

(2016) 06 KAR CK 0130
In the Karnataka High Court
Case No : Criminal Appeal No. 29 of 2013

State of Karnataka

APPELLANT

Vs

Mr. Shekhar V. Harikanth

RESPONDENT

Date of Decision : 16-06-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 302, 304, 317

Citation : (2016) 4 AirKarR 441 : (2016) ILRKarnataka 3455 : (2016) 4 KCCR 3190

Hon'ble Judges : Mohan M. Shantanagoudar and Budihal R.B., JJ.

Bench : Division Bench

Advocate : S. Rachaiah, HCGP, for the Appellant; Archana Murthy for T. Thippeswamy, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Mohan M. Shantanagoudar, J.—;The judgment and order of acquittal dated 23.8.2011 passed by the Additional Sessions Judge/Fast track Court at Puttur, Dakshina Kannada, in Sessions Case No. 79/2011 is appealed by the State questioning the acquittal of the accused.

2. By the impugned judgment, the Trial Court acquitted the accused of the offence punishable under Sections 302, 201 read with Section 34 of Indian Penal Code.

3. The case of the prosecution in brief is that accused No. 1 is serving in the Indian Army; he had love with accused No. 2; both the accused are of the same native place; intimacy and love of accused resulted in pregnancy of accused No. 2; the parents of both the accused were not agreeable for the marriage of both the accused; fearing about the negative consequences, accused No. 2 did not disclose about her pregnancy to her parents, but informed the same to accused No. 1; on the request of accused No. 1, accused No. 2 came to Bangalore from

her native place; both the accused hired a house and lived life as husband and wife; thereafter, they decided to marry, both went to a temple at Domalur and married; their marriage was registered in the office of the Sub-Registrar, Indiranagar, Bangalore; thereafter, accused No. 2 gave birth to a female child at Air Force Command Hospital, Bangalore, on 6.3.2011. However, the factum of such marriage was suppressed by them before the parents of both the accused as well as the villagers. Having apprehended that the accused would not be allowed inside the village if the villagers come to know that accused No.2 was pregnant without marriage, they decided to kill the child and thereafter, to go to the village; they chose Sri Kukke Subramanya for abandoning the child and hence, they went to Kukke Subramanya on 31.3.2011 in a bus; and after alighting in the bus stand they hired an autorickshaw and went to bathing point at Kumaradhara river where the pilgrims take holy dip. Accused No. 1 took the child to an isolated place on the river bank and killed the child by suffocating the same. He buried the child in the sand and came back to the place where accused No. 2 was sitting and informed her; they came back to the bus stand to board the bus; the auto drivers and public at large who had seen the accused with child while going to bathing point returning back with empty hands suspected some foul play, questioned them about whereabouts of the child; being dissatisfied with the answer given by the accused, they took the accused to Subramanya Police Station, wherein the accused disclosed their identity and showed the marriage certificate; after recording the statement of the accused, the police let the accused go from Kukke Subramanya in as much as they did not suspect the accused.

4. On 4.4.2011, that is four days after the incident, PW.1, whose house was near the Asalesha Petrol Pump of Sri Kukke Subramanya, saw a street dog carrying carcass/dead body inside her compound; she chased the dog and the dog left the dead body inside the compound. P.W.1 after seeing the street dog carrying carcass of a female child alerted her tenant by name Mr. Mahabala-P.W.13 who is the Forest Officer; P.W.13. in turn brought the aforementioned fact to the police; P.W.19 Sub-Inspector of Police visited the spot and shifted the body to the hospital. P.W.1 lodged a complaint as per Ex.P.1 which was registered in Crime No. 17/2011 in Subramanya Police Station. P.Ws.20 and 21 are the Inspectors; they conducted the investigation and ultimately, final investigation report came to be filed by P.W.21.

5. In order to prove its case, the prosecution in all examined 22 witnesses and got marked 37 exhibits and 2 Material Objects. The defence did not adduce any evidence. As mentioned supra, the Trial Court, on evaluation of the record, acquitted the accused by concluding that the prosecution has not proved its case for the offence under Section 302 of IPC and that charge under Section 317 of IPC was not framed.

