IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

WEDNESDAY, THE 22ND DAY OF NOVEMBER 2023 / 1ST AGRAHAYANA, 1945

CRL.A NO. 277 OF 2019

AGAINST THE ORDER OF CONVICTION AND SENTENCE DATED 30.10.2018 PASSED BY THE SPECIAL COURT FOR TRIAL OF OFFENCES UNDER POCSO ACT & CHILDREN'S (ADDITIONAL SESSIONS COURT – I), ALAPPUZHA DISTRICT, IN SC NO.161 OF 2016

APPELLANT/2ND ACCUSED:

PRATHIBHA,
[redacted]

BY ADVS.
J.R.PREM NAVAZ
SUMIN.S

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, PIN 682 031.

SMT.AMBIKA DEVI S, SPL.GP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03.11.2023, ALONG WITH CRL.A.676/2019, THE COURT ON 22.11.2023 DELIVERED THE FOLLOWING:

2023/KER/72745

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

WEDNESDAY, THE 22ND DAY OF NOVEMBER 2023 / 1ST AGRAHAYANA, 1945

CRL.A NO. 676 OF 2019

AGAINST JUDGMENT & SENTENCE IN SC NO.161 OF 2016 DATED 30.10.2018 OF THE SPECIAL COURT FOR TRIAL OF OFFENCES UNDER POSCO ACT & CHILDREN'S COURT (ADDITIONAL SESSIONS JUDGE – I), ALAPPUZHA

APPELLANT/1ST ACCUSED:

BASHDEV,

[redacted]

BY ADV P.YEMUNA(K/1079/2004) STATE BRIEF

RESPONDENTS/COMPLAINANTS:

1 **STATE OF KERALA,**
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

2 **THE INSPECTOR OF POLICE,**
KAYAMKULAM POLICE STATION.

SMT.AMBIKA DEVI S, SPL.GP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03.11.2023, ALONG WITH CRL.A.277/2019, THE COURT ON 22.11.2023 DELIVERED THE FOLLOWING:

2023/KER/72745

C.R.

P.B.SURESH KUMAR & JOHNSON JOHN, JJ.

Criminal Appeal Nos.277 & 676 of 2019

Dated this the 22nd day of November, 2023

JUDGMENT

P.B.Suresh Kumar, J.

The pivotal question that falls for consideration in these appeals is whether an act performed by a person on a body which he/she believed to be lifeless, would attract the offence punishable under Section 299 of the Indian Penal Code (IPC).

2. Accused 1 and 2 in S.C.No.161 of 2016 on the files of the Additional Sessions Court I, Alappuzha, who stand convicted and sentenced for offences punishable under Sections 302 and 201 read with Section 34 IPC are the appellants in the appeals. They are husband and wife respectively. Among the appeals, Crl.Appeal No.676 of 2019 is preferred by the husband, the first accused and Crl.Appeal

No.277 of 2019 is preferred by the wife, the second accused.

3. This is an alleged case of infanticide. The accused are natives of Uttar Pradesh. One Subahani found the dead body of the infant daughter of accused 1 and 2, Sivani aged 6 months, floating in the Arabian Sea at Azheekkal, where he was baiting fish on 16.10.2015. On the basis of the information furnished by Subahani, a case was registered by Ochira Police under Section 174 of the Code of Criminal Procedure (the Code). Pursuant to the registration of the case, the Sub Inspector of Police, Ochira conducted the inquest and made arrangements for autopsy. Later, having found that it is a suspected case of murder, the Sub Inspector submitted a report to that effect before the Jurisdictional Magistrate. The investigation in the case was thereafter taken over by the Inspector of Police, Karunagappally and after preliminary investigation, having found that the occurrence is one that took place within the limits of Kayamkulam Police, the file was transferred to Kayamkulam Police and the investigation of the case was continued and completed by the Inspector of Police, Kayamkulam. It is alleged in the final report filed in the case

that on 21.09.2015, accused 1 and 2, due to the discontent towards their daughter Sivani, in furtherance of their common intention, caused grievous hurt to Sivani, resulting in the fracture of the elbow of her left hand. It is also alleged in the final report that later, on 12.10.2015, accused 1 and 2 caused an injury on the back of her head by hitting the same against the edge of a cot and thereby caused her death. It is further alleged in the final report that later, on 13.10.2015, accused 1 and 2, with the help of the third accused, caused destruction of the evidence of the crime by disposing of the body of the child in the Arabian Sea at Azheekkal.

