

(2000) 03 KAR CK 0117
In the Karnataka High Court
Case No : Criminal Appeal No. 1243 of 1999

Ansar Pasha and another

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 22-03-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 293, 306, 313
Penal Code, 1860 (IPC) — Section 302, 306, 34, 364

Citation : (2001) 1 ALT(Cri) 420 : (2000) CriLJ 5066 : (2001) ILR (Kar) 2383 :
(2000) 6 KarLJ 54 : (2001) 4 KCCR 313 SN

Hon'ble Judges : S.R. Bannurmath, J; M.F. Saldanha, J

Bench : Division Bench

Advocate : Sri M. Rajgopal and Sri Ram Doraiswamy, for the Appellant; Sri S.S. Koti, Additional State Public Prosecutor, for the Respondent

Judgement

M.F. Saldanha, J.—This appeal raises certain interesting and important issues touching the aspects of identification as also with regard to the manner of proof that is required in respect of documents that are tendered in evidence in a criminal proceeding. The two appellants before us, who were the original accused 1 and 2 in S.C. No. 134 of 1993 before the learned Sessions Judge, Bangalore were alleged to have kidnapped a four year old boy by the name of Zeesban, son of P.W. 10-Syed Zakir Hussain, a resident of Azad Nagar at Bangalore. The allegation is to the effect that some time in the morning of 29-1-1993, the accused 1 was seen playing with Zeeshan. It is necessary for us to record that A-1 and A-2 are brothers and they are neighbours of the deceased, staying virtually next door. The prosecution alleges that Zeeshan was found missing on the afternoon of 29-1-1993 and that a detailed search was undertaken to trace him out, which proved futile. A missing complaint was lodged by his father and subsequently, on 4-2-1993 a further complaint was lodged by him in which he indicated certain suspicions with regard to the accused 1 and 2. The police arrested the accused on 4-2-1993. It is relevant to mention that there were three accused before the Trial Court but, since A-3 was a juvenile, the case

against him has been separated and the trial proceeded only against A-1 and A-2. According to the prosecution, one more person was involved in the offences that are the subject-matter of this trial, who is A-4. The prosecution has sought to contend that A-4 had turned approver and that his statement which implicates the remaining accused is a strong piece of evidence on which reliance should be placed. We shall deal with that aspect of the matter presently.

2. The prosecution contends that the accused persons took the child with them to Kolar and that they spent two nights in two different lodges in Kolar when the child was with them. Thereafter, the accused are alleged to have murdered the child and dumped the body in a nearby forest. P.W. 6 who is a forest guard was informed by some boys that a human hand was lying in the forest and he contends that he covered it up and left it there. There is a temple close by and P.W. 16 who is the Priest in charge of the temple also supports the version that a human hand was found lying in the forest. Ultimately the hand was taken charge of by the police and it was sent for post-mortem. There are contrary opinions with regard to the hand in question which we shall again deal with. It does appear from the record that the rest of the body was attacked and possibly consumed by wild animals because only a few pieces of bones were found near the hand and the condition in which the hand was found, with only a bare piece of bone protruding from it, would support the theory that the body had been virtually eaten up by wild animals and that only the hand and the few bones were left. The prosecution however, contends that pursuant to a statement made by the accused, that they lead the police and the panchas to that spot in the forest at Kolar and pointed out the hand in question and that this circumstance heavily incriminates the accused. The police have also alleged to have recovered a small piece of cloth and a pair of short pants close by to the scene of offence in the forest and these items have been identified by the father of the child as belonging to him. In the course of investigation, the A-1 is alleged to have made a statement pursuant to which the police went to his house and he is alleged to have produced two inland letters which are Exs. P. 12 and P. 13 which the prosecution places very heavy reliance on because these documents are in the form of ransom notes addressed to Zakir who is the boy's father calling upon him to pay a sum of Rs. 1,00,000/- at a prescribed place if he is interested in his son's life. We shall have occasion to deal with the admissibility or otherwise of these documents and more importantly the evidentiary value thereof because the defence has seriously challenged any reliance being placed on Exs. P. 12 and P. 13. Similarly, in the course of the same recovery, the police are alleged to have seized a child's shirt which again has been identified by the boy's father-P.W. 10 as being the garment belonging to his son and which the child was wearing. The learned Trial Judge on consideration of the evidence lead in the trial held that the material fully establishes both the charges under Sections 364 and 302 of the IPC and convicted A-1 and A-2 for the offence punishable u/s 302 of the IPC. The accused were awarded a sentence of R.I. for life for the offence u/s 302 of the IPC and for the offence punishable u/s 364 read with Section 34 of the

