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IN THE COURT OF THE SPECIAL JUDGE (POCSO) AT AURANGABAD.

(Presided over by : Shri K.R.Choudhari)

Spl. Case (POCSO) No.356/2022

Exh.No.

The State of Maharashtra
through Police Station Jinsi
Aurangabad.

... **Prosecution**

Versus

1) Syd.Amer @ Chira Syd. Salim
Age: 21 yrs. Occ. Labour
R/o Dada Colony, Kailasnagar,
Aurangabad.

2) Feroj Yunus Shaikh
Age: 26 yrs. Occ.Labour
R/o Galli No.4, Kailasnagar,
Aurangabad.

... **Accused.**

Charge: U/sec.302, 363, 364 r/w 34, 377 IPC and u/sec.4 r/w 3 of
POCSO Act.

.....
Smt.D.K.Nagula, Spl.P P for the State
Shri M.A.Aher, Chief Legal Aid Defence Counsel for accused no.1
Shri Sachin S.Shinde, Adv. for accused no.2.
.....

JUDGMENT

(Delivered on : 29/05/2024)

1] Jinsi Police Station forwarded charge sheet against these two accused persons alleging that they have committed the offence punishable u/sec.302, 377, 363, 364, 364-A r/w 34 of the Indian Penal Code (IPC, for short). Accused no.1 is under-trial prisoner and accused no.2 is on bail.

2] Brief facts leading to the case of prosecution are as under-
PW.1- Asadulla Khan lodged report (Exh.29) on 13.06.2022 stating that he is aged about 53 years involved in clothes business and resides at Kailasnagar, Lane No.4, Aurangabad. He sells clothes in Sanjaynagar area and maintains his family. He has three sons namely Ejaj Khan, Nurulla Khan and victim and daughter namely Faujiya Khan. On 11.06.2022 in the morning at about 11.00 a.m. his son victim aged about 16 years went out of house without intimating to anybody. They took search of victim in surrounding area as well as

with relatives but he was not found. So they became certain that some unknown person for unknown reason induced and kidnapped the victim. So he came to Jinsi Police Station and lodged report. His son victim was 5 ft in height, blackish colour, medium in physique, talks in Hindi, round face, small hair, wearing jeans pant and black shirt.

3] Duty officer recorded report (Exh.29), registered crime No.151/2022 u/sec.363 IPC and handed over investigation to P.W.9 PSI Tangade.

4] During investigation PSI Tangade received report as well as FIR. Then he alongwith informant had been to the place of kidnapping and conducting spot panchanama in presence of panchas vide Exh.56. Thereafter he proceeded to search the victim. He took search of accused no.1, he was brought to police station and made inquiry with him. Then he came to know that victim boy and Feroz had gone towards Jadhavwadi. Then we went to jungle near Jadhavwadi but he was not found. There dead body of deceased was found inside that jungle. It was decomposed. Then they called informant and conducted panchanama in respect of place of dead body. Then investigation was transferred to P.W.11 PI. Kendre. PI. Kendre received FIR, inquest

panchanama and spot panchanama. The accused persons were under arrest. Then accused no.2 made statement in presence of panchas that he would produce mobile handset of deceased and the clothes which were on his person. Then they went to the place of incident in Kailasnagar area. Its key was collected from the neighbouring person by the accused. The lock of the house was opened. Accused no.2 produced clothes and mobile handset and those were attached under panchanama. Thereafter, letter was sent to the Commissioner of Police Aurangabad in respect of CDR and SDR pertaining to phone of accused persons and deceased vide Exh.95. On 16.06.2022 the seized articles were sent to FSL for analysis alongwith two letters (Exh.96 & 97). Again on 17.06.2022 articles were sent to FSL alongwith two letters (Exh.98 & 99). Then accused no.1 made confessional statement in presence of panchas. Then alongwith panchas and at the instance of accused no.1 they went to the place of incident. Accused no.1 showed the places wherever he had gone with deceased. That panchanama was conducted vide Exh.72 and 73. On 18.06.2022 finger prints of accused no.1 and CCTV footage were collected. On 22.06.2022 a letter was sent to the Police Commissioner Aurangabad for CCTV

footage in respect of Smart City camera section vide Exh.100. That CCTV footage shows auto-rickshaw by which the accused persons went. Then letter was sent to ARTO to provide information in respect of that auto-rickshaw vide Exh.101. Thereafter, investigation was handed over to P.W. 14 P.I.Mayekar. He received FIR, spot panchanamas, inquest panchanama and correspondence which was made to the concerned offices. Then he recorded supplementary statement of informant, statement of mother of deceased victim, statements of two brothers of victim, sent letter to GMCH Aurangabad for providing final postmortem report vide Exh.117. Then he and his colleagues were called by Smart City on 15th July 2022 with pendrive. Then he went there along with his colleagues, gave pendrive to the Smart City employee namely Sunil Warade. Sunil Warade took CCTV footage in that pendrive from 13:41 to 13:52 dated 11.06.2022. Screenshots of those CCTV footage were taken. That pendrive is at Exh.118. That seizure panchanama is at Exh.74 and screenshots are at Exh.109 to 112. On 17.07.2022 Chandrashekhar Kothawale, the proprietor of Siddhai Medical Stores was called and his statement was recorded. Then letter was sent to the court vide Exh.119 to record

statements of informant and witnesses u/sec.164 of the Code of Criminal Procedure (Cr.P.C. for short) Then letter was sent alongwith muddemal and samples to Director of FSL vide Exh.120. Thereafter section 364-A and 377 IPC were added. During investigation it was found that accused committed the offence, so forwarded charge sheet.

