IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C.JAYACHANDRAN

WEDNESDAY, THE 16TH DAY OF FEBRUARY 2022 / 27TH MAGHA, 1943

CRL.A NO.917 OF 2020

AGAINST THE JUDGMENT IN S.C.NO.882/2017 OF THE COURT OF ADDITIONAL DISTRICT & SESSIONS JUDGE, ERNAKULAM [FOR THE TRIAL OF CASES RELATING TO ATROCITIES & SEXUAL VIOLENCE AGAINST WOMEN AND CHILDREN]

(CP 19/2017 OF JUDICIAL FIRST CLASS MAGISTRATE COURT, ANGAMALY) (CRIME NO.901/2016 OF ANGAMALI POLICE STATION, ERNAKULAM)

APPELLANT/ACCUSED:

TEENA, AGED 37 YEARS, W/O.BAIJU,
PANAGATTUPARAMBIL HOUSE,
NEAR CHAPPEL, KOKKUNNU KARA,
MOOKKANNUR VILLAGE.

BY ADVS.
SRI.P.K.VARGHESE
SMT.M.B.SHYNI
SMT.SANJANA RACHEL JOSE

RESPONDENT/ RESPONDENT:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031.

BY ADVS.
SMT.AMBIKA DEVI .S., SPL.GOVERNMENT PLEADER
(FOR ATROCITIES AGAINST WOMEN AND CHILDREN
AND WELFARE OF WOMEN AND CHILDREN)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21.01.2022, THE COURT ON 16.02.2022 DELIVERED THE FOLLOWING:

K. Vinod Chandran & C.Jayachandran,JJ CR

Crl.Appeal No.917 of 2020

Dated, this 16th February, 2022

JUDGMENT

Vinod Chandran, J.

'*God could not be everywhere and therefore he made mothers*'; wrote Rudyard Kipling. But quiet paradoxical and tragic, is the story projected before us of a mother having murdered her nine year old; an only child. When a woman kills her progeny there is more than that meets the eye; which sensitivity, often, the investigators lack.

2. The charge against the accused was that due to marital discord, to wreck vengeance against her husband, the accused killed her son and for reason of her distressing married life, she attempted suicide at around 10'O clock on 30.04.2016. The accused administered sleeping pills (Nitrest 10mg) to her unsuspecting child, and while he was dozing, slit the vein on his left hand with a razor blade. The child woke up and he was smothered with a turkey towel. Later the accused consumed

pesticide and with the very same razor blade, slit the vein on her right hand with the intention of committing suicide. The prosecution examined twenty seven witnesses, marked Exts P1 to P32 documents and produced Material Objects MO1 to MO5. The defence examined DW1 and the Court *suo motu* under S.311 Cr.P.C, summoned two witnesses; one for re-examination. The case sheet of the accused at the Hospital was marked as Ext. C1. The trial court found the accused guilty of the offences charged under S.302 and 309 of the IPC and sentenced her to life and six months simple imprisonment respectively, together with a fine under S.302 and a default sentence.

I. *THE CONTENTIONS*

3. Sri.P.K.Varghese, learned Counsel who appeared for the accused, argued that the trial court's findings are quiet contrary to the evidence led; which in fact exonerates the accused from the offence of murder. The reliance placed on the alleged dying declaration is impermissible. In any event Ext.P28 as spoken of by PW27 says nothing about cause of death; as evidenced from the

post-mortem examination. PW15, the Doctor who conducted the post-mortem examination and marked Ext.P12 report clearly stated the cause of death as smothering. The alleged dying declaration does not speak of smothering. Further death having not occasioned to the declarant, the declaration does not qualify as one under S.32 of the Evidence Act. It cannot be treated as a confession, since the provisions under S.164(2)&(4) have not been complied with. The husband, PW8, entered the house after opening the locked front door, to see his wife lying supine and bleeding in the front hall. He did not look around for the son and only later, when a neighbour enquired, he went in search of the boy. PW8 was careful to create an alibi by asking his neighbour as to whether his wife was available in the house; before he entered his own house. While the prosecution relies heavily on the admission of the accused, regarding administration of sleeping pills and cutting the vein on the boy's hand; there was no investigation carried out regarding the smothering. If the accused admitted to the other acts, ordinarily, it

would have been spoken of by the accused; if, she smothered the child. The extra judicial confession is suspect and so is the medicine strip recovered by Ext.P6. PW 4, the witness did not see the accused handing over the strip and he also does not remember where he signed the mahazar; at the house or the Police Station. The recovery by Ext.P6 was on 12.05.2016, before which on 01.05.2016, the just next day of the occurrence, the entire house was examined with a fine tooth-comb, by the I.O as evidenced from Ext.P5 scene mahazar. The recovered strip contained a half tablet, while Ext.P32 chemical examination report speaks of an empty strip having been received for examination. The learned Counsel would heavily rely on the evidence of DW1, the Psychiatrist who examined the accused at the hospital from which hospital Ext.C1 case sheet was issued.

