
(2013) 02 BOM CK 0159

In the Bombay High Court

Case No : Criminal Confirmation Case No. 03 of 2012 with Criminal Appeal No. 244 of 2012

The State of Maharashtra

APPELLANT

Vs

Chandrashekhar Shriram Atram

RESPONDENT

Date of Decision : 25-02-2013

Acts Referred:

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 201, 302, 364, 367, 377

Citation : (2013) 5 ABR 29 : (2013) ALLMR(Cri) 1592 : (2013) 2 BomCR(Cri) 680

Hon'ble Judges : A.P. Lavande, J;A.B. Chaudhari, J

Bench : Division Bench

Advocate : S.S. Doifode, APP in Confirmation case No. 03 of 2012 and Mr. Ashwin Wasnik, in Criminal Appeal No. 244 of 2011, for the Appellant; S.S. Doifode, Additional Public Prosecutor in Criminal Appeal No. 244 of 2012 and Mr. Ashwin Wasnik, in Confirmation case No. 03 of 2012, for the Respondent

Judgement

A.B. Chaudhari, J.—Criminal Confirmation Case was registered in this Court since In-charge District Judge-I and Additional Sessions Judge, Nagpur, by Judgment and order dated 11th June, 2012, sentenced the appellant in Criminal Appeal No. 244 of 2012 to death for offence punishable u/s 302 of Indian Penal Code. The Trial Court also found the appellant guilty for commission of offence punishable u/s 377 of Indian Penal Code and sentenced him to Imprisonment for Life and to pay a fine of Rs. 1,000/-, so also for offence u/s 364 of Indian Penal Code, sentenced him to suffer Imprisonment for Life and to pay a fine of Rs. 2,000/-, and for offence u/s 367, Indian Penal Code, Rigorous Imprisonment for seven years and to pay a fine of Rs. 1,000/-. In Criminal Appeal No. 244 of 2012, the original accused - Appellant -Chandrashekhar Shri ram Atram has challenged the said Judgment and order convicting him for the above referred offences and also sentencing him thereunder as aforesaid.

2. In brief, the prosecution case is as under:-

3. On 14th May, 2010, in the evening, PW 5 -Complainant -Ganesh Ramnivas Chaudhari lodged a missing report with Gittikhadan Police Station, Nagpur, stating that his son Golu, aged about two-and-half-year, was playing in his courtyard at about 12.00 noon. When the complainant Ganesh, who had gone out, returned home at about 12.30 p.m., his wife told him that Golu is not being traced out. The complainant Ganesh searched for Golu and made enquiry with the relatives, but could not find him. The said report was registered at Sr. No. 68 in the Missing Register.

4. On the next day, namely 15th May, 2010, when PW 11 - Subhah Pandurangrao Unhale, Police Sub-Inspector, was on duty as a Night Officer, at about 1.30 a.m., the complainant -Ganesh Chaudhari along with five-seven persons of Surendragarh Locality brought the accused -Chandrashekhar in the Police Station. Ganesh told the Police Sub-Inspector that he made enquiry with the accused about Golu, but the accused was giving evasive replies. On enquiry by PSI Subhash Unhale with the accused about Golu, the accused told him that he kept Golu at Gondia. Thereafter, accused told him that he kept Golu beneath a bridge located on Kalmeshwar road in between Katol Road Naka of Nagpur and Kalmeshwar. PSI Subhash Unhale took an entry in the Station Diary accordingly about the information given by the accused and proceeded from the Police Station along with police staff, the accused, persons from Surendragarh locality and the complainant in search of Golu. The accused showed the road to police and then he asked to stop the vehicle on a bridge on Katol Road. After getting down from the jeep, the accused took the police party beneath a bridge, where nothing was found. Then the accused told PSI that Golu was beneath the next bridge. Therefore, all went to the next two bridges, but again Golu was not found there. Then the accused took them to another bridge located on Kalmeshwar Road, and after stepping down from the jeep, told that Golu was available beneath that bridge. All of them went under the bridge along with a torch, and found a white plastic gunny bag containing something in it by the side of a stone beneath the bridge. On noticing the bag, the accused told them that Golu was in the bag. Upon search, a dead body of a small boy was found in it. The complainant-Ganesh Chaudhari identified the dead body to be that of Golu.

