

(2014) 02 GUJ CK 0094
In the Gujarat High Court
Case No : Criminal Appeal No. 614 of 2007

Kanubhai Shanabhai Gamechi

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 04-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 209, 313
Evidence Act, 1872 — Section 25, 26, 27, 8
Penal Code, 1860 (IPC) — Section 302, 364

Citation : (2014) 2 GLR 1620

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Mrudul M. Barot, Advocate for the Appellant; Chetana M. Shah, A.P.P, Advocate for the Respondent

Judgement

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J.B. Pardiwala, J.—This Appeal is at the instance of a convict - accused for the offence of murder and is directed against an order of conviction and sentence dated 21st February, 2007 passed by the Additional Sessions Judge and Presiding Officer, Fast Track Court No. 2, Anand, in Sessions Case No. 34 of 2006, by which the Additional Sessions Judge convicted the appellant for the offences punishable under Secs. 302 and 364 of the Indian Penal Code. The learned Additional Sessions Judge sentenced the accused-appellant to undergo life imprisonment with fine of Rs. 500/- for the offence punishable under Sec. 302 of the Indian Penal Code, and in default of payment of fine, further rigorous imprisonment of two months. The learned Additional Sessions Judge also sentenced the accused-appellant to undergo rigorous imprisonment for a period of 10 years with fine of Rs. 500/- for the offence punishable under Sec. 364 of the Indian Penal Code, and in default of payment of fine, further simple imprisonment of two months.

Case of the Prosecution:

A First Information Report, (Exh. 57) was lodged by one Madhuben alias Puniben

Arjunbhai Gamji, the mother of the deceased Nitesh, who, at the time of incident, was around three and a half years of age, at the Vasad Police Station on 21st September, 2005, inter alia, alleging that past one year she was residing with Arjun, (P.W. 5) her husband of second marriage. During the wedlock from the first marriage with one Raman Sama, a son, was born named Nitesh. The first wife of Arjun, namely, Shardaben had committed suicide by consuming poison, and during the wedlock of the first marriage, four children were born to Arjun - two sons and two daughters, namely, Pappu @ Punam, Bhopo @ Ravi, Rekha and Sonam. While Arjun was in jail, at the time when his first wife had committed suicide, all the four children of Arjun, from the first marriage, were residing with his younger brother Kanubhai, the accused, and her mother-in-law. Arjun was running a small tea stall near Viswanath Petrol Pump on the highway and was earning his livelihood out of the same. The deceased Nitesh also used to reside with Arjun and the first informant Madhuben.

2. On 17th September, 2005, Arjun and his wife Madhuben had gone to pay their homage at a temple, living behind Nitesh in the care of Pappu, the elder son of Arjun from the first marriage. After their return to home, on the next day they enquired with Pappu about Nitesh, and Pappu in turn, informed them that on the previous night, the accused had taken away Nitesh with him on his bicycle. Thereafter, Arjun and Madhuben went to the house of the accused and enquired about the whereabouts of Nitesh with the mother of Arjun. They were informed by the mother that Nitesh had not come along with Kanu, the accused, and nobody had any idea as to where Nitesh had gone. Since, the whereabouts of Nitesh could not be found out, Madhuben as a mother, thought fit to lodge an F.I.R. on 21st September, 2005, which was registered initially for the offence punishable under Sec. 364 of the Indian Penal Code i.e. kidnapping for the purpose of committing murder.

3. According to Madhuben, the first informant - the accused was at inimical terms with her as he was under a false impression that his wife, Anju had divorced him only because of Madhuben. Keeping such a grudge in mind, Madhuben alleged that her son Nitesh might have been kidnapped by Kanu with an intention to commit his murder.

4. According to the prosecution, the investigation carried out by the Police pursuant to the First Information Report lodged by Madhuben on 21st September, 2005 revealed that on the night intervening of 17th and 18th September, 2005 the accused had taken away Nitesh along with him on a bicycle, and with a view to seek revenge, committed murder by throwing him into a well.