IPC they were ordered to undergo R.I. for 5 years and to pay a fine of Rs. 2,000/- each in default to undergo S.I. for a period of 6 months, substantive sentence to run concurrently. It is against this conviction and sentence that the present appeal has been directed.

3. We need to mention at the very outset that the two learned Advocates Sri Ram Doraiswamy, assisted by Sri M. Rajgopal who appear on behalf of the appellant-accused and the learned Additional State Public Prosecutor Sri S.S. Koti have both admirably assisted the Court in the course of the hearing of this appeal. The appellants' learned Advocate submitted that undoubtedly this is a case where the accused is under heavy prejudice insofar as undoubtedly they were neighbours of the deceased and the allegation is that a plot was hatched, possibly under some misguided notions, that if the deceased child were to be kidnapped and that some money were to be demanded for his safe return that the parents would pay it up and that since the operation was unsuccessful, in order to cover up their tracks, the accused decided to do away with the boy Zeeshan. The learned Advocate submitted that a reading of the judgment would indicate that the learned Trial Judge has accepted all the evidence led by the prosecution, particularly the circumstantial evidence and has recorded the finding that the offence is conclusively established. It is his submission that undoubtedly the child was missing, that a complaint was lodged with the police and that despite efforts, it was impossible to trace out the child. His submission is that as admitted by the father-P.W. 10 a suspicion was cast on the accused 1 merely because he had been last seen in the company of Zeeshan on the morning of 29-1-1993 and that once the police suspected him and his associates that the rest of the case has virtually been built-up particularly after the recovery of the hand in the forest at Kolar.

4. In support of this submission, the learned Advocate has first taken us through the evidence of P.Ws. 1, 2 and 3 who are the lodge owners in Kolar and a staff member of the lodge. Though the learned Trial Judge has accepted the evidence of these three witnesses as proof of the fact that on the night of 29-1-1993 and on the two subsequent dates, the accused were seen in the company of the deceased Zeeshan, what has been pointed out to us by the learned Advocate is that there has been absolutely no scrutiny of this evidence nor has it been carefully evaluated. His submission is that while it is true that these persons run the lodges in Kolar that the evidence adduced by them is highly and hopelessly unreliable. Even though it is alleged that there are some references in the Register to the fact that a room was let out to the accused, what is pointed out is that there are neither the names of the accused nor their signatures to be found in the Register and secondly, that the so-called identification which they are relying upon is too weak for a Court to accept. It is true that the police contend that an identification parade was held on 27th April, 1993 and according to the prosecution these witnesses had identified the accused at this parade. What we need to straightaway away record is that Ex. P. 38 which is the memorandum of this identification parade is required to be proved by examining the Magistrate

who is the author of that document. A peculiar and totally unsatisfactory and unacceptable procedure has been followed in this case whereby the memorandum-Ex. P. 38 has been tendered by the Investigating Officer and the Trial Court has admitted it in evidence. This procedure is absolutely irregular and we only need to record that no reliance whatsoever can be placed on this document which cannot be said to have been admitted in evidence in keeping with the well-defined principles of law because it is elementary that the contents of the document ought to have been proved by the author of the document viz., the learned Magistrate. The non-examination of this witness is fatal to the prosecution as far as this document is concerned because this is a criminal prosecution and in such a situation the accused have absolutely no opportunity of challenging the validity of this document and more importantly the correctness of its contents. The appellants learned Advocate submitted that there are very well-defined principles with regard to the manner in which an identification parade has to be held, that the Courts have issued various guidelines and that there are several safety features which may not be observed when such identification parades are held. His submission is that the only means of establishing that these principles were followed or for that matter that they were not followed would be by examining the witness who conducted the identification parade i.e., the Magistrate, who will necessarily have to be subjected to cross-examination. The prosecution has not chosen to examine this witness and we may mention in passing that even a bare perusal of Ex. P. 38 indicates that among other things, the accused were required to maintain their fixed position during the several identifications and this ground alone would be sufficient to indicate that even an elementary opportunity of changing one's clothes or changing one's position in the line was not afforded to the accused. Whichever way we look at the situation we find it hopelessly bad in law and consequently, there is no option except to reject the evidence of identification in totality. If this evidence goes, then the evidence of P.Ws. 1, 2 and 3 is further weakened. The tenor of their evidence indicates that they have casually stated with no degree of conviction or of certainty that they saw one or the other of the accused in the company of the deceased during the relevant dates. On a scrutiny of the quality of this evidence we find it highly weak and unreliable and we need to record just one or two reasons for our conclusion.