5. On opening the bag, they found a pad of cloth stuffed in the mouth of Golu and his both arms and one leg tied in back side by "Sutali" [ajute string]. Blood was oozing out from the mouth of Golu. A Panchanama was prepared between 2.30 and 3.35 am., and then the dead body was brought and sent to mortuary. Complainant Ganesh Chaudhari lodged a report accusing the accused for having kidnapped Golu and committing his murder, because Ganesh had not paid Rs. 5,000/- to the accused prior to fifteen days of the incident on demand. On the basis of the report, a crime was registered against the accused for the offences punishable under Sections 364, 302 and 201 of Indian Penal Code.

6. During the course of investigation, it was revealed that death of Golu was caused because of asphyxia due to gagging with injuries to anus due to

unnatural sex with him. Accordingly the charge-sheet was filed in the Court of Judicial First Class. Nagpur, after the investigation was completed. The charge was framed against the appellant-accused for offences u/s 364, 377 and 302 of Indian Penal Code by Additional Sessions Judge, Nagpur.

7. Trial was held. The prosecution examined in all eleven witnesses. The Trial Court then heard parties and finally convicted the appellant and sentenced him to death.

8. In support of the Confirmation Case, the learned Additional Public Prosecutor Mr. S.S. Doifode made the following submissions:-

[a] The prosecution case is based on circumstantial evidence and the prosecution has proved its case by establishing all the circumstances beyond any reasonable doubt.

[b] The prosecution has proved through the evidence of mother of deceased Golu, namely PW 4-Geeta and PW 1 -Dilip Rana, the landlord of the complainant - Ganesh that at about 9.00 am on 14th May, 2010, the accused had taken Golu with him and they saw the accused taking Golu away upto the shop at the house of Nani. PW 4-Geeta had, in fact, objected to the accused when he took away Golu; but then the accused had told her that Golu will be brought back in a short time.

[c] The dead body of Golu was found under the bridge in the dawn of 15th May, 2010 and that was discovered at the instance of the accused. Thus, according to the learned Addl. Public Prosecutor for the State, the time gap between the last seen with the accused and the discovery of the dead body at the instance of the accused was short and, therefore, the prosecution has completed the chain of circumstantial evidence.

[d] In the evening, the accused was seen in the locality and upon being questioned by the complainant Ganesh and other neighbours, he was giving evasive answers, stating that Golu was sent to Gondia, and that he was not knowing where Golu had gone. The conduct of the accused, therefore, was highly suspicious and that is why PW 5 -Ganesh, the complainant and other persons of the locality having been suspicious about the accused, took him to the police station at about 1.30 a.m., on 15th May, 2010 and brought him before the Night Duty Police Officer Mr. Subhash Unhale.

[e] PW 11 - Subhash Unhale then interrogated the accused and the accused disclosed the fact that he kept Golu under the bridge on Kalmeshwar Road. Pursuant to this information, which was recorded in the Station Diary, all of them went towards the said road as guided by the accused and finally they reached under the fourth bridge where the dead body of Golu was stuffed in a gunny bag. It is, thus, clear, according to learned APP, that discovery u/s 27 of the Evidence Act in respect of the dead body was made at the instance of the accused while the accused was in police custody.

[f] Though the arrest of the accused was not made when the discovery was done, the fact remains that in the presence of complainant Ganesh and others, the accused was interrogated by the PSI, upon which the accused disclosed the vital information, in pursuance whereof, the dead body of Golu was discovered. Learned APP contended that though the accused was not formally arrested, he was in custody of the police and as such the discovery is not vitiated. He then submitted that the evidence regarding "last seen" being consistent with the discovery of the dead body by the accused, the prosecution has proved its case to the hilt and left no lacuna. According to him, therefore, the finding of conviction for murder is rightly recorded by the Trial Court.

[g] As far as the offences under Sections 364 and 367 of Indian Penal Code are concerned, the learned APP argued that said offences are also proved, since the deceased was taken from the lawful custody of his parents by the accused with a view to commit the offences in question. The Post-mortem Report proved by the medical experts clearly shows that the deceased was subjected to carnal intercourse and, therefore, the accused was rightly convicted for the offence punishable u/s 377 also.