4. The learned Counsel attacked the manner in which the trial court invoked the power under S.311; specifically pointing out Ground D in the appeal memorandum. It is stated that after arguments were over,

the case was posted for judgment and without any notice it was reopened and summons issued to two witnesses, one of whom was earlier examined. It is alleged that the learned Judge stepped into the shoes of the prosecutor to somehow convict the accused. Ext.C1 case sheet is tampered with by PW20, on his own saying and also by unknown persons. There can be no credibility attached to the narration of the history of occurrence by the accused in Page 11 of Ext.C1. It is pointed out that even as per the evidence of PW20, he examined the patient in the Casualty, who was later referred to the Medical ICU [MICU] by another Doctor as evidenced from sheet number 10 of the case sheet. Page No.12 also indicates the notations made in the ICU and Page No.11 is clearly an interpolation. The Doctor who conducted post-mortem examination opined the cause of death to be smothering. He affirmed the absence of poisonous substances in the body and the cut on the left wrist of the boy to be insufficient to cause death. On the mandatory compliance of S.164(2)to(4)the learned Counsel relies on *Shivappa v.*

State of Karnataka [(1995) 2 SCC 76], ***Parmanand Pegu v. State of Assam [(2004) 7 SCC 779]***, and ***State of Punjab v. Harjagdev Singh [(2009) 16 SCC 91]***. The efficacy of the alleged dying declaration is challenged placing reliance on ***Kishan Lal v. State of Rajasthan [(2000) 1 SCC 310]*** and ***Parmanad Pegu*** (supra).

5. Smt. S Ambikadevi, learned Senior Government Pleader (Atrocities against Women and Children) first urged that though a case built up entirely on circumstantial evidence, the accused is the mother and the victim is her own nine year old son. The child and the mother were seen together between 10.00 and 11.15 a.m in the backyard of their house by PW6. It is argued that the declaration is not a confession under Section 164, but still has relevance under Section 21 of the Evidence Act. A dying declaration is considered credible since the person anticipating death, would not want to leave this world with a lie in her lips. Viewed in this context, the accused had truthfully spoken of what transpired which clearly is admissible. Reliance is placed on ***Ammini V.***

State of Kerala [(1998) 2 SCC 301]. **In addition to Ext.P28 dying declaration recorded by a Magistrate, the accused had spoken of the incident to the Doctor, which is an extra judicial confession. It has been established that the child was administered sleeping pills and the veins of his left hand were cut, which is more than proof of the intention of the mother, who was last seen together with the child and was alone in the house with the child. The accused had totally denied the allegations and the incriminating evidences and even the factum of her having worked as a Pharmacist which is established beyond doubt by PWs.9 to 12.**

6. That the child was murdered by smothering is very clear in the postmortem certificate which speaks of '*petechial hemorrhages*' in both the lungs and heart; the breaking open of capillaries due to asphyxia. A turkey towel, recovered from the cot where the child was lying was used for smothering. The learned counsel castigates the defence for having tried to implicate the husband, after having murdered the little child. The

administration of sleeping pills and the slitting of the veins definitely leads to an inference that the smothering was also done by the accused. The admissions of the accused were in a conscious state and she has been certified to be capable of lucid understanding by the Physician who examined her at the first hospital. The denial of admitted facts and the attempt to frame the husband, without any proof, provides additional links in the chain of circumstances. PW20 signed page 7 of Ext.P1 series and normally there would be other Doctors attached to the casualty who would also examine the patient. To impress upon us, the relevance of Section 106 of the Evidence Act *State of West Bengal V. Mir Mohammad Omar [(2000) 8 SCC 382]* is relied on. There is no explanation offered by the accused regarding the cause of death of the child and her own condition. *Trimukh Maroti Kirkan V State of Maharashtra [(2006) 10 SCC 681]* is relied to canvass the position of last seen together theory. While it is strongly urged for dismissal of the appeal, confirming the conviction and sentence under Section 302

and 309; the learned Counsel would also remind us that the admitted actions of the accused would at least attract Section 307; if this Court opines otherwise on Section 302.

II. *THE EVIDENCE:*

7. The FIS was by PW1, the brother of the accused. The FIS speaks of the accused having killed her 9 year old son by cutting the veins of his hands and later attempting suicide; obviously hearsay. PW1 was in his family house, when in the night during prayer time, a call came in his mother's telephone. He gave the phone to his mother since it was his brother-in-law calling. The mother informed the family that his sister and her son passed away. PW1 immediately called a relative who lived near his sister and she merely responded that all is lost. He rushed to the Little Flower (L.F) Hospital and saw his sister. The Doctor informed him that his sister had consumed poison and also slit her veins. He also saw his nephew's body in the Mortuary. Even at that point he spoke of physical torture by the husband on his sister

and presumed that she would have killed her son and attempted suicide, when it became intolerable.

8. PW1, before Court, elaborated on the unhappy marital life of his sister, made worse by the drunkenness of her husband [PW8]. There was an incident in which PW8 faced his wife and son with a knife; which led to his admission in a Mental Hospital. PW1 spoke of a wordy altercation on the night of his marriage, on 25.04.2016, after which PW8 left with his wife and son. Two days later, when his mother called his sister, she complained of physical torture. He admitted Ext.P1, but denied Exts.P2 and P3 contradictions marked. Ext.P2 was his prior statement that the murder of the child and the attempt to suicide must have been due to the depression arising from an unhappy married life. Ext.P3 is his statement that when he asked the people gathered in the Hospital, he was told that, his brother-in-law returned from work to see his wife and son lying with their veins slit in a bad condition, that, since his sister had consumed poison and was unconscious she was brought to

the L.F Hospital for further treatment. Before Court, he also deposed that when he talked to his sister on May 3rd, he was informed that on 30.4.2016, in the after noon, PW8 came home drunk and started beating her and the child. PW8 was accused of forcefully pouring poison into his wife's mouth, which was informed to the police on the very next day and a formal complaint made to the C.I of Police.