4. On the case being committed for trial to the Court of Session, after hearing the prosecution and the accused, the Court of Session framed charges against the accused. The charges framed by the Court of Session against the accused are the following:

> "Firstly, that you, the above said accused Nos.1 and 2, due to your discontent towards your daughter Sivani, aged 6 months, in furtherance of your common intention, had voluntarily caused grievous hurt to her by brutally attacking her, resulting fracture on her left 4th, 5th and 7th ribs and fracture on her left elbow on 21/9/2015 at about 8 am., in your

house bearing No.IX/980, Kayamkulam Municipality, and thereby committed an offence punishable u/s.325 r/w.34 IPC., within the cognizance of this court.

Secondly, that you, the above said accused Nos. 1 to 3, in furtherance of your common intention, had committed murder of the said Sivani on 12/10/2015 at about 2 pm by disposing of her in the Arabian Sea near the sea-wall at a place called Azheekkal, Alappadu Village and thereby committed an offence punishable u/s 302 r/w.34 IPC., within the cognizance of this court.

Lastly, that you, the above said accused Nos. 1 to 3, in furtherance of your common intention, had caused disappearance of evidence of the aforesaid brutal crimes committed by you by disposing of the dead body of the said victim child at the Azheekkal Beach, Alappadu Village during the course of the same transaction and thereby committed an offence punishable u/s.201 r/w.34 IPC., within the cognizance of this court."

When the charges framed were read over and explained to the accused, they denied the same. Thereupon, on being called upon to give evidence, the prosecution examined 33 witnesses on their side as PW1 to PW33 and proved through them 53 documents as Exts.P1 to 53. MOs 1 to 3 are the material objects identified by the witnesses. As the Court of Session did not find the case to be one fit for acquittal under Section 232 of the Code, the accused were called upon to enter on their

defence. The accused, however, chose not to adduce any evidence. Thereupon, after considering the explanation offered by the accused on the various incriminating circumstances brought out against them in the evidence of the prosecution, the Court of Session found that among the three charges framed, the first charge was not established by the prosecution. However, the Court of Session found that the prosecution could establish the second and last charge and consequently, accused 1 and 2 were convicted and sentenced for the offences punishable under Sections 302 and 201 read with Section 34 IPC and the third accused was convicted and sentenced for the offence punishable under Section 201 read with Section 34 IPC. Accused 1 and 2 are aggrieved by their conviction and sentence.

5. Even though the allegation in the final report was that on 12.10.2015, accused 1 and 2 caused the death of the infant by hitting the back of her head against the edge of a cot and thereafter caused destruction of the evidence by disposing of the body of the infant at the Arabian Sea, as evident from the court charge, there is no allegation in the

charges framed by the court in respect of the said head injury allegedly caused to the infant on 12.10.2015. Instead, the charge framed by the court was that the death of the infant was caused by disposing of her body in the Arabian Sea. Of course, there was also a charge that the accused caused destruction of the evidence by disposing of the dead body of the victim in the sea, in the same transaction.

6. Accused 1 and 2 have not challenged the case of the prosecution that they are the biological parents of the deceased infant. Similarly, they have also not challenged the case of the prosecution that they disposed of the body of the deceased infant at the Arabian Sea where the same was found by Subahani on 16.10.2015. But, according to them, they have not disposed of the infant alive in the sea as alleged in the charge, but they only disposed of the body in the sea after her death, as it was a form of burial as per their custom.

