

(2010) 09 MAD CK 0072

In the Madras High Court

Case No : R.T. No. 2 of 2010 and Criminal A. No. 525 of 2010

Sundar @ Sundarrajan

APPELLANT

Vs

State by Inspector of Police

RESPONDENT

Date of Decision : 30-09-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313

Evidence Act, 1872 — Section 118, 27, 8

Penal Code, 1860 (IPC) — Section 201, 302, 363, 364, 364A

Citation : (2011) 3 RCR(Criminal) 55

Hon'ble Judges : M. Sathyanarayanan, J; M. Chockalingam, J

Bench : Division Bench

Advocate : A.N. Thambidurai, for the Appellant; P. Kumaresan, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—The Sessions Division, Mahila Court, Cuddalore, has sought for confirmation of the sentence of death penalty

imposed in S.C. No. 23 of 2010 whereby the appellant/A-1 who stood charged and on trial, found guilty under Sections 364 (A), 302 and 201 of

IPC and awarded death penalty along with a fine of Rs. 1000/- each on the first two charges and also 7 years Rigorous Imprisonment along with a

fine of Rs. 1000/- on the third charge, in the referred trial, while the appellant/A-1 has sought for setting aside the said judgment of conviction and

sentence.

2. The case of the prosecution can be stated thus:

(a) P.W.1 is the mother of the deceased child Suresh, aged 7. She was living in Karkudal Village within the jurisdiction of the respondent police.

Her husband was in the foreign parts. The child was doing his II Standard at Sakthi Matricualtion School at Vridhachalam. The child used to leave

for school every morning at about 8.00 A.M. and come back in the afternoon at about 4.30 P.M. On the date of occurrence that was on

27.7.2009, as usual the child returned from the school by a van which was meant for the purpose of the students, and got down at Karkudal along

with P.W.2, his colleague by name Kamali, aged 10. When P.W.2 and the deceased child Suresh got down from the van, the appellant/A-1 was

waiting nearby along with the motorbike, came near the child, called him by name and informed the child that both her mother and grandmother

were not doing well and so that, he wanted to take the child. With that false reason, he took the child from that place. This was witnessed not only

by P.W.2, but also by P.W.3, a Villager of the place, who was actually coming on his way.

(b) Since the child did not come back, P.W.1 made a search along with others. She also enquired P.W.2. P.W.2 furnished the facts that the

deceased child Suresh was intercepted by a person, and on the reason that both the mother and grandmother of Suresh were not doing well, he

took Suresh in a motorbike. Then P.W.1 went to the respondent police station and gave a complaint to P.W.18, the Sub Inspector of Police, who

on the strength of Ex.P1, the complaint, given at about 7.00 P.M., registered a case in Crime No. 106/2009 u/s 366 of IPC. The printed FIR,

Ex.P14, was despatched to the Court. He took up investigation, proceeded to the spot and prepared an observation mahazar, Ex.P2, and also a

rough sketch, Ex.P15. Then he examined the witnesses and recorded their statements.

(c) At about 9.22 P.M., a call was received by P.W.8 in her cellphone No. 9943020435 from a person calling himself as Shankar, and it was

made to know the cellphone number of P.W.1. Again a call was made by him to P.W.8 at about 9.25 P.M. and P.W.8 furnished the cellphone

number of P.W.1. After the cell number was furnished, within a short span of five minutes at about 9.39 P.M., a phone call was made to the

cellphone of P.W.1 by the appellant/A-1, who demanded a ransom of Rs. 5 lakhs in order to release the child. Immediately, P.W.1 rushed to the

respondent police station and gave that information to the Station House Officer who was on duty at that time, and the Investigation was taken up

by P.W.19, the Inspector of Police. He arrested both A-1 and A-2 on 30.7.2009, and along with P.W.13, the Village Administrative Officer, he

proceeded to the house of P.W.7, where during the relevant time, A-1 and A-2 were staying. P.W.7 identified A-1 and A-2. In the presence of

P.W.13, the confessional statement given by A-1 voluntarily, was recorded. The admissible part of the said confessional statement is marked as

Ex.P9, pursuant to which A-1 first produced three cell phones, one with SIM card and the other two without SIM card and also M.O.5,

motorcycle, which were all recovered under a cover of Ex.P10 mahazar.

(d) A-1/appellant took the police party to Meerankulam within which the dead body of the child was thrown after the commission of Murder.

Then the fire squad was informed, and P.W.9, the Officer attached to the Fire Department, came with his Assistant, and a gunny bag was taken

out, and thereafter, an observation mahazar, Ex.P12, and a rough sketch, Ex.P17, were prepared by the Investigator. After the gunny bag was

taken out from Meerankulam, it was opened, and the dead body of the child along with M.O.1 series, school bag, school books and also the slate

of the child, was found.