5. The Police Sub-Inspector of the Vasad Police Station forwarded a yadi, Exh. 61 dated 21-9-2005 to the Police Control Room at Anand, directing that since Nitesh, the minor son of Madhuben, had been murdered by him by throwing him into a well, the Fire Brigade Department be asked to remain present with the necessary equipments for the purpose of taking out the dead body of the

deceased. The officials of the Fire Brigade Department accordingly reached the place where the well was situated and taken out the dead body of the deceased from the well. The same was identified by Madhuben as that of his son Nitesh.

6. The inquest panchnama Exh. 20 was drawn in the presence of the two panch witnesses. Thereafter, the dead body of the deceased was sent to a primary health centre at Vasad for the purpose of post-mortem. The post-mortem examination revealed that the cause of death was asphyxia due to drowning.

7. At the time of drawing of the inquest panchnama Exh. 20, a discovery panchnama Exh. 23 in terms of Sec. 27 of the Evidence Act, was also drawn, since the accused pointed out the place, more particularly, the well, in which, the deceased was thrown away.

8. The statements of various witnesses were recorded. It is the case of the prosecution that the accused was arrested on 22nd September, 2005 at around 12-20 hours.

9. On conclusion of the investigation, the Investigating Officer filed a charge-sheet in the Court of the learned Judicial Magistrate, First Class, Anand.

10. As the case was exclusively triable by the Sessions Court, the Judicial Magistrate, First Class, Anand, committed the case to the Sessions Court under Sec. 209 of the Criminal Procedure Code.

11. The Sessions Court framed charge against the accused Exh. 9 and a statement of the accused was recorded. The accused did not admit the charge and claimed to be tried.

12. The prosecution adduced the following oral evidence in support of its case:

(1) P.W. 1, Doctor Nareshkumar Govindlal Bhalja, (who performed the post-mortem) Exh. 14

(2) P.W. 2, Sureshbhai Hathibhai Patel, panch-witness Exh. 19

(3) P.W. 3, Vithalbhai Mahijibhai Solanki, panch-witness Exh. 22

(4) P.W. 4, Govindbhai Mohanbhai Pandya, panch-witness Exh. 26

(5) P.W. 5, Arjunbhai Sanabhai Gamechi, step father of the deceased Exh. 31

(6) P.W. 6, Rekhaben Arjunbhai Parmar Exh. 32

(7) P.W. 7, Ramabhai Pujabhai Zala, panch-witness Exh. 40

(8) P.W. 8, Pappu alias Punam Arjunbhai Gamechi, step brother of the deceased Exh. 42

(9) P.W. 9, Khatubhai Dalabhai Chanpot, (the witness who took out the body of the deceased from the well) Exh. 44

(10) P.W. 10, Ramanbhai Bhikhabhai Benewal, (Fireman) Exh. 45

(11) P.W. 11, Ravjibhai Sombhai Parmar Exh. 47

(12) P.W. 12, Benedick Nikolas Mekwan (the witness who prepared the map of the scene of offence) Exh. 50

(13) P.W. 13, Amarsinh Anopsinh (Police Officer) Exh. 53

(14) P.W. 14, Babubhai Ratilal (Police Constable) Exh. 55

(15) P.W. 15, Udeysinh Khatubhai Thakor (Investigating Officer) Exh. 56

13. The following pieces of documentary evidence were adduced by the prosecution:

1. Original complaint, Exh. 57

2. Discovery panchnama under Sec. 27 of the Evidence Act, Exh. 23

3. Inquest Panchnama, Exh. 20

4. Panchnama of bicycle, Exh. 41

5. Panchnama of the clothes of the deceased, Exh. 27

6. Yadi forwarded to the Medical Officer for post-mortem Report, Exh. 17.

7. Post-mortem Report, Exh. 17

8. Certificate of the Medical Officer of the dead body, Exh. 18.

9. Police Yadi dated 21st September, 2005 forwarded to the Police Control Room, Anand, seeking help of the Fire Brigade Department, Exh. 60.