5] Initially this proceeding was registered as R.C.C.No.1819/2022. Learned J.M.F.C. took cognizance of the proceeding. Then learned J.M.F.C. passed order below Exh.1 on 22.09.2022 and committed the proceeding to the court of Sessions. In the Court of Sessions this proceeding was registered as Sessions Case No.423/2022. Thereafter vide office order dated 10.11.2022 this proceeding came to be transferred to the court of Additional Sessions Judge Aurangabad and District Judge-4. My predecessor framed charge (Exh.6) u/sec.302 r/w 34, 363 and 364 r/w 34 against both the accused persons and u/sec.377 against accused no.1. The contents of the charge were read over and explained to the accused persons in vernacular. They pleaded not guilty and claimed to be tried. Their plea is separately recorded at Exh.7 and 8. Thereafter this proceeding was re-registered as Spl.Case(POCSO) No.356/2022 with observation that

accused no.1 committed penetrative sexual assault upon the victim child and section pertaining to of POCSO Act is made out. Then on 20.07.2023 I framed additional charge u/sec.3 r/w 4 of POCSO Act against both accused. The accused persons pleaded not guilty and claimed to be tried.

6] Prosecution examined P.W.1 informant Asadulla Khan (Exh.28). He proved report (Exh.29) and FIR (Exh.30). P.W.2 Syd. Mobin (Exh.33) proved inquest panchanama (Exh.34) and seizure panchanama (Exh.35). P.W.3 Dr.Nitin Ninad (Exh.38) the Assistant Professor in Lexicology in GMCH Aurangabad proved letter (Exh.39), postmortem report (Exh.40) and C.A. reports (Exh.31 to 47). P.W.4 Anil Adhane (Exh.48) the panch witness proved letters (Exh.49 & 50), panchanama (Exh.51) and three photographs collectively (Exh.52). Defence admitted spot panchanama (Exh.56), proforma for examination of rape cases (Exh.57) and arrest panchanama (Exh.58). P.W.5 Ajay Salve (Exh.64) the panch witness proved letter (Exh.65), clothes seizure panchanama (Exh.66), statement u/sec.27 of Evidence Act (Exh.67), mobile seizure panchanama (Exh.68), labels affixed to envelope (Exh.69, 70 & 71), statement u/sec.27 of Evidence Act

(Exh.52), panchanama (Exh.73), seizure panchanama of pendrive (Exh.74), pendrive was kept in the envelope (Exh.75) and label on envelope (Exh.76) and 77). P.W.6 Asmabi Khan, the mother of deceased is examined vide Exh.81. The defence admitted Proforma-B (Exh.83), proforma for examination of rape cases (Exh.84), arrest panchanama of accused no.2 (Exh.85). P.W.7 Police Constable Sachin Thokal (Exh.86) proved certificate u/sec.65-B of Evidence Act (Exh.87). P.W.8 School headmistress Vandana Somwanshi (Exh.89) proved attested copy of admission application form (Exh.90) and Pravesh Nirgam register extract (Exh.91) P.W.9 first Investigating officer PSI Ananta Tangade is examined at Exh.92. P.W.10 Chandrashekhar Kothale , the proprietor of Siddhai Medical Stores is examined at Exh.93. P.W.11- second investigating officer P.I. Kendre (Exh.94) proved letters (Exh.95 to 101). P.W.12 Sunil Warade (Exh.102) proved certificate u/sec.65-B of Evidence Act (Exh.103). P.W.13 Police Constable Dnyaneshwr Baviskar (Exh.107) proved certificate U/sec.65-B of Evidence Act (Exh.108). The photographs are at Exh.109 to 112. P.W.14, third investigating officer P.I. Rajesh Mayekar (Exh.116) proved letter (Exh.117), pendrive (Exh.118) and

letters (Exh.119 & 120). P.W.15 Raosaheb Kakad (Exh.123), the duty officer who recorded report (Exh.123) proved contradiction (Exh.124) which are in Exh.29.

7] Incriminating circumstances were put to both the accused u/sec.313 Cr.PC. vide Exh.127 and 128. The accused denied those circumstances and contended about false implication.