5. The accused are alleged to have abducted or kidnapped a four year old boy who was living with his parents and we cannot conceive of a situation whereby, even when tricked or deceived, the child would voluntarily, quietly and happily remain in the company of some neighbours who had taken him to a lodge in a different and strange city. The child would most naturally have reacted and resisted and created a commotion and in this background, the evidence of the witnesses who seem to indicate that the child was quite normal and happy in the company of the accused seems to be too strange to accept. Also, the quality of the evidence is extremely poor because these witnesses have not indicated any of the finer details with regard to the identity of the child, or for that matter the

identity of the accused both of whom were seen for the first time and for a very short period of time. This is not a case where the police have tested the memory or ability to recall of all the witnesses by showing them different photographs and asking them to identify the child which could have been done and in the absence of this, head of evidence is totally unacceptable and will have to be rejected.

6. The learned Additional State Public Prosecutor did submit that there is nothing inherently improbable as far as the evidence of these witnesses are concerned and secondly that they are independent outsiders who have no reason to either falsely implicate the accused or for that matter to oblige the police. As far as the second part of the submission is concerned, we do find that these persons are running small guest-houses and from the tenor and quality of their evidence, we have no hesitation in holding that they have obviously come forward at the instance of the police to give evidence in all probability because these sort of places often have their own equation with the law enforcement authorities and the persons who run them are therefore invariably amenable to the police influence. Essentially, what we have found is that the evidence fails every test of appreciation, the first being the aspect of probability and thereafter, on the aspects of basic credibility and reliability. The obvious telltale circumstance that has emerged is that the two witnesses give divergent versions with regard to the identity of the particular accused with whom the child was. The submission of the learned Additional State Public Prosecutor therefore is that this evidence establishes the fact that the child was with the accused after he had disappeared on the afternoon on 30-1-1993 at Kolar cannot therefore be accepted.

7. At this stage we shall also deal with the allied evidence relating to the accused 1 having been last seen with the deceased and under this head we have the evidence of P.W. 5 who is the uncle of A-1. This witness does categorically state that A-1 was seen playing with the deceased on the morning of 29-1-1993. There is no getting away from this evidence because the witness has withstood the cross-examination and furthermore, we see absolutely no ground on which the uncle would falsely implicate his own nephew. Mr. Doraiswamy however, submitted that the evidence will have to be strictly construed and that only a limited inference is permissible in law. He was critical of the view taken by the Trial Court wherein the learned Trial Judge has construed this evidence as being an incriminating circumstance against the accused and has held it on par with those cases wherein the deceased has been last seen in the company of the accused and the Court has held this circumstance as one wherein the accused would have as of necessity to tender a satisfactory explanation as to what happened to the deceased and in the absence thereof, that an adverse inference would follow. The learned Advocate submitted that the A-1 and the deceased are neighbours and as such, there is nothing unusual if they were seen playing together. Even assuming that the child has disappeared thereafter the learned Advocate vehemently submitted that in the absence of any additional evidence to indicate that there was some act on the part of the accused vis-a-vis the

deceased Zeeshan other than that they were merely playing together, that no adverse inference is permissible. The learned Additional State Public Prosecutor submitted that Zeeshan was not found by his family or home people after that, that it was clear that Zeeshan was abducted or kidnapped around that point of time and that therefore, it was for the accused to explain satisfactorily to the Court as to what happened to Zeeshan after the point of time when he was playing with the accused.