[h] In so far as the discovery of the dead body and the law laid down about it is concerned, the learned APP relied on the following decisions:-

- [1] State of Karnataka Vs. David Razario and Another, ,
- [2] Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir, ,
- [3] Suresh Chandra Bahri Vs. State of Bihar with Gurbachan Singh, ,
- [4] State of Maharashtra Vs. Suresh, ,
- [5] Pershadi Vs. State of Uttar Pradesh, ,
- [6] Sanjay @ Kaka Vs. The State (NCC.T. of Delhi), ,
- [7] Sahadevan @ Sagadevan Vs. State rep. by Inspector of Police, ,
- [8] Lavji Mona Vs. State of Gujarat, ,
- [9] State of U.P. Vs. M.K. Anthony, ,
- [10] Vinayak Shivajirao Pol Vs. The State of Maharashtra, ,
- [11] State of Himachal Pradesh Vs. Jeet Singh, , and
- [12] State of Rajasthan Vs. Teja Ram and Others, .

9. Learned APP then submitted that the Trial Judge has rightly awarded the death penalty to the accused since the offence committed by the accused certainly falls in the category of "Rarest of Rare". The death sentence is perfectly justified and no interference by this Court is called for. In support of this contention, the learned APP placed reliance on the following decisions:-

- [1] State of Maharashtra Vs. Shankar Krisanrao Khade, ,
- [2] Rajendra Pralhadrao Wasnik Vs. The State of Maharashtra, ,
- [3] Md. Mannan @ Abdul Mannan Vs. State of Bihar, ,
- [4] Molai and Another Vs. State of Madhya Pradesh, ,
- [5] Jai Kumar Vs. State of M.P., ,
- [6] State of Maharashtra Vs. Anil Joseph [Criminal Confirmation Case No. 2/10 decided on 18th October, 2011, Coram : P.V. Hardas & S.B. Deshmukh, JJ.], and
- [7] State of Maharashtra Vs. Vasanta Dupare [Criminal Confirmation Case No. 1/12 decided on 27th March, 2012, Coram: P.V. Hardas & Smt. S.S. Jadhav, JJ.].

10. Per contra, the learned defence counsel Mr. Wasnik made the following submissions:-

[1] The prosecution failed to prove its case which was admittedly based on circumstantial evidence only. The prosecution also failed to complete the chain of circumstances and, therefore, the conviction recorded by the Trial Court is wholly illegal.

[2] The Trial Court has, without any good reasons, refused to take into consideration the Missing Report [Exh. 48], which clearly belies the prosecution case and which clearly destroys the alleged circumstantial evidence against the accused. In the Missing Report, it was clearly stated that the boy Golu was missing from 12.00 noon, while the evidence of the prosecution led before the Court is that he was missing since 9.00 a.m. Therefore, the very substratum of the prosecution story is highly suspicious and doubtful.

[3] The conduct of the accused in facing the complainant, his wife and the neighbours in the evening after he came back and in accompanying them in search of Golu has not at all been taken into consideration in the proper perspective by the Trial Court.

[4] The circumstantial evidence about the "last seen theory" through PW 1-Dilip Rana and PW 4-Geeta is highly doubtful and the prosecution case itself is contradicted in relation to the missing report. The missing report was lodged at the earliest point of time and surprisingly enough, PW 5 -Ganesh denied the said very important aspect which was marked as "Contradiction A" in the Missing Report. The reason given by the Trial Court about the said contradiction is unacceptable and has not been explained by the prosecution witnesses. The Court could not have inserted its own explanation when it was for the complainant Ganesh to give an explanation, if any. On the contrary, the complainant Ganesh went on denying it.

[5] The last seen theory, thus, having been destroyed, the other evidence relied upon by the prosecution is regarding discovery u/s 27. According to defence counsel, Section 27 discovery in this case is nothing but a farce, which is clear

from the record and the recording of the proceedings for the purpose of discovery u/s 27. According to the learned defence counsel, the evidence and the record itself shows that the accused did not accompany the police to the place from where the dead body was discovered. and the police and the witnesses themselves went and discovered the dead body under the bridge, since it is apparent from record that the accused was asked to sit in the jeep on the road itself. There is, thus, no discovery and consequently no evidence about the fact that the accused knew where the dead body was kept. Thus, the said evidence is also wholly infirm and will have to be discarded.

The learned Defence counsel, therefore, urged for acquittal of the accused.

11. Opposing the death sentence, the learned counsel for the accused argued in the alternative that the case does not fall in the category of "rarest of rare and there is a serious doubt about the accused having committed any crime. The facts and the evidence on record do not at all show that the appellant would be a menace to the society. There are no other circumstances by which it can be said that but for the death penalty, no other punishment can be imposed on the accused. He, therefore, prayed for answering the Reference for Confirmation accordingly.

