show the place where I have murdered Jose C Kafan with an iron rod and the place where I have buried his dead body in the pit.

> **PW-2:** "On 21.01.2012, I had been to Kerodi Village due to some personal work. Tahsildar and police were going there in a jeep. I greeted Tahsildar. He told me that a case is there and asked me to accompany him. The accused showed a place there. He showed a place and told that there is a dead body in a compost pit situated next to lemon tree and told that he has closed it. I, Devendra and Shivu opened the pit. While digging the pit, a cloth was found and while removing the mud a blanket was found after cloth and again while removing the mud slowly a dead body wrapped with a blanket was found."

> **PW-4:** "I have told Stanie that my father has not expired. Immediately, I and my brothers Ajith and Ranjith came to Kerodi village with K.K. Shaabu of Kundapura. When we went to that place, neither my father nor the workers were there. Immediately we went to the rural Police Station of Sagar and lodged complaints. I have not lodged complaint about missing. We went to the station on 21st the Police were investigating Siju Kurian. The witness showed the accused and identified him as Siju Kurian. The accused has stated before the police that he has killed my father by assaulting with an iron rod on his head and has buried in a pit by wrapping the dead body with a blanket. The accused told that he would show the place where he had buried the dead body and hence led us and showed the place where he had buried the dead body. The accused has shown the

place of incident occurred. He took us to the place and showed the place my father was sleeping.

Later he showed us the place where the dead body was buried. Then, before the presence of Tahasildar, the dead body was exhumed."

PW-10: "On 21.01.2012, A Dafedar namely sundar told me that he wants someone who knew Malayalam and requested to go with him in order to do translation form Malayalam language. I went to Sagar Rural station. I was taken to the station and Dy.S.P was there in the station. The accused was shown to me and asked whether I have the acquaintance of the accused and I identified the accused and stated that he was working in the garden land of Kafan. The Police showed the accused and told me that he does not know Kannada and told me to ask him about Jose Kafan. I used to ask the accused in Malayalam in the manner in which the police wanted to ask and the reply given by the accused is translated into Tamil (Translator's note: In the original document it is written Tamil and the word is underlined.) and informed to the police. The accused stated that "on 02.12.2011 when Kafan was sleeping at 6-6:30 in his house in the garden land, I killed him by assaulting on his head with an iron rod. Half an hour later when I lifted his hand and dropped, it fell downwards and later I got confirmed that he is dead and then wrapped his dead body using bed sheet and buried". He has stated that there was a compost pit behind the house and he has buried the dead body in that compost pit only. He told that after burying the dead body he was residing there only. He stated that he murdered in order to gain money by selling the equipments. He also told that he even thought of selling the land.

The accused told that he would show the place where he has buried the dead body and would show the people to whom he has sold the equipments."

PW-25: In his statement, he had admitted about committing the offence and stated that he would show the place where the dead body was buried.

It is no doubt true that aforesaid confession of PW-25 in its entirety is not admissible in view of Section 25 of the Evidence Act. However, in the teeth of Section 8 read with Section 27 of the Evidence Act, that part of the confession which led to the recovery of the dead body of the victim would become admissible, apart from other articles of the deceased recovered at the instance of the accused has been identified by several witnesses independently. This has also persuaded the High Court to accept the statement recorded under Ex.P-2 as being admissible which cannot be construed as highly improbable. Certain articles were recovered on the strength of confession statement – Ex.P-2 made by the accused and in order to prove such recovery the witnesses who have been examined by the prosecution have deposed to the following effect and this has also persuaded us to accept the findings of the High Court.