(e) The Investigator conducted inquest on the dead body of Suresh in the presence of witnesses and panchayatdars and prepared an inquest

report, Ex.P18. The dead body was sent to the Government Hospital along with a requisition for the purpose of autopsy. Thereafter, A-1 was

brought to the station, and the case was converted to Sections 363 and 302 of IPC. The amended FIR, Ex.P16, was despatched to the Court,

and pending investigation, the Investigator examined P.W.3 and also the child witness, P.W.2, and P.W.7, in whose house A-1 and A-2 were

residing for sometime and also P.W.8, to whom two phone calls were made by Shankar on the night hours of the date of occurrence namely

27.7.2009.

(f) P.W.12, the Civil Assistant Surgeon, attached to the Government Hospital, Vridhachalam, on receipt of the said requisition, has conducted

autopsy on the dead body of Suresh and has issued a postmortem certificate, Ex.P8, with his opinion that the deceased would appear to have died

of asphyxia by suffocation prior to dumping in water.

(g) The further investigation also led to the examination of P.W.16. According to

him, at about 3.30 P.M. on 28.7.2009, A-1 came to his public telephone booth and he was also demanding Rs. 5 lakhs ransom. P.W.17 was also examined. He gave a statement to the effect that on 28.7.2010 at about 8.30 P.M., when he was coming from the agricultural field, he found A-1 driving a bike and A-2 sitting as pillion rider, and in between a child aged about 7, was found sitting, and thereafter, at about 10.15 or 10.30 P.M., when he was sitting in front of the house, both A-1 and A-2 were returning, but the child was not found. The Investigating Officer also examined the Officer (Legal Cell) of the Vodafone Company from whom he got documents pertaining to the particulars of cellphone calls made on 27.7.2009 and 28.7.2009, etc., and the same was marked as Ex.P5 series.

(h) A requisition was forwarded to the Chief Judicial Magistrate, Cuddalore. P.W.10, the Judicial Magistrate No. I, Vridhachalam, was required to conduct the test identification parade. Accordingly, he conducted the identification parade in respect of A-1, and at that time, P. Ws.2 and 3 were taken for the purpose of identification parade. It was procedurally conducted. The identification parade proceedings are marked as Ex.P4.

On completion of investigation, the Investigator filed the final report.

3. The case was committed to Court of Sessions, and necessary charges were framed. In order to substantiate the charges, the prosecution examined 19 witnesses and also relied on 18 exhibits and 10 material objects. On completion of the evidence on the side of the prosecution, the accused were questioned u/s 313 of Code of Criminal Procedure as to the incriminating circumstances found in the evidence of the prosecution witnesses which they flatly denied as false. No defence witness was examined. The trial Court heard the arguments advanced on either side, and took the view that the prosecution has proved the case beyond reasonable doubt in respect of the three charges levelled against the appellant/A-1 and found him guilty and awarded the above punishment. In order to seek confirmation of the death penalty, the matter is referred to by the Court of Session, while the appellant who was shown as A-1, has preferred the appeal whereby he challenged the judgment of conviction and sentence by the trial Court. However, the learned trial Judge was not convinced with the case of the prosecution in respect of A-2 and made an order of

acquittal. Insofar as A-2, no appeal has been preferred by the State.

4. Seeking affirmation of the death sentence, the learned Public Prosecutor Mr. P. Kumaresan would submit that in the instant case, it was a case

where a child was kidnapped for making a demand of ransom of Rs. 5 lakhs; that all the circumstances were actually brought to the notice of the

trial Judge that it was A-1 who had the illicit intimacy with A-2, and in order to quench his thirst, he has actually made the demand of ransom, and

since it was not met, he has murdered the young child aged 7 brutally and mercilessly and also screened the evidence; that actually the act of A-1,

under the circumstances, would fall under the rarest of rare cases, and hence the judgment of the trial Court awarding death penalty, was proper

and it has got to be affirmed.

5. In order to fortify his contentions, the learned Public Prosecutor relied on a decision of the Apex Court reported in Vikram Singh and Others

Vs. State of Punjab, .

6. Advancing arguments on behalf of the appellant/A-1, the learned Counsel Mr. A.N. Thambidurai would submit that in the instant case, the

prosecution had no direct evidence to offer, and it relied only upon circumstantial evidence. The learned Counsel made a caution to the Court that

in a given case like this, where the prosecution rests its case exclusively on the circumstantial evidence, all the circumstances must constitute a chain

without a snap and also be pointing to the hypothesis that except the accused no one could have committed the offence. In the instant case,

according to the Counsel, no one circumstance was pointing to the guilt of A-1. The learned Counsel made the following comments and levelled

criticisms on the evidence adduced by the prosecution.