7. The main contention raised by the learned counsel for accused 1 and 2 is that the prosecution has not established beyond reasonable doubt that it is the accused who caused the death of the infant by disposing of her body in the

sea. According to the learned counsel, even if it is found that accused 1 and 2 caused the death of the infant by the said means, inasmuch as the accused have done so under the belief that the child was not alive at the relevant time, in the absence of any evidence indicating that they had the knowledge that the child is alive, they are guilty of the offence punishable under Section 302 IPC, for such an act on the part of the accused would not attract Section 299 IPC. In order to reinforce the said argument, it was pointed out by the learned counsel that the Court of Session has in fact found that the accused were not aware that the child was alive when they disposed of her body in the sea, and the said finding has become final.

8. *Per contra*, the learned Special Public Prosecutor asserted that the materials on record would establish beyond reasonable doubt that accused 1 and 2 had knowledge that the infant was alive at the time of disposing of her body in the sea and as such, a case under Section 299 of the Code has been made out. Various arguments have been advanced by the learned Special Public Prosecutor in support of the said stand. As we propose to deal with the same

elaborately in the latter part of this judgment, we are not referring to the said arguments here. It was also argued by the learned Special Public Prosecutor that even assuming that the finding rendered by the Court of Session that accused 1 and 2 were not aware that the infant was alive at the time when they disposed of her body in the sea, still, according to the learned Special Public Prosecutor, inasmuch as the infant was alive at the time when the body was disposed of, the act of the accused would certainly amount to murder.

9. The points that arise for consideration are (i) whether the prosecution has established that the accused had knowledge that the infant was alive when they disposed of her body in the sea and (ii) if not, the offence, if any, committed by the accused.

10. Points: As indicated, the finding rendered by the Court of Session in the impugned judgment is that accused 1 and 2, in furtherance of a common intention, had committed the murder of the infant by inflicting a fatal injury on the back of her head on 12.10.2015 at about 10 p.m. and disposed of her body under the belief that she was not alive and that the

death occurred due to the combined effect of drowning and head injury. Paragraph 51 of the impugned judgment dealing with the said finding reads thus:

> "51. On a sagacious consideration of the above evaluation of evidence, I hold that the accused Nos.1 and 2, in furtherance of their common intention, had committed the murder of the said tiny child by inflicting fatal injury on its head on 12/10/2015 at about 10 pm and disposing of it in the Arabian Sea at Azheekkal near the sea-wall under the belief that the child was already died. Hence, I hold that the death of the child took place due to the combined effects of drowning and head injury as opined by the PW27. There is substance in the argument of the defence that the 3rd accused was not aware of the fact that the child was alive when it was disposed of in the Arabian Sea as required by the accused Nos.1 and 2 that such a disposal of its body was part of the rites and rituals prevailing in the community of the accused Nos.1 and 2. Therefore, I hold that there is no sufficient evidence to believe that the 3rd accused had committed murder of the said child along with the accused Nos.1 and 2. 'B' is answered accordingly."

Inasmuch as the Court of Session found the accused 1 and 2 guilty of the offence punishable under Section 302 read with Section 34 IPC despite the finding aforesaid, no doubt, the learned Special Public Prosecutor is entitled to contend that the finding aforesaid rendered by the Court of Session is incorrect

to sustain the conviction of the accused under the said provisions. In other words, the learned Special Public Prosecutor is entitled to argue based on the materials on record that the accused had the knowledge that the infant was alive when they disposed of her body in the Arabian Sea on 13.10.2015. In order to appreciate the arguments advanced by the learned Special Public Prosecutor in this regard, it is necessary to refer to the evidence relied on by her for the said purpose.