8. We have carefully evaluated these submissions and what we need to record is that an accused person who is last seen with the deceased or close to the scene of offence or is last seen in the company of the deceased at a point of time close to the commission of the offence will undoubtedly have to explain to the satisfaction of the Court as to what happened to the deceased person, when the accused parted company and if the explanation is not fully to the satisfaction of the Court an adverse inference will follow. The Courts have also construed the conduct of the accused at that point of time and, have looked to other evidence on record for purposes of establishing as to whether the accused being in the company of the deceased was innocuous, whether it was a mere coincidence or whether, it is inextricably linked to the commission of the offence. One factor that emerges very strangely in this case is that even though the prosecution alleges that Zeeshan disappeared some time towards midday on 29-1-1993, it is not possible from the record to even fix within reasonable parameters as to exactly when he was abducted or kidnapped. The time factor is of paramount importance because if the prosecution was able to show that there is little or no time difference between the point of time when A-1 was playing with Zeeshan and his abduction or kidnapping then it would have brought A-1 dangerously close to an adverse inference being drawn. Secondly, if the prosecution evidence indicated that the behaviour of A-1 was either suspicious or unusual or the prosecution evidence indicated that A-1 was seen taking Zeeshan away from that place, then an adverse inference would have been inevitable. These are the crucial aspects of the case and in the absence of any other material, indicating what we would construe as guilty conduct on the part of A-1, merely because he was playing with the deceased in front of his house would not be sufficient to treat this material as incriminating. We have deliberately dealt with the second aspect of the prosecution case namely as to whether the evidence in relation to the witnesses at Kolar is good enough to establish that Zeeshan was in the company of A-1 or any of the other accused. Had this evidence been good enough then we would certainly have worked backwards and held that most certainly A-1 was playing with Zeeshan and since nobody had seen Zeeshan thereafter that he must have quietly been instrumental in abducting him away from that place. Having already held that the second head of evidence is virtually worthless we see no ground on which we can uphold the finding of the Trial Court that A-1 was last seen in the company of the deceased and that this is an incriminating circumstance against him and vicariously against the other accused. We are fortified in this finding because of another very important aspect of the case

about which we need to observe with some level of distress. The investigation in this case is full of lacunae and the quality of the investigation leaves much to be desired. For instance, even though P.W. 5 has been examined or for that matter P.W. 10-the father of Zeeshan who also states that he suspected A-1 at no stage have these witnesses thrown any light on the question as to whether or not the accused had been found absent from their house or from the locality for the period of time that the prosecution alleges that they had taken the child to Kolar. This is a crucial aspect of the case because A-1 and A-2 are brothers and their absence from the house for a reasonably long period of time has to coincide with the absence of the child and this would undoubtedly lead the families or for that matter the police to the irresistible conclusion that there is an interconnection between the two disappearances. Both these witnesses are silent with regard to this very crucial aspect of the prosecution case and in the absence of positive evidence indicating that A-1 and A-2 had disappeared from their house and the locality at the same time when Zeeshan had disappeared, we find it impossible to hold the circumstance of last seen as one that can go against the accused.

9. We then come to the most crucial part of the case viz., the finding of the hand in the Antharagange Forest Range at Kolar. We have on record the evidence of P.W. 6-Narayanappa who is a forest guard. Not only is his evidence formal but, it is typical of a subordinate Government employee. Despite the fact that he was informed of a human hand being found in the forest, he seems to have been least bothered about it and is quite proud to tell the Court that he just covered it up and left it there. In this regard, we also have the evidence of the P.W. 16-Chandrashekara Dixit who is the priest of the temple close by who again confirms the fact that a human hand was seen in the forest on some day around the first week of February. These witnesses also admit the fact that on the next day, the police came and took charge of the hand. We have traced the sequence of the evidence because the prosecution case is to the effect that pursuant to a statement made by A-1 that the police and the panchas along with the father of the boy P.W. 10 had proceeded to Kolar and that it was the accused who pointed out the spot where the hand was retrieved. Mr. Doraiswamy points out to us that there are clear admissions from the Investigating Officer to the effect that the hand had earlier been found in the forest and his contention is that the entire sting in the prosecution charge that it was at the instance of the accused that the hand was recovered is untenable. We do find such an admission in the evidence of the Investigating Officer and in the light of this admission, the inevitable conclusion in law would be that if the police were in the knowledge of the fact that the hand was at a particular place in the forest that the entire evidence with regard to the accused having lead the police to the spot and pointing it out would be of no consequence. This admission is virtually fatal to the prosecution case and it would only mean that pursuant to having gathered information that the police proceeded to that spot and that they took the accused and the father of Zeeshan to that place. The important aspect with regard to the identity of the hand in question has been furiously debated before us. Mr. Doraiswamy