Consideration:-

12. We have gone through the evidence tendered by the prosecution before the Trial Court. We have also gone through the entire record and proceedings. We have heard the learned counsel for the rival parties. We have perused all the cited decisions before us. We proceed to record the reasons for our findings as follows:-

13. In order to prove the homicidal death of Golu, the prosecution examined PW 3 Dr. Manish Shrigiriwar, who stated that he himself, Dr. V.T. Jadhao and Dr. S.M. Wankhede started post-mortem at 12.15 p.m., and completed it at 1.15 p.m. He deposed that he found a piece of cloth stuffed in the mouth of the body. Blood was oozing from the nostrils. He and his team also found, inter alia, tongue-thrusted posteriorly, completely blocking the pharynx. The soft white piece of cloth was stuffed tightly inside the oral cavity blocking the respiratory passage completely and the cloth was partly outside the mouth. The cloth was a Dhoti of the size 87 cms x 78 cms stained with blood. He found about twenty-one injuries on the body. The injuries were caused in between twelve to thirty-six hours prior to post-mortem. He stated that the death was homicidal. He proved the Post-mortem Report [Exh. 35]. There is no challenge to his evidence apart from the fact that the defence does not dispute the homicidal death. We, therefore, concur with the Trial Judge and also hold that the death of Golu was homicidal.

14. PW 1-Dilip Rana in his evidence before the Trial Court deposed that the complainant Ganesh Chaudhari and accused Chandrashekhar Atram were working with one and the same contractor. One Guddu Burman was his tenant, with whom accused started living in his room. Ganesh Chaudhari's daughter

Pinky and son Golu used to wander in the neighbourhood and room of Guddu. The incident occurred on 14th May, 2010. He opened the shop at about 8.00 a.m. He saw Golu playing in front of his shop till 9.00 a.m. At about 9.00 a.m., the accused came there, picked up Golu with him and was seen going along with Golu towards the grocery shop of Nani, which was located in the area of their locality, and was visible from his shop. At about 1.00 p.m., the Ganesh's daughter Pinky told him that her father Ganesh was asking for telephone number of Guddu. Thereupon, he went to the house of Ganesh who told him that Golu was missing since morning. Wife of Ganesh also told him that during morning when she was cleaning the utensils, Golu was playing in the courtyard and the accused had taken him along with him. He also told Ganesh that he too saw accused picking up Golu and taking him towards the grocery shop. Ganesh made a search and came back at about 2.30 p.m. In the evening, he saw Ganesh and Guddu, and accused coming towards the house when Guddu and Ganesh told him that they saw the accused while returning home at 7.00 p.m. All of them made enquiries about Golu with the accused who told him that he had not taken Golu with him and asked why he would take Golu with him. They insisted upon the accused to tell about Golu. He started perspiring. All of them took him to Police Station. They narrated the incident about missing of Golu. Ganesh lodged a missing report with Police Station at that time in the presence of the accused. Thereafter, Ganesh, Guddu, PW 1-Dilip and accused returned home. Till 11.00 p.m., since accused did not return home and Golu was not found, again search started and at about 00.30 hours, they saw the accused while coming on foot. They asked the accused where he had gone? The accused told them that he had gone to his brother. Then they asked him to take them to his brother; but he did not do so. Then they asked the accused to tell about Golu. He told that Golu was sent to Gondia. They had a strong suspicion and then they brought the accused in the locality and took him to the Police Station. In the police station, accused told the police upon enquiry that he had kept Golu at Katol Road and accordingly, the body was discovered from Katol Road.

In cross-examination, PW 1-Dilip Rana stated that when the missing report was lodged in his presence by Ganesh, this witness did not tell the police that he had seen the accused Chandrashekhar taking Golu with him at 9.00 a.m. in the morning and since then Golu was not seen. He also stated that he omitted to state about the accused perspiring when enquiry was made with him.

15. PW 4-Geeta is the wife of the complainant-Ganesh Chaudhari. She stated that the incident took place on 14th May, 2010 [Friday]. Her husband -Ganesh had taken Pinky to hospital at 9.00 a.m. She was cleaning utensils in front of house in a Galli and Golu was playing before her. Tailoring shop of Dilip was open and Dilip was present in the shop. At about 9.30 a.m., accused told Golu that he will take him to shop and accordingly by picking up Golu, the accused started going with him. She obstructed the accused from taking Golu with him. At that time, the accused told her that he will bring Golu immediately. Then accused took Golu with him towards the grocery shop of one Nani, which was visible from