(a) PW-3- Mr. Raghavendra (Panch witness) has deposed as under:

> "… When Lijo came out the police enquired as to whether the accused has given him any items, for which Lijo admitted and told that he has given him certain items. Lijo produced the said items before the police. Lijo produced almirah, suitcase, basket and spade. Lijo produced almirah, suitcase, basket and spade. He totally produced 4 baskets…"

(b) PW-9 Mr. Sunil Kumar in his evidence has stated that-

> "When we went to Kafan's land, the accused was there. The accused told in Malayalam that we would sell the equipments and Keriyappa understood little bit of Malayalam. He told that rubber roller machine is for sale. Since the price of it was costly, I refused to buy and when we were returning, he had piled up the

> equipments in front of the house. He told that he would sell that too. He wrote and showed the price of those equipments as Rs. 2,500/-. I wrote and showed Rs. 2,000/-. The accused agreed for it and sold the equipments. We purchased it. I have purchased 12 spades, one iron rod, and one handsaw, two water drums wherein one had lid and the other one was not having and pest control spraying machine…"

(c) PW-10-Kunjali has stated that-

> "… Police and Panchas were there when I went to the station and accused and also there. From there the accused led us to Bheemaneri. I do not remember the name of the person to whose house he took us. I have translated whatever the accused has spoken from Malayalam to Kannada language. One almirah, suitcase, Bank cheque book and pass book, 4-5 baskets and one spade and documents were there in that place and he has identified it and they have been marked as M.O.23-32…"

(d) PW-12- Denny C. Thomas in his deposition has stated that-

> "I have the acquaintance of Lijo. I was in need of water tank and have informed this matter to Lijo. He informed me that one water tank is for sale. It was an old water tank. Later Lijo took me to the garden land of Jose Kafan and showed the water tank. He charged Rs. 15,000/- but I told I would give Rs. 12,000/-. Lijo agreed for that. All these happened in the month of December 2011. Later I gave Rs. 12,000/- and purchased the water tank. I gave that to Sebastian as he asked to preserve water for marriage."

20.1 In fact, accused had sold the rubber rolling machines for a sum of Rs.27,000 in favour of PW-11, which came to be marked as MO 43 and MO 44. The factum of sale of MO 43 and MO 44 has also been proved through PW-5. It would be apt and appropriate to extract the deposition of PW-5 which is to the following effect:

> **PW-5:** "On 08.12.2011 in the evening Babu called me over phone and told me that rubber roller machine is for sale in Lingadahalli and he is thinking of purchasing it. He asked my suggestion because the cost of that machine was Rs. 30,000/-. I told him not to buy immediately but to buy the next day after preparing an agreement with the advocate.
>
> Later all three of us namely I, Babu and the accused Binu went to Lingadahalli. There we went to the house of Uday Kumar, who was an advocate. My brother-in-law knew him and he was requested to prepare an agreement regarding the purchase of roller machine.
>
> He took us to the garden land of Jose Kafan and had shown the rubber roller machine. At that time, it was dark. Later we went to the hose of Babu in the same auto. We took machine in the auto and kept in Babu's house. I enquired about Jose Kafan with the accused. He told that he is unwell and hence he is in the hospital in Kerala and he cannot move his hands and legs and can only move his head and hence he is in Ernakulam Hospital."
>
> **PW-7:** "I asked whether the owner is doing fine and the accused told that he is doing fine and had gone to Kerala. He informed about rubber machine and asked me only to purchase it. I told that I do not want it and would inform him about people who wants to purchase it. I told I need the owner for that dealing. At that time the accused told that the owner is not keeping well. He told that money is required for his treatment only for which he is selling it. Therefore, the next day I and Sunil Kumar went to the Garden land of Jose Kafan. We saw the rubber roller machine. The accused told that the cost of it is Rs. 50,000/- We asked for Rs. 30,000/-. We did not buy it but came back."

20.2 In fact the land belonging to the deceased was attempted to be sold by the accused to PW-5 and the uncontroverted evidence that is available on record is to be following effect below:

PW-5: "He told that they will not do any agricultural activities and want to sell property and asked me to inform whether anybody wants to buy it. I agreed for that and told that I would inform if any party is ready to buy it. He told that Binu does not know Kannada and did not have the acquaintance of anyone. Therefore, he asked me to keep and preserve the records.

PW-8: "He has identified the person wearing purple colour shirt as Jose Kafan. In the month of December 2011, Bisu had told that 4 ½ acres of farm land of Kafan is for sale. Lijo had told Bisu about this. In order to obtain advice regarding the purchase of the said farm land, I, Lijo and my brother-in-law Bisu met Nagaraj, who is an advocate. Lijo had the documents.