6. Sri S. Rachaiah the Learned High Court Government Pleader appearing for the appellant-State taking us through the entire material on record submits that

though the villagers of Kukke Subramanya have turned hostile to the case of the prosecution, all the vital circumstances are proved by the prosecution; the factum of accused No. 2 giving birth to the deceased child which was found to be dead subsequently is proved; the fact that the child was born at Air Force Command Hospital, Bangalore on 6.3.2011 is also proved; the report of the Scientific Officer who conducted the DNA test clearly shows that the child was born to accused Nos. 1 and 2; the call details of accused Nos. 1 and P.W.2 also disclose that accused were very much present in Kukke Subramanya on 31.3.2011; the statement of accused No. 1 under Section 313 of Cr.P.C also supports the version of the prosecution witnesses that the child was taken by the accused to Kukke Subramanya and was killed there. On these grounds, he prays for setting aside the judgment of the Court below and for conviction of the accused under Section 302 of IPC.

Per contra, Smt. Archana Murthy, the Learned Counsel appearing on behalf of the accused argues in support of the judgment of the Court below contending that the Trial Court was justified in acquitting the accused under Section 302 of IPC; since it is the specific case of the prosecution that the child was murdered by the accused and as such the specific case is not proved by the prosecution beyond doubt; the Trial Court was justified in acquitting the accused.

7. Before proceeding further, it would be beneficial to note the depositions of each of the witnesses in brief:

P.W. 1 is the resident of Kukke Subramanya; she lodged a complaint in Subramanya Police Station as per Ex.P.1, based on which. Crime No. 17/2011 came to be registered; her complaint discloses, that she has seen the dead body of a female child being dragged by a street dog; she chased the dog and the dog left the carcass of a female child inside her compound; she informed the same to the tenant and thereafter, the complaint came to be lodged. The very version as found in Ex.P.1 is deposed by her before this Court.

P.Ws.2 to 6 were supposed to depose about seeing the accused carrying the child to the bathing place, that is Kumaradara river and about seeing the accused coming back without the child; about apprehending the accused and taking them to the police station etc. But they have not supported the case of the prosecution and they have turned hostile to the case of the prosecution.

P.Ws.7 and 8 are the mother and father of accused No. 2 respectively; both of them have also not supported the case of the prosecution. P.W.9 is the witness who has deposed about the marriage of accused Nos. 1 and 2. P.W. 10 has deposed that he has seen the dead body of a child near the compound of P.W.1 and that 45-50 autorickshaw drivers were present at the spot. P.W.10 is the witness to the panchanama-Ex.P.4 relating to the scene wherein the dead body of the child was found; P.W.11 is the witness to the panchanama-Exs.P.12 and P.13; P.W.12 is the witness to the panchanama-Ex.P.14.

P.W. 13 is the Forest Department employee, he was the tenant of the house

belonging to P.W.1. He was informed by P.W. 1 about the dead body of a female child near the compound of P.W. 1 and consequently he informed the same to the police. P.Ws. 14, 15 and 18 are the Police Constables who participated during the course of investigation at different levels. P.W. 16 is the Doctor, he conducted the post mortem on the dead body of the deceased child. The post mortem report is at Ex.P. 17. P.W. 19 is the Sub-Inspector of Police. He registered the case in Crime No. 17/2011 and sent the first information report to the jurisdictional Magistrate. He conducted the part of investigation. P.W.20 is the Inspector of Police, he also conducted the part of the investigation. After the arrest of accused on 6.4.2011. the statement of accused was recorded. He requested the Doctors for subjecting the bones and other parts of the child to the DNA test, so also he produced the accused before the Court, Sullia, for collecting the blood samples of both the accused for the purpose of DNA test. He handed over the investigation to P.W.21. Subsequently, P.W.21 conducted the investigation and filed the charge sheet. PW.22 is the Scientific Officer. He conducted the DNA test and issued the certificate as per Ex.P35 which fully supports the case of the prosecution.

8. The case is based on circumstantial evidence. The circumstances relied upon by the prosecution are as under:

(a) the deceased child was born at Bangalore in the Air Force Command Hospital, Bangalore on 6.3.2011. Ex.P.23 is the certificate issued by the hospital Authorities, birth certificate issued by the Command Hospital states the names of parents of a child as Smt. Nagarathna and Sri Shekar V. Harikanth (accused herein).

(b) Accused No. 2 was examined by the Doctor-P.W. 17. She was subjected to radiological examination.

(c) P.W.17 - Dr. Vijaya Kumar has opined as per Ex.P.18 that accused No. 2 has delivered a body within two months prior the date of the test. The DNA test was conducted by P.W.22 and the report as per Ex.P.35 discloses that the child in question is the child of accused Nos. 1 and 2.