7. According to him, the prosecution came forward to state that P. Ws.2 and 3 have actually seen A-1 along with the child, and this evidence was

believed by the trial Court. The evidence of P.W.2 should have been rejected by the trial Judge. P.W.2, at the time of occurrence was only 10

years old and at the time of evidence before the Court, 11 years old. At the time when P.W.2 was examined before the Court, the maturity of the

child to give evidence before the Court should have been tested. But, the trial Judge has not even recorded any question to satisfy the maturity of

mind of the child to depose before a Court of law. That apart, it was only 10

years old. Under the circumstance, the evidence of P.W.2 should not have been relied upon.

8. Commenting upon the evidence of P.W.3, he would submit that P.W.3 could not have seen A-1 at the place of occurrence wherefrom the child

was alleged to have been kidnapped, at all; that according to P.W.3, he was not only standing there, but also one Jayaraman was standing nearby

who was examined as P.W.4; that P.W.4 has categorically deposed that he came to the place of occurrence at about 7.30 P.M. and thus he could

not have seen the occurrence at all; that had it been true that P.W.4 was one standing by the side of P.W.3 at the time of the alleged kidnapping,

both could not have seen at all; that apart from that, according to P.W.3, he also accompanied P.W.1 to the police station; that if to be so, he

would have furnished the said information, but not done so; and that under the circumstances, the evidence of P.W.3 becomes all the more

doubtful.

9. Added further the learned Counsel that as far as the evidence of P.W.7 is concerned, during the relevant time, both A-1 and A-2 were actually

residing in the house of P.W.7, and only to that extent, it can be taken; that except that, the other part of her evidence could not be relied; that as

far as P.W.8 is concerned, according to her, there were two phone calls received by her at about 9.22 P.M. and 9.25 P.M. respectively from one

Shankar, and the said Shankar wanted to know the cell phone number of P.W.1, and it was actually furnished by her in the second call made by

him; and that if to be so, the Investigator should have actually made investigation whether Shankar is the person alive or a fictitious person, but no

investigation was done from that angle.

10. The learned Counsel would further add that according to P.W.1, she received a phone call at about 9.39 P.M. from A-1 demanding a ransom

of Rs. 5 lakhs; that as far as this is concerned, she has given a phone number; but, it is pertinent to point out that on verification, the phone number

from which calls were alleged to have been received from A-1 by both P.W.8 and also by P.W.1 during the relevant time, belonged to one

Vathsala; but the investigation was actually not done in that line; that it would be quite indicative of the fact that A-1 did not own such a phone on

that day and at the relevant time; that under the circumstances, it would also

cast a suspicion; that the investigation should have been done in that line, but not actually done; that the prosecution had relied on the recovery of the material objects on being identified by the appellant/A-1; that according to P.W.13, he was the Village Administrative Officer of Karkudal Village, and he received a requisition from the Investigating Officer at about 4.30 A.M., and after getting permission from the Tahsildar, he went to the police station, and he was taken to the house of P.W.7, and on being identified by P.W.7, A- 1 and A-2 were arrested pursuant to which A-1 produced three cell phones and also a motorbike. Now, at this juncture, the learned Counsel commenting upon the evidence of P.W.13 would submit that P.W.13 had gone out of his jurisdiction; that while the witnesses were available in a place 40 or 50 kms. away in a different village, those witnesses should have been examined and their statements should have been recorded, and the recovery should have been made in their presence and not in the presence of P.W.13; that apart from that, P.W.13 has nowhere stated that A-1 has taken the child to Meerankulam; that so far as the recovery mahazars alleged to have been made at Meerankulam in respect of the gunny bag or the dead body or M.O.1 series are concerned, in no one of the recovery mahazars, the signature of A-1 was obtained; that it would also cast a doubt whether such a recovery could have been made at all; and that it would also cast a doubt on the arrest, confession and recovery of the material objects.

11. Added further the learned Counsel that according to P.W.17, at about 8.30 P.M., he was coming from the agricultural field, and at that time, he found A-1 and A-2 sitting in the motorbike and in between a child was actually sitting, and they took the child, and after sometime, at about 10.15 or 10.30 P.M., when he was in front of his house, A-1 and A-2 alone were returning, but the child was not found in their company; that as far as the evidence of P.W.17 was concerned, it should have been completely rejected by the trial Court for the reason that when he gave a statement u/s 161 of Code of Criminal Procedure , he has stated that he was coming from the agricultural operation, but when he gave evidence before the Court, he stated that he came after attending the nature's call; that apart from that, according to him, he found the appellant/A-1 nearby Meerankulam; that an observation mahazar and also a rough sketch were

prepared by the Investigator in which not even a light is shown; that according to P.W.17, he found both A-1 and A-2 at about 8.30 P.M.; that he has categorically admitted at the time of his cross-examination that he had not even seen A-1 and A-2 either before or after the time, and under the circumstances, the evidence of P.W.17 was of no use to the prosecution.