10. Certificate about the presence of the Fireman issued by the Chief Officer, Exh. 46.

11. Copy of the Police Yadi dated 23rd September, 2005 forwarded to the Executive Magistrate for drawing inquest panchnama, Exh. 61.

12. Report to the learned Judicial Magistrate for addition of the charge of Sec. 302 of the Indian Penal Code, Exh. 62.

13. Yadi to the Circle Inspector for preparation of map of the scene of offence dated 12th February, 2005, Exh. 51.

14. Map of the scene of offence, Exh. 52.

15. Police Yadi dated 8th September, 2005 to the Talati-cum-Mantri for certificate of well, Exh. 59.

16. Muddamal Ravangi of F.S.L. Exh. 63.

17. Receipt of the F.S.L., Exh. 64.

18. Forwarding letter to the F.S.L., Exh. 65.

19. Report of the F.S.L., Exh. 66.

20. Serological report of the F.S.L., Exh. 67.

14. After completion of the oral as well as the documentary evidence of the prosecution, the statement of the accused under Sec. 313 of the Criminal Procedure Code was recorded, in which the accused stated that the complaint was a false one and he was innocent. The accused further stated that only on suspicion he had been implicated as an accused in the crime.

15. At the conclusion of the trial, the learned trial Judge convicted the accused for the offences under Secs. 302 and 364 of the Indian Penal Code and sentenced him as stated hereinbefore.

16. Being dissatisfied, the accused-appellant has come up with this Appeal.

Submissions on behalf of the accused-appellant:

17. Mr. Mrudul M. Barot, the learned Advocate appearing for the accused-appellant, vehemently submitted that the trial Court committed a serious error in holding the accused guilty of the offence of murder punishable under Sec. 302 of the Indian Penal Code as well as for the offence punishable under Sec. 364 of the Indian Penal Code.

18. According to Mr. Barot, the entire case of the prosecution hinges on circumstantial evidence. Mr. Barot submitted that if a case is decided on circumstantial evidence, the circumstances put forward must be satisfactorily proved and those circumstances should be consistent only with the hypothesis of the guilt of the accused. Mr. Barot further submitted that again those circumstances should be of a conclusive nature and tendency and they should be such so as to include every hypothesis but the one proposed to be proved. In other words, according to Mr. Barot, there must be a chain of evidence so far as, complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused, and it must be such so as to show that within all given probabilities the act must have been done by the accused.

19. Mr. Barot submitted that the trial Court has substantially based the conviction on two circumstances: (i) the accused was last seen together with the deceased, and (ii) the discovery of the dead body of the deceased from the well pursuant to the statement made by the accused pointing out the place where the well was situated.

20. According to Mr. Barot neither of the two circumstances could be said to have been established in accordance with the law pointing only towards the guilt of the accused.

21. Mr. Barot submitted that the prosecution could be said to have failed to establish the guilt of the accused by applying the principles of circumstantial evidence. He, therefore, urged to set aside the conviction of the accused and allow the Appeal.

Submissions made on behalf of the State:

22. Ms. Chetana M. Shah, the learned Additional Public Prosecutor appearing for the State of Gujarat, vehemently submitted that the trial Court has rightly convicted the accused for the offences punishable under Secs. 302 and 364 of the Indian Penal Code and no interference is warranted at the end of this Court in the present Appeal.

23. According to Ms. Shah, the incriminating circumstance of the accused last seen together with the deceased is established by the oral evidence of the P.W. 5-Arjunbhai Gamechi, Exh. 31, whereas the discovery of the dead body of the deceased pursuant to the statement made by the accused has been well proved through the evidence of the P.W. 3-Vithalbhai Mahijibhai Solanki, a panch witness, Exh. 22.