8] Ongoing through the evidence led by the prosecution and papers of proceeding including proved documents, following points arise for determination. The points and findings with reasons given below:-

Sr. No.	Points	Findings
1.	Whether prosecution proves that on the day of incident the victim was child under Section 2(d) of POCSO Act?	:- Not proved.
2.	Whether prosecution proves that accused persons on 11.06.2022 at about 11.00 a.m. backside of open space of market yard of Jadhavwadi, densely babul trees area, Survey No.1, Aurangabad in furtherance of their common intention committed murder by intentionally causing death of deceased victim boy by tying his neck with handkerchief ?	:- Not proved.

3.	Whether prosecution proves that accused no.1 on the above date, time and place had carnal intercourse which is against the order of nature with deceased victim boy?	:- Not proved.
4.	Whether prosecution proves that accused persons on the above date, time and place in furtherance of their common intention kidnapped the deceased victim boy from lawful guardianship of his parents?	:- Not proved.
5.	Whether prosecution proves that accused persons on the above date, time and place in furtherance of their common intention kidnapped the deceased victim boy in order that he might be murdered ?	:- Not proved.
6.	Whether prosecution proves that accused no.1 on the above date, time and place committed penetrative sexual assault upon the victim child?	:- Not proved.
7.	What order?	:-Accused is acquitted.

REASONS

9] I have heard learned Special Prosecutor Smt. D.K.Nagula and learned Chief Legal Aid defence counsel Shri M.A.Aher for accused no.1 and learned defence counsel Shri Sachin S.Shinde for accused no.2. I will consider their relevant submissions in the process

of further reasoning.

As to Point No.1, 4 & 6 :-

10] The allegations against the accused persons are in respect of kidnapping u/sec.361 IPC and also in respect of violation of provisions of POCSO Act. So it is incumbent upon the prosecution to prove that at the time of incident the victim was below the age of 18 years and as such child u/sec.2(d) of POCSO Act. In this respect the prosecution is required to establish these things and then and then only the charges in respect of kidnapping and violation of provisions of POCSO Act would attract. Here in this case P.W.1 Asadulla Khan, the father of victim boy and informant has stated in his evidence that at the time of incident his son victim was of 16 years. Prosecution examined P.W.8 Vandana Somwanshi, the school headmistress. She has stated that she is headmistress of Vidnyan Vardhini Primary School Aurangabad since from 1st January 2024. Prior to that she was Assistant teacher in that school since from 2003. She brought original papers in respect of admission of victim . On 01.08.2013 the victim was admitted in their school in first standard. The guardian of the victim mentioned date of birth in admission application form as

12.04.2006. Further she has stated that she cannot tell who put signature on the admission application form, as at that time she was not school headmistress. Furthermore, she has stated that birth certificate or medical certificate in respect of date of birth of victim was not brought at the time of admission of victim in the school. This much evidence in respect of age of victim is on record.

11] For the sake of arguments, ld. Special Prosecutor Smt. D.K.Nagula submitted that the father of victim has stated that at the time of incident the victim was of 15 years. This evidenced is corroborated by school record produced by P.W.8 Smt. Somwanshi. So the prosecution succeeded to establish that the victim was child at the time of incident.

12] Learned Chief Legal Aid Defence Counsel Mr. M.A.Aher relied on the judgment in the case of ***P Yuvaprakash Vs State, AIR 2023 SC 3525*** and submitted that no reliance could be placed to ascertain the age of victim on Exh.90 and 91 as these documents are not in consonance with Section 94(2) of J.J.Act. So the prosecution failed to establish that at the time of incident the victim was child.

13] On hearing both sides in respect of age of victim, the father of victim P.W.1 Asadulla has stated that at the time of incident the victim was of 16 years. He has not stated about date of birth of victim. The Hon'ble Apex Court, while dealing with the case of ***P. Yuvaprakash Vs State, AIR 2023 SC 3525*** observed that it is incumbent from conjoint reading of Section 34(1) of the POCSO Act, Section 94 of the JJ Act, 2015 that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these documents that the age is to be determined through, an ossification test or 'any other latest medical age determination test' conducted on the orders of the concerned authority, i.e. Committee or Board or Court. Admittedly there is no record in consonance of Section 94(2) of the JJ Act for

ascertain the age of victim at the time of incident. So the evidence of PW.1 informant and the evidence of PW.8 Smt. Somwanshi, the school headmistress cannot be relied upon to ascertain the age and date of birth of victim. So I hold that prosecution failed to establish that at the time of incident the victim was below the age of 18/16 years. So charges in respect of kidnapping u/sec.361 IPC and in respect of violation of provisions of the POCSO Act are not sustainable. Hence I answer Point no.1, 4 and 6 in the negative.

