

A

STATE OF MAHARASHTRA

v.

DAMU AND ORS.

MAY 1, 2000

B

[K.T. THOMAS AND D.P. MOHAPATRA, JJ.]

*Penal Code, 1860 :*

C

*Ss. 302/34, 120B and 364—Abduction and murder of infant children—Circumstantial evidence—Confessional statement of an accused—Testimony of a child who miraculously escaped from the abduction attempt—Recovery of articles—Conviction and sentence by Trial Court—On appeal, High Court disbelieving the confessional statement and testimony of child witness, acquitting the accused—Validity of—Held, the circumstances in the case, sufficiently establish that pursuant to a criminal conspiracy, accused committed abduction and murder of children—High Court erred in acquitting the accused persons by side-stepping each one of the circumstances established by the prosecution—Conviction passed by Trial Court upheld—Criminal Procedure Code, 1973, S. 164—Evidence Act, 1872—Ss. 27, 30 & 10.*

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E

*Section 302/34 :*

*Sentence—Death sentence—Award of—Rarest of rare cases—Abduction and murder of children on a superstitions belief of unearthing hidden treasure—Children not abducted and killed for ransom or for vengeance or for committing robbery—Held, though the acts of accused were horrendous but since it was committed due to utter ignorance, normal punishment prescribed for murder would serve the ends of justice—Thus, death sentence converted to imprisonment for life.*

F

*Criminal Procedure Code, 1973 : Section 164.*

G

*Confessional statement—Recording of—Police influence—Precautions to be taken by Magistrate—Held, Magistrate should not record the confession until a lapse of such time till the fear of police is completely extricated from the mind of accused.*

H

*Confessional statement—Recording of—Police influence—Police Station situated adjacent to sub-jail—Effect of—Held, not sufficient to infer that*

*there was police control over the accused.*

A

*Confessional statement—Recording of—Magistrate from a distant place recording the statement—Effect of—Held, not sufficient to vitiate the confessional statement.*

*S. 162—Confessional Statement—Recording of—Sources from where the Investigation Officer came to know that the accused was desiring to confess—Held, not obliged to disclose.*

B

*Criminal Trial :*

*Circumstantial evidence—Murder—Recovery of an article on the information supplied by the accused—Blood found sticking on the outer side of the said article—Subsequent denial of recovery of article by the said accused—Held such denial is sufficient to provide missing link in the chain of circumstances—Criminal Procedure Code, 1973 S. 313.*

C

*Witnesses—Child witness—Reliability of—Abduction and murder—Minor incidents relating to past—Revival of—Held, it is possible to revive if the consequences of the incidents is told to the child.*

D

*Evidence Act, 1872 :*

*S. 27—Doctrine of Confirmation by subsequent events—Statement by accused that dead body was carried in a motorcycle and thrown in the canal—Recovery of a piece of glass from the spot found to be a part of the motorcycle—Held, it can be inferred that the body was carried by the accused in the motorcycle—Information supplied by the accused admissible in evidence.*

E

*S. 10—Confessional statement by an accused—Relevancy of against co-accused—Criminal conspiracy to abduct and murder—Confessional statement by an accused disclosing common intention of conspirators—Held, usable against the co-accused also.*

F

**Accused-Respondents were prosecuted for offences under Sections 302/34, 120-B and 364 of the Penal Code. According to the prosecution, accused persons abducted and killed children for human sacrifice on the belief of unearthing hidden treasure. However, one 'S' (PW 31), aged about 5 or 6 years escaped from the abduction attempt twice and narrated the incidents before the court which was duly corroborated by his father**

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A (PW 30). On arrest A-4 made a confessional statement (Exh.38) before  
PW 19, Judicial Magistrate. Trial Court believing the said confessional  
statement as voluntary and true and relying upon the testimony of 'S'  
B (PW 31) convicted and sentenced the accused to death. However, on  
appeal, High Court disbelieving the confessional statement on flimsy  
grounds and also rejecting the testimony of 'S' on the ground that it  
would not have been possible for a child of his age to remember such  
minor instances after 3 years, acquitted the accused persons by extending  
, benefit of doubt. Hence the present appeal.

C Allowing the appeal, the Court

C HELD : 1. The circumstances in the case are sufficient to establish  
that there was criminal conspiracy to abduct and slay the children by the  
accused-persons and as a sequel to the said conspiracy, three children were  
abducted and killed by the accused persons. The Divisions Bench of the  
D High Court erred in acquitting the accused-persons by side stepping each  
one of the circumstances established by the prosecution. [900-D-E]

E 2.1. The reasons built up by the Division Bench of the High Court for  
carrying out an area of doubt regarding the voluntariness of the confession  
made by A-4 cannot stand scrutiny. Trial Court rightly relied on the said  
confession as voluntary and true and the High Court was not justified in  
upsetting the findings of the Trial Court regarding that respect. [892-H;  
893-A; 890-F; 900-E]