24. Ms. Shah, therefore, urged that there being no merits in this Appeal, the same may be dismissed.

25. Having heard the learned Counsel appearing for the parties and having gone through the materials on record, the only question that falls for our determination in this Appeal is, whether the learned trial Judge committed any error in holding the accused-appellant guilty for the offences of murder punishable under Secs. 302 and 364 of the Indian Penal Code.

26. The prosecution case is based on the circumstantial evidence and it is a well-settled proposition of law that when the case rests upon circumstantial evidence such evidence must satisfy the following tests:

1. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
3. The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

27. The picture that emerges from a cumulative reading and assessment of the materials on record is thus: The deceased was residing with his mother Madhuben and step-father Arjunbhai along with other four children of the P.W. 5-Arjunbhai, born during the wedlock of his first marriage with one Shardaben.

28. According to the oral evidence of the P.W. 5-Arjunbhai, Exh. 31, after the return of his wife Madhuben from her parental home both of them decided to

visit a place called Chelawada to pay homage at a temple.

29. According to the P.W. 5-Arjunbhai, on a Saturday, which was the last day of the Ganesh festival, he along with Madhuben had left for Chelawada, leaving the deceased in the care of Pappu, the eldest son of Arjunbhai born during the wedlock of his first marriage. Arjunbhai and Madhuben returned home next day and enquired with Pappu about the deceased Nitesh. Pappu, in turn, is said to have informed his father Arjunbhai that on the previous night Kanu, the accused, had come at the tea stall and had carried away Nitesh along with him on a bicycle. The P.W. 5-Arjunbhai, in his evidence, has deposed that as the whereabouts of Nitesh could not be traced, his wife Madhuben lodged the F.I.R. in that regard at the Vasad Police Station.

30. It may not be out of place to mention at this stage that the first informant Madhuben, despite number of summons being issued, failed to remain present during the course of the trial, and therefore, the First Information Report could not be proved through Madhuben. The same was proved and exhibited through the evidence of the Investigating Officer.

31. The prosecution also examined Pappu @ Punam Gamechi as P.W. No. 8 and his oral evidence has been marked as Exh. 42. The P.W. 8 Pappu, being a child witness, was first tested by the trial Court to ascertain whether he was competent enough to depose before the Court or not. The trial Court, after being satisfied, granted permission to examine Pappu as a prosecution witness.

32. We have perused the oral evidence of the P.W. 8-Pappu. In his evidence, he has not deposed that he had informed his father Arjunbhai that Nitesh was carried away in the night by the accused on his bicycle and further that he was last seen in the company of the accused. We have also gone through the oral evidence of the P.W. 6-Rekhaben, one of the daughters of the P.W. 5-Arjunbhai, and in her evidence also, all that she has deposed is that at the time of having dinner the accused was present along with Nitesh and other children.

33. Having regard to the evidence on record, we are of the opinion that the circumstantial evidence of last seen together relied upon by the prosecution does not inspire any confidence. Even otherwise, the circumstance of last seen does not by itself lead to an inference that it was the accused who committed the crime.

34. The P.W. 5-Arjunbhai Gamechi, Exh. 31, in his cross-examination, has admitted that it was true that his son Pappu had not seen Nitesh being taken away by the accused.

35. Even according to the P.W. 6-Rekhaben Gamechi, Exh. 32 on the date of the incident, she had seen Nitesh being carried away by Pappu on his bicycle. The P.W. 6-Rekhaben has also admitted in her cross-examination that it was true that neither they themselves nor the others in the family had verified whether Nitesh had reached the tea stall in the night or not. The P.W. 6-Rekhaben has also

deposed that after the dinner was over Pappu i.e. her brother had gone to sleep at the petrol pump. On the next day, as usual, he resumed his work. The P.W. 6-Rekhaben has also deposed in her cross-examination that it was true that in the night hours Pappu had not stated anything about Nitesh and not even after waking up in the morning.