the tailoring shop of Dilip. Thereafter, the accused and Golu were not seen in the grocery shop. She, therefore, searched for Golu in the vicinity, but could not find him. At about 12.30 p.m., she told her husband that Golu was not traceable. Her husband made efforts to find Golu and the accused in the area. In the evening, the accused came back to the locality. Upon making enquiry with the accused about Golu, he kept mum. The accused also accompanied her husband to the Police Station. After lodging a missing report, her husband and persons from the locality returned back. After some time, the accused left the locality. Thereafter, Guddu and persons from locality went to trace out the accused because of suspicion and accused was brought in the locality. At that time, accused told the persons that Golu was sent to Gondia and thereafter they took the accused to Police Station. In the Police Station, accused disclosed that Golu was kept under a bridge.

In cross-examination, PW 4-Geeta stated that her husband and persons from locality had gone to Police Station to lodge a missing report and at that time, accused was also accompanying them.

16. PW 5 -Ganesh Chaudhari, who is the complainant, deposed that he and accused were working on different sites, but under the same contractor who was doing the business of painting. The incident occurred on 14th May, 2010. At about 9.00 a.m., he went to hospital with his daughter Pinky when Golu and Geeta were at home. He came back at about 12.30 p.m., and thereafter search of Golu was on. The search went on in the locality and also at places where the accused could have gone. since PW 1 Dilip and PW 4-Geeta were repeatedly saying that accused had taken Golu with him. In the evening, they found accused coming towards the house, but Golu was not with him. Persons from the locality asked the accused about Golu, but he told that he did not take Golu with him. Then the accused was taken to Police Station. At that time, though he was saying that his wife told that accused had taken Golu with him, the accused told him to lodge a missing report about Golu. He denied that in the missing report, he stated that his son Golu was playing in the courtyard in front of house at 12.00 noon and this portion was marked "A" in Exh. 48, the missing report. He then deposed that he, Guddu and accused returned back. The accused then took bath and ran away from the locality. Around 10.00 or 11.00 p.m., the accused made a phone call to Guddu that they should not worry and Golu will return. They brought the accused to the locality from Sadar area and made enquiry with him, when he told him that Golu was sent to Gondia and thereafter he stated that Golu was thrown in Futala Talao and also that he had given Golu to the persons having no issues. Hence, all the persons took him to the Police Station. Police made enquiry and thereafter there was a disclosure by him about Golu being under a bridge. He then stated that accused had asked for a loan of Rs. 5,000/-, but the same was not given to him and it was mainly because of that the accused was aggrieved.

In cross-examination, PW 5 -Ganesh stated that Exh. 48 -Missing Report was

lodged by him at about 7.00 p.m. He also stated that he knew that since 12.30 p.m., the accused had taken Golu with him because his wife had told him accordingly. He reiterated that though his wife had told him that at about 12.30 p.m., the accused had taken her son with him, but since he was not being traced after 9.30 a.m., he felt that the accused will not cause any harm to his son and that is why he lodged a missing report [Exh. 48]. He had made a telephone call to his contractor making enquiry about accused, with whom the accused was also working. He does not know why police wrote the portion marked "A" in his missing report [Exh. 48].

17. Taking up the above evidence for discussion, we find that the employer of the complainant-Ganesh and the accused was the same contractor and they were residing in the neighbourhood. PW 1-Dilip stated that he saw the accused going along with Golu between 9.00 and 9.30 a.m., towards the grocery shop of Nani, which is visible from his shop. That means the shop of Nani is at a very short distance from the house of PW 1-Dilip and PW 4-Geeta. Interestingly, the Investigating Officer has not recorded any statement of Nani in order to show that from the shop of Nani afterwards, the accused and Golu went together. PW 1-Dilip has categorically deposed that at about 1.00 p.m., he talked with Ganesh and wife of Ganesh, i.e., PW 4-Geeta, who also told him that since morning Golu was missing and was taken by the accused. He also stated that when they asked the accused in the evening after he returned home about the whereabouts of Golu, the accused told them that he had not taken Golu with him and there was no reason for taking Golu with him. That the accused started perspiring on making a thorough enquiry is an omission in his evidence. He also claimed that he narrated the entire incident about missing of Golu to the Police when they lodged a missing report and they were with the accused at the time when the missing report was lodged. Similar is the case of Ganesh on this point. Missing report, that was lodged and the contradiction marked as "A" that has been proved clearly shows that on 14th May, 2010, at about 12.00 O'clock in the noon, his son Golu Ganesh Chaudhari, aged about two-and-half-year was playing in the courtyard in front of the house. He returned home at about 12.30 p.m. His wife told him that Golu was not seen anywhere. The said time 12.00 noon of missing of Golu was as admitted by PW 5 -Ganesh told to him by his wife PW 4-Geeta and that is why he mentioned 12.00 noon in Exh. 48. Thereupon, he searched him, but he was not found. He enquired about him, but in vain. It is the consistent evidence of the prosecution witnesses that PW 1-Dilip, PW 5 -Ganesh and various persons from the locality had been to the Police Station in the evening to lodge a missing report along with the accused. While lodging missing report, PW 1-Dilip told the entire incident about missing of Golu which means that he told the police that accused had taken away Golu along with him. But there is no whisper about it in the missing report, nor it is the case of prosecution that at that moment accused, who was with them, was interrogated by the police. It is also the consistent evidence of all the prosecution witnesses that PW 1-Dilip and PW 4-Geeta throughout the day were repeatedly saying