submitted that the evidence of the two doctors in this case who are P.W. 13 and P.W. 14-Dr. K.S. Narayanaswamy and Dr. Thirunavukkarasu is widely divergent. First of all, P.W. 13 has very clearly described the condition of the hand and has also stated that he cannot give any conclusive opinion but has tentatively indicated that the hand appears to be that of a female child. The second doctor has stated that the hand was that of a child of the age of about 3 to 4 years and that it was the right hand. Having regard to the fact that it was only the hand and a part of the arm that was recovered that it was also in a relatively bad condition since it was found lying in the forest obviously several days after death and more importantly since no other elaborate scientific investigation has been done, we are left with very sketchy opinion evidence which does not help the prosecution case at all. The learned Additional State Public Prosecutor vehemently contended that it was unnecessary for the prosecution to adduce anything more than establishing that it was the hand of a child of Zeeshan's age and he relied on the fact that a piece of cloth and short pants were found close by and it is his submission that the evidence must be taken cumulatively. He relies on the fact that the father-P.W. 10 has conclusively stated that it was the hand of his son and this witness has also identified the cloth and the shorts as belonging to his son and Mr. Koti submitted that taken together, his evidence would establish that it was Zeeshan's hand that was found by the police. He relies on the fact that after Zeeshan's disappearance that he was not found alive and furthermore, on the fact that the accused and Zeeshan were last seen in the lodges at Kolar and his submission is that piecing all these circumstances together that the Court must accept the finding" of the Trial Court that it was Zeeshan's hand that had been retrieved. We do see considerable justification in these submissions. The fact that Zeeshan had disappeared some days earlier, the fact that the condition of the hand indicated time factor wise that it could belong to the same child who had disappeared and who had possibly been killed around that point of time, but more importantly from the fact that the clothes were found close by, the highest that can be said is that the Court cannot rule out the possibility that the hand belonged to the deceased Zeeshan.

10. The more important aspect of the case is the question as to whether prosecution is able to establish a nexus between the accused and the hand in question. We have already rejected the evidence with regard to the circumstances of last seen both in Bangalore and in Kolar and, the last aspect of the case that we are required to examine is as to whether the remaining material can still establish the nexus between the accused and the hand in question. Even with regard to the pointing out of the hand in the forest at the instance of the accused we are required to hold that there is a grave doubt with regard to the correctness of the said evidence in view of the admission of the Investigating Officer that he was aware of the fact that the hand was lying in the forest. For purposes of establishing a direct nexus the prosecution has relied on two documents which are inland letters-Exs. P. 12 and P. 13. These letters are alleged to have been recovered from the house of A-1 pursuant to a voluntary statement