9. PW2 witnessed the inquest and marked the report, Ext.P4 and PW3, witnessed the scene mahazar, Ext.P5 dated 01.05.2016. PW4 is the immediate neighbour, who was not present when the mother and child were detected injured. Being informed of the mishap at around 8.30 p.m, he went to MAGJ Hospital, to see the accused in an unconscious state. His wife informed him that PW8, in the evening, enquired whether there was anybody in his house. Later, PW8 was heard screaming, upon which PW.4's wife rushed to the neighbouring house and saw the accused lying in the hall, bleeding. PW4 witnessed the recovery of an empty packet of tablets from the waste bin in the

kitchen. However, the Mahazar, though seen to have been confronted to the witness, was not marked. The material object recovered was also not confronted to the witness for reason of the same having not being returned from the Forensic Science Laboratory (FSL). PW4 in cross examination said that he does not remember from where he signed the mahazar - at the police station or the house itself.

10. PW5 is an auto driver who responded to the summons of a neighbour and took the injured child to the MAGJ Hospital, where the child was declared dead. PW6 is the wife of PW4 and a neighbour whose house is on the backside of the house of the accused. She saw the accused and her son between 10.00 and 11.15 a.m, on their backyard. PW6, her husband and PW7, responded to the screams of PW8, to find the accused lying in the hall, bleeding. PW6 claimed ignorance about the marital life of the accused, but admitted knowledge of PW8 having been admitted to a de-addiction centre. PW7, the wife of PW4, spoke of keeping good relations with the family of the

accused and admitted the drunkenness of the husband who was admitted to a Mental Health Facility; after which there was no such incident. PW7 was sitting in the sit-out of her house at around 8.30 p.m, when PW8 alighted in front of their house from a vehicle and enquired as to why there were no lights in his house. She responded that two or three days back, the accused informed her of plans to go to Chowara. PW8 went to his house, put on the lights; after which PW7 heard him scream, asking her to come running. PW7, along with PW6 and her husband went to PW8's house. PW7, deposed in tandem with PW6, as to what she witnessed in the house. PW7 also said that on 30.4.2016, at 6 a.m, the accused had come to her house. PW7 questioned the accused as to why they returned after the marriage on 25th, she replied that her husband quarrelled with her brother.

11. PW8 is the husband of the accused. He admitted his treatment at a Mental Health Facility and claimed to have given up his drinking habits; one and a half years back. He admitted to have picked up a quarrel, in his

wife's house on the day of the marriage of his brother-in-law and having returned with his wife and son without taking food. He was enraged with his wife for not being supportive and stopped interacting with his wife after the said incident. He deposed that from Wednesday to Saturday he did not talk to his wife and that they were sleeping in separate rooms. On 30.04.2016, he went for work at around 8 a.m and came back by 8 p.m. The front gate was closed and there were no lights in the house. He enquired at the opposite house, to PW7, whether she saw his wife. When she replied that they might have gone to Chowara, he went to his house and found the front door locked. According to him, he took the key, placed in the usual place, to open the door. When he put on the lights, he saw the accused lying in the hall, bleeding. He tried to lift her and not being successful, called PW7, who came along with PW6 and her husband. Together they lifted the accused and placed her in a car. Then PW6 enquired about the boy; in search of whom PW8 went to the room where the child sleeps. Inside

the room he saw the child lying on the cot with blood on the floor. He took the child in his arms and realised that the child is no more. Immediately, himself and the husband of PW6 took the accused to the hospital, from where she was referred to the L.F Hospital. The child was brought by others and his body was kept in the mortuary. PW8 saw the cut on the left hand of the accused but did not notice anything on the child. He deposed that after he came back from the de-addiction centre, his family life was happy. He also deposed about the blade and poison bottle recovered from his house.

12. PW9 to PW12 were witnesses arrayed by the prosecution to prove that the accused was working as a Pharmacist and that she had purchased five Nitrest tablets from the Neethi Medical Stores in which she was working. PW13, PW16 & PW18 proved the purchase of a pesticide bottle named 'Tafgor', by PW8, from the shop of PW13. PW17, Village Officer prepared the site plan and PW19, proved the Ownership Certificate of the Pharmacy building. PW21, Scientific Assistant examined the scene

of occurrence, PW22, CPO collected viscera of the child, handed over to the I.O and released the body to the relatives. PW23 is the CPO, who guarded the place of occurrence and PW24, the S.I who registered FIR. PW25 & PW26 were the Investigating Officers.

13. PW14, is the Chief Medical officer of the MAGJ Hospital, who first examined the accused and also declared the child's death. Ext.P10 is the Wound Certificate of the accused and Ext.P11 that of the child. PW15, the Doctor who conducted post-mortem, marked Ext.P12 Postmortem Certificate and Ext.P13 final opinion as to cause of death. PW20 is the Chief Casualty Medical Officer of L.F. Hospital, who marked Ext.P18 Discharge Certificate of the accused. PW20 was later examined as CW2, at which point Ext.C1 series, treatment records of the accused, was marked. PW2, examined as CW2, was summoned under S.311 Cr.P.C., prior to which CW1, the Consultant Physician of L.F. Hospital was also summoned. The defence examined DW1, the Psychiatrist of L.F. Hospital.

III. *FINDINGS OF THE TRIAL COURT*

14. The trial court found the motive proved since PW8 admitted to have kept aloof from his wife, which could have caused mental trauma inducing a thought to commit suicide; after taking the life of their only son. Based on the post-mortem report it was held that the death by homicide stood proved. The delay in registration of FIR, argued by the defence, was found to have been sufficiently explained by PW24 and even PW1 did not have a dispute with regard to the time of registration of FIR. The evidence of PWs.13, 18, 25 & 26, which remained unchallenged, was held to be sufficient to find the presence of pesticide in the house, which the accused admitted to have consumed.