As to Point No.3 :-

14] It is alleged by the prosecution that on 11.06.2022 accused no.1 had carnal intercourse which is against the order of nature with the victim boy and thereby committed an offence punishable u/sec.377 IPC. Admittedly herein this case total case of prosecution is based on circumstantial evidence. There is no direct evidence as the victim is no more. So this charge u/sec.377 IPC is to be considered on medical evidence. The prosecution relies on the evidence of PW.3 Dr. Nitin Ninad who conducted postmortem on the dead body of deceased victim. He is Assistant Professor in Lexicology in GMCH, Aurangabad. On 15.06.2022 he received request letter (Exh.39) from Jinsi Police

Station with a dead body and he was asked to conduct postmortem on the dead body and he was also asked to provide opinion in respect of penetrative sexual assault if committed upon the deceased in his living time. He has stated that thereafter he alongwith Dr.Wasnik, Dr. Harbhade and Dr. Zine conducted postmortem examination on the dead body of victim as per the request letter. Inquest panchanama was also received to him. He has stated that in anal penetrative sexual assault there is possibility of injury to the anal part of the body. If such anal penetrative sexual assault occurs in open space then there is possibility of injuries on the other parts of he body. If dead body is thrown in bushes then there is possibility of scratches injury marks on the other parts of that body. In case of unidentified dead body usual sample of plucked scalp hairs and molar teeth is kept for DNA analysis. He has stated that report in respect of anal swab, nail clippings appears to be in negative form. There was no injury on external genital. Column no.15 of postmortem report (Exh.40) shows no injury, no purging sings of decomposition present on external genital. Column no.21 of postmortem report (Exh.40) shows abdomen intact, no injury. So evidence of medical officer as well as the postmortem report is

silent in regard to penetrative sexual assault upon the victim. Furthermore, the FSL reports which are on record in respect of clothes of deceased, clothes of accused persons and the samples collected by medical officer are also not suggesting in respect of offence u/sec.377 IPC. Moreover, this witness has not stated in respect of carnal intercourse against the order of nature with the victim boy during his life time in terms of letter (Exh.39). So I hold that prosecution failed to establish that accused no.1 committed carnal intercourse against the order of nature with the victim and thereby committed offence punishable u/sec.377 of IPC. So I answer point no.3 in the negative.

As to Points No.2 & 5 :-

15] The prosecution is coming with a specific case that both the accused persons in collusion with each other committed murder of the deceased victim boy by tying his neck (throat) with handkerchief and prior to that both the accused persons in furtherance of their common intention kidnapped the victim boy for the purpose of committing his murder. So the charge against the accused is in respect of offence punishable u/sec.302 and 364 r/w 34 IPC.

16] In the course of argument, learned Special Prosecutor

submitted that the case of prosecution is based on circumstantial evidence and the prosecution with the help of witnesses linked the chain of evidence to hold that that these two accused persons had kidnapped the deceased victim, took him to the jungle behind Jadhavwadi, all of them sat together, drank liquor and thereafter committed murder of the victim boy by tying his neck with handkerchief. So the evidence led by the prosecution beyond doubt proves the involvement of accused persons in this heinous crime. So they deserves to be convicted.

17] Per contra learned Chief Legal Defence Counsel Mr. M.A.Aher submitted that the case of prosecution is based on circumstantial evidence and the circumstantial evidence requires to link the chain of accused persons about their involvement in the crime and for that charges motive to commit the offence by the accused requires to be proved. Here in this case, the evidence led by the prosecution is not at all convincing though the number of witnesses are examined. So prayed to discard the evidence led by the prosecution and acquit the accused persons.

18] Learned counsel for accused no.2 Mr. Sachin S.Shinde supported the submissions of Mr.M.A.Aher and prayed to acquit accused no.2. Besides the oral submissions both ld. Special Prosecutor Smt. D.K.Nagula as well as ld. Chief Legal Aid Defence counsel Mr.M.A.Aher relied on certain citations. I will consider them in the process of reasoning.

19] Prior to touching to the evidence led by the prosecution, I would like to mention here that in case of circumstantial evidence the prosecution is bound to establish the circumstances from which the conclusion is drawn must be fully proved; the circumstances should be conclusive in nature; all the circumstances so established should be consistent only with the hypothesis of guilt and inconsistent with the innocence; and lastly the circumstances should to a great certainty exclude the possibility of guilt of any person other than the accused. The law relating to circumstantial evidence no longer remains *res integra* and it has been held by catena of decisions of Apex Court that the circumstances proved should lead to no other inference except that of the guilt of the accused so that, the accused can be convicted of the offences charged. It may be stated as a rule of caution that before the

court records conviction on the basis of circumstantial evidence, it must satisfy itself that the circumstances from which inference of guilt could be drawn have been established by the unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused, as is observed by Hon'ble Apex Court in the case of ***Brijlal Prasad Sinha Vs State of Bihar, (1998) SC (Cri) 1382.***

20] So in view of the guidelines in respect of proof of circumstantial evidence ruled by the Hon'ble Apex Court in the above referred judgment, I take the evidence led by the prosecution for appreciation.