F 2.2. A Magistrate who proposed to record the confession has to  
ensure that the confession is free from police interference. Even if he was  
produced from police custody, the Magistrate was not to record the confes-  
sion until the lapse of such time, as he thinks necessary to extricate his  
mind completely from fear of police to have the confession in his own way  
by telling the Magistrate the true facts. In the instant case, A-4 remained in  
G police custody only till 26.4.1995 and the confession was recorded only on  
25.5.1995 which means, there was an interval of almost a full month after  
he was removed from police custody to judicial custody. [892-A-C]

H 2.3. The geographical distance between the sub-jail and the police  
station should not have been a consideration to decide the possibility of  
police exerting control over a detenu. To keep a detenu in the police fear  
it is not necessary that the location of the police station should be proximal

to the edifice in which the prisoner is detained in judicial custody. In many places judicial courts are situated very near to police station houses, or the offices of higher police officers would be housed in the same complex. It is not a contention to be countenanced that such nearness would vitiate the independence of judicial function in any manner. [892-D-E]

2.4. High Court was not justified in doubting the voluntariness of the confessional statement on the ground that it was recorded by a Magistrate from a distant place. Further it is a worthless exercise to ponder over how or from which source the investigating officer would have come to know that the accused was desiring to confess. Investigating Officer can have different sources to know that fact and he is not obliged to state in court the same, particularly in view of the ban contained in Section 162 of the Code of Criminal Procedure. [892-F-H; 893-A]

3.1. The confession statement made by A-4 was voluntary and it contained the true narration of what all transpired between the conspirators and how the children were abducted and killed. Further, the said confessional statement was duly corroborated by large number of circumstances. Thus, the said confessional statement can be used against A-4 without any difficulty. [898-E-F]

*Sarwan Singh Ratan Singh v. State of Punjab*, AIR (1957) SC 637 and *Kehar Singh v. State (Delhi Administration)*, AIR (1988) SC 1883, relied on.

*State of Gujarat v. Subamiya Deshmohmed*, [1992] 1 SCC 473, referred to.

*Kashmira Singh v. State of Madhya Pradesh*, AIR (1952) SC 159, distinguished.

3.2. On the foremost among the circumstances which supports the confessional statement was a testimony of PW 31, the boy who escaped from the abduction attempt twice. The Division Bench of the High Court brushed aside his evidence holding that the boy was 5-6 years of age when the instances occurred and the instances being so minor that in ordinary course any body being of that age would not have remembered the same even by the end of the day. For the boy the said instances might have been very minor not to keep them alive in memory even till evening of that day. But when he was told later of the danger he escaped from, that minor

A incident would winch to the surface of his mood. This is how human mind  
works and mind of a child is no exception to the process. For the parents of  
the boy the two episodes could not have created any impact at the time the  
incident happened. But when they knew later that A-4 was kidnapping  
B infants and killing them it would have created the most probable reaction  
of human mind in them also by realizing how they escaped by the skin of  
their teeth from a perennial calamity. The Division Bench was, therefore  
too unrealistic when it brushed aside the truthful evidence of PW 31 and  
his father PW 30. [894-C; F-H; 895-A-B]

C 3.3. PW 41, a 11 years girl when examined said that deceased 'G' was  
her neighbour and one day while they were playing together A-4 took 'G'  
with him. She told that she had not seen 'G' thereafter. High Court  
disbelieved her testimony solely on the ground that it is not possible for a  
child of that age to remember what happened 3 years ago. As a matter of  
fact PW 41 had seen 'G' last while they were playing together and later the  
D dead body of 'G' was recovered. If so, the one thing which a child of that  
age could have never forgotten would have been the last occasion they have  
played together. The reasoning of the High Court in rejecting her testi-  
mony was not only unreasonable, it reflected a poor understanding of how  
children would react and retain. [895-C-E]

E 4. When A-2 was arrested and interrogated, he stated to PW 44  
Investigating Officer regarding a "Kalash" (Pitcher) which was later  
recovered by PW 44 from his house. When chemical test was made on that,  
blood was found sticking on the outer side of the vessel. But when A-2 was  
questioned under Section 313 of the Code regarding the said circum-  
stances he simply denied even the recovery of the "Kalash". When there  
F was blood on the pitcher it is for A-2 to explain; But when he denied even  
the seizure of the pitcher, such a denial can be treated as sufficient to  
provide 'missing link' to the chain of circumstances. [896-B-E]

*State of Maharashtra v. Suresh*, [2000] 1 SCC 471, relied on.

G 5. On the information of A-3 that the body of one of the deceased  
child was carried by him and A-2 on his motor cycle, and thrown in the  
canal, the Investigation Officer went along with him to the spot. There he  
found a broken piece of glass laying on the ground. In the mean-time a  
motor cycle was recovered from the house of A-2 and its tail lamp was  
found broken. But when the broken piece of glass recovered from the spot  
H was placed on the broken situs of the motor cycle it so fitted with the space

that PW 44 had no doubt whatsoever that the said glass piece was originally part of the tail lamp of the motor cycle. The basic idea embedded in Section 27 of the Evidence Act is doctrine of confirmation by subsequent event. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from the spot and that piece was found to be part to the tail lamp of the motor cycle of A-2, it can safely be held that the Investigating Officer discovered the fact that A-3 had carried the dead body on that particular motor cycle upto the spot. Thus, the information supplied by A-3 that the dead body was carried on the motor cycle up to the particular spot is admissible in evidence. [896-F-H; 897-A-B; F-H; 898-A]