11. The first among the witnesses whose evidence is relied on is PW6. PW6 is a social worker. PW6 testified that he found the second accused one day in the premises of the Government Hospital, Kayamkulam with an infant who suffered a fracture on her hand; that the second accused was weeping then and that when he enquired with the duty nurse about the reason, he was informed that since the second accused did not disclose the cause of fracture suffered by her infant, the duty doctor did not treat the infant. PW6 also testified that after a few days, he saw the second accused with the infant when she came to reside in a house behind his shop and that the hand of

the infant was found plastered then. PW6 also testified that the infant was found missing after a few days and when he enquired about the infant to the second accused through a few migrant workers, she informed that the child was sent back to her native place in Uttar Pradesh. PW6 also testified that after a few days when it was published in the newspapers that the body of an infant was found at Azheekal Beach, having found that the child whose body was found at Azheekal is identical to the child of the second accused, he informed the matter to the police. PW7 is the next witness. PW7 was the duty medical officer at T.D.Medical College, Alappuzha on 21.09.2015. PW7 testified that on that day, he examined an infant brought by the second accused on a reference to the Medical College from a local hospital with pain and swelling on her left elbow. PW7 deposed that when he questioned the second accused about the cause of the injury, the second accused left the place cunningly. PW8 is the next witness. He was a Civil Police Officer attached to the Police Aid Post at T.D.Medical College, Alappuzha. PW8 was in duty on 29.09.2015. PW8 testified that on that day as the second accused informed him that she does

not have money to purchase plaster to be used for treating the fracture suffered by her infant, he arranged the plaster and by the time he did so, the second accused had left the scene.

12. PW13 is the next witness. He is a person residing at Kodamukku near Kayamkulam. PW13 testified that accused 1 and 2 stayed in a house owned by him on rental basis for about 12 days along with the third accused, who was staying there for about two years; that when accused 1 and 2 came to the house, they had an infant with them whose left hand was plastered and that when he enquired with them about the cause of the fracture, they informed him that she was injured on account of a fall from the cradle. PW13 testified that after some days, he could not find the infant with them and when the wife of PW13 enquired about the infant, accused 1 and 2 informed her that the child was sent to the elder sister of the second accused. PW14 is the next witness. He is an auto driver. PW14 testified that on 13.10.2015, the third accused hired his auto at about 1.00 p.m. in which he took accused 1 and 2 from a place near the house of one Salim and dropped all of them at Valiyazheekal. PW14 also testified that at the said

time, the second accused was carrying an infant in her hands and the infant was covered with a shawl. PW15 is the next witness residing at Medamukku near Kayamkulam. PW15 testified that accused 1 and 2 stayed in a house rented out to them by him with an infant for about two months and the hand of the infant was plastered then.

13. PW23 is the next witness. She was the Medical Officer attached to General Hospital, Kayamkulam on 21.09.2015. PW23 testified that on that day, at about 9.30 a.m., she examined one female infant namely, Sivani and issued Ext.P14 wound certificate. PW23 also testified that even though it was stated to her that the child suffered the injury on account of a fall from the cot, there was no corresponding injury on the body of the infant and that she noted an old healed wound also on the back of the scalp of the infant. PW23 testified that as the case was found to be a suspicious one, she intimated the matter to the police. Ext.P7 is the communication issued by her to the police. PW17, the next witness, was the Head Constable attached to Kayamkulam Police Station. PW17 testified that on 21.09.2015, he was in the charge of the

General Diary maintained at the police station and on that day, he received Ext.P7 intimation and even though he conducted necessary enquiries, he could not find the whereabouts of the infant.

14. PW27 is the last witness. She is the police surgeon who conducted the autopsy of the deceased infant. Ext.P19 is the preliminary autopsy certificate issued by PW27. The following were the ante-mortem injuries noted by PW27 in the body of the deceased:

> "1. Contusion 4x4x0.2 cm on top of head in the middle, 7 cm above root of nose.
>
> 2. Contusion 6x4x0.2 cm on top and back of head 3 cm above occiput. Brain showed flattening of gyri and narrowing of sulci.
>
> 3. Contusion 6x3x0.5 cm on front and sides of left elbow, arm and forearm with fracture dislocation of left elbow joint.
>
> 4. Contusion 4x3x0.5 cm on front and sides of right leg, just below knee.
>
> 5. Fracture of IV rib on left side at the outer aspect with callus formation around.
>
> 6. Fracture of V to VII ribs on left side at the back aspect with bluish coloured blood infiltration and thickening around.
>
> 7. Contusion 0.5x0.3x0.1 cm on top of left foot at the root of big toe.
>
> 8. Contusion 0.5x0.3x0.2 cm on tip of left little toe."