15. The trial court then considered the allegation raised by the defence against PW8 through the suggestions in cross-examination and the written statement under S.313. It was held that the evidence of PW14, the Doctor who first examined her, was never challenged and the accused was treated by various Doctors, to whom there was

no complaint raised of forceful administration of pesticide. The accused or the mother and brother [PW1], who accompanied the accused at the time of consultation with DW1, did not raise that complaint to DW1. The allegation raised of a quarrel on the afternoon of 30.04.2016; which PW8 allegedly initiated in a drunken state as also the manhandling of the wife and son, was not heard by any of the neighbours examined. PW7 affirmed the return of PW8 in the night around 8.30 p.m. These facts cumulatively falsify the defence case against PW8.

16. The trial court placed faith in PW8's admission that he had stopped consumption of alcohol after his return from the de-addiction centre and also his quarrelsome habits. There were no complaints against PW8 produced and no steps were taken by the family of the accused to conduct further investigation, if at all the accused had told them about the specific incident which happened in the afternoon of 30.04.2016. The conduct of PW8 was unimpeachable and there was only one question put to PW7 about PW8's conduct, after his return from the de-

addiction centre, which was denied by PW7. PW8, it was found, would not have taken the accused to the hospital if he had committed the offence. From the versions of PW7 & PW4, it was categorically held by the trial court that PW8 was not at all involved or responsible for the offences committed by the accused and the evidence led unerringly pins the guilt on the accused.

17. On the evidence against the accused, the trial court found that the purchase of five Nitrest tablets by the accused was proved through PW9 to PW12 and Ext.P7 bills. The different name of the purchaser in Ext.P7(c) bill was held to be inconsequential. Reliance was placed on the recovery under S.27, of an empty strip of tablet from the waste basket in the kitchen. The argument raised by the defence that the entire house was searched by the I.O on the next day of the crime was negatived looking at Ext.P5 scene mahazar and finding that it does not indicate a search made of the kitchen and the work area. The trial court read Ext. P5 to find an opening to the northern courtyard of the house, through which the

accused could have entered the house after locking the front door. The blood stains on the turkey towel, it was held, probabilise the case of smothering of the child, which blood according to the trial court was from the bleeding hand of the accused. The 'last seen together alive theory' was emphasized by the trial court to arrive at the guilt of the accused.

18.The trial court also relied on Ext.C1(k) statement made by the accused to PW20 Doctor, where she had completely exonerated her husband and spoken only about her involvement in the crime. Ext.P18 Discharge Summary also spoke of the innocence of the husband. The treatment records coupled with the evidence of the Doctors were relied on to find that the accused was only drowsy and could very well have made the statement. The trial court also looked at the test results of the vitals of the patient and found that she was in a normal condition. The defects in the treatment sheets regarding the additions made in pen, clearly visible in the copy handed over to the defence counsel, was brushed aside by the trial court

as routine correction of mistakes. Ext.C1(k) statement made to PW20 was found to be an extra-judicial confession. Corroboration to the same was found from the evidence of PW27, the Magistrate, who recorded the dying declaration, Ext.P28. The attending Physician at the L.F Hospital, CW1, deposed to her condition at the time of recording of the statement and the Magistrate spoke of the admissions made by her.

19. The Magistrate had not complied with the requirements under S.164(2)&(4) when Ext.P28 was recorded. It is neither a dying declaration under S.32 or a confession under S.164. But still it is a voluntary statement made by the accused in a fit and conscious state of mind and it was read over to her. At that time the accused was not in police custody; she having been arrested only on 12.05.2016. Based on decisions it was found that S.164 Cr.P.C. comes into play only when the accused is brought to a Magistrate, during an investigation for the purpose of recording confession. Since S.164 does not apply, Ext.P28 recorded by the

Magistrate can be treated as an admission under S.21 of the Evidence Act, was the finding. The contention of the defence that the medical evidence regarding the cause of death does not tally with either Ext.P28 statement or Ext.C1(k) extra-judicial confession was rejected. Though there is no admission of smothering, there could be no proof with mathematical precision or absolute certainty of every act of the accused. On an evaluation of the entire evidence against the accused, coupled with no explanation having been offered by the accused regarding smothering, it was held that *'reasonably, logically and legally'* (sic) it can be presumed that the accused is responsible for the death of her son.

IV. *THE PRELIMINARY ASPECTS:*

20. The FIS by PW1, though reported his sister having killed her son and the attempted suicide; it is just hearsay. He arrived directly at the hospital and in the FIS he does not speak of his sister having told him anything. His specific statement is that he saw his

sister and the Doctor informed him that she had consumed poison and also slit the vein in her hand. At the first instance itself he had spoken of the physical violence to which his sister was subjected to from the time, her son was one year old. It was his inference that probably his sister would have committed suicide after taking the life of her only child, for reason of the husband's harassment being unbearable. It cannot at all be said that the FIS stands against the accused, since PW1 conveyed only what he was told by the persons he found at the hospital and inferred that she would have done it due to her miserable marital life. Suffice it to notice that PW1 had, at the first instance itself, spoken of the sad life of his sister, the accused. We agree with the trial court that the aspect of delay in registering the FIR, raised by the accused is not sustainable.