6.1. Section 30 of the Indian Evidence Act permits only a limited use of the confession as against a co-accused to whom a major role is ascribed by the confessor. It is well settled that the confession made by one accused can be used against the co-accused even when the other conditions under Section 30 are satisfied only for the purpose of corroboration of other evidence. However, in the instant case, one of the offences alleged against all the accused is criminal conspiracy under Section 120-B of the Penal Code. Section 10 of the Evidence Act dealing with "relevancy of facts" provides that anything said, done or written by anyone of the conspirators in reference to their common intention as a relevant fact, not only as against each of the conspirators but for proving the existence of the conspiracy itself. Further, the said fact can be used for showing that a particular person was a party to the conspiracy. The only condition for application of the rule in Section 10 is that there must be "reasonable ground to believe that two or more persons have conspired together to commit an offence." [898-G-H; 899-A-C]

6.2. In the instant case, there are reasonable grounds to believe that all the four accused have conspired together to commit the offences of abduction and murder of the children involved in the case. So what these accused have spoken to each other in reference to their common intention as could be gathered from Exh.88 can be regarded as relevant facts falling within the purview of the Section 10 of the Evidence Act. All the things reported in that confession referring to what A-1 and A-3 have said and done in reference to the common intention of the conspirators are thus usable under S. 10 of the Evidence Act as against those two accused as well, in the same manner in which they are usable against A-4 himself. [899-H; 900-A-C]

A. *S. Nalini and Others v. State by D.S.P., C.B.I. SIT, Chennai*, [1999] 5 SCC 253 and *State of Gujarat v. Mohd. Atik*, [1998] 4 SCC 351, relied on.

B 7. Looking at the horrendous acts committed by the accused, it can doubtlessly be said that this is an extremely rare case. Nonetheless, a factor which looms large in this case is that the accused genuinely believed that a hidden treasure trove could be winched to the surface by infantile sacrifice ceremoniously performed. It is germane to note that none of the children were abducted or killed for ransom or for vengeance or for committing robbery. It was due to utter ignorance that these accused became so gullible to such superstitious thinking. Consequently, the normal punishment prescribed for murder is preferable for these accused. Accordingly, while restoring the sentence passed by the trial court in respect of other counts of offences, it is ordered that the accused shall undergo imprisonment for life for the offence under Section 302 read with Section 34 of the I.P.C. [900-G-H; 901-A-B]

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 992-993 of 1999.

From the Judgment and Order dated 10.3.99 of the Bombay High Court in Confirmation Case No. 1 of 1998 with CrI.A. No. 274 of 1998.

E V.B. Joshi, Gopal Balwant Sathe, A.R. Phadnis, S.H. Gandhi, S.S. Shinde and S.V. Deshpande for the Appellant.

Satishchandra V. Sudrik and Shivaju M. Jadhav for the Respondents.

F The Judgment of the Court was delivered by

G THOMAS, J. Abduction and triple infanticide are the gravamen of this case. Kids, male and female, were abducted not for ransom but for their blood to propitiate gods to reveal the spot beneath which a treasure trove was believed to have been embedded. What finally disinterested were not the treasures - not even a tiny bit of it - but the putrefied corpses of three infants whose blood had copiously been collected in vain for searching out a non existing cauldron of jewelleries. One of the abducted kids (Sagar) was not destined to die then as he escaped from the clutches of the kidnappers and his infantile recollections were utilised by the prosecution to tell the tale H to the court.

The Sessions Judge found all the four persons who were arraigned before him for such grisly perpetrated acts, guilty of the offences charged against them and they were all sentenced to death. But a division bench of the High Court of Bombay, Aurangabad Bench (VK Barde and JA Patil, JJ) extended benefit of doubt which they entertained and set all the accused free. This is the appeal which the State of Maharashtra has filed by Special Leave in challenge of the order of acquittal.

Sri Satish Chandra B.Subrik learned counsel who entered appearance for the accused reported to us that the first accused (Dami Gopi Nath) died during the pendency of this appeal and hence the appeal as against him can be treated as abated. The remaining three respondents are A2- Gangadhar Gitaram Kotka @ Guruji, A3-Mukinda Anna Thorat and A4 Dhananjaya @ Balu Joshi. It is convenient for us to refer to them in the rank as they were arraigned as accused in the trial court.

The events narrated in this case have the silhouette of a crime thriller. Mystery hovered around Chanda village in Newasa Taluk (Ahmadnagar district in Maharashtra) over the sudden disappearances of children one after the other. Horror struck the minds of the villagers when cadavers of the children were recovered one after another from a canal which flowed through Newasa.