36. Thus, considering the evidence on record, it is evident that none of the witnesses have satisfactorily deposed as regards what had happened to Nitesh in the night hours. It deserves to be noted that all the children i.e. four children of Arjunbhai and Nitesh were residing together but still there is no satisfactory evidence even to remotely suggest that Nitesh was picked up by the accused any time after the dinner and was last seen in company of the accused. Even if we believe a part of the testimony of the P.W. 5-Arjunbhai wherein he has stated that his son Pappu had conveyed to him that Nitesh was last seen with the accused in the night, the same remains in the realm of hearsay evidence.

37. The above takes us to consider the second piece of incriminating circumstance, viz., the discovery of the dead body of the deceased from the well pursuant to the statement alleged to have been made by the accused before the police in that regard.

38. The prosecution has placed strong reliance on the circumstance of discovery of the dead body of the deceased from the well after the place was pointed out by the accused while in police custody. According to the prosecution, the accused, after his arrest, volunteered to show the place where he had thrown away the deceased in a well and in that regard a panchnama was drawn as contemplated under Sec. 27 of the Evidence Act.

39. To prove the circumstance of discovery, the prosecution has examined one Vithalbhai Solanki, Exh. 22. The P.W. 3-Vithalbhai, in his evidence, has deposed that on 22nd September, 2005, he was called by the police at Vasad Police Station to act as a panch witness. According to him, there was one another person named Bagabhai Chandbhai who was also called by the police to act as a second panch witness. They were called at around 2-30 in the afternoon, and according to the P.W. 3-Vithalbhai, at that point of time, the accused was also sitting in the Police Station. It has been deposed by the P.W. 3-Vithalbhai that the accused volunteered to point out the place, and accordingly, his signature was obtained on a panchnama. Thereafter, the accused along with the two panch witnesses and the police party proceeded in a vehicle and the vehicle was being led by the accused. According to the P.W. 3-Vithalbhai the accused led them near a well, known as Meetha Kuwa. According to the P.W. 3-Vithalbhai, the accused, after reaching near the well, stated that he had thrown away the child in the well. Thereafter, the body of the deceased was fished out.

40. The P.W. 3-Vithalbhai Solanki in his cross-examination has deposed that it was true that he had knowledge about the incident which had occurred much prior to 22nd September, 2005.

41. From the evidence of the P.W. 3-Vithalbhai it could be said that the discovery panchnama under Sec. 27 of the Evidence Act, Exh. 23, was drawn on 22nd September, 2005. According to the P.W. 3-Vithalbhai the body of the deceased was taken out from the well on 22nd September, 2005 pursuant to the statement made by the accused regarding the same.

42. A circumstance of discovery of an incriminating fact pursuant to the statement made by the accused while in police custody is admissible in evidence and could definitely be considered as one of the incriminating piece of circumstances pointing towards the guilt of the accused. However, we are not convinced and satisfied with this piece of evidence which has been strongly relied upon by the trial Court in holding the accused guilty.

43. There are many reasons why we are not willing to accept the circumstance of discovery of the dead body of the deceased from the well as an incriminating piece of circumstance. It deserves to be noted that according to the P.W. 15-Udeysinh Thakor, Exh. 56, the Investigating Officer, the accused was arrested in connection with the crime on 22nd September, 2005 at around 12-20 in the afternoon, and thereafter, was interrogated. According to the P.W. 15-Udeysinh Thakor, upon interrogation of the accused, the accused expressed his willingness to point out the place where he had thrown away the deceased in a well. It is only thereafter, according to the P.W. 15-Udeysinh Thakor, that a preliminary panchnama in that regard under Sec. 27 of the Evidence Act was drawn and after taking the help of the officials of the Fire Brigade Department and the panch witnesses, the body of the deceased was taken out from the well at around 16-45 on 22nd September, 2005.