made by him. The letters were sent to the handwriting expert who has opined on the basis of a notebook containing the handwritings of A-3, that the handwriting on those two letters is similar to the handwriting of A-3. Mr. Doraiswamy has challenged the correctness of the recovery evidence. We find it difficult to find any serious fault with regard to the recoveries because these have been deposed to by the Investigating Officer as also the Panchas and P.W. 10 but, on the overall credibility, there is something that we would have to say. There are certain strange features with regard to the two documents. The prosecution has relied on the evidence of P.W. 15 in support of the allegation that A-3 had purchased these blank inland letter forms from his shop at Kolar. What has created a serious doubt in the mind of the Court is a perusal of the two documents. Ex facie these letters purport to be in the form of ransom demands whereby Zakhir the boy's father has been asked not to inform the police or anybody else. He has further been asked to bring a sum of Rs. 1,00,000/- and a diagram has also been set out indicating the exact location in the locality where he should come with the money. Strangely enough, neither of the letters has been posted nor have the letters been despatched through any other means to Zakhir. The question would arise as to why, if there was an intention of kidnapping the boy for purpose of the demanding a ransom, having written out the contents neither of the letters were sent to Zakhir. This aspect of the case cannot be left to conjecture and the prosecution ought to have provided a rational answer or explanation for it. It does not stand to reason that persons who kidnapped the child for ransom would not send the communication to the father of the child if the intention was to obtain money and if everything including the spot where the money was to be paid had been decided upon. Another aspect of the case that has created a high degree of doubt in the mind of the Court is with regard to the quality of the language of the letters in question. One of them bears no address and the second one has a type of address which could never get the letter to its destination. Both the letters are written in the English language of rather, in such horribly broken English that they are far from intelligible but the real point is that it is clear to us from the status of the accused and P.W. 10-the father of the child that neither of them are the sort of persons who would in normal course of conversation or writing resort to the use of the English language and in this background it appears not only strange but, almost certain that these documents could not be at all genuine.

11. The learned Additional State Public Prosecutor has relied on the documents as the strongest link in the chain of circumstances against the accused, principally on the ground that the documents are alleged to have been recovered at the instance of A-1, secondly that they fit in with the kidnapping and killing of Zeeshan and particularly on the ground that the handwriting expert has clearly opined that the handwriting tallies with that of A-3. On the contrary, Mr. Doraiswamy points out to us something very crucial viz., that it is not open in any judicial proceeding to mechanically tender documentary evidence without following the subsequent and more important ingredient of proving that

evidence. The requirements of the Evidence Act are abundantly clear and there is an essential requirement of law that if the contents of the document are to be relied upon that it is very necessary that the aspect of formal proof must be complied with. In this case, the documents have again come through the Investigating Officer, they are supposed to have been shown to P.W. 10 at Kolar at the point of time after the documents were supposed to have been put into a sealed cover by the Investigating Officer and there is no explanation as to how this could have happened. More importantly, what Mr. Doraiswamy brings to our notice is the fact that u/s 102(3) of the Cr. P.C. it is mandatory for such material to be forwarded to the Court for obvious reasons of safety and that there has been considerable time lapse before these documents were forwarded to the Court. More importantly, he has attacked the marking of these documents as exhibits on the ground that they have not been proved and secondly on the ground that the contents could not have been looked at by the Court in the absence of the requirement of proof.

12. In this regard, Mr. Doraiswamy has drawn our attention to a long line of decisions which we shall presently recount below:--

1. Thimma and Thimma Raju Vs. State of Mysore, ; 2. Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others, ; 3. Sanjay Cotton Co. Vs. Omprakash Shiopprakash and Another, ; 4. 1957 Cri. L.J. 688; 5. Hasta Ismail and Others v Emperor; 6. AIR 1988 Gau. 56.

The ratio laid down by the Courts in these decisions is to the effect that certain cautions are required to be observed, particularly in criminal proceedings with regard to the admission in evidence of documents, particularly where the prosecution relies on the contents for purposes of securing a conviction. The documents are required to be proved by either the maker of the document or some other person who is in a position to depose to the satisfaction of the Court with regard to their contents. Effectively, it is necessary to adopt this procedure for two reasons, first is in order to introduce that material in evidence through a process that is in consonance with that prescribed by the provisions of Evidence Act but, more importantly in order to make available to the accused the witness who vouches for the contents so that the veracity can be tested by cross-examination of that witness. In the present case, the prosecution had adopted the very dubious procedure of seeking to smuggle in the Exs. P. 12 and P. 13 through the Investigating Officer who is in no position to depose to the contents beyond stating that they were recovered by him in the course of investigation and what is sought to be done is to place on record the evidence of the handwriting expert which even though it may be admissible by virtue of the provisions of Section 293 of the Cr. P.C. cannot be used against the accused in the absence of the witness being made available for cross-examination, We have scrutinised the questions put to the accused u/s 313 of the Cr. P.C. and we find that the learned Trial Judge has not confronted them with the contents of these two documents. What is stated in those two letters is very highly incriminating