The episodes started on 4.3.1992 when a little girl by name Meera (one of the four children of Ramdas) was missing from her house. The elders of the family made hectic searches and then caused announcements to be broadcast through loudspeakers fitted at the Gram Panchayat's office regarding the disappearance of the child. Next day a complaint was lodged with the police. On the third day her dead body was recovered from the canal flowing through the locality. It was wrapped in a gunny bag made for urea storage. Among the injuries noted on the dead body two were so peculiar that the mystery deepened further. Dr. Ramprasad (PW33) who conducted autopsy on the body has described one injury as anti-mortem and the other as post-mortem. The former was multiple abrasions on the left labia majora on the lateral aspect. The latter was a "triangular wound on the perineal region just posterior to vaginal opening." PW33 Doctor opined from the other injuries noted by him that death of Meera was caused by throttling.

On 9.2.1994 a five-year-old kid by name Devidas (one of the two

A children of PW 26 - Khandu) was found missing. A complaint was lodged with the police on the succeeding day and three days later the dead body of Devidas was found floating in the canal at Dedgaon in Newasa Taluk. He had an injury on the back of his head and his penis was seen chopped off. His father PW26, a rustic villager, wished to avert a post-mortem examination on the remainings of his dear child and hence he did not choose to inform the police about recovery of the dead body.

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C On 13.2.1995 another little male child by name Deepak (who was then studying in the 2nd standard) was found missing from his house. His father PW2 Suresh deputed his uncle to lodge the complaint with the police. Three days later the dead body of Deepak was found in the same canal and penis of that child was also seen chopped off, besides the lobes of his two ears were sliced off.

D While the above events had rocked the locality, the particular village at Newasa Taluk was agog with different stories - In the meanwhile a seemingly event-less incident took place. A five year old boy by name Sagar (PW31) was endeared to A4 Balu Joshi whom the boy used to address "Balu Mama" (as the nephew of A4 Balu Joshi by name Krishna and Sagar were classmates and friends). On two occasions A4 (Balu Joshi) tried to allure Sagar by offering sweets to him and took him to some distance but on both occasions Sagar wriggled out from his grip and ran off. The first attempt took place in February 1993 and second was in 1995. The boy told his father PW30 Ramakant about it but the latter did not take it as a matter of serious implication to be reported to any authorities. But later when things crystalized into larger dimensions PW30 felt the need to bring it to the notice of the police.

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H A1 Damu Gopi Nath was arrested on 26.2.1995 and with his interrogation the police could make a break-through regarding the mysterious disappearances and death of the children. Arrests of the remaining three accused were followed swiftly and thereafter investigation progressed to a considerable extent. Certain articles were recovered consequent upon the information elicited from the accused and such recovery threw further light on the multiple infanticides. A confession was recorded by Ms. Anjali Apte, a Judicial Magistrate, First Class on 26.5.1995 and it became the sheet-anchor of the prosecution matrix. The confession is marked by the prosecution as Ex.88.

Narration of the prosecution case would be incomplete without giving at least a summary of what has been recorded by PW19 in Ex.88. Hence the following extract is taken therefrom.

When Balu Joshi(A-4) talked to Kotkar @ Guruji(A- 2) about his financial problems, the latter brought Mukinda Thorat(A-3) for suggesting some solution. Mukinda Thorat(A-3) mentioned about the hidden treasures in the property of Guruji(A-2) and wanted to seek the assistance of someone who practiced occult things. The genesis of that thinking was the recovery of a gold ring from this land twenty five years ago when a manual labourer(PW 25) tilled the land for agricultural operation. Pursuant to it, Damu Gopinath(A-1) was brought and the latter told them that sacrificing five infant children would help to disinter the treasure trove. Damu Gopinath(A-1) then suggested the sequences to be adhered to as well as the auspicious days for performance of each such sacrifice. Guruji(A-2) would perform the necessary ceremonies or rituals for the same.

As suggested by Guruji(A-2), the first to be sacrificed was a female child by name 'Guddi'. The task was assigned to Balu Joshi(A-4) for procuring the girl. So Balu Joshi(A-4) managed to abduct Meera @ Guddi on 4.3.92 from the place where she was playing with her friends and brought her to the house("Wada") of Guruji(A-2). At 11.30 p.m.,the girl was bathed and thereafter her legs were held by Guruji(A-2) and Mukinda Thorat(A-3). Damu Gopinath(A-1) took out a knife and inflicted a cross shaped incised wound on her vagina and collected the blood in a brass pitcher(Kalash). After the blood collection was over, she was throttled to death and the dead body was covered in a gunny bag. Guruji(A-2) and Mukinda Thorat(A-3) carried the dead body to the canal on a motor cycle(Bajaj-M50) and threw it into the water.

As directed by Guruji(A-2), an endeavour was made by Balu Joshi(A-4) to abduct a boy by name "Sagar"(PW 30) in March, 1993. But the boy did not respond to the allurement offered by Balu Joshi(A-4). The accused persons became fearful lest Sagar might disclose it to other people about the abduction attempt but nothing happened for one year and hence they decided to revive their operation. Then Guruji(A-2) mentioned the name of Bhau Khandu Murge(@ Devidas) as a sacrificial kid. Balu Joshi(A-4) succeeded in abducting Devidas on 4.3.94 and brought him to the Wada of Guruji(A-2). After performing the rituals in the night, Damu Gopinath(A-1) directed

A Mukinda Thorat(A-3) to take up the knife and inflict the cut. Strictly adhering to the said direction, Mukinda Thorat (A-3) chopped the penis of the child off and collected the blood in a pitcher. Thereafter, a heavy blow was inflicted on the head of the boy with a club and Devidas died instantaneously. His body was also disposed of in the canal.