12. In his further arguments, the learned Counsel made much comment on the identification parade. According to him, the identification parade was filled with infirmities and illegalities, and A-1 actually had a fracture in his lap; but at that time, no one of the persons who were actually taken for that purpose, sustained any injury, and in such circumstances, it would be quite easier for P. Ws.2 and 3 to identify the person, and after the identification parade was over, the signature of A-1 was not obtained by the Judicial Magistrate, and it is also infirm as noticed, and under the circumstances, it cannot be given any evidentiary value.

13. Added further the learned Counsel that it is an admitted position that at the time when he was arrested, he was found with a fracture; that under the circumstances, a duty was cast upon the prosecution to explain how he sustained that injury; but the prosecution has miserably failed in that regard; that apart from that, though it was the case of the prosecution that the child was kidnapped from the place of occurrence only for the purpose of making a demand of ransom, the capacity of P.W.1 to meet such a demand was not at all available in the evidence; that it can be well stated that the prosecution has miserably failed to prove the case by the so-called circumstances; that the circumstances placed were neither sufficient nor proved, and thus the prosecution has miserably failed to prove any one of the charges.

14. The learned Counsel while concluding his arguments would further submit that while the trial Judge was not ready to believe the case of the prosecution insofar as A-2 against whom all the three charges were levelled, the same reasons are equally applicable and should have been applied insofar as the appellant/A-1 also, and he should have been acquitted, and thus the judgment of the trial Court is erroneous and it has got to be set aside.

15. The Court paid its anxious consideration on the submissions made and

looked into all the materials available.

16. It is not in controversy that the dead body of a child aged 7, by name Suresh, the son of P.W.1, was found in Meerankulam during the

investigation conducted by P.W.19 in Crime No. 106 of 2009 originally registered u/s 363 IPC and subsequently altered to Sections 363 and 302

IPC. Following the inquest made by the Investigating Officer and preparation of the inquest report, Ex.P18, the dead body was subjected to

postmortem by P.W.12, the Doctor, who has given a categorical opinion that the child died out of asphyxia due to suffocation. The cause of death

as put forth by the prosecution, was never disputed by the appellant before the trial Court, and thus the trial Judge was perfectly correct in relying

on the evidence of the prosecution through the medical person examined as P.W.12, and the postmortem certificate marked as Ex.P8, to record

the cause of death.

17. In order to substantiate the charges that in order to get the ransom, the child of P.W.1, the deceased Suresh, was kidnapped by the

appellant/A-1, and once the demand was made and the same was not met, A-1 killed the child mercilessly, put the dead body in a gunny bag and

threw into the tank, the prosecution had no direct evidence to offer. But, it relied upon the circumstantial evidence. It is well settled proposition of

law that the circumstantial evidence has got equal rigor and also equal vigor, and it can be relied upon provided the circumstances are clinchingly

pointing to the guilt of the accused. In the instant case, the following circumstances are noticed by the Court.

18. According to P.W.1 the mother of the deceased child Suresh, the child used to leave for School every day at about 8.00 A.M. and come

back at about 4.30 P.M., and on the date of occurrence, i.e., 27.7.2009, the child as usual went to the school. From the evidence of P.W.6, the

Correspondent of Sakthi Matriculation School, Vridhachalam, and also the attendance register, Ex.P3, it would be quite evident that the child

attended the school that day and was returning from the school in the van meant for that purpose. According to P.W.2, she is also studying along

with the deceased Suresh, and on the day, both were returning from the school in the van and got down at Karkudal, and at that time A-1 who

was standing under a Neem tree along with the motorbike, came to them and

told the child Suresh that both his mother and grandmother were not doing well and on that false reason, took the child from the place. The evidence of P.W.2 was much commented by the learned Counsel for the appellant. But, those contentions cannot be agreed. The learned trial Judge has categorically pointed out before recording the evidence that the maturity of the mind of the child, P.W.2, to give evidence was actually tested and found satisfactory, and then he recorded the evidence. The child at the time of occurrence, was 10 years old, and at the time of giving evidence, it was aged 11. The Apex Court had an occasion to consider the child evidence and the reliability thereon in a case reported in 2008 (2) Supreme 592 (Golla Yelugu Govindu v. State of Andhra Pradesh) wherein it has been held as follows:

7. Indian Evidence Act, 1872 (in short the Evidence Act) does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in *Wheeler v. United States* (159 U.S. 523). The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See *Surya Narayana v. State of Karnataka* (2001 (1) Supreme 1)).