(d) The accused tried to escape from the scene of offence immediately after the incident; they gave false information to the police-and the public at large when they were interrogated.

9. As mentioned supra, it is the case of the prosecution that the child was born to the accused on 6.3.2011; 4-5 months prior to the birth of the child, accused Nos. 1 and 2 got married at Bangalore in a temple, and the marriage was registered in the Sub-Registrar's office at Bangalore; within few days of marriage, the child was born; which means accused No. 2 was 7 to 8 months pregnant when her marriage took place with accused No. 1; the child died on 31.3.2011; the dead body of the child was found on 4.4.2011 in front of the house of P.W. 1 and accused were arrested on 6.4.2011.

10. Looking to the records, it is clear that accused do not seriously dispute

regarding their inter-se relationship as lovers before their marriage and as husband and wife after the marriage. There is no serious dispute with regard to begetting a child immediately after the marriage; they also do not seriously dispute that they went to Kukke Subramanya during the relevant point of time.

11. Ex.P.23 is the birth certificate issued by Air Force Command Hospital, Bangalore on 6.3.2011. The marriage registration certificate vide Ex.P.25 reveals that the marriage was solemnized on 21.10.2010 and registered on 26.10.2010, which means the child was born within 4? months from the date of the marriage. Consequently, it is clear that accused No. 2 was 4? months pregnant at the time of marriage; so also the defence does not dispute that accused Nos. 1 and 2 had sexual relationship with each other prior to the marriage and that the accused No. 2 became pregnant and the child was born. Even otherwise in Ex.P.23, it is clearly mentioned that a daughter is born to Smt. Nagarathna (accused No. 2) wife of Sri Shekar V. Harikanth (accused No. 1). The designation of accused No. 1 is also mentioned as No. 14843452H having Rank SEP working in the unit of ASC Centre and College. The child was born at 18.50 hours on 6.3.2011 and weight of the child was 2.7 kg. The birth certificate-Ex.P.23 is marked through the Inspector of Police P.W.21 who conducted the part of investigation. The defence has not objected for production of the said certificate at the time of recording the evidence before the Trial Court. As mentioned supra, the defence does not seriously dispute with regard to the birth of the child and the names of the parents of the child (both the accused). Thus, it is clear that the child was born on 6.3.2011 and the names of the parents of the child are accused Nos. 1 and 2 (Smt. Nagarathna and Sri Shekar V. Harikanth) respectively.

12. The prosecution, in order to support its case has further examined the Doctor P.W. 17 who had subjected accused No.2 to radiological test. The Doctor P.W. 17 has deposed that accused No. 2 delivered a baby within two months prior to the date of test. The certificate issued by the Doctor P.W.17 is at Ex.P.18. There is no cross examination by the defence on this aspect. From the deposition of P.W.17 it is clear that accused No. 2 delivered a baby within two months from 7.4.2011. It is relevant to note that accused No. 2 was subjected to radiological examination on 7.4.2011. The evidence of P.W.17 fully supports the case of the prosecution that accused No. 2 delivered a baby in question within 2 months from 7.4.2011.

13. The third circumstance relating to DNA test is also proved by the prosecution beyond reasonable doubt. The DNA report is at Ex.P.35. The Scientific Officer (P. W.22) has conducted the DNA test and has given the report.

P.W. 16, the Doctor has conducted the autopsy over the dead body. Said doctor has deposed that intestine and liver of the child were rotten and whereas both the kidneys, urinary bladder and organs of generation were intact and they were not rotten. He collected the liver, muscles from the thighs of the child and bones of left thigh of the child for DNA test in three bottles and sealed them and thereafter, handed over the sealed bottles to the police for getting them tested. After getting the radiological report, the Doctor has opined that the child was

aged about 2 months. Since the body was decomposed, the cause of death could not be determined by the Doctor who conducted the post mortem examination.

The evidence of P.W.20, the Inspector of Police reveals that the accused were taken before the Magistrate for drawing up of blood for DNA test. Thereafter, the blood of both the accused was collected in the presence of the Magistrate. The blood samples so collected from the accused as well as bones, liver and muscles from the dead body of the child were sent by the Inspector of Police (P.W.20) for DNA test. There is no serious cross-examination on the aforementioned facts. Thus, it is amply proved by the prosecution that samples of bones, muscles and liver of the child as well as the blood samples of both accused were sent to DNA test and all such samples were collected by the concerned Police Officers and the Doctors as required under law. Exs.P.32 and P.34 bear the seal and signature of the Magistrate before whom blood samples of accused were collected.