21] Here in this the prosecution examined 15 witnesses. I first categories these witnesses in different part for the purpose of appreciation. P.W.1 informant Asadulla the father of deceased, P.W.6 Asmabi, the mother of deceased and wife of informant and P.W.10 Chandrashekhar Kothale, the proprietor of Siddhai Medical Stores at Kailasnagar, Dada Colony Aurangabad. The statements of these three

witnesses u/sec.161 Cr.P.C. are recorded by the investigating officer.

22] P.W.2 Syd. Mobin, P.W.4 Anil Adhane and P.W.5 Ajay Salve are the panch witnesses.

23] P.W.7 Sachin Thokal, P.W.12 Sunil Warade and P.W.13 Police Constable Bawiskar are the witnesses who had given the certificates u/sec.65-B of the Evidence Act.

24] P.W.3 Dr.Nitin Ninad is medical officer who conducted autopsy/postmortem on the dead body of deceased victim. P.W.15 PSI Raosaheb Kakad is duty officer who recorded the report and registered Crime No.151/2022.

25] P.W.9 PSI Ananta Tangade is the first investigating officer. P.W.11 PI.Venkatrao Kendre is second investigating officer. P.W.14 PI. Rajesh Mayekar is the third investigating officer who forwarded charge sheet.

26] The role of above referred witnesses is different to each other. So I divide their evidence in the above referred categories for the purpose of appreciation. At first I would like to deal with the evidence of P.W.1 Asadulla Khan and P.W.6 Asmabi, the mother of deceased and wife of informant and P.W.10 Chandrashekhar Kothale.

The evidence of these three witnesses requires to be considered together for the reason that the case of prosecution is based on last seen together the victim and the accused persons. P.W.1 Asadulla, the informant in his evidence has stated that on 11th June 2022 at about 11.00 O'clock after taking tea and breakfast his son victim left the home. He did not return 4-5 hours and so they took search of his mobile but his mobile was also switched off. They took search of him for two days. Thereafter, on 13th he approached to Jinsi Police Station and lodged report. He has also stated that his son victim is of 5 ft in height, blackish in colour, talks in Hindi, short hairs, round face, wore blue jeans pant and sky blue shirt. He has stated that he leaves home in the morning at about 09.00 a.m. to 10.00 a.m. and returns home in the noon at about 02.00 p.m. He has stated that he does not remember that he had stated to police that his son victim wore sky blue colour shirt. Further he has stated that he does not remember whether he stated to police that his son victim wore black shirt. He has stated that he does not remember whether he has stated police that on 11.06.2022 after taking tea and breakfast his son victim went at about 11 O'clock and did not return for 4-5 hours. He has also stated that he

does not remember while lodging report he stated that his deceased son wore blue jeans pant. He has also stated that dead body was brought covered fully after panchanama. The face of the deceased was not visible. The contents of report (Exh.29) shows that on 11.06.2022 the deceased had worn jeans pant and black colour shirt at the time of leaving the house. This contradiction is proved. It has come in the evidence that duty officer PW.15 Raosaheb Kakad recorded the report (Exh.29). PW.6 Asmabi, the wife of informant and the mother of deceased victim has stated in her evidence that she knows accused Amer and Feroz. On 11th June at about 11 O'clock the victim left the home. Then they took search of deceased in the surrounding area as well as with relatives but he was not found. On 11th June Amer came to their home and said as to why they were not searching victim and anyone might have kidnapped him or anyone might have strangulated him. Such was inquired by Amer daily with her.

27] PW.10 Chandrashekhar Kothale, the proprietor of Medical Stores has stated that on 17.08.2022 Jinsi Police came to him. They had brought one boy in handcuff. Police inquired with him whether

this boy had been to his shop at any time, whether he had been to his shop on 22.08.2022. Then he said them that he would check CCTV footage and tell about it. When he was checking CCTV footage, he found that its timing was miss-matching. It was running two hours fast. So he asked police to snap photographs of CCTV footage. He had seen the CCTV footage. On going through CCTV footage, he had seen that Amer and deceased boy had been to his shop in between 09.00 to 09.30. He can identify those photographs which were snapped from CCTV footage.

28] While appreciating the evidence of these three witnesses in respect of last seen together, the ocular evidence of these witnesses is not appearing corroborative to each other, as P.W.1 informant and P.W.6 Asmabi have not seen accused no.1 with deceased victim together after leaving their home. So on the basis of their evidence it can be inferred that deceased left the home but not with accused Amer. The deceased left the home on 11.06.2022. It means at about 11 O'clock prior to leaving the home the deceased victim was not seen by his mother P.W.6 Asmabi. Then in respect of last seen we have to consider the evidence of P.W.10 Chandrashekhar Kothale, the proprietor of medical

stores. He has stated that on going through CCTV footage he had seen Amer and deceased had been to his shop between 09.00 to 09.30. If such evidence of this witness is accepted as it is then it would be safe to say that after the medical stores of P.W.10 the deceased and victim returned to home and thereafter at about 11.00 O'clock left the home alone as stated by P.W.1 informant and P.W.6 Asmabi. So the evidence of P.W.10 Chandrashekhar Kothale cannot be said to be the evidence on the point of "last seen". So his evidence is not at all helpful to the case of prosecution. Furthermore, he has stated that the CCTV footage was running fast. It means that CCTV footage may of timing between 07.00 to 07.30 a.m. So this fact rules out the possibility to say that these three witnesses are on the point of last seen together. So the evidence of these three witnesses is not at all considerable to connect any of the accused with any of the charge. The evidence of P.W.1 informant is to be considered for the purpose of bringing the law into motion.