PW27 testified that injury Nos.1 and 2 are sufficient to render a

person or an infant into an unconscious state, and sufficient in the ordinary course of nature to cause death. Even though the opinion as to the cause of death as indicated by PW27 in Ext.P19 was that the post-mortem findings are consistent with death due to head injury, she reserved final opinion pending report of the chemical analysis. Exts.P20 and 21 are the chemical analysis certificates and Ext.P22 is the final opinion as to the cause of death given by PW27. The opinion given in Ext.P22 is that the death of the infant was due to the combined effect of drowning and head injury. In cross-examination, PW27 admitted that at the time of post-mortem, there was no external or internal signs of drowning, as the body was in a state of decomposition at that time and signs of drowning may not be approaching in such a situation.

15. Although the evidence tendered by the witnesses referred to in the preceding paragraphs would create a suspicion that the infant was being abused physically by somebody at home, the same, according to us, is not sufficient to hold that the child was subjected to any physical abuse either by the first or the second accused, for suspicion,

howsoever great it may be, is no substitute of proof in criminal jurisprudence. This is exactly the view taken by the Court of Session also, as revealed from paragraph 43 of the impugned judgment, and it is on that basis, the Court of Session acquitted the accused under Section 325 IPC. Paragraph 43 of the impugned judgment dealing with the said finding reads thus:

> 43. I have duly considered the said facts and circumstances brought in evidence by the prosecution. Though the materials on record do raise a needle of suspicion towards the accused Nos.1 and 2, it appears to me that the prosecution has failed to elevate it a case from the realm of “may be true” to the plane of “must be true” as is indispensably required in law for conviction on a criminal charge. It was well settled that in a criminal trial, suspicion, howsoever grave, cannot substitute proof (Sharad Birdhi Chand Sarda vs. State of Maharashtra AIR 1984 SCC 1622 (1984 (4) SCC 116)). In the light of the above dictum, the question 'A' above was evaluated. It appears to me that the said dictum is squarely applicable in the case on hand. It is not possible to conclude that the prosecution could prove the charge against the accused Nos.1 and 2 that they had voluntarily caused grievous hurt to the said victim child as alleged. Of course, the said child had sustained fatal injuries on its vital parts. But, in the absence of cogent and convincing evidence, I am unable to conclude that the prosecution could prove an offence punishable u/s.325 r/w 34 IPC against the accused Nos.1 and 2. Hence, the question 'A' is answered against the prosecution.”

We take this view also for reason that it has come out in

evidence that when the infant suffered an injury on her left hand, she was taken to the hospital by the second accused for treatment and when the same was denied on the ground that the cause of injury as disclosed is not correct, the second accused was found weeping at the hospital, which is not a conduct consistent with the allegation that the infant was being physically abused by the second accused, at least with a view to cause the death of her own child, for her conduct of taking the infant for treatment, establishes her emotional attachment with the infant.

16. According to the learned Special Public Prosecutor, the aforesaid evidence, especially the evidence tendered by PW14 that the second accused was holding an infant covered by a shawl close to her chest on 13.10.2015 when he took them to Azheekal in his auto rickshaw, coupled with the absence of any explanation on the part of the accused as to what happened to the infant after 21.09.2015 and as to how she suffered the various injuries noted in the post-mortem certificate, would establish that accused 1 and 2 definitely had knowledge that the child was alive when they disposed of her

body in the sea. The learned Special Public Prosecutor was relying on Section 106 of the Indian Evidence Act to make the said submission. As noted, even though it was alleged in the final report that accused 1 and 2 caused the death of the infant on 12.10.2015 by hitting her head against the edge of a cot, the court has not framed any charge against the accused in respect of the occurrence allegedly took place on 12.10.2015. On the other hand, the court charge was that accused 1 and 2 caused the death of the infant by disposing of her body in the sea on 13.10.2015. In the absence of any charge in respect of any occurrence that allegedly took place on 12.10.2015, we are unable to agree with the argument advanced by the learned Special Public Prosecutor that it was obligatory on the part of the accused, in a case of this nature, to disclose as to what happened to the infant on and after 12.10.2015, even though PW27 noticed an ante-mortem injury on the head of the deceased at the time of autopsy. There cannot be any doubt to the proposition that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution. Section 106 of the Indian Evidence Act, of course, provides that

when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In the context of criminal trials, the Apex Court has observed in **Shambu Nath Mehra v. State of Ajmer**, 1956 SCC OnLine SC 27 that Section 106 is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. The relevant observation reads thus:

> "This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.
>
> The word "especially" stresses that. It means facts that are *pre-eminently* or *exceptionally* within his knowledge."

Placing reliance on the said judgment, in **State of W.B. v. Mir Mohammad Omar**, (2000) 8 SCC 382, the Apex Court held that Section 106 would apply only to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other

facts, unless the accused, by virtue of the special knowledge regarding such facts, offers any explanation which might drive the court to draw a different inference. In the case on hand, the prosecution has not proved any facts from which a reasonable inference can be made that the accused had the knowledge that the infant was alive when they disposed of her body in the sea. The facts proved by the prosecution would only establish that the infant suffered an injury on her head before her body was disposed of by the accused in the sea. We do not think that from the said fact alone, it could be reasonably inferred that the accused had knowledge that the infant was alive when they disposed of her body in the sea. Even assuming that the said circumstance is sufficient to make a reasonable inference that the accused had the knowledge that the infant was alive when they disposed of her body, an explanation is seen offered by the accused when they were questioned under Section 313 of the Code that the child had an accidental death on account of an unexpected fall from the cot and they buried the body in the water as per their custom. In other words, they maintained that they were not aware that the child was alive when they

disposed of her body in the sea. There is nothing on record to rule out the explanation aforesaid offered by the accused as false, even if it is so. In the aforesaid facts and circumstances, we are unable to find fault with the Court of Session for having held that accused 1 and 2 disposed of the body of the infant under the belief that the infant was not alive.

17. In the light of the evidence tendered by PW27 that the cause of death of the infant was the combined effect of drowning and head injury, it has to be held that the child was disposed of alive by accused 1 and 2 in the sea, even though they believed that the child was lifeless. This takes us to the legal issue whether an act performed by a person, as in the case on hand, by disposing of the body of the infant in the sea which he/she believed to be lifeless, would attract the offence punishable under Section 299 IPC. Section 299 is brought under Chapter XVI of IPC titled 'OF OFFENCES AFFECTING THE HUMAN BODY' and under the sub-title 'OF OFFENCES AFFECTING LIFE'. The offence of culpable homicide is defined under Section 299 of IPC under the said sub-title, which reads thus:

> "**299. Culpable homicide**.
>
> Whoever causes death by doing an act with the

intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Illustrations

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it. A intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence, but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1 : A person who causes bodily injury, to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

> Explanation 2 : Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.
>
> Explanation 3 : The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born".

As evident from the extracted definition itself, the provision is attracted only when a person does an act which causes death of another, either with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death. These three are the species of *mens rea* contemplated in the provision, and unless it is established that the act of the accused would fall under any of these, it would not amount to an offence of culpable homicide. Therefore, in order to attract the Section, the act must be one performed with the intention of putting an end to a human life or with the knowledge that the same may put an end to a human life.

Needless to say, if the act is performed on a body which the person concerned believed to be lifeless, the offence is not attracted, for when the act was performed, the person concerned could have neither had the intention of putting an end to the human life nor had the knowledge that the act performed by him may or is likely put an end to human life. An identical view is seen taken by a Full Bench of the Madras High Court in **Palani Goundan v. Emperor**, 1919 SCC OnLine Mad 67. It is also seen that the said case was considered by a Full Bench on a reference by a Division Bench dealing with a case where the accused hanged the body of a person under the belief that the body is lifeless. The relevant portion of the judgment reads thus:

> "When the case came before us, Mr. Osborne, the Public Prosecutor, at once intimated that he did not propose to contend that the facts as found by the learned referring Judges constituted the crime of murder or even culpable homicide. We think that he was right in doing so: but as doubts have been entertained on the subject, we think it proper to state shortly the grounds for our opinion. By English Law this would clearly not be murder but man-slaughter on the general principles of the Common Law. In India every offence is defined both as to what must be done and with what intention it must be done by the section of the Penal

Code which creates it a crime. There are certain general exceptions laid down in chapter IV, but none of them fits the present case. We must therefore tarn, to the defining section 299. Section 299 defines culpable homicide as the act of causing death with one of three intentions:

(a) of causing death,

(b) of causing such bodily injury as is likely to cause death,

(c) of doing something which the accused knows to be likely to cause death.

It is not necessary that any intention should exist with regard to the particular person whose death is caused, as in the familiar example of a shot aimed at one person killing another, or poison intended for one being taken by another. “Causing death” may be paraphrased as putting an end to human life; and thus all three intentions must be directed either deliberately to putting an end to a human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life. The knowledge must have reference to the particular circumstances in which the accused is placed. No doubt if a man outs the head off from a human body, he does an act which he knows will put an end to life, if it exists. But we think that, the intention demanded by the section must stand in some relation to a person who either is alive, or who is believed by the accused to be alive. If a man kills another by shooting at what he believes to be a third person whom he intends to kill, but which is in fact the stump of a tree, it is clear that he would be guilty of culpable homicide. This is because though he had no criminal intention towards any human being actually in existence, he had such an intention towards what he believed to be a living human being. The conclusion is irresistible that the intention of the accused must be judged not in the light of

> the actual circumstances, but in the light of what he supposed to be the circumstances. It follows that a man is not guilty of culpable homicide if his intention was directed only to what be believed to be a lifeless body. Complications may arise when it arguable that the two acts of the accused should be treated as being really one transaction as in Queen-Empress v. Khandu [(1891) I.L.R., 15 Bom., 194.] or when the facts suggest a doubt whether there may not be imputed to the accused a reckless indifference and ignorance as to whether the body he bandied was alive or dead, as in Gour Gobindo's Case [(1866) 6 W.R. (Cr. R.), 55.] . The facts as found here eliminate both these possibilities, and are practically the same as those found in The Emperor v. Dalu Sardar [(1914) 18 C.W.N. 1279.] . We agree with the decision of the learned Judges in that case and with clear intimation of opinion by Sergeant, C.J., in Queen-Empress v. Khandu.
>
> Though in our opinion, on the facts as found, the accused cannot be convicted either of murder or culpable homicide, be can of course be punished both for his original assault on his wife and for his attempt to create false evidence by banging her. These, however, are matters for the consideration and determination of the referring Bench."

As evident from the extracted passage in the judgment, the view taken is that the intention of the accused must be judged not in the light of the actual circumstances, but in the light of what he supposed to be the circumstances and that therefore, he/she is not guilty of culpable homicide if his intention was directed only to what he believed to be a lifeless body. We are

in respectful agreement with the said view. Needless to say, the conviction of accused 1 and 2 under Section 302 read with Section 34 is liable to be interfered with.

18. As clarified by the Madras High Court in **Palani Goundan**, in a case of this nature, the accused can certainly be convicted for the original act which rendered the child to an unconscious state and also for their attempt to cause disappearance of the evidence. But, in the case on hand, as noted, there is no charge in respect of the same. In other words, the accused cannot be convicted for any offence. If the accused cannot be convicted for any offence, the question of convicting them for causing disappearance of the evidence does not arise [See **Duvvur Dasratharammareddy v. State of A.P.**, (1971) 3 SCC 247].

In the result, the appeals are allowed, the conviction of accused 1 and 2 under Sections 302 and 201 read with Section 34 of IPC is set aside and they are acquitted. They shall be set at liberty forthwith from the concerned prison, if their continued detention is not required in connection with any other case.

Registry shall communicate this judgment forthwith to the concerned prison, where the appellants are undergoing incarceration.

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

JOHNSON JOHN, JUDGE.

YKB