44. As against the above, it appears that the Investigating Agency somehow had derived prior knowledge on 21st September, 2005 itself that the body of the deceased was in a well. These two things do not reconcile. First, if the accused was arrested on 22nd September, 2005 at around 12-20 hours in the afternoon then on what basis the police derived the knowledge that the deceased had been thrown away in a well on the previous day i.e. on 21st September, 2005. The prosecution is unable to explain the wardhi Exh. 60 forwarded by the Police Sub-Inspector of the Vasad Police Station to the Police Control Room, Anand, stating that in connection with the offence registered with CR. No. 1-113 of 2005 the body of a child named Nitesh who was three and a half years had to be taken out from a well as there was an information that the accused had thrown away Nitesh in the well. In the vardhi Exh. 60 it has been stated that since the body is to be taken out, the Fire Brigade Department be informed to remain present at Meetha Kuwa along with the necessary equipments. The prosecution is not able to explain how did it derive the knowledge that the deceased had been thrown away in a well by the accused on 21st September, 2005, more particularly, when the accused is said to have been arrested on 22nd September, 2005 at 12-20 hours.

45. The matter does not over here. It is essential that to look into the evidence

of the P.W. 10-Ramanbhai Exh. 45. This witness, in his evidence, has deposed that past 27 years he was working with the Fire Brigade Department at Anand. He had deposed that on 21st September, 2005 he received a wardhi from the Police Control Room, Anand, that a boy has been thrown away in a well and the dead body had to be taken out from the well. Accordingly, on 22nd September, 2005, they reached at the well which is known as Meetha Kuwa. According to this witness, at that point of time, the accused was also present, and on asking the accused, he pointed out the place where he had thrown away the boy. The dead body was taken out from the well with the help of an expert swimmer.

46. What has the expert swimmer to say about the fishing out of the dead body from the well is also important. For this purpose, we need to look into the evidence of the P.W. 9-Khatubhai Dalabhai, Exh. 44. The evidence of this witness assumes importance because this witness has something absolutely contrary to convey. The P.W. 9-Khatubhai Dalabhai Chanpot, in his evidence, has deposed that past 20 years he had been serving with the Anand Nagar Palika as a swimmer. He has deposed that on 21st day of September, 2005 he had received a vardhi from the police stating that a dead body of a boy is to be searched and taken out from a well. He himself along with his colleagues Ramanbhai, Purshottambhai and Govindbhai had left for that particular place in a fire brigade vehicle bearing No. GQG-6700. They all reached at the well, and at that point of time, according to this witness, one person was present. Thereafter, they all entered inside the well and after removal of some garbage inside the same, could spot the dead body of a small child. The dead body was taken out from the well and the same was identified by her mother as that of her son Nitesh. In his deposition, he has stated that he had received the wardhi on 21st September, 2005 and on that very day in the afternoon they had left in the vehicle and had taken out the dead body from the well.

47. Thus, from the above, it is evident that there are two sets of evidence so far as the discovery part is concerned. The first set of evidence would suggest that after the arrest of the accused on 22nd September, 2005 at 12-20 hours in the afternoon the Investigating Agency derived the knowledge that the body of the child had been thrown away in a well pursuant to the statement made by the accused at the Police Station while in police custody and the second set of evidence would suggest that the police had already derived knowledge on 21st September, 2005 i.e. a day prior to the arrest of the accused and the body of the deceased was also taken out from the well on 21st September, 2005 itself.

48. What is important is not as to on which date the body of the deceased was taken out from the well i.e. whether on 21st September, 2005 or 22nd September, 2005. The crucial question is how did the police derive the knowledge that the child had been thrown away in a well on 21st September, 2005. At least one thing is quite evident that the police had prior knowledge of the place where the deceased was thrown away in the well.