that they had seen the accused taking away Golu with him in the morning. Despite the fact that PW 1-Dilip and PW 5 -Ganesh had gone to the Police Station, it was not mentioned in the report Exh. 48 that PW 1-Dilip and PW 4-Geeta had seen the accused taking away Golu at about 9.00 a.m., along with him, and added to all this, that PW 4 had obstructed the accused from taking away Golu with him, but still accused took away Golu. Curiously, the Trial Court in para 48 of its Judgment has given the following reason-cum-explanation for the said unnatural conduct:-

48. Considering the state of mind of PW 5 Ganesh at the time of lodging of missing report Exh. 48 and as a mistake of mentioning wrong time can occur on the part of police also, only because it is mentioned in missing report Exh. 48 that Golu was playing in a courtyard of the house at about 12.00 noon, version of PW 4 Sau. Geeta about taking Golu by accused at about 9.00 a.m. which is supported by PW 1 Dilip Rana cannot be disbelieved. Moreover, missing report Exh. 48 was not lodged by PW 4 Sou. Geeta, but it was lodged by her husband Ganesh.

18. We do not agree with the above reasoning given by the Trial Judge. We have already stated that PW 1-Dilip and many people from the locality had a lot of discussion for the whole day while they were searching for Golu till the missing report [Exh. 48] was lodged in the evening, and the topic of discussion being that the accused had taken Golu with him and was seen by PW 1-Dilip and PW 4 Geeta and that too after obstruction by PW 4-Geeta. Further, PW 5 -Ganesh has not deposed about his state of mind in his evidence, nor police state about any mistake about wrong time. Exh. 48 -missing report is first in point of time in the police station and is a contemporaneous document. There is no basis to infer that there was a mistake of mentioning of wrong time in Exh. 48, i.e., 12.00 noon. In such a serious matter, the learned Trial Judge could not have drawn his own conclusion in the absence of any evidence. We, thus, find that the evidence of PW 1-Dilip and PW 4-Geeta, if read in the context of missing report [Exh. 48], and the conduct of the accused of coming in the evening to the house and telling the people that he did not take Golu with him and said why he would take Golu with him and further that he accompanied them to the Police Station at 7.00 p.m., and suggested them to lodge report, is inconsistent with his guilt. Because of the fact that PW 4-Geeta had told her husband -PW 5 -Ganesh that at 12.30 noon, accused had taken Golu with him and Golu was playing at 12.00 noon, as is clear from Exh. 48, we have a serious doubt in our mind as to whether Golu was really taken away by the accused at 9.00 a.m. as claimed by PW 1 Dilip and PW 4-Geeta. We are not, therefore, prepared to accept the evidence of PW 1-Dilip and PW 4-Geeta that it was the accused who had taken away Golu with him at about 9-00 or 9.30 am., despite her obstruction. Added to all this, the Investigating Officer neither recorded statement of the grocery shop owner Nani, nor examined her when it is claimed that accused with Golu had gone to the shop of Nani. We, thus, find that the evidence on the last seen theory has, thus, become highly doubtful.