21. PW4, PW6 & PW7 are the neighbours on whom absolute reliance was placed by the trial court. PW4 went to the hospital on hearing of the mishap and categorically stated that when he saw the accused, she

was unconscious. PW7 rushed to the house of PW8, on hearing his screams, along with PW6 and her husband. She saw the accused lying in the hall and made enquiries about the child. PW8 opened a room and put on the lights, where the child was seen lying dead on the cot. The trial court found motive from the admitted quarrel between the husband and wife and found the general conduct of PW8, as spoken of by the witnesses to be in his favour. PW7 admitted quarrels between the husband and wife, due to the drunkenness of the husband, but after his treatment, he had reformed. PW6 feigned ignorance of the relationship between the husband and wife but was aware of PW8 having been taken to a de-addiction centre. Pertinent is the fact that, when PW8 asserted to have reformed himself, he admits to have quarrelled with his brother-in-law, on the latter's wedding day, the 25th, for reason of the newly-weds having booked a room in a resort. He admitted to have left the home of the in-law's in a huff, along with his wife and child and stopped interaction with his wife after that. PW7 affirmed the

accused having told her about the quarrel, which prompted them to return on the wedding day itself. We are unable to accept the assertion of PW8, of having shed his quarrelsome manner and the husband and wife, obviously did not share a congenial or even a cordial relationship.

22. That PW8 kept aloof from his own family is admitted by himself. He was incensed by the conduct of his brother-in-law on the day of the latter's marriage and he was also infuriated with his wife for having not supported him. We are unable to find unequivocally, that this proves the motive for the murder of the child and the subsequent attempt to suicide. None can ferret out the feelings of a distressed woman and it is difficult to fathom the despair of a woman subjected to constant domestic abuse. But based on such surmises, it would be unfair to find motive of revenge, that too in a case where a beleaguered woman is accused of killing her own child. The said motive could equally be attributed to the domineering husband/father who admittedly was infuriated by the conduct of his wife and her immediate relatives.

PW1 spoke of a long history of physical torture and harassment, his sister was subjected to at the hands of PW8. There is also a history of drunkenness and psychiatric treatment of PW8, coupled with abuse complained of by the accused. We are unable to agree with the trial court that the motive stood established, but there is no rule that without motive there can be no conviction for a criminal offence.

23. As far as the death of the child is concerned, it has been established that it was by homicide. The Doctor who carried out post-mortem examination opines that death was caused by smothering by reason of the injuries seen on the face of the child and the internal signs disclosed on post-mortem examination. The Doctor is categorical in his informed opinion that neither the consumption of poison nor the cutting of the veins on the hand of the child would have led to the death of the child. Immediately we have to notice that the accused-mother; even if the extra-judicial confession or the statement under S.164 are admissible, does not

speak of a smothering. Definitely there can be no inference drawn that the mother who fed sleeping pills and cut the veins of her child would ensure death by smothering. The trial court's statement that the blood on the turkey towel would be that of the mother; is not supported by the FSL report Ext. P30. We do not see the turkey towel, even send to or received at the FSL. Further, even the so called admissions speak only of having dealt with the child and then consumed poison and slit her own veins in the next room. We say this without having looked into the extra-judicial confession or the admissions made by the accused to the Magistrate, the efficacy of which will have to be examined independently.

24. Before that, we have to look at the evidence proffered by the prosecution from the time when the mother and child were found bleeding and the mother, rushed to a hospital first. PW14 is the Doctor, who first saw the accused in MAGJ Hospital, who issued Ext.P10 wound certificate. In Ext.P10, after recording the history, of having been brought to Casualty in a

semi-conscious state with cut injury to wrist and consumption of pesticides, it is written so: "*Pt. admitted to consumption of pesticide after persistent questioning*". Due to breathing difficulties, the patient was referred to L.F Hospital. PW14 deposed that the patient was semi conscious and responding to questions. The child was brought to the same Hospital, where he was declared dead which certificate is marked as Ext.P11. Here, we cannot but notice that PW8 though admits to have found the child in another room, does not take him to the hospital in the same car in which the accused was taken. PW8 discerned death, when he took the child, in his arms and left the child unattended; which in itself is a very suspicious circumstance. The child was taken in PW5's auto-rickshaw at the request of a neighbour.

V. THE EXTRA-JUDICIAL CONFESSION:

25. Now we come to the extra judicial confession as relied on by the Court; but pertinently the prosecution never had such a case. PW20 is said to be the Chief Casualty Medical Officer of L.F Hospital. When he was

first examined, on the side of the prosecution, his evidence was that at 9.10 p.m on 30.04.2016, the accused was brought to L.F Hospital, with the allegation of a suicide attempt; consumption of pesticide and slashing of right wrist with a razor blade, at 12 noon, due to depression. She is also alleged to have said that her husband was not involved. He produced Ext.P18 Certificate issued by him at the time of discharge, on 12.05.2016. The Discharge Certificate reads so:

> **Referred from MAGJ_Mookannur,H/o consuming Pesticide at 12 noon.30.04.16 and slashing her Rt Wrist E a Razor Blade due to depression** ***and there is no involvement of her husband in this act***
> **12 Noon**

The portion in italics is in a different hand and clearly an interpolation; for the person who wrote the earlier recital had recorded the time '12 Noon' immediately after the earlier recital, which necessitated the interpolation to be completed at the end of the next line. PW20 admitted that Dr.Thomas Raju had treated the patient. He deposed that the recital in Ext.P18 was told to him by the patient herself. The evidence at the first stage was

confined to the above and there was nothing about any injury having been inflicted on the child or the child administered with sleeping pills. There was also no whisper about a statement having been recorded.