49. If that be so, then what will be the evidentiary value of the discovery

panchnama Exh. 23 drawn in terms of Sec. 27 of the Evidence Act. In our opinion, no evidentiary value could be attached to such a piece of evidence for the simple reason that a fact which has already been discovered and if any information given in that behalf afterwards cannot be said to have lead to the discovery of the fact. There cannot be a rediscovery. If the fact was already known to the police there cannot be a discovery again of that fact as a result of a statement made by the accused subsequent to the original discovery.

50. Once, a fact is discovered from other sources, there can be no fresh discovery even if the relevant information is extracted from the accused and the Courts have to be watchful against the ingenuity of the Investigating Officer in this respect so that the protection afforded by the wholesome provisions of Secs. 25 and 26 of the Evidence Act that it is not whittled down by the mere manipulation of the record of case diary.

51. It would, in the circumstances, be somewhat unsafe to rely of this information for proving the appellant's guilt.

52. The learned Assistant Public Prosecutor, having realized that it would be difficult to tender a satisfactory reply as regards the discrepancies referred to above, tried to convince us by submitting that assuming for the moment that the police had the prior knowledge of the fact that the dead body of the deceased had been thrown away in a well, even then the panch witnesses have deposed that on 22nd September, 2005 the accused was present near the well, and pursuant to the place pointed out by the accused, the dead body of the deceased was taken out from the well, would be admissible as the conduct of the accused under Sec. 8 of the Evidence Act, quite apart from the admissibility of the disclosure statement under Sec. 27 of the Evidence Act.

53. Ms. Shah, the learned A.P.P., placed strong reliance on the decision of the Supreme Court in A.N. Venkatesh and Another Vs. State of Karnataka, wherein the Hon''ble Supreme Court made the following observations:

"By virtue of Sec. 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influenced or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the Police Officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Sec. 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Sec. 27 or not as held by this Court in Prakash Chand Vs. State (Delhi Administration), . Even if we hold that the disclosure statement made by the accused-appellants (Exhs. P-15 and P-16) is not admissible under Sec. 27 of the Evidence Act, still it is relevant under Sec. 8."

54. There cannot be any quarrel with the proposition of the law as explained by the Supreme Court so far as the conduct of the accused relevant under Sec. 8 of the Evidence Act is concerned. However, an accused cannot be convicted for a

serious offence like murder solely relying upon his conduct, more particularly, when the prosecution fails to prove and establish other circumstances against the accused. In the present case, we have disbelieved the circumstance of the accused last seen together with the deceased as well as the discovery. Then, in such circumstances, conviction cannot be affirmed by merely placing reliance on the conduct of the accused, which may be relevant under Sec. 8 of the Evidence Act.

55. Here again, we may say that the argument of Ms. Shah, could have been taken into consideration, provided there was satisfactory evidence as regards the date on which the body of the deceased was fished out from the well. If the body was fished out from the well on 21st September, 2005, as deposed by one of the witnesses who was an employee in the Fire Brigade Department of the Anand Nagar Palika, then even the conduct of the accused sought to be relied upon would not save the situation for the prosecution.

56. We have also noticed that the accused, in his further statement recorded under Sec. 313 of the Criminal Procedure Code, has stated that he had been implicated in the crime merely on the basis of suspicion at a later stage.

57. In the overall view of the matter, we find substance in the say of the accused as reflected from his statement under Sec. 313 of the Criminal Procedure Code.

58. Thus, in the overall view of the matter, we are of the opinion that the trial Court committed an error in placing reliance on the circumstance of last seen together as well as the discovery of the dead body of the deceased pursuant to the statement alleged to have been made by the accused. In the result, we allow this Appeal and set aside the judgment and order of conviction dated 21st February, 2007 passed by the learned Additional Sessions Judge and Presiding Officer, Fast Track Court No. 2, Anand, in Sessions Case No. 34 of 2006 and acquit the accused appellant of all the charges. The accused-appellant be released forthwith unless required in any other case.