14. P.W.22 is the Scientific Officer of the Forensic Science Laboratory. He has deposed that five sealed articles were sent to him which are as under:

(a) plastic container containing two pieces of liver collected on 5.4.2011 from the dead body (item No. 1)

(b) plastic container containing muscles from the left thigh collected on 5.4.2011 from the dead body (item No. 2)

(c) plastic container containing left femur bone as a whole collected from the dead body during post mortem on 5.4.2011 (item No.3)

(d) one sealed tube containing sample blood collected from male individual by name Sri Shekar V. Harikanth (item No. 4) (wrongly shown as item No. 5)

(e) one sealed tube containing sample blood collected from female individual by name Smt. Nagarathna (item No. 5) (wrongly shown as item No. 6)

He has further deposed that liver, muscle, femur bone and blood samples were taken up for DNA profile examination in the DNA Centre; due care was taken for the integrity of each sample by coding and decoding; the DNA was isolated from the samples sent in items No. 1, 2, 3, 4 and 5; the DNA was extracted, quantified and amplified by the Polymerase Chain Reaction (PCR) from each of the above samples; sample was Profiled using PCR amplified STR technique. After following the due method, the Scientific Officer has given the report as per Ex.P.35. He has in detail assigned the reasons for coming to the conclusion and in the very report as at Ex.P.35, it is also mentioned that amplicon from item No. 3 was not sufficient for DNA profiling. Thus, virtually item Nos. 1, 2, 4 and 5 were sufficient for DNA profiling and were subjected to thorough test. P.W.22 the Scientific Officer concluded as under:

"From the DNA profile results of the liver, muscle tissue and sample blood, it is found that:

(1) The liver and muscle tissue sent in item Nos. 1 and 2 are of human in origin

and of female sex.

(2) The DNA profile of the individual to whom the liver and muscle tissue belongs sent in item Nos. 1 and 2 is consistent with having come from the offspring of Sri Shekhar V. Harikanth S/o Sri Vishnu Harikanth, sample blood sent in item No. 4 and Smt. Nagarathna W/o Sri Shekhar V. Harikanth, sample blood sent in item No. 5.

I have therefore, considered the possibility of the individual to whom the liver and muscle tissue belongs sent in item Nos. 1 and 2 is the offspring and biological child of Sri Shekhar V. Harikanth S/o Sri Vishnu Harikanth, sample blood sent in item No. 4 and Smt Nagarathna W/o Sri Shekhar V. Harikanth, sample blood sent in item No. 5".

From the aforementioned conclusion, it is clear that the child to whom the liver and muscle tissue belonged i.e., item Nos. 1 and 2 which were sent for test, is the offspring and biological child of Sri Shekhar V. Harikanth and Smt. Nagarathna (having sample blood at item Nos. 4 and 5) respectively. The aforementioned conclusion of the Scientific Officer and the report at Ex.P.35 fully proves the case of the prosecution that the child is born to the accused. As mentioned supra, there is no serious examination on that aspect of the matter also.

15. However, the case of the accused is that they were not responsible for the murder of the deceased and that they had abandoned the child at Kukke Subramanya. (but had not murdered).

From the aforementioned reasons assigned by us is amply clear that all circumstances relied upon by the prosecution are proved beyond reasonable doubt. From the proved circumstances, it is clear that the accused had come to Kukke Subramanya on 31.3.2011; the deceased child was born to them; the child was also brought to Kukke Subramanya on that day and the child was then aged about 25 days old, as it is clear from the birth certificate issued by the Air Force Command Hospital, Bangalore. Since the child which was in possession of accused Nos. 1 and 2 during the relevant point of time at the said place of Kukke Subramanya is dead, naturally it is for the accused to explain as to how the child died in as much as such factor would be known only to the parents of the child (i.e., the accused) and none else. It is not the case of the accused that somebody has stolen/kidnapped the child and had murdered. Since reasonable explanation is expected under the facts and circumstances of the case from the accused, they have explained as to how the death of the child has taken place, by filing their written statement at the stage of recording the statement of the accused under Section 313 of Cr.P.C. We hasten to add here itself that the accused did not lead evidence on their behalf. However, they tendered their explanation under Section 313 of Cr.P.C by submitting the written statement before the Court and the same reads thus:

VERNACULAR MATTER

16. From the aforementioned statement of accused No. 1 submitted before the Court (which is in Kannada language) it is clear that he was loving accused No. 2 deeply and they had sexual intercourse; consequently accused No. 2 became pregnant; accused No. 2 who was feared of her life from the parents and her villagers did not inform to her parents about her pregnancy, but she informed the same to accused No. 1 who was working at Bangalore during the relevant point of time; accused No. 1 requested accused No. 2 to come to Bangalore; after the arrival of accused No. 2 to Bangalore both the accused went and married as per law and started living as husband and wife in a rented house at Bangalore; female child was born to accused No. 2 in Air Force Command Hospital. Bangalore; that both the accused having felt that the villagers and their respective parents would not tolerate about the behaviour of accused having the child and about accused No. 2 becoming pregnant even prior to the marriage, feared about their life and came to Kukke Subramanya temple to abandon the child; since they knew that for married couple who do beget child would come to Kukke Subramanya temple for praying for birth of child, the accused thought fit to abandon the child in order to facilitate for such childless couple to take the child with them, to foster the child and to safeguard the interest of the child; they also felt that such childless couple may probably feel that Kukke Subramany Swamy himself has given them the child in the form of the abandoned child in question. So thinking, they abandoned the child near the bank of river, wherein the public at large take bath. It is further stated by accused No. 1 in his statement under Section 313 of Cr.P.C, that when they were in bus stand, the police started interrogating them and ultimately, they showed their marriage certificate and identity card issued by Military in the police station and were relieved by the police. Based on this explanation, they pleaded that the accused have not committed the murder of the deceased, but have tried to safeguard the life of the child.

17. In our considered opinion, the written statement filed before the Court by the accused, at the stage of recording the statement under Section 313 of Cr.P.C, fully supports the case of the prosecution and corroborates its case in all material aspects.

We are conscious of the fact that statement of accused No. 1 recorded under Section 313 of Cr.P.C constitutes merely as the defence plea. However, such statement made in defence by accused under Section 313 of Cr.P.C. can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of Cr.P.C. cannot be made the sole basis of his conviction. The law on the subject is almost settled that statement under Section 313 of Cr.P.C. of the accused can either be relied in whole or in part. In the cases of *Nishi Kant Jha v. State of Bihar*, AIR 1969 SC 0422 and *Mohan Singh v. Prem Singh and another*, AIR 2002 SC 3582, the Apex Court has held that it may also be possible to rely on the inculpatory part of the statement of the accused if the exculpatory part is found to be false on the basis of the evidence led by the prosecution.

It is also well settled law that if accused gives false answer during the course of his statement under Section 313 of Cr.P.C. the Court can draw an adverse inference against him. However, in the case on hand, the accused appear to have not given incorrect and false answer, but the explanation seems to be fair, believable and hence acceptable. We hasten to add here itself that, merely because the statement of the accused fully supports and corroborates the case of the prosecution, the same cannot be the sole basis for conviction of the accused. The statement of accused under Section 313 of Cr.P.C. can be taken into consideration to appreciate the truthfulness or otherwise of the prosecution case. Since such a statement is not recorded after administration of oath and as the accused cannot be cross-examined, his statement so recorded under Section 313 of Cr.P.C. cannot be treated to be evidence within the meaning of Section 3 of the Evidence Act, 1872. Though, the statement of accused under Section 313 of Cr.P.C. cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, 1872, it can be taken into consideration to appreciate the truthfulness or otherwise of the prosecution case. If the statement of accused recorded under Section 313 of Cr.P.C supports the case of the prosecution, it can be certainly relevant consideration for the Court to examine, particularly when the prosecution has otherwise been able to establish the chain of events. Since we find that the circumstances relied upon by the prosecution are proved beyond reasonable doubt and consequently the chain of circumstances is complete, the statement of accused under Section 313 of Cr.P.C. is an additional and relevant consideration for this Court to consider.

18. We are also conscious of the fact that the statement of accused No. 1 cannot be used as the statement of the co-accused. However, under Section 10 of the Evidence Act, 1872, the statement can be utilised against the co-accused, if the Court is satisfied that both the accused had clear and joint intention to commit crime and thus have conspired to commit the crime. In the matter on hand, there is no charge of conspiracy. However, the evidence on record reveals that both the accused had common intention to commit the act in question. Even in her statement recorded under Section 313 of Cr.P.C., accused No. 2 has not denied the incriminating evidence against her relating to birth of a child; her marriage with accused No. 1 when she was pregnant, and drawing of her blood during the investigation etc.