8. In *Dattu Ramrao Sakhare and Others Vs. State of Maharashtra*, it was held as follows:

A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered u/s 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only

precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her

demeanour must be like any other competent witness and there is no likelihood of being tutored.

19. It would quite clear that if the evidence of a child witness is cogent and convincing, the Court can accept that evidence. In the instant case, the

evidence of P.W.2 is narrated above. According to P.W.1, immediately when the child did not return by 4.30 P.M., she entertained suspicion and

went in search of her son, and she immediately met P.W.2, the other child. P.W.2 informed P.W.1 that the child Suresh was taken by a person in

a motorbike telling the above reasons. Now, at this juncture, in order to accept the evidence of P.W.2, the earliest version as found in Ex.P1, in

the considered opinion of the Court, would suffice. A perusal of Ex.P1, the complaint, would clearly indicate that after the child did not return,

P.W.1 met P.W.2 Kamali, the other child, and she was informed by P.W.2 that the child was taken by a person in a motorbike with the above

false reasons. Thus the earliest version found therein, would clearly indicate that P.W.2 has come with a true version. That apart, the child was able

to identify the motorbike, marked as M.O.5, before the Court. Despite cross-examination in full, the evidence of P.W.2 the child remained

unshaken. Following the ratio laid down in the above decision by the Apex Court, this Court is of the considered opinion that the evidence of

P.W.2 has got to be accepted.

20. Added further, P.W.2 at the time of the identification parade, was able to identify A-1 properly as could be seen from the identification parade

proceedings Ex.P4. Apart from that, the evidence of P.W.2 stood fully corroborated by the evidence of P.W.3. P.W.3 was a native of the same

village, and all these persons were already known to him. P.W.3 was sufficiently matured and aged 41. According to him, he was actually coming

on the way, and when the school van was stopped, P.W.2 and the deceased Suresh got down, and the child was called by A-1, and on some

reason, the child was taken in the bike which was noticed by him. P.W.3 also took part in the identification parade and has also identified A-1

properly. Now, the comment made by the learned Counsel for the appellant that as regards the identification parade, there were infirmities noticed

cannot be countenanced in law. As far as the comment made that there was no requisition made by the Investigating Officer for the test

identification parade or the signature of A-1 was not obtained is concerned, the same cannot be accepted for the reason that insofar as the

identification parade conducted by P.W.10, it was pursuant to the orders of the Chief Judicial Magistrate only on the requisition made by the

Investigating Officer; otherwise, it could not have taken place at all. The conduct of the identification parade in order to identify A-1 in which P.

Ws.2 and 3 have participated, was never denied by the appellant before the trial Court. Under the circumstances, this Court is of the considered

opinion that the test identification parade was properly done, and the trial Judge was perfectly correct in accepting the evidence adduced by the

prosecution in that regard.

21. Apart from the above, it is pertinent to point out the legal position in respect of the identification parade. It is settled proposition of law that the

identification parade is only a corroborative piece of evidence and the identification done in the Court, is a substantive piece of evidence. The

Court must look into whether at the time when the witnesses saw the accused in the company of the deceased, such a thing would have caused a

dent in their memory. In the instant case, the child was only 7 years old, and both the child and P.W.2 Kamali who was coming along with the

child, got down together, and the appellant/A-1 came there and took the child on the flimsy reason. In such a situation, naturally the same would

have caused a dent in the memory of P.W.2, and and it would not fail ordinarily, and equally so the memory of P.W.3, a man aged about 41. No

doubt, it would have caused a dent in their memory. Therefore, the trial Judge was perfectly correct in accepting the evidence of P. Ws.2 and 3.

22. Added circumstances, in the considered opinion of the Court, which are stronger against the appellant, are the recovery of the dead body and

also the material objects pursuant to the confessional statement given by the appellant/A-1 voluntarily and recorded by the Investigating Officer in

the presence of P.W.13. P.W.13, it is true, is the VAO of the place of P.W.1 within the jurisdiction of the respondent police. According to

P.W.13, he was requested by the Investigator at about 4.30 A.M., and after getting permission from the higher-ups, he accompanied P.W.19, the

Investigator, and went to Chengunam Village where A-1 and A-2 were actually staying in the house of P.W.7. It is pertinent to point out that

though P.W.7 has turned hostile, he has spoken to the fact that during the relevant time A-1 and A-2 were residing in the house, and he identified