29] Furthermore, the evidence of P.W.1 informant is also required to be considered on the point of identification of dead body. He has stated that on 14th he received phone call from Jinsi Police Station. Then he with his son Ejaj had been to Jinsi Police Station.

There Mr. Tangade inquired whether his son had quarrel with anyone. Then he said to Mr. Tangade that on 12th one boy name Amer had been to their house and prior to that he was frequently coming to their house. Amer said his wife why they were not searching her son, some one would have killed him or committed his murder. Then on the same day at about 04.00 O'clock Tangade Saheb again called him to the jungle which is near Jadhavwadi Sabji Mandi. He went there with his son Ejaj. Tangade Saheb said him that there is one dead body and he asked him to see it and say whether it is of his son. He identified the dead body on the basis of clothes which were on the dead body and physique of the dead body and said that it is of his son. Such type of evidence in respect of identification of dead body on the basis of clothes which were on the person, there are material contradictions which clothes were the clothes on the person of deceased. In the report jeans pant and black shirt was on the person of deceased while leaving the home. But in the evidence of P.W.1 informant Asadulla stated that he had worn blue jeans pant and sky blue shirt. So there is contradiction in respect of clothes which were on the person of deceased at the time of leaving home. The photograph (Exh.78) in

respect of clothes which were seized from the dead body of deceased are seeing blue jeans pant and black shirt, having white colour of its front side. It means there are three versions in respect of the clothes which were on the person of the deceased at the time of leaving the home. It appears that the dead body was identified only on the basis of clothes which were on the dead body. The witness has stated that same clothes and actual clothes which were attached from the dead body are different. The dead body was decomposed. On the face of dead body it was not possible to identify it. Furthermore, the spot panchanama (Exh.51) and the photographs (Exh.52) which were snapped while conducting that spot panchanama, presence of informant there at that place is not appearing. So identification of dead body by the informant himself is also doubtful.

30] The spot panchanama (Exh.51) dated 14.06.2022 appears to be conducted in presence of panchas Kailas Ramrao Chavan and Anil Raibhan Adhane by PSI Tangade. On going through the recitals of this panchanma there are recitals as follows:

“ सदर घटनास्थळाचे निरीक्षण केले असता औरंगाबाद जिल्हा बाजार समीती जाधाववाडी यांच्या मालकीचा सव्हे नं. १ मधील सहान जागेत असलेल्या बाभळीच्या झाडीत एक पुरुष जातीची डेडबॉडी उत्तरेस डोके व दक्षिणेस पाय उताणे स्थीतीत पडलेली असून अंगावर

निळ्या रंगाची पॅट असून जिन्स अर्धवट कमरेच्या खाली आलेली दिसत आहे. कमरेचा चामडी बेल्ट सुटलेला दिसत आहे. फिक्कट निळ्या रंगाचा शर्ट असून रक्ताने काळसर झालेला दिसत आहे. कुजलेल्या अवस्थेत असल्याने तोंडावर अळ्या झालेल्या असून सडलेला घाण वास येत आहे. सदरची डेडबॉडी युसूफचीच असल्याचे पुन्हा सय्यद अमिर याने सांगितले. अम्ही तात्काळ ऑबूलन्स बोलावून स्टाफच्या मदतीने डेड बॉडी घाटी दवाखाना येथे रवाना केली. घटनास्थळाचे बारककाईने निरीक्षण केले असता घटनास्थळावर काहीएक संशयीत वस्तू मिळून आली नाही.”

31] It is in respect of dead body of deceased and accused no.1 stated that this dead body is of victim. Prosecution is relying on it. Such type of evidence in respect of statement of accused no.1 incriminating to himself cannot be considered for the reasons that it is hit by section 25 and 26 of the Evidence Act. Spot panchanama (Exh.51) does not disclose the presence of informant at the place of incident and on discovery of dead body as well as identification of dead body by the informant. The photograph (Exh.52) also does not disclose that the informant was present there. Immediately after this panchanama the dead body was sent to hospital in ambulance. After postmortem totally covered dead body was handed over to the informant for burial. So the informant had no opportunity to see the face of dead body for its identification. So the identification of dead body of victim is also not proved by the prosecution.