19. The next circumstance relied upon by the prosecution is about the discovery of the dead body at the instance of the accused. In this behalf, we find that there is evidence of Police Sub-Inspector PW 11-Subhash Pandurang Unhale. PW 11-Subhash deposed that he was on night duty at the Police Station. At about 1.30 a.m., on 15th May, 2010, the complainant -Ganesh Choudhary along with five-seven persons from Surendragarh locality came to the Police Station along with accused Chandrashekhar. Ganesh told him that he was having suspicion on Chandrashekhar for having taken with him his son Golu. PW 11 then stated that Ganesh also told him that he made enquiry with the accused Chandrashekhar and that Chandrashekhar replied to Ganesh that he had kept his son Golu at Gondia. Interestingly enough, PW 11 further deposed that Ganesh also told him that accused Chandrashekhar replied to Ganesh that he kept his son Golu beneath a bridge. PW 11-Subhash then stated that thereafter he made enquiry with accused about Golu in the presence of those persons and accused told him that Golu was kept beneath a bridge located on Kalmeshwar road in between Katol road Naka of Nagpur and Kalmeshwar. He accordingly took the said information in the station diary. He took police staff along with complainant Ganesh and the accused. Some people from Surendragarh locality also joined them. He then deposed that accused was telling them about the road. The accused then asked them to stop the vehicle on one bridge located on Katol Road. The accused then stepped down from the jeep and took them beneath a bridge. Nothing was found under that bridge. He then told that Golu was under the next bridge. There also they found nothing. Again the accused took them to another bridge, where also nothing was found under it. Thereafter, the accused took them to one more bridge on Kalmeshwar Road and after stepping down from the jeep, the accused told that Golu was available under that bridge. This was the fourth bridge. The police staff and accused went under the bridge with a torch and found a plastic bag having something in it and that was the dead body of Golu.

In cross-examination, PW 11 Subhash stated that Exh. 17, the Crime Details Form did not mention that accused Chandrashekhar had shown the dead body and that the place beneath the bridge was accessible to anybody where dead body was found. Exh. 120 is the Station Diary entry taken at 1.40 O'clock on 15th May, 2010. Relevant portion of the Station Diary entry reads thus:-

.....Thereupon, when the said person named Chandrashekhar Shreeram Atram, aged 28 years, residing near the house of reporter in Surendragarh was interrogated he told that he had kept the said body under one bridge on Katol-Kalmeshwar Road. On the basis of the said information, I along with Police Inspector and staff comprising. Assistant Sub-Inspector Bagade, B. No. 1627, Police Head Constable 4163, NPC 4641, NPC B. Nos. 3818, 1624, 4925 Police Constable B. Nos. 1427, 2836, 2683, Police Constable B. No. 1392 by Peter mobile started for the spot of occurrence.

20. Exh. 121 is the arrest Panchanama which shows that the accused was

arrested at 3.40 O'clock on 15th May, 2010.

21. We have carefully perused the decisions cited before us in relation to discovery u/s 27 and keeping in mind the law laid down by the Apex Court in our mind, we proceed to record further findings.

22. It is seen from the evidence of PW 11-Subhash that at 1.30 a.m., complainant Ganesh along with several persons and the accused came to Police Station. He then stated in his Examination-in-Chief that the complainant -PW 5-Ganesh told him that the accused had told him that the accused had kept his son Golu beneath a bridge. This clearly shows that the complainant PW 5 Ganesh already had the knowledge of the the place [bridge] where the dead body was kept. That is why, PW 5 -Ganesh made the disclosure about it to PW 11 Subhash. Thus, the complainant-Ganesh, people from the locality and the police had already got knowledge about Golu at or before 1.30 a.m. We do not think that such a discovery can be said to be a discovery of the dead body at the instance of the accused, when the said fact was already known to everybody. That apart, it is astonishing to know that if at all the accused had given a statement for discovery of a fact, the said statement was not at all recorded in the form of memorandum contemplated by Section 27 of the Evidence Act. Even the minimum procedure, that is required to be followed for preparation of a memorandum u/s 27 of the Evidence Act was not followed. On the contrary, PW 11-Subhash remained contented by taking entry about it in the station diary. We do not mean to say that the information received from the accused, if not recorded in a separate memorandum, but recorded in the station diary, should be thrown outright. But then what is seen from Exh. 120, i.e., Station Diary is that it nowhere shows that the accused was taken by them along with them to find out the location of the dead body. This is clearly strengthened by the recitals in the Panchanama that was prepared by PW 11-Subhash on the bridge 10/2 [Exh. 17] between 2.30 a.m., and 3.30 a.m., of 15th May, 2010. The relevant portion reads thus:-

.....Chandrashekhar Shriram Atram, resident of Gupta Square, Surendragad, Nagpur was brought to the police station by the persons residing in the locality over the suspicion that he only might have taken away Golu, aged 2 1/2 years, taken away Golu, aged 2 1/2 years, the son of Ganesh Ramnivas Chaudhary from that locality itself, when the said person named Chandrashekhar Atram was interrogated, he told that he had kept Golu, the son of Ganesh Chaudhary under one bridge on Katol-Kalmeshwar road and that on the basis of such information, when I along with the staff reached there while searching the said boy, we found dead body of one boy in one white sack under the said bridge and when (we) showed the said dead body to Ganesh Chaudhary in the light of torch, he identified the said dead body and stated it to be of his son Golu only and that as Panchanama of the said spot of occurrence was to be executed, they (Panchas) should remain present and act as Panchas.....