A-1 and A-2 to the Investigating Officer. At this juncture, P.W.13 has categorically spoken to the fact that at the time of arrest, A-1 came forward

to give a confessional statement voluntarily, and the same was recorded by the Investigator. The admissible part is marked as Ex.P9 pursuant to

which he produced three cell phones out of which it was one which contained the number through which he made two phone calls to P.W.8 at

about 9.22 P.M. and 9.25 P.M. respectively on 27.7.2010, and also at about 9.39 P.M. to P.W.1 making a demand for ransom. At this juncture,

the contentions put forth by the learned Counsel as to whether one Shankar who made the calls at 9.22 and 9.25 P.M., was alive or a fictitious

person, and the cellphone recovered from A-1, did not belong to him even as per the documentary evidence have got to be rejected since they do

not carry merit. The cellphone from which all the three calls were made namely two calls to P.W.8 at about 9.22 and 9.25 P.M. in the name of

Shankar and one call at 9.39 P.M. by A-1 to P.W.1, has been recovered, and the particulars of those calls have been recorded in the cellphone,

and it was actually kept by P.W.8 during the relevant time and also A-1 during the relevant time. Thus the prosecution has brought to the notice of

the Court that in Ex.P5, the calls were actually found for 71 seconds at 9.22 P.M. and 43 seconds at 9.25 P.M. are found in Ex.P5, and another

call which was made is also found therein which was from M.O.4 cellphone which was recovered from the appellant/A-1. Out of these three cell

phones one cell phone was with the SIM card and the other two cell phones without SIM card. Now the documentary evidence produced by the

prosecution would go to show that three calls were made namely two calls to P.W.8 at 9.22 and 9.25 P.M. respectively and after ascertaining the

number of P.W.1, the third call was made to P.W.1. All the documentary evidence were placed before the trial Court. Thus it would be quite clear

that the evidence of P.W.8 that the appellant/A-1 wanted to know the number of P.W.1, and then he made a call to P.W.8 and came to know

about the number, and thereafter, he made a call at about 9.39 P.M. to P.W.1 as could be found in the evidence of P.W.1.

23. Now, the learned Counsel made a comment that if really such an information as to the demand for ransom was received by P.W.1 and she went to the police station and informed the same at the night itself, the investigation should have been done in that line. This contention cannot be countenanced for the simple reason that the case was not registered for boy missing, but it was registered u/s 363 of IPC, and the investigation was on. Now, it is pertinent to point out that the cellphone which was in the hands of A-1 during the relevant time, was not in his name, but in the name of one Vathsala, and therefore, even the verification would not have brought about any result at that time. From the evidence available, it would be quite clear that it was the appellant/A-1 who took the Investigator along with P.W.13 to Meerankulam where the dead body of the child which was put in a gunny bag, was thrown, and it was actually taken out by P.W.9, the Officer from the Fire Squad, and thereafter, in the presence of witnesses, it was opened and the dead body along with M.O.1 series namely the school bag, books and slate which belonged to the child, was found. The fact that the confession of the appellant/A-1 which led to the recovery of the dead body of the child put in the gunny bag, inside Meerankulam and also the recovery of the belongings of the child would be clinchingly pointing to the nexus of the crime with the appellant. Thus the comments made by the appellant's side in that regard have got to be rejected. The Apex Court in a decision reported in A.N. Venkatesh and Another Vs. State of Karnataka, has held thus:

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

Ws 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was

buried, is an admissible piece of evidence u/s 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to

be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible u/s 8 of the Evidence Act.

24. In the instant case, the prosecution has got a consistent evidence as to the last seen theory by P. Ws.2 and 3, and thereafter, the cellphone calls

made by A-1 to P.W.8 and after ascertaining the number, to P.W.1 making a demand for a ransom, and since it was not met, he caused the death

of the child, put in the gunny bag and threw the same into the tank, and the recovery of the dead body pursuant to the confessional statement, was

made clear. It can be well stated that the prosecution had suffice evidence pointing to the guilt of the appellant/A-1. Insofar as A-2, the trial Judge

was not ready to believe the evidence of P.W.17 since the prosecution had abundant evidence pointing to the guilt of A-1 in kidnapping the boy

and making the demand of ransom by phone and thereafter as to the recovery of the material objects and also identification of the place by A-1

where the dead body which was put in the gunny bag, was thrown. All would be pointing to the crime of kidnapping, causing murder and also

screening the evidence committed by A-1. The trial Judge has marshalled the evidence proper and has arrived at a correct conclusion that it was

the appellant/ A-1 who committed all the three crimes, and found him guilty and rightly too. On scrutiny of the materials available, this Court is of

the considered opinion that all or any one of the contentions put forth by the learned Counsel for the appellant, cannot be countenanced. Thus the

finding of the trial Judge in that regard that the prosecution has proved all the three charges against the appellant beyond reasonable doubt have got

to be affirmed.