26. At the second stage when PW2 was examined as CW2, he produced the case sheet, as summoned by the Court. The extra judicial confession is found in page 11 of the case sheet which reads as under:

> ***33 year old female Mrs.Teena Baiju was brought to the E.R as referred case from MAGJ Hospital Mookkannoor with an alleged history of suicide attempt by consumption of PESTICIDE(DIMETHOATE 30% EC) and slashing her wrist at around 12.00 pm 30/04/2016 Mrs.Teena also has slashed the wrist of her 8 year old son (L.Wrist) after giving 5 tablets of Nitrest 10 mg which she got from her work place Neethi Medical Store; Karukutty. She has been working there for the past 2 months. She is a Pharmacist that graduated from Amrita Institute. The reason stated by Mrs.Teena for attempting suicide is that her husband is not speaking to her and their child for the past 4 day. Moreover he does not have food too. According to her the plan to suicide was formulated by her son and her 2 days Back and it is with her son's consent that she slashed his left Wrist using a Razor Blade.***
> ***She claims that her husband has no influence over her attempted suicide.***

This statement recorded in Ext.C1 case sheet, was marked

as Ext.C1(k).

27. We have examined the case sheet in the light of the arguments raised by the learned counsel for the appellant/accused. Page 7 is the admission/discharge record wherein both the date and time of the admission and discharge are shown. The trial court found that entries will be made at the time of admission and discharge; without the Doctor having so stated. It is in page 7 that the name of PW20 is entered in ink; where there is no requirement so to do. Further two signatures are put by the very same Doctor in page 11; without any requirement so to do. The Admission Discharge Record has six columns from top to bottom; wherein - 'Provisional Admission Diagnosis', 'Final Diagnosis' 'Operative Procedures', 'Result', 'Cause of Death' and the 'Name and Sign of the Nurse in Charge and the Consultant' are to be respectively recorded. Looking at the Admission-Discharge Record at page 7, we find no necessity for recording the name of the Doctor or putting the signatures at the place where it appears. Yet again there are two sets of

handwritings seen in the said sheet one recording the aspects in capitals and the other in running hand; the latter being that of PW20, who made the obvious interpolation of his name and quite probably interpolated the recitals in the running hand afterwards, before the photocopy produced before Court was taken. Those in capitals was entered by someone, (for) Dr. Thomas Raj Paul, the attending Consultant. The Admission-Discharge Record has been signed, at the bottom, in the appropriate column, (for) Dr.Thomas Raju Paul, who was the Consultant Physician who treated the accused; admitted by PW20.

28. The Admission-Discharge Record, obviously is one issued at the time of Discharge since it also records the date of discharge and result of treatment; the required details being copied from the case sheet. Moreover at page 9 is seen the 'Emergency: Initial Assessment Sheet' which is prepared on admission. Though PW20 says that he was the Chief Casualty Medical Officer, there is no endorsement made by PW20, in page 9 which records the alleged cause of injury as attempted suicide

and the date and time as 30.4.2016, 9.10 p.m. The complaint and history, as also the findings have been recorded and so were the vitals taken and results recorded in page 9. The Doctor in attendance, Dr. Denim Edger, MBBS, Medical Officer, signed on the first page of page 9 and also overleaf, with his seal; both at the bottom of the page. Coming to page 10, it is the 'Prescription and Administration Record', which on the overleaf indicates that one Dr.Shiva saw the patient and advised admission and the patient was handed over to MICU. It is after this that the statement in page 11 has been recorded, which going by PW20's testimony was recorded in the Casualty, before the handing over to MICU. In page 11, the date now seen is 30.4.2016, with '0' interpolated in ink; even in the photocopy available with the defence Counsel. There is nothing to indicate PW20 having seen the patient, on admission.

29. Here, we have to notice that even according to the learned Sessions Judge, when PW2 was summoned, he came with the original case sheet and a photocopy. The

photocopy, going by the impugned judgment itself, was '*mistakenly handed over to the counsel for the defence, rather than the Prosecutor*'(sic). The learned counsel for the appellant, who appeared in the trial court too, asserts that when the Doctor produced the case sheet, he insisted for a copy and the Court handed over the photo copy, produced by the Doctor, to the defence counsel. While cross examining, the defence counsel pointed out that in page 7, the name of PW20 was entered in ink, in the copy. So was a '0' interpolated in ink after the figure '3' in the date shown in page 11 as '3.04.2016'. The copies before us, however does not indicate this because even according to the trial court, there were further copies taken for supplying to the Prosecutor from the original produced. On being shown the copy by the learned Counsel for the appellant, we requested him to hand over the same and in the presence of both Counsels handed it over to the Registry for safe keeping in a sealed cover, signed by both of us. The said sealed cover was opened when we examined the Doctor and we again

sealed it, which is marked as court exhibit Ext. X2.

30. We summoned PW20 before us and examined him. He admitted to have put the name in ink in the original and the photocopy prior to production before the trial court. As to the interpolation of '0' in the date shown on page 11, he feigned ignorance and opined that it would have been put by the Record Section. He explained the name having been interpolated as a mere filling up of the vacant column. As we noticed, there is no column for writing the name of the Doctor, where it is written. Hence, it is very clear that the name of the Doctor in page 7 was not available in the case sheet, which indicated only the name of Dr. Thomas Raju Paul. PW20 stated before the trial court also that prior to submission to court, he had written his name both on the original case sheet and on the photocopy brought by him to court; a clear admission of the interpolation. He claims ignorance about the interpolation of zero in page 11, but admits that it would have been done before production before court. The interpolation made in page

7, of the name of PW20, indicates a deliberate attempt to establish before court that, in fact PW20 had seen the patient and also recorded the statement at page 11. More curious is the fact that the initial assessment sheet does not indicate PW20's presence at page 9 or at page 10. The patient was examined by Dr. Denim Edger and then Dr. Shiva and on the latter's advise she was handed over to MICU. Quite possibly the recitals in the running hand and the two signatures in the original were also put by PW20, just before the photo copy produced by him, was taken.