and if this material were to be used against the accused then it was absolutely essential for the prosecution to have produced the witnesses particularly, the handwriting expert so that the accused could have had the opportunity of testing the veracity. The opinion of the handwriting expert is at the very highest opinion evidence and the Court is not obliged to accept that evidence. Under the circumstances of the present case, where the opinion has been placed on record without producing the expert for cross-examination we see no ground on which this evidence can be relied upon by the Court as against the accused. Furthermore, what needs to be noted is that even though the prosecution alleges that A-1, A-2 and A-3 were acting in furtherance of their common intention along with A-4, we do not find sufficient material on record as far as the interconnection of these accused is concerned and this is of some importance because even assuming that the Court were to place some reliance on the evidence of the handwriting expert, it still goes against A-3 and there is nothing to connect A-1 and A-2 with that evidence.

13. Next, the prosecution has relied on another incriminating circumstance viz., the fact that in the course of the recovery the police seized a checked shirt and that this was recovered from the house of A-1 pursuant to a voluntary statement made by him. P.W. 10-the father of Zeeshan has identified the shirt as the one belonging to his son and the prosecution seeks to fasten the guilt on A-1 and A-2 by virtue of this recovery because there was really no explanation as to how a garment belonging to the deceased Zeeshan could have been recovered from the custody of the A-1 and A-2. In this regard, we have scrutinised this head of evidence and we find that there is no special distinguishing or identifying mark on the basis of which it can be established with certainty that the shirt in question belonged to the deceased. More importantly, there is an entirely different aspect of law viz., the question of probability. While dealing with an identical situation the Supreme Court in the case in Chandu alias Chandrahas Vs. State of Madhya Pradesh, , had totally rejected the evidence of recovery of the shirt of a deceased in a kidnapping case by holding that it does not stand to reason at all as to why the accused, who at the highest may have had a monetary interest in a kidnapping, would do away with the life of the child and keep the shirt with him. The Supreme Court took note of simple probabilities including the fact that the garment was one of virtually no value and held that the recovery of the shirt appears to be totally incongruous and that no reliance can be placed on this recovery. In the present instance the situation is even worse because if one had to go by the prosecution case, that the accused had kidnapped the child with the objective of extorting Rs. 1,00,000/- from the father, that their attempt had failed and that they finally got rid of the child in order to cover up their tracks, it appears more absurd that they would bring the shirt of the child and keep it in their house. This conduct that is attributed to the accused does not at all stand to reason more so when the death has taken place in a forest in Kolar and the accused are residing at Azadnagar in Bangalore. We consequently find no justification in the finding of the Trial Court that this is one

more incriminating circumstance against the accused.

14. The prosecution sought to place reliance on another interesting head of evidence viz., the fact that A-4 who is alleged to have been an accomplice of A-1 to A-3 turned approver and made a statement incriminating the remaining accused. As far as this head of evidence is concerned, what has been submitted before us by Mr. Doraiswamy is that once again the prosecution has resorted to various impermissible shortcuts. The learned Advocate has drawn our attention to the provisions of Section 306 of the Criminal Procedure Code wherein there are very well-defined guidelines prescribed by law in cases where approver evidence is sought to be used by the prosecution. Firstly, the law postulates that the statement of the approver will have to be recorded by the judicial authority viz., the Magistrate and this is for obvious reasons because the Court has to satisfy itself that the statement has not been obtained through coercion, fraud and misrepresentation.

15. Next, despite the statement being recorded by the judicial authority in view of the serious consequences of an approver statement which in many instances could form the principal basis of a conviction, the law requires that the approver's statement must be duly substantiated through the evidence of the authority which recorded it. At the trial, the Court has to be more than sure that there is no unfairness or inaccuracy involved in the approver statement. In the present instance all these requirements have been conveniently bypassed and short-circuited. The Investigating Officer has recorded the statement of A-4 who is supposed be the approver and the witness was never taken before the Magistrate nor was his statement recorded by the Magistrate, but what is worse is that once again the statement has been tendered, but A-4 has not been produced as a witness. Suffice it to say, that on this last ground alone this head of evidence will have to be totally excluded from consideration.