25. Insofar as the death penalty imposed by the trial Judge, this Court, for the following reasons, has to affirm the same. In the case on hand, a

child of 7 years old was kidnapped by A-1 from the place for a demand of Rs. 5 lakhs ransom, and when it was not met, he has mercilessly and

brutally murdered the child. It is not only gruesome, but also merciless act. Ordinarily, it would shock the conscience of the society. In a case like

this, when an illegal demand of ransom is made, and if not met, whether a young child could be murdered. Here is a case where the act of A-1

would not be compatible to the human behaviour, and it is, no doubt, inhuman. It can even be commented that like a beast, he has acted so and

that too mercilessly. It remains to be stated that from the evidence of P.W.1, it is quite clear that she has got three daughters, but only one son

namely the deceased young child. This Court is conscious of the fact that the life sentence is the rule, and the death sentence is an exception. This

Court is also mindful of the caution made by the Apex Court that the death sentence could be imposed in rarest of rare cases. The case on hand

would fall under ""rarest of rare cases"".

26. It has been laid down by the Apex Court in a decision reported in Vikram Singh and Others Vs. State of Punjab, as follows:

63. The learned Counsel for the complainant and the State have, however, pointed out that Section 364A had been introduced in the Penal Code,

1860 by virtue of Amendment Act 42 of 1993 and the purpose for its introduction was given as under:

Statement of Objects and Reasons: Kidnappings by terrorists for ransom, for creating panic amongst the people and for securing release of

arrested associates and cadres have assumed serious dimensions. The existing provisions of law have proved to be inadequate as deterrence. The

Law Commission in its 42nd Report has also recommended a specific provision to deal with this menace. It was necessary to amend the Indian

Penal Code to provide for deterrent punishment to persons committing such acts and to make consequential amendments to the Code of Criminal

Procedure, 1973.

64. A plain reading of the Objects and Reasons which led to the amendment shows the concern of Parliament in dealing with kidnapping for

ransom, a crime which called for a deterrent punishment, even in a case where the kidnapping had not resulted in the death of the victim. The

statistics further reveal that kidnapping for ransom has become a lucrative and thriving industry all over the country which must be dealt with in the

harshest possible manner and an obligation rests on the courts as well. The courts to lend a helping hand in that direction.

65. In the case before us, we find that not only was Abhi Verma kidnapped for

ransom which act would by itself attract the death penalty but he was murdered in the process. It is relevant that even before the aforesaid amendments, this Court in *Henry Westmuller Roberts Vs. State of Assam*, observed that death sentence could be awarded even in a case of kidnapping and murder based on circumstantial evidence holding that: (SCC p. 313, para 40)

40. ...We are of the opinion that the offences committed by Henry, the originator of the idea of kidnapping children of rich people for extracting ransom, are very heinous and pre-planned. He had been attempting to extract money from the unfortunate boy's father, PW 23 even after the boy had been murdered by making the father to believe that the boy was alive and would be returned to him if he paid the ransom. In our opinion, this is one of the rarest of rare cases in which the extreme penalty of death is called for for the murder of the innocent young boy, Sanjay in cold blood after he had been kidnapped with promise to be given sweets. We, therefore, confirm the sentence of death and the other sentences awarded to Henry by the High Court under Sections 302, 364, 201 and 387 IPC and dismiss Criminal Appeal No. 545 of 1982 filed by him.

27. The Apex Court has held in a decision reported in 2010 (9) SCALE 571 (*Sunder Singh v. State of Uttaranchal*) as follows:

30. The law is now well settled in the decision in *Bachan Singh Vs. State of Punjab*, , where it was held that the death penalty can be inflicted only in the gravest of the grave cases. It was also held that such death penalty can be imposed only when the life imprisonment appears to be inadequate punishment. Again it was cautioned that while imposing the death sentence, there must be balance between circumstances regarding the accused and the mitigating circumstances and that there has to be overall consideration of the circumstances regarding the accused as also the offence. Some aggravating circumstances were also culled out, they being:

- (a) where the murder has been committed after previous planning and involved extreme brutality; or
- (b) where the murder involves exceptional depravity.