B Almost one year elapsed thereafter and the treasure hunters wanted to try once again to get Sagar(PW30). On 10.2.95, Balu Joshi(A-4) went to the school where that boy was studying and he took the boy to some distance by offering sweets to be purchased. But somehow, Sagar did not bite the bait and hence the child ran away from Balu Joshi(A-4).

C Three days after, Damu Gopinath(A-1) was directed to procure another boy by name Dipak Waware. Balu Joshi(A-4) went prowling for that boy and succeeded in abducting him on 15.2.95. As it was a full moon night, A1 to A3 bathed him first and took him out of the room for exposing his penis to moonrays. Damu Gopinath(A-1) commanded Mukinda Thorat(A-3) to cut the earlobes of the boy first and then to chop down his penis and the commands were implicitly obeyed. After collecting his blood a heavy blow was given to his head and the boy died. The dead body was carried on a TVS Suzuki Motor Cycle and was consigned to the same canal.

E The above narration is only a summary of the confession recorded by PW19 Judicial Magistrate First Class. In fact, the confession contains much greater elaboration of each episode with minute details. We thought it not very necessary to reproduce the whole details.

F The trial court relied on the said confession as voluntary and true but the Division Bench of the High Court, after a detailed discussion, reached the following conclusion: -

G “It will be, thus, seen that there is reasonable doubt to hold that Balu Joshi (A-4) made the confession voluntarily. On scrutinizing the details given in the confessional statement, it does not appear that whatever is stated would be possible or probable. The confessional statement does not appear to be true. Furthermore, it is retracted, may be at a late stage by the accused.”

H As we pointed out earlier, the confessional statement was recorded by PW19 Mrs. Anjali Apte (Judicial Magistrate First Class), and when she was

examined in Court, she pointed to the details of the various steps adopted by her for ensuring that the confession was voluntary. In fact, the Division bench of the High Court discussed the procedure adopted by PW 19 elaborately and found that no fault could be discerned regarding the steps adopted for recording the confession. The finding made by the Division Bench in that regard is extracted below: -

“So, on going through the evidence of learned Judicial Magistrate(F.C.), Mrs. Apte (PW 19), and the statement of Balu Joshi (A-4) recorded by her on 25th and 26th May 1995, it can very well be said that the learned Judicial Magistrate(F.C.) followed the provisions regarding recording confession properly and correctly. No defect can be found in recording of confession.”

What persuaded the Division Bench to sideline the confession are the following reasons: -

1. The fourth accused Balu Joshi remained in police custody for a considerably long period and that circumstance is sufficient to view the confession with suspicion.

2. The Sub-Jail, Newasa (in which the accused was interred) was located adjacent to the police station and hence the mere fact that he was locked up in the Sub-Jail is not enough to dispel the fear in the mind of the confession regarding police surveillance.

3. PW 19 (Mrs. Anjali Apte) was a Judicial Magistrate at Ahmednagar, whereas, there was a Judicial Magistrate First Class at Newasa itself. As the accused was locked up in the Sub-Jail at Newasa, there is no explanation why a magistrate belonging to a distant place was asked to record the confession, in preference to a magistrate at a near place.

4. The Investigating Officer (PW42) has not explained how he knew that Balu Joshi(A-4) was willing to make a confession to him. Learned judges draw an inference like the following:-

“If the circumstance, that the Police Station is adjacent to Sub-Jail, Newasa, is taken into consideration, then an inference can very well be drawn that nobody but Police contacted Balu Joshi(A-4) and Police informed Mr. Suryawanshi(PW 44) that the accused was willing to make confessional statement.”

A We have considered the above reasons and the arguments addressed for and against them. We have realised that those reasons are *ex facia fragile*. Even otherwise, a Magistrate who proposed to record the confession has to ensure that the confession is free from police interference. Even if he was produced from police custody, the Magistrate was not to record the confession until the lapse of such time, as he thinks necessary to extricate his mind completely from fear of police to have the confession in his own way by telling the magistrate the true facts.

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C In fact, A4 (Balu Joshi) remained in police custody only till 26.4.1995 and the confession was recorded only on 25.5.1995, which means, there was an interval of almost a full month after he was removed from police custody to judicial custody.

D The geographical distance between the two buildings - sub-jail and the police station - should not have been a consideration to decide the possibility of police exerting control over a detinue. To keep a detinue in the police fear it is not necessary that the location of the police station should be proximal to the edifice in which the prisoner is detained in judicial custody. In many places judicial courts are situated very near to police station houses, or the offices of higher police officers would be housed in the same complex. It is not a contention to be countenanced that such nearness would vitiate the independence of judicial function in any manner.