32] In respect of above reference I turn towards the evidence of PW.3 Dr. Nitin Ninad who conducted postmortem on the dead body. He has stated that in case of identified dead body usually samples of plucked scalp hairs and molar teeth is kept for DNA analysis. Accordingly it is mentioned in column no.21 of postmortem report (Exh.40). DNA report is not on record to establish that person of whom autopsy was conducted was the son of PW.1 informant and PW.6 Asmabi. So this fact remained to be proved by the prosecution though had an opportunity.

33] Now the evidence of panch witness is to be considered. PW.2 Syd. Mobin is the panch witness on the point of inquest panchanama. This witness is rickshaw driver of village Deulghat Tq. and Dist. Buldhana. He has stated that on 15.06.2022 he received phone call of the son of his maternal uncle stating that victim is murdered. Then he came to Aurangabad and went to hospital see the dead body. Sadaulla Khan was with him. Then he saw the dead body of victim. The dead body was decomposed. The half portion of face was decomposed. Half hairs of his head were fallen. One handkerchief was tied to his neck. Chest was decomposed. Total body was decomposed.

Private part was also decomposed. Further he has stated that informant is his real maternal uncle. His maternal uncle and maternal aunt (means father and mother of deceased) are present in the court. He came to court with them. While coming to the court he had discussion with them. He has also stated that deceased is his cousin brother and informant is his maternal uncle. He resides at the distance of 125 k.m. from Ghati Hospital, still then police asked him to act as panch. Second panch is not examined by the prosecution. The inquest panchanama (Exh.34) shows that face, neck, chest, stomach, right hand, left hand and private part are partially decomposed. Photographs of dead body are not taken. So the inquest panchanama (Exh.34) is not conducted in presence of independent panchas. The panch witness is interested one. So inquest panchanama (Exh.34) is doubtful.

34] P.W.4 Anil Adhane (Exh.48) the panch witness proved panchanama (Exh.51) and panchanama (Exh.56) is admitted by the defence. Panchanama (Exh.56) is dated 13.06.2022 and panchanama (Exh.51) is dated 14.06.2022. These two panchanamas are in respect of different places.

35] P.W.5 Ajay Salve (Exh.64), in his presence running panchanama was conducted. He has stated that he was called for this panchanama (Exh.65) initially at about 12 O'clock. In panchanama (Exh.65) it was mentioned that he was called at about 4 O'clock. On that day when for the first time he had been to police station for the first time, at that time itself, he was told by police that in the evening mobile handset and clothes from accused Amer were to be attached. He was not aware that since that Amer is in police custody. He was not aware that police have not made inquiry with Asif. He cannot say whether there was use of computer or not in panchanama (Exh.68). He has also stated that on 16.06.2022 after completion of work of panchanama they were told by police to come on 17.06.2022 for panchanama Exh.72 and 73 and accordingly they went there. So it means the panchanamas Exh.67, 68, 72 and 73 were not conducted by following procedure as the police as well witnesses were aware even prior to conducting these panchanamas about the purpose of panchanamas and the contents therein. So recovery as well as contents of these panchanamas are not proved by the prosecution. So the evidence of panch P.W.2, P.W.4 and P.W.5 is not trustworthy to rely on

them.

36] I turn towards the evidence of P.W.7 Sachin Thokal, P.W.12 Sunil Warade and P.W.13 Police Constable Dnyaneshwar Bawiskar. These three witnesses are on the point of certificates (Exh.87, 103 and 108) u/sec.65-B of the Evidence Act. P.W.13 Police Constable Bawiskar produced certificate u/sec.65-B (Exh.108) bears date 25.04.2024 and produced the photographs Exh.109, 110, 111 and 112. These photographs were placed on record by the prosecution alongwith letter (Exh.105) on 29.01.2024. Prior to this certificate (Exh.108) the photographs (Exh.109 to 112) were not placed on record alongwith charge sheet. Then question arises where were these papers ?This witness has stated in his evidence that those papers were handed over to investigation officer immediately. He cannot tell why those papers and photographs were not placed on record the investigating officer till 27.01.2024. The investigating officer Mr. Mayekar has stated in his evidence that he received photographs (Exh.109 to 112) and certificate u/sec.65-B on the day on which he placed on record. So these two witnesses of prosecution are contradicting to each other. So in such situation, the photographs (Exh.109 to 112) are not proved by the

prosecution and furthermore these photographs are faint and so on its basis the faces of the persons in those photographs cannot be identified. So these photographs are not at all helpful and there is possibility of tampering with these photographs.