The advocate examined the documents. Lijo told that Mr. Jose Kafan has expired. By looking at the documents, advocate told that the death certificate of Kafan is required and for identification purpose his ID card or License is required and Kafan's son has to come in order to sell the land. Later we went to bus stand from the house of advocate. I also went to the bus stand. Lijo and Bisu went in bike. Later, after 5 minutes Lijo made a phone call to me and told me to be in bus stand only saying Kafan's son had called and they could talk directly with him. They came to bus stand. They made a phone call and gave mobile to me. The person who made a phone call asked to give advance amount of one lakh rupees to Binu. The person who made a phone call stated that he is Kafan's son Sajith. He told that the value of land is 10 lakhs. I told that I would get the advance amount to Kerala. At that time he asked me to give advance amount to Binu. Lijo asked for commission. He asked to give one lakh rupees to Lijo. Around 2-3 days after this, my brother-in-law Bisu had been to Mankalale, where Kolathur Jose was residing. He is the relative of Jose Kafan.

Lijo told Kolathur Jose that Jose Kafan has expired and his sons are selling his land. Then Kolathur Jose told that Jose Kafan is not dead and he would talk to Kafan's children and let us know about it."

PW-9: "When we went to Kafan's land, the accused was there. The accused told in Malayalam that he would sell the equipments and Keriyappa understood little bit of Malayalam language. Keriyappa explained by understanding little bit of Malayalam. He told that rubber roller machine is for sale. Since the price of it was costly, I refused to buy and when we were returning, he had piled up the equipments in front of the house. He said that he would sell that also. He wrote and showed the price of those equipments as Rs. 2,500/- I wrote and showed Rs. 2,000/-. The accused agreed for it and sold the equipments. We purchased it. I have purchased 12 spades one iron rod, one handsaw, two water drums wherein on had lid and the other one was not having and pest control spraying machine. We shifted all the items and I gave the drum that had no lid to Keriyappa. I took the remaining."

PW-11: "In the month of December 2011, it was told about rubber roller machine. It was told that the machine is there in someone's house at Kerodi. I and Sunil Kumar went to see the machine and the accused was there in that place. The accused disclosed his name as Binu. He introduced himself as the son of Kafan's younger brother. He said that the rubber roller machine is on sale and informed that its cost is Rs. 30,000/-. I agreed to purchase the machine and after negotiation it was decided to purchase it for an amount of Rs. 27,000/-. We came back on that day only.

I had informed Lijo about purchasing the machine. Lijo is my brother-in-law and he told to prepare an agreement for that. Then I, my brother-in-law Lijo and Binu went to advocate's house on 09.12.2011. Advocate Uday Kumar resides in Lingadahalli. We had been to his house. He wrote the content of agreement on a white paper. I, Binu and Lijo had affixed our signature on the said document. The accused himself is Binu. The witness identifies his signature of the accused in M.O.41-agreement. The witness identifies his signature also. The signature of the witness has been marked as M.O.41(b), accused signature as M.O.41 (c) and Lijo's signature as M.O.41 (a). The sale agreement

was prepared for Rs. 30,000/- but I gave only Rs. 27,000/-."

PW-13: "On 07.01.2012, I went to Vigneshwara Hospital with my wife and son because my son was unwell. Lijo also had come to the hospital since his son was also unwell. I know Lijo from long back. While talking, Lijo informed me that Jose Kafan is dead. He informed me that Kafan was suffering from Paralysis disease and his son took him to Kerala for treatment and since the disease became severe in Kerala, he took Kafan to America for better treatment but Kafan died two days before Christmas festival. Lijo even told that his dead body was not bought back but the funeral was conducted there only.