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G Newasa is a taluk located within the territorial limits of the district of Ahmadnagar. The Chief Judicial Magistrate, Ahmadnagar was approached for nominating a magistrate within his jurisdiction for recording the confession. There could have been a variety of reasons for the Chief Judicial Magistrate for choosing a particular magistrate to do the work. When not even a question was put to PW19 or PW 44 (the Investigating Officer) as to why the CJM, Ahmadnagar did not assign the work to a magistrate at Newasa, it is not proper for the High Court to have used that as a ground for holding that voluntariness of the confession was vitiated. Similarly, it is a worthless exercise to ponder over how or from which source the investigating officer would have come to know that the accused was desiring to confess. Investigating Officer can have different sources to know that fact and he is not obliged to state in court the same, particularly in view of the ban contained in Section 162 of the Code of Criminal Procedure.

H Thus the reasons built up by the division bench of the High Court for

carving out an area of doubt regarding the voluntariness of the confession made by A4 (Balu Joshi) cannot stand scrutiny. High Court should not have upset the finding of the trial court regarding that aspect.

The division bench has erroneously understood the ratio laid down by this court in *Kashmira Singh v. State of Madhya Pradesh*, AIR (1952) SC 159. The portion of the decision extracted by the division bench in the impugned judgment was the same as this court has quoted in *State of Gujarat v. Subamiya Deshmohmed*, [1992] 1 SCC 473. The following is that portion:

“The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.”

We may make it clear that in *Kashmira Singh* (supra) this Court has rendered the ratio that confession cannot be made the foundation of conviction in the context of considering the utility of that confession as against a co-accused in view of Section 30 of the Evidence Act. Hence the observations in that decision cannot be misapplied to cases in which confession is considered as against its maker. The legal position concerning confession vis-a-vis the confessor himself has been well-nigh settled by this court in *Sarwan Singh Ratan Singh v. State of Punjab*, AIR (1957) SC 637 as under:

“In law it is always open to the court to convict an accused on his confession itself though he has retracted it at a later stage. Nevertheless usually courts require some corroboration to the confessional statement before convicting an accused person on such statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of

A the circumstances of each case.”

This has been followed by this Court in *Kehar Singh v. State (Delhi Administration)*, AIR (1988) SC 1883.

B There are quite a large number of circumstances in this case which substantially support the truth of the version contained in the confessional statement given by A4 to PW19. We may now refer to them one by one.

C The foremost among such circumstances can be seen from the testimony of PW31 (Sagar) the boy who escaped from the abduction attempt twice. His father PW30 (Ramakant) also supported it. The boy was aged nine, when he was examined in court, and he said that he knew A4 as “Balumama”, he being the uncle of his classmate. He said in court that once he was playing with his friends A4 Balu Joshi took him to a short distance by offering sweets but he did not like to go with him further and hence he ran away. He also said that while he was studying in the first standard A4 (Balu Joshi) went D near him and caught hold of his hand by saying that he (A4-Balu Joshi) would escort him to his house but then also the boy ran away to the school. His father PW30 said that Sagar told him of both the above episodes but his initial reaction was not to treat them seriously. It was only when he heard later about the arrest of A4 in connection with abducting and killing of children, that E he and the other elder members of his family realised how narrowly their child escaped.

The unrealistic approach made by the Division Bench of the High Court to the evidence of PW 30 and PW31 can be seen even by a glance through the observation made by the learned judges which is extracted below:

F “Sagar is stating about the instances which took place, according to him, when he was of 5 or 6 years of age. The instances by themselves are so minor that anybody, in ordinary course, being of that age, would not remember the same even by the end of the day on which the incident took place. Trying to find corroboration to the deposition G of Sagar (PW31) from the deposition of Ramakant (PW30) is a futile exercise.”

H For the boy the said instances might have been very minor not to keep them alive in memory even till evening of that day. But when he was told later of the danger he escaped from, that minor incident would winch to the

surface of his mood. This is how human mind works and mind of a child is no exception to the process. For the parents of the boy the two episodes could not have created any impact at the time the incident happened. But when they knew later that A4 was kidnapping infants and killing them it would have created the most probable reaction of human mind in them also by realising how they escaped by the skin of their teeth from a perennial calamity. The Division Bench was therefore too unrealistic when it brushed aside the truthful evidence of PW 31 (Sagar) and his father PW30 (Ramakant).

PW 41 Kum. Archana was 11 years old when she was examined as a witness. She said that Guddi was her neighbour and they were playmates. The last occasion she saw Guddi was when they played together with some other children. During then, A4 Balu Joshi reached there and after a few minutes, Guddi was found walking with A4 balu Joshi. PW41 Kum. Archana had not seen her thereafter. The said evidence of PW 41 Kum. Archana has been found reliable by the trial court, but the High Court disbelieved her testimony on the sole ground that it is not possible for a child of that age to remember what happened three years ago.

It is rather unfortunate that the Division Bench of the High Court said so. As a matter of fact, PW 41 had seen Guddi last while they were playing together and later dead body of Guddi was recovered. If so, the one thing which a child of that age could have never forgotten would have been the last occasion they had played together. The reasoning of the High Court in rejecting her testimony was not only unreasonable, it reflected a poor understanding of how children would react and retain.