37] I turn towards the evidence of P.W.15 PSI Raosaheb Kakad. He has stated in his evidence that Asdulla Khan had been to Police station and lodged report. He recorded his report as per his say. Its contents being true and correct, he put signature on it. Thereafter, he registered crime. The informant had given report in Hindi. He has stated that informant has not stated that the victim had worn sky blue colour shirt. Similarly he has not stated that the mobile handset of deceased victim was not working. Similarly he had not stated that someone might have kidnapped his son. Similarly he has not stated that his son worn blue jeans pant. On the contrary, the informant has stated that his son had worn black shirt. Accordingly it was mentioned in the report (Exh.29) which is at Exh.124. So considering his evidence and considering he clothes which were on the person of deceased are not matching each other. The informant has stated that on the basis of clothes he identified that dead body, but the colour of

clothes mentioned in report (Exh.29) and the colour of clothes which were on the dead body are not matching with each other. So identification of dead body is not proved. Hence prosecution was required to compare the collected DNA samples of deceased with DNA samples of informant and his wife and that would be the best evidence for the purpose of identification of the dead body. The prosecution has not brought the evidence to this effect. So considering the above said aspects which are on record and in view of the facts and observations of the Hon'ble Apex Court in the case of ***State of Rajasthan Vs. Kashi Ram, LAWS(SC)-2006-11-24*** u/sec.106 of the Evidence Act would not apply to the facts of the present case, as it was not the case that at the time of collecting CCTV footage by the investigating officer Mr. Mayekar, he had no occasion to see the dead body of deceased victim as well as accused no.1, as accused no.1 was previously remanded in MCR. So the CCTV footage evidence placed on record and the evidence of P.W.12 Sunil Warade is not all convincing on the point of CCTV footage and photographs. So the observations of the Hon'ble Apex Court in the case of ***Shakut Hussain Guru Vs State LAWS(SC)-2008-5-2*** and the observations of the Hon'ble Apex Court in the case of ***Vishnu***

@ Undrya Vs state of Maharashtra, Criminal Appeal No.1112/1999 dated 24th November 2005 are also not applicable to the facts of the present case as the facts of the case in hand and the facts of the cases in these two citations are different to each other.

38] As stated, here in this case the dead body on which the postmortem conducted is not proved by the prosecution that the dead body was of the son of informant. Furthermore, the last seen together is also not proved by the prosecution. In the case in hand prosecution failed to establish the circumstances from which conclusion could be drawn as fully proved. The circumstances which are on record are not of conclusive in nature. The circumstances which are on record are with hypothesis of guilt and inconsistent with the innocence. The circumstances which are on record are not excluding the possibility of guilty of any other person other than the accused. So reliance is placed on the judgment in the case of *Shankar Vs State of Maharashtra reported in 2023 Live Law (SC) 2012*, the observations there in para no.15, it is case of blind murder there are no eye witnesses and absence of complete chain of events. The facts of the case in hand are identical to the facts of the case in citation. So I hold that

prosecution failed to establish that accused persons in furtherance of their common intention kidnapped the victim boy in order that said victim boy may be murdered and both accused in furtherance of their common intention committed murder of deceased victim by tying his neck (throat) with handkerchief. So prosecution failed to establish that the accused persons committed the offence punishable u/sec.302, 364 r/w 34 IPC, So I answer Point no.2 and 5 in the negative.

39] Muddemal property- Clothes and pin being worthless has to be destroyed, Muddemal property- Vivo Mobile handset of chocolate is attached from accused Feroz Yunus Shaikh and so it has to be returned to him and muddemal property- San Disk pendrive has to be returned to investigating officer for disposal in accordance with law after appeal period vide Section 452 Cr.P.C.

40] In view of above discussion and findings on the point, I pass following order.

Order

- 1) Accused No.1 Syd.Amer @ Chira Syd. Salim and accused no.2 Feroj Yunus Shaikh are hereby acquitted of the offence punishable u/sec.302, 363, 364 r/w 34, 377 IPC and u/sec.4 of POCSO Act vide section 235(1) Cr.P.C.

- 2) The bail bonds of accused no.2 shall stand cancelled and he is set at liberty.
- 3) Muddemal property-
 - (a) Clothes being worthless be destroyed after appeal period vide Section 452 Cr.P.C.
 - (b) Vivo Mobile handset of chocolate be returned to accused no.2 after vide Section 452 Cr.P.C.
 - (c) Pin being worthless be destroyed after appeal period vide Section 452 Cr.P.C.
 - (d) San Disk pendrive be returned to investigating officer for disposal in accordance with law after appeal period vide Section 452 Cr.Pc.
- 4) The accused persons shall furnish bail vide Section 437-A Cr.P.C. by executing PR. and S.B. of Rs.15000/ each.
- 5) Inform Jail Superintendent to release accused no.1 forthwith if not required in any other case.

(Pronounced in open court).

Date: 29/05/2024.

(K.R.Choudhari)
Special Judge (POCSO),
Aurangabad.

CERTIFICATE

I affirm that the contents of this P.D.F. file Judgment are same, word to word, as per the original Judgment.

Name of the Stenographer	: B.D.Bhosale
Court	: Special Judge (POCSO), Aurangabad.
Date	: 29/05/2024.
Judgment signed by P.O. on	: 29/05/2024.
Judgment uploaded on	: 04/05/2024.