16. On the overall aspects of the case, Mr. Doraiswamy drew our attention to a recent decision of the Division Bench of this Court in Ningappa alias Ningaraddi and Another Vs. State, , wherein inter alia this Court had occasion to consider the legal requirements in respect of a charge of kidnapping particularly that the essential ingredients had to be established by the prosecution viz., that it must be conclusively proved, that it was the accused who was responsible for enticing and taking the minor out of the custody of the lawful guardianship. Mr. Doraiswamy is right when he points out that the evidence before us falls short of establishing this vital ingredient which is the condition precedent for a conviction u/s 364 of the Indian Penal Code. As far as the requirements of Section 302 of the Indian Penal Code in relation to a case of kidnapping and abduction it is necessary to establish as laid down in the decision that the two offences are inter alia connected and that there is enough material to prove beyond reasonable doubt that the accused were responsible for the subsequent death of the minor who had been kidnapped. Again on the strength of the present record, we find that the material before the Court fails to establish the interconnection between

the two offences and in any event fails to establish a nexus between the accused and the death of Zeeshan. We need to clarify that even though we have held that the recovery of the hand in the forest at Kolar could at the highest indicate that the hand belonged to Zeeshan there is no conclusive evidence before the Court even to establish that Zeeshan met with a homicidal death.

17. Having regard to the findings recorded by this Court, it necessarily follows that the conviction and sentence awarded to the two accused by the Trial Court are erroneous. The findings recorded by the Trial Court against A-1 and A-2 are accordingly set aside. The conviction and sentence awarded to A-1 and A-2 by the Trial Court are also quashed and set aside. A-1 is in custody. A-2 is on bail. It is directed that the bail bond of A-2 to be cancelled. As far as A-1 is concerned he shall be set at liberty forthwith unless required in connection with any other offence. The appeal accordingly succeeds and stands disposed of.

18. Once again we are constrained to observe with all the indignation at our command that both the investigation and the manner in which this prosecution has been conducted leaves us with the unmistakable impression that it is a rudderless, directionless exercise with no thought whatsoever having been bestowed on the basic objective in such cases namely that of establishing the charges. This Court does not have to point out to the investigating agencies and to the prosecuting authorities that there has got to be a basic master plan or chart of action, that the police have to produce evidence that furthers the cause of the prosecution and not that which is self-contradictory and self-destructive. The law also envisages that this evidence has to be proved and this is one more of the cases wherein, despite the loss of a valuable life of a four year child, the culprits go unpunished due to the lapses of the very agencies whose fundamental duty it is to ensure that those who are guilty of these atrocities are brought to book. It is this sort of insipid unprofessional performance that is undermining the rule of law.

19. The highlights of this case are that even though the hand of a child was recovered that shockingly enough, the prosecution itself has produced two sets of opinions that are mutually self-destructive. We would have expected that a D.N.A. test should have been conducted so that the identity of the hand could have been conclusively established but this was not done. Some haphazard evidence was produced to establish that the deceased Zeeshan was last seen in the company of the accused at Kolar but on scrutiny, the evidence of the lodge keeper was found to be totally worthless. It was attempted to link the accused with the most incriminating evidence namely the recovery of the hand in the forest at Kolar by the police contending that the accused had led the police to that spot where the accused pointed out the hand whereas the prosecution itself has totally demolished its own case by examining four other witnesses who indicate that the hand was found in the forest and handed over to the police by some other persons even before the accused had been arrested. While no evidence of motive was brought forward, the prosecution produced two ransom

notes on inland letters which were, for some strange reason, never despatched to the father of the deceased and while it was attempted to link the accused with these very incriminating documents by contending that the letters were in their own handwriting the most vital and crucial evidence of the handwriting expert himself was kept back from the Court. This is a sad state of affairs which is virtually subverting the justice dispensation process and we would like the authorities at the helm of affairs to ensure that there is a full stop to this situation. We expect a degree of skill and professionalism in the investigation of all criminal cases more so those pertaining to antisocial atrocities such as kidnapping of children for ransom and murdering them and it is not saying too much if we insist on an equally high level of care, skill and professionalism in the presentation of the prosecution case before the Trial Courts.