Recovery of dead body of the children from the canal, the post-mortem findings of the Doctors(PW22 Dr. Ashok who conducted the autopsy on the body of Dipak and PW33 Dr. Ram Prasad who conducted the autopsy on the dead body of Mira); the condition of the dead body of Devidas as seen by his father(PW 26 Khandu) as the penis of the child was seen cut off are all circumstances which unmistakably corroborate the detailed confessional statement made by A4 Balu Joshi. The High Court did not even believe that death of Devidas was homicidal because no post-mortem examination was conducted on that dead body. The position would be different if the High Court had concluded that death of Devidas could not have been homicidal. The Court should be circumspective over the broader features in deciding whether death was homicidal or not. PW 26 Khandu had noted, besides the

A devastation caused on the penis of the child, an injury on the back of his  
head. If the latter alone was noticed by PW 26 perhaps one could have  
entertained the doubt that the death of the child could as well be accidental.  
But the presence of the other injuries on the dead body, would lead any  
sensible person to the conclusion that the child was done to death and it  
B is no matter that a post-mortem examination was not conducted on the dead  
body.

When A2-Guruji was arrested and interrogated, he stated to PW44-  
Investigating Officer regarding a "Kalash"(pitcher) which was recovered by  
PW44-Investigating Officer from the house of A2-Guruji. What is significant  
C about the recovery is that when chemical test was made on the pitcher, blood  
was found sticking on the outer side of the vessel. Of course, the chemical  
analyst could not determine the origin of the blood as it was disintegrated  
by that time. But the learned Judges of the High Court did not attach any  
value to the circumstance on that sole reason. At the first blush, the approach  
D of the High Court may appear to be sound. But when we considered the  
answer which A2-Guruji had given to the questions put on him under Section  
313 of the Code regarding the said circumstance, he simply denied even the  
recovery of "Kalash" as stated by PW44 Investigating Officer. When we  
know that there was blood on the pitcher it is for A2 Guruji to explain how  
it was. But when he denied even the seizure of the pitcher, such a denial,  
E in this context, is not inconsequential. In another case, a similar denial was  
treated by this Court as sufficient to provide a "missing link" to the chain  
of circumstances. (*State of Maharashtra v. Suresh*, [2000] 1 SCC 471)

After the arrest of A3 Mukinda Thorat, he told the Investigating Officer  
F that "Dipak's dead body was carried by me and Guruji(A-2) on his motor  
cycle and thrown in the canal." The said statement of A3 Mukinda Thorat  
was not found admissible in evidence as the dead body was not recovered  
pursuant to the said statement. This aspect requires more consideration. It  
must be pointed out that pursuant to the said statement and the offer made  
G by A3 Mukinda Thorat that he would point out the spot, he was taken to the  
spot and there PW44(Investigating Officer) found a broken piece of glass  
lying on the ground. It was picked up by him. In this context, it is important  
to refer to another item of evidence. A motor cycle was recovered from the  
house of A2 Guruji and its tail lamp was found broken and one piece of it  
was missing. But when the broken glass piece recovered from the spot pointed  
H out by A3 Mukinda Thorat was placed on the broken situs of the tail lamp

of the motor cycle, it so fitted with the space that PW44 Investigating Officer had no doubt whatsoever that the said glass piece was originally part of the tail lamp of that motor cycle.

The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non- inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well-settled that recovery of an object is not discovery of a fact as envisaged in the Section. The decision of Privy Council in *Pullukurri Kottayya v. Emperor*, AIR 1947 PC 67 is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the Section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.

No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. In this case, the fact discovered by PW 44 is that A3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motor cycle.

How the particular information led to the discovery of the fact? No doubt, recovery of dead body of Dipak from the same canal was antecedent to the information which PW 44 obtained. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motor cycle of A2 Guruji, it can safely be held that the Investigating Officer discovered the fact that A2 Guruji had carried the dead body on that particular motor cycle upto the spot.

In view of the said discovery of the fact, we are inclined to hold that

A the information supplied by A2 Guruji that the dead body of Dipak was carried on the motor cycle up to the particular spot is admissible in evidence. That information, therefore, proves the prosecution case to the above-mentioned extent.

B In Exh. 88 confession, A4 Balu Joshi has stated that on 4.2.95, A3 Mukinda Thorat had handed over to him a list in which A3 Mukinda Thorat had written down the articles to be purchased for performing the ceremony before Sagar and Dipak were killed. Later, A4 Balu Joshi had purchased those herbals as per the said list. Now, it is important to note that when PW44  
C Investigating Officer made a search in the house of A4 Balu Joshi on 8.3.95, a small book(an Almanac) which contained a slip of paper inside. A few names of herbal articles were written on that slip(such as frankencense). That slip was forwarded to the handwriting expert alongwith the specimen  
D handwritings collected from A3 Mukinda Thorat for comparison. Ex. 64 is the opinion forwarded by the said handwriting expert holding that the scribe who wrote the slip and the specimen manuscripts was the same.

Exh. 64 is only the opinion of the Asstt. State Examiner of Documents. From that description alone, it cannot be gathered whether his office would fall within the purview of Sec. 293 of the Code. Hence, without examining the expert as a witness in Court, no reliance can be placed on Exh. 64 alone.