19. Having regard to the facts and circumstances of the case, we are of the opinion that the prosecution has proved its case beyond reasonable doubt; so also we conclude that all the circumstances proved by the prosecution beyond reasonable doubt do form the complete chain of circumstances which does not leave any scope for the accused to escape from clutches of law. So also the case of prosecution is supported by the statement of accused No. 1 recorded under Section 313 of Cr.P.C. In view of the same we conclude that the accused have committed the offence punishable at least under Section 317 of IPC.

From the facts and circumstances of the case as well from the discussion made

supra, we are of the firm conclusion that both the parents of the child, that is accused herein, have exposed and left the child in a public place with an intention of abandoning the said child. We also conclude that the child has died due to consequences of such exposure. Though, the Trial Court in its judgment at paragraph No. 26 has observed with regard to applicability of Section 317 of IPC to the facts of this case, has erred in not convicting the accused for the offence under Section 317 of IPC only on the simple ground that the charge under Section 317 of IPC was not framed. While observing so, the Trial Court has missed to note the explanation to Section 317 of IPC. At this stage, it is relevant to quote the provision of Section 317 of IPC, which reads thus:

Exposure and abandonment of child under twelve years, by parent or person having care of it:-

Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation:-

This Section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequences of the exposure.

20. Homogeneous reading of Section 317 of IPC with explanation makes amply clear that Section 317 is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequence of the exposure. Undisputedly, in the matter on hand, the child has died because of its exposure in the public place. The child was aged just about 25 days as on the date of the incident. Evidence of P.W. 1 clearly reveals that the street dog was dragging the carcass/dead body of the child in front of her house; immediately thereafter, she informed the same to P.W.13, in turn he informed the same to the Police Inspector; the police came to the spot within a short span of time and collected the dead body from the said spot, that is, in front of the house of P.W.1 by drawing mahazar. It is also proved by the prosecution that liver, muscles and bones of the child were collected at the time of post mortem for DNA test and they were also subjected to test by comparing with blood samples of the accused. The DNA test shows that the deceased child was born to accused Nos. 1 and 2.

21. In addition to the same, the evidence of Police Constable (P.W.14) and the evidence of P.W.15 (Head Constable) attached to Kukke Subramanya Police Station clearly reveals that certain autorickshaw drivers and public at large had brought both the accused to the police station at 12 Noon on 31.3.2011 (on the date of the incident); that the said Head Constable (P.W.15) interrogated the accused on the point of missing of the child; during interrogation, the accused

showed the identity card issued by the military and the marriage certificate. They were subjected to interrogation by police till 3 P.M. Ultimately, the phone numbers of the accused were taken by P.W. 15 and thereafter, the accused were released. Evidence of P.W. 15 makes it fully clear that accused were present at Kukke Subramanya temple premises on 31.3.2011 at about 12 Noon and they were interrogated not only by the police, but also by the public at large about the missing of the child.

22. In view of aforementioned proved facts and circumstances of the case, the Trial Court is not justified in acquitting the accused. However, we find that the accused probably did not have intention to commit murder of the child. However they have deserted/abandoned the child with a view to see that any childless couple may take the child along with them and foster the same, the accused may not be convicted for the offence under Section 302 of IPC. However, they shall be convicted under Sections 304 Part II and 317 of IPC in as much as they had the knowledge that the child may die in case of such abandonment.

23. Having heard the Learned Advocates on the question of sentence, we pass the following:

ORDER

24. The judgment and order of acquittal dated 23.8.2011 passed in Sessions Case No.79/2011 stands set-aside. Both accused Nos. 1 and 2 are convicted for the offence punishable under Section 304 Part II and Section 317 of IPC read with Section 34 of IPC. They are sentenced to undergo imprisonment for a period of 7 years in respect of both the offences separately and to pay a total fine of Rs. 1,00,000/- each. In case of default of payment of fine, both accused shall further undergo imprisonment for a period of 3 years. The sentence of imprisonment in respect of both offences shall run concurrently. The period of imprisonment already undergone by the accused/respondents shall be given set off as per Section 428 of Cr.P.C. The entire amount of fine, if recovered, shall vest with the State.