This Panchanama does not show that search under three bridges was made and

then under the fourth bridge, dead body was found. Further there is variance in the evidence of various witnesses in the sense that the location was stated to be on Kalmeshwar Road and no specific bridge was specified by the accused. PW 1- Dilip stated in para 6 of his evidence that the dead body was found under the third bridge. PW 2 -Guddu stated in para 3 that accused had taken the police party directly to the bridge under which body of Golu was kept. PW 5 Ganesh and PW 8 Madhukar stated that it was under second bridge, the body was found. It is risky to rely on such highly inconsistent evidence. We are, therefore, not prepared to believe that along with the police, accused had gone to the place and places when ultimately after crossing three bridges, the dead body is said to have been found under the fourth bridge.

23. The next question is about custody of the accused before making discovery. We are aware that the accused was taken to the Police Station by the persons from the locality, and PW 5 -Ganesh himself had told PW 11-Subhash that Golu was kept under a bridge as told to him by the accused. That being so, we fail to understand as to why Arrest Panchanama of the accused was not drawn then and there before proceeding to make alleged discovery. On the contrary, Arrest Panchanama shows that arrest was made at 3.40 a.m., after recovery of the dead body which was done before 3.40 a.m. We, therefore, find that there is no justifiable reason for the police not to take the accused into custody before proceeding to take steps for discovery. The decisions cited before us in the wake of above glaring evidence, thus, to our mind, cannot be of any assistance to the prosecution and the alleged discovery of the dead body of Golu at the instance of the accused must fail. We, thus, hold that neither the "last seen theory" is proved to the satisfaction of the Court, nor the discovery of the dead body at the instance of the accused has at all been proved according to law.

24. As to the offence u/s 377 of Indian Penal Code, the medical evidence clearly shows rupture of anus of the deceased and the injury to the said portion, which is described as Injury No. 20, reads thus:-

(20) A wedge shaped anal tear present over the posterior quadrant of anus from 4 O'clock position to 8 O'clock position of size 2 cm x 1 cm x subcutaneous tissue deep, margins -swollen, reddish, internal mucosa exposed.

25. Perusal of the said injury and the diagram of the anal tear shows to our mind that the injury is big one. Despite this position, the medical experts have opined that there will be no corresponding injury on the penis of the accused. The Trial Court has convicted the accused for the offence u/s 377. The accused was sent for medical examination and there is absolute no injury on his penis or any other part of the body. Looking to the nature of Injury No. 20 to the anus of the deceased, as aforesaid, and with no injury to the accused, we are not prepared to believe that the accused can be held guilty of the offence of carnal intercourse. Since we have returned the findings on the above issues as aforesaid that the prosecution has miserably failed to prove the last seen theory as well as discovery, we are not prepared to hold the accused guilty for the

offence under Sections 377, 364 or 367 of Indian Penal Code. To conclude, we find that the evidence tendered by the prosecution raises a strong suspicion against the accused, but then the law is well settled that the suspicion, however, grave, cannot take the place of proof. That being so, we conclude that the prosecution has failed to prove any of the offences with which the accused was charged. In the result, we make the following order:-

ORDER

[i] Criminal Appeal No. 244 of 2012 filed by the appellant-accused is allowed.

[ii] The impugned Judgment and Order dated 11th June, 2012 delivered by the In-charge District Judge-1 & Additional Sessions Judge, Nagpur, in Sessions Trial No. 360 of 2010, convicting and sentencing the appellant-accused for the offences punishable under Sections 364, 367, 377 and 302 of Indian Penal Code is set aside.

[iii] The accused is acquitted of the offences punishable under Sections 364, 367, 377 and 302 of Indian Penal Code, for which he has been convicted. He be set at liberty forthwith, if not required in any other crime/case. Fine, if paid, be refunded to him.

[iv] Reference made by learned Additional Sessions Judge, Nagpur, is rejected.