E But, excluding Exh. 64, we have come across a lot of other circumstances to corroborate the truth of the confessional statement contained in Exh. 88. As we have adverted to many such circumstances, we do not think it necessary to exhaust all of them for a detailed discussion here. All the  
F circumstances discussed above would ensure confidence in our mind in believing that the confession was made voluntarily and it contained the true narration of what all transpired between the conspirators and how the children were abducted and killed. No doubt, it can be used against A4 Balu Joshi without any difficulty whatsoever.

G For using Exh. 88 as against A2 Guruji and A3 Mukinda Thorat, there is a constraint. Section 30 of the Indian Evidence Act permits only a limited use of the confession as against a co-accused to whom a major role is ascribed by the confessor. It is well settled that the confession made by one accused can be used against the co-accused even when the other conditions under  
H Section 30 are satisfied only for the purpose of corroboration of other

evidence. But this aspect is not sufficient to end the travails of A2 Guruji and A3 Mukinda Thorat in this case.

One of the offences alleged against all the accused is criminal conspiracy under Section 120(B) of the Indian Penal Code. Section 10 of the Evidence Act falls within Chapter 2 which deals with "relevancy of facts". That Section renders anything said, done or written by anyone of the conspirators in reference to their common intention as a relevant fact, not only as against each of the conspirators but for proving the existence of the conspiracy itself. Further, the said fact can be used for showing that a particular person was a party to the conspiracy. The only condition for application of the rule in Section 10 is that there must be "reasonable ground to believe that two or more persons have conspired together to commit an offence". In this context, we may refer to *S. Nalini and Others v. State by D.S.P. CBI, SIT, Chennai*, [1999] 5 SCC 253. In paragraph 107, this Court has stated thus:-

"The first condition which is almost the opening lock of that provision is the existence of "reasonable ground to believe" that the conspirators have conspired together. This condition will be satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement "in reference to their common intention". Under the corresponding provision in the English law the expression used is "in furtherance of the common object". No doubt, the words "in reference to their common intention" are wider than the words used in English law (vide *Sardar Sardul Singh Carveeshar v. State of Maharashtra*)."

The basic principle which underlies in Section 10 of the Evidence Act is the theory of agency and hence every conspirator is an agent of his associate in carrying out the object of the conspiracy (*State of Gujarat v. Mohd. Atik*, [1998] 4 SCC 351. Section 10 permits "anything said, done or written by anyone of such persons in reference to their common intention" to be recorded as a relevant fact as against each of the persons believed to be so conspired.

In this case, there can be no doubt, relying on Exh. 88 that, there are

A reasonable grounds to believe that all the four accused have conspired together to commit the offences of abduction and murders of the children involved in this case. So what these accused have spoken to each other in reference to their common intention as could be gathered from Exh. 88 can be regarded as relevant facts falling within the purview of the Section 10 of the Evidence Act. It is not necessary that a witness should have deposed to the fact so transpired between the conspirators. A dialogue between them could be proved through any other legally permitted mode. When Exh. 88 is legally proved and found admissible in evidence, the same can be used to ascertain what was said, done or written between the conspirators. All the things reported in that confession referring to what A1 Damu Gopinath and A3 Mukinda Thorat have said and done in reference to the common intention of the conspirators are thus usable under Section 10 of the Evidence Act as against those two accused as well, in the same manner in which they are usable against A4 Damu Joshi himself.

D The net result is, the circumstances in this case are sufficient to establish that there was criminal conspiracy to abduct and slay five little children in which the four accused persons were the conspirators and further that abductions of four children and killing of three of them were carried out as sequel to the said conspiracy. There is no escape for them from conviction of the offences found against them by the Sessions Court. The Division Bench of the High Court has gone gravely erroneous in side-stepping everyone of the circumstances established by the prosecution. Criminal justice became the unfortunate casualty as a consequence of the unwarranted interference made by the High Court with a well-considered conclusion arrived at by the trial court. By acquitting the accused in a case of this nature, despite so much of sturdy and reliable circumstances, the judicial system became mauled and faith of the public in the efficacy of the judicial function would have considerably impaired.

G Now, we have to make up our mind regarding the sentence to be imposed on the three accused. Learned Counsel for the state pleaded for restoration of the same sentence which the trial court has imposed, i.e., death penalty. The question is whether this case can be regarded as rarest of rare cases in which the lesser alternative is unquestionably foreclosed. Looking at the horrendous acts committed by the accused, it can doubtlessly be said that this is an extremely rare case. Nonetheless, a factor which looms large H. in this case is that the accused genuinely believed that a hidden treasure trove

could be winched to the surface by infantile sacrifice ceremoniously performed. It is germane to note that none of the children were abducted or killed for ransom or for vengeance or for committing robbery. It was due to utter ignorance that these accused became so gullible to such superstitious thinking. Of course, such thinking was also motivated by greed for gold. Even so, we persuade ourselves to choose the normal punishment prescribed for murder as for these accused. Accordingly, while restoring the sentence passed by the trial court in respect of other counts of offences, we order that the accused shall undergo imprisonment for life for the offence under Section 302 read with Section 34 of the I.P.C.

S.V.K.

Appeals allowed

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