The mitigating circumstance which were mentioned in that judgment were:

- (a) That the offence was committed under the influence of extreme mental or emotional disturbance;

- (b) The age of the accused. If the accused is young or old, he shall not be sentenced to death;
- (c) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society;
- (d) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (c) and (d) above;
- (e) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence;
- (f) That the accused acted under the duress or domination of another person; and
- (g) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

The law was further settled in the decision in *Machhi Singh and Others Vs. State of Punjab*, where this Court insisted upon the mitigating circumstances being balanced against the aggravating circumstances. The aggravating circumstances were described as under:

- (a) When the murder is in extremely brutal manner so as to arouse intense and extreme indignation of the community.
- (b) When the murder of a large number of persons of a particular caste, community, or locality is committed.
- (c) When the murder of an innocent child, a helpless woman is committed.

The matter was further considered in *Devender Pal Singh Vs. State National Capital Territory of Delhi and Another*, wherein, after examining

both the aforementioned cases, it was held that when a murder is committed in an extremely brutal manner, or for a motive which suggests total depravity and meanness or where the murder is by hired assassin for money or reward, or a cold blooded murder for gains, the death sentence is

justified. Similar such observation was made even in the decision in *Atbir v. Govt. of NCT of Delhi* (JT 2010 (8) SC 372). Relying on all these

cases, this Court, in Criminal Appeal Nos. 127-130 of 2008 (*C. Muniappan and Ors. v. State of Tamil Nadu*) decided on 30.8.2010, confirmed

the death sentence. That was a case where the accused persons, while demonstrating against the arrest of their leader, started damaging public transport vehicles. Some girl students of a University were travelling in a bus.

The three accused persons attacked the bus and sprinkled petrol in the bus full of girl and boy students and set it on fire with the students still inside the bus. As a result, the inmates started escaping; however, three of the girls could not escape and were roasted alive. The unprovoked attack on the bus and the burning of the bus by sprinkling petrol on the bus, and the death of three students as a result of such burning was viewed by this Court as a barbaric and inhuman act of the highest degree. The offence was viewed as brutal, diabolical, grotesque and cruel, shocking the collective conscience of society. It was on that account that the death sentence was confirmed. Several comments have also been made by this Court on the inaction shown by the general public and the police who remained passive and did not try to help the unfortunate victims.

....

33. In another decision in *Gurdev Singh and Another Vs. State of Punjab*, , this Court specifically held in Para 19 that there could be no fixed or rigid formula or standard for invoking extreme penalty of death sentence. This was a case where this Court took notice of the decision in *Rajendra Prasad Vs. State of Uttar Pradesh*, , where this Court had held that the focus had shifted from crime to criminal and the special reasons necessary for imposing death penalty must relate not to the crime as such but to the criminal. The Court, however, noted that this was overruled in *Bachan Singh v. State of Punjab* (cited supra) later on. The Court also referred to various cases like (i) *A. Deivendran Vs. State of T.N.*, , which was a case of triple murder, where the Court had refused to pass the death sentence, (ii) *Kumudi Lal Vs. State of U.P.*, , which was a case of rape and murder of a young girl aged 14 years and where this Court had refused to confirm the death sentence on the ground that the death of the girl must not had been intended by the accused, and (iii) *Om Prakash Vs. State of Haryana*, , which was a case where a BSF Jawan had murdered as many as 7 persons. This was also a case where the Court refused to confirm the death sentence on the ground that the bitterness in the mind of the accused had increased to a boiling point and the agony suffered by the accused and his family members at the hands of the other party, and for not getting protection from the police officers concerned and the total inaction on their part inspite of repeated written prayers, had goaded or

compelled the accused to take the law in his own hands. Two other cases where the death sentence was not confirmed were also referred to in

Gurdev Singh and Anr. v. State of Punjab with Piara Singh and Anr. v. State of Punjab (cited supra). They were Mohd. Chaman v. State (NCT of

Delhi) (2001 (2) SCC 28) and Lehna Vs. State of Haryana, . However, this Court then took notice of the facts and noted that the accused in that

case had fired at the marriage party as he knew that there was going to be a marriage on the next day in the house of the complainant. The accused

had fired at the time when the feast was going on and 13 persons were killed on the spot and 8 persons were seriously injured. Out of all those 13

persons, one was 7 years" child. This Court, under the circumstances, refused to convert the death sentence into the sentence for life.

28. In a given case like this, it is an inhuman and a merciless act of gruesome murder which would shock the conscience of the society. Under the

circumstance, showing mercy or leniency to such accused would be misplacing the mercy. That apart, showing leniency would be mockery on the

criminal system. Therefore, the death penalty imposed by the trial Judge, has got to be affirmed, and accordingly, it is affirmed.

29. In the result, this criminal appeal fails and the same is dismissed confirming the judgment of the trial Court.

Before concluding the judgment, this Court has to record its appreciation for the able assistance rendered by the learned Public Prosecutor Mr. P.

Kumaresan and also the learned Counsel for the appellant, Mr. A.N. Thambidurai, who put forth his submissions with full sincerity.