31. We agree with the learned counsel for the appellant that after the patient was handed over to MICU, there could not have been a statement recorded as seen from page 11, in the presence of PW20, who is the Chief Casualty Medical Officer. More suspicious is the factum of the interpolations made of the name and the date. The statement recorded is also so lucid and complete making it artificial and impossible of being spoken of by a person, who on examination was found to be "*drowsy,*

obeying commands, pupils constricted". **Only a conscious and oriented person would be able to give such a statement, which obviously the patient was not, at the time of admission. The trial court ought not to have entered a finding based merely on the test results of the vitals, that the patient would have been fit to make such a statement; which expertise Judges, irrespective of hierarchy, lack.**

32. PW14, the Doctor who examined the accused first at MAGJ hospital deposed that she was semi-conscious and PW4 who saw her there, also deposed that she was unconscious. The initial impression of Dr. Denim Edger in page 9 of Ext.C1 is also that the patient was drowsy, belying as very unlikely the lucid statements of the patient about the history of occurrence and her own antecedents as found in Ext. C1(k). Further suspicion wells up in our minds for reason of the Doctor having not stated any of this, when he was examined as PW20. There is nothing about the child, in the 'Discharge Certificate for Medico-legal Cases' at Ext.P18. At the first

instance, we reiterate, PW20's only statement was that the patient had consumed poison and had slashed her wrist. There was no reference to the child or the alleged acts to which he was subjected. One other relevant aspect is that PW20 admits that the statement (extra-judicial confession) in page 11 was taken down by a junior doctor, who was not examined. There is nothing produced by the prosecution to prove that PW20 was present at the time the admission was made. Definitely the Casualty Medical Officer is not on duty 24/7. His presence is not seen from the case sheet and there is a will-full attempt to interpolate his name in the case sheet and the copy, before production before Court. The recitals are in different handwritings and the signatures too appear in places where they are not required and could have been put later on; but before the photo copy was taken. Even in Ext.P18 the recitals of the innocence of the husband is an interpolation. The witness is unreliable and cannot be believed.

33. The totality of the above circumstances commend us to reject the statement Ext.C1(k) in the case sheet as

concocted and unbelievable. *Sahadevan v. State of T.N., [(2012) 6 SCC 403]*, at page 410 held so :

> ***14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.***

We cannot but find that there is an inherent improbability in the accused, who was drowsy from the poison imbibed and loss of blood from the slit on her wrist, making such a statement. There are also material discrepancies in the narration about the recording of the statement, the doubts about the presence of PW20 accentuated by tampering of the case sheet, the non-examination of the scribe, the absence of such confessions in Ext. P18, the interpolation regarding the

innocence of the husband in Ext. P18 issued by PW20 himself and the failure of PW20 to speak of it at the first instance when he was examined in Court. Above all, the prosecution never projected the case of an extra-judicial confession.

VI. *Section 311:*

34. It is in this context we examine whether there was over zealousness on the part of the court, in summoning the witness for re-examination under S.311 Cr.P.C, when there was no such prayer by the prosecution. We looked at the proceedings sheet, which indicates the trial having commenced on 14.08.2019 with the examination of PW1. Evidence was closed on 31.10.2019 and the accused was questioned under Section 313 Cr.P.C on 29.11.2019. An application filed under Section 232 Cr.P.C was heard and rejected on 07.12.2019. On 26.12.2019, the defence submitted that there is no evidence from their part. After various postings, on 20.02.2020, the matter was heard in part and on 24.02.2020, the court *suo motu* found that the Doctor who

gave the certification in Ext.P28, is a material witness and issued summons. The said Doctor was examined as CW1 on 12.03.2020. Without anything further, the Court again *suo motu*, issued summons to PW20 for production of case sheet and for evidence, for the just decision of the case, without assigning any reason or recording a satisfaction as to how the production of the case sheet or the re-examination of the witness would enable a just decision in the case.

35. Here, we have to examine the power under S. 311 Cr.P.C, which the Hon'ble Supreme Court held is so wide that it obliges the Courts to be very responsible while invoking the same. *Natasha Singh v. CBI, [(2013) 5 SCC 741]* was concerned with an application made by one of the accused under S.311. The Court directed a brief summary of the nature of the evidence, be provided, based on which the application was rejected. It was held that the Court at the stage of consideration of an application under S.311 cannot weigh the evidence and analyse it and what is required is only a satisfaction that the evidence

would facilitate a just decision in the case. The request for summoning a handwriting expert was rejected on the ground that it would not be conclusive; which was held to be not proper. The principles were laid down as below:

> ***15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells***

> ***out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.***

36. Mannan Shaikh v. State of W.B [(2014) 13 SCC 591 **was a case in which the prosecution failed to bring on record a statement purportedly taken from the deceased despite the I.O having deposed before Court that such a statement was taken. An application to recall the I.O was rejected by the trial court holding that it would merely allow the prosecution to fill up a lacuna; which the High Court reversed on the premise that no advantage can flow to the accused from an obvious mistake of the prosecution. While upholding the order of the High Court as one eminently justified in the pursuit of truth, which every Court is engaged in; the following caution was expressed:**

12. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the section uses the word "shall". It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words "essential to the just decision of the case" are the keywords. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be guided only by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill up the lacuna. Whether recall of a witness is for filling up of a lacuna or it is for just decision of a case depends on the facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill up a lacuna because the line of demarcation is thin. It is for the court to consider all the

circumstances and decide whether the prayer for recall is genuine.