Later, after several days I went to Century Motors for my bike repair. Lijo was also there in that place. Lijo told me that Kafan's children are intended to sell his land and asked me whether I would be interested to buy it. I told Lijo that I don't want and would inform my brother-in-law about it. After 2 days Lijo informed me about the price of the land and about his commission. Later Lijo told me that he has land documents with him. Since I said that I have to take suggestions from Advocate, I and my brother-in-law, Stanie and Lijo went to the house of Advocate Nagaraj with the said documents. Advocate Nagaraj examined the documents and since the advocate was informed that Jose Kafan had died, he informed that Kafan's children have to come and should bring Power of Attorney from all the heirs and also the death certificate of Kafan. We went to our respective houses from the hose of Advocate. By the time I reached Mari temple, I once again made a phone call to Lijo. Lijo told me that Kafan's son had called him over phone and asked me to go there saying that Kafan's son Sajith had called him over phone. I and Stanie again went near the court. Lijo was there and at that time Lijo got a phone call and he talked and then gave mobile phone to Stanie. Stanie talked directly and the person who was talking in the phone told that he would come to Sagar to obtain the advance amount. He even told that he would come after making a phone call."

PW-15: "From 17 years I have been practicing as an Advocate in Sagar. I have the acquaintance of Babu

> of Marur village. He had come to my house on 09.12.2011 at about 7-45 in the evening. The said Babu was accompanied by his uncle and the accused before the Court. The witness was shown Ex.P.21. He has identified the person who is holding documents in Ex.P.21-photograph as the brother-in-law of Babu. Babu, who came to my house, told me that the accused has a rubber roller machine and he is purchasing it. He asked me to prepare a sale agreement with regard to that. I asked him the details about the company of the rubber roller machine, its owner, its number and other details, for which he said that he does not have all those details.
>
> According to the information furnished from them, I prepared a sale agreement of movable property. The witness was shown M.O. 41. He identifies it as the sale agreement that was prepared by him. The accused, who was selling the rubber roller machine, did not know Kannada. I read out the sale agreement in Kannada and also in English. Since the accused did not know both English and Kannada, Lijo translated the contents of sale agreement into Malayalam language and explained to the accused. Both the vendor and vendee have affixed their signature before me. The accused, who is the vendor, has affixed his signature and the vendee has also affixed his signature. Lijo has affixed his signature as a witness."

21. The other surrounding circumstances which prove the accused being guilty of the offence beyond reasonable doubt are the recovery of the articles belonging to the deceased and sold by the accused which were recovered on the strength of the voluntary statement of accused as per Ex.P-2. In-fact PW-5 has clearly stated as to how the accused intended to sell the immoveable property belonging to the deceased. PW-

5 has clearly deposed as to how the accused was apprehended by the police when he was attempting to sell the property of the deceased.

22. That apart the statements made by the accused that deceased had gone to Kerala or the deceased had suffered a paralytic stroke or deceased had proceeded to America and expired there are all incorrect and conflicting statements as has been deposed by PW-5, reliance of which is placed by the High Court in the background of the Judgment of this Court in ***State of Karnataka*** v**.** ***Swarnama***[8], and as such we are of the view that conclusion arrived at by the High Court is based on sound appreciation of evidence and proper application of law. That apart, accused has failed to explain with regard to the incriminating evidence found against him except total denial and as such the High Court has rightly applied the principles laid down by this Court in ***Pattu Rajan*** v**.** ***State of Tamil Nadu***[9] to reject the contention of the accused appellant. On account of evidence available on record having been ignored and there being patent perversity in appreciation of evidence by the Learned Sessions Judge it resulted in interference by the High Court. We do not find any material irregularly having crept in the judgment of the High Court calling for our interference. On re-appreciation of entire evidence by the High Court in proper perspective it has resulted in arriving at a

[8] (2015) 1 SCC 323
[9](2019) 4 SCC 771

right conclusion viz. that accused alone has committed the murder of the deceased Mr. Jose C Kafan and there being no other possible view which could be considered as missing in the link of chain of circumstances, this Court is of the considered view that appeal deserves to be dismissed as being devoid of merits.

23. For the reasons indicated hereinabove we dismiss the appeal and confirm the judgment dated 20.03.2020 passed by the High Court of Karnataka in Criminal Appeal No. 335 of 2014.

…….J.
(Surya Kant)

…….J.
(Aravind Kumar)

New Delhi
April 17, 2023