37. With the above principles in mind we look at the manner in which the power under S.311 was invoked by the Sessions Court. As we noticed from the proceedings sheet, after conclusion of evidence and the hearing having proceeded with on 20.02.2020 and 24.02.2020, it was posted for further hearing to 28.02.2020. On 28.02.2020, the Doctor, who certified Ext.P28 was *suo motu* summoned for examination for the just decision of the case. The Doctor was then examined as CW1 on 12.03.2020, who spoke about the condition of the accused at the time when the statement was recorded by the Magistrate. Again without any application by the prosecution or even an oral request by them and without any perceivable reason being recorded, PW20 was summoned to produce the case sheet. We cannot but observe that it would have been appropriate that the mind of the Court was made clear to both the Prosecutor and the Counsel appearing for the defence, their views heard and then the satisfaction recorded with sufficient reasons.

38. The witness was summoned to produce the case sheet and give evidence 'for the just decision of the case' (sic). The principles propounded by the Hon'ble Supreme Court, we are sure, does not merely mandate a hollow reiteration of the words employed in the provision: 'for a just decision of the case'. There should be strong and valid reasons recorded, however brief, as to the exercise of that power, facilitating a just decision. In fact when CW1 was summoned, it was briefly noticed that he was the Doctor who gave the certification in Ext.P28 of competence of the patient to make a statement to the Magistrate; quite justified. That is a strong and valid reason and the *suo motu* power exercised under S.311 was proper in so far as the summons issued to CW1. The satisfaction of the recall of PW20, for enabling a just decision is totally absent. It has been famously said that greater the power; higher is the degree of responsibility. On the above reasoning we find the invocation of the power to be bad, the testimony of the Doctor as CW1 to be a gross embellishment of what he

stated as PW20 and also eschew the statement said to have been made by the patient; as not worthy of any credence.

VII. *Statement to the Magistrate:*

39. Now we come to Ext.P28 and the issue as to whether it is a dying declaration or a confession or an admission or a mere statement under S.164. It cannot certainly be all of these, since there are definite contours within which each of these terms are defined; statutorily and judicially. As far as dying declarations are concerned the distinction in evaluation under the English Law and the Indian Law as also the underlying principles are succinctly stated by the Hon'ble Supreme Court in *Kishan Lal* (supra). Paragraph 18 is extracted here under:

> ***"18. Now we proceed to examine the principle of evaluation of any dying declaration. There is a distinction between the evaluation of a dying declaration under the English law and that under the Indian law. Under the English law, credence and the relevancy of a dying declaration is only when a person making such a statement is in a hopeless condition and expecting an imminent death. So under the English law, for its admissibility, the declarant should have been in actual danger of***

> ***death at the time when they are made, and that he should have had a full apprehension of this danger and the death should have ensued. Under the Indian law the dying declaration is relevant whether the person who makes it was or was not under expectation of death at the time of declaration. Dying declaration is admissible not only in the case of homicide but also in civil suits. Under the English law, the admissibility rests on the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath. The general principle on which this species of evidence are admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak only the truth. If evidence in a case reveals that the declarant has reached this state while making a declaration then within the sphere of the Indian law, while testing the credibility of such dying declaration weightage can be given. Of course depending on other relevant facts and circumstances of the case".***

40. In the cited case the dying declaration was disbelieved for reason of it having been given two months after the alleged incident, at which time the deceased was not expecting imminent death, the real cause of death being in conflict with that stated and the disparity between two dying declarations. In the present case also

we notice that the declarant was not, at the time of giving the statement, having any fear of imminent death. CW1, the Doctor who certified that she was fit to give the statement and well oriented also stated in his deposition that 'she was not in a critical stage'. In Ext.P28, the 11th question asked by the Magistrate to the declarant was whether the declarant feels that her condition is critical. The declarant clearly responded that she does not feel that her present condition is critical. She also volunteered that yesterday she was not able to move her hands and legs and today there is only pain. Hence clearly the declarant was not under fear of death; which as per the cited decision is not imperative, but all the same has a marginal relevance when compared with the other circumstances.

41. S.32(1) of the Evidence Act makes, *inter alia*, a written statement of a person who is dead or cannot be found, to be relevant, when it relates to cause of death; in cases where the statement is made by a person as to the cause of his/her death or the circumstances of the

transaction resulting in his/her death, when the cause of his/her death comes into question. In the present case the declarant is alive and was also not under any fear of imminent death at the time the statement was given. The statements made regarding the cause of injuries inflicted on the child, oneself and the poisonous substance imbibed voluntarily are confessions of a crime which do not fall under the definition of a dying declaration under S.32 of the Evidence Act and is inadmissible under Article 20(3); unless it is recorded following the procedure mandated under sub-sections (2) to (4) of Section 164.

42. *Gentela Vijayavardhan Rao v. State of A.P. (1996) 6 SCC 241* was a case in which two victims, whose dying declarations were recorded survived and it was held so:

> ***"17. Though the statement given to a magistrate by someone under expectation of death ceases to have evidentiary value under Section 32 of the Evidence Act if the maker thereof did not die, such a statement has, nevertheless, some utility in trials. It can be used to corroborate this testimony in court under Section 157 of the Evidence Act which permits such use, being a***

> ***statement made by the witness "before any authority legally competent to investigate". The word 'investigate' has been used in the section in a broader sense. Similarly the words "legally competent" denote a person vested with the authority by law to collect facts. A magistrate is legally competent to record dying declaration "in the course of an investigation" as provided in Chapter XII of the Code of Criminal Procedure, 1973. The contours provided in Section 164(1) would cover such a statement also. Vide Maqsoodan v. State of U.P. (1983) 1 SCC 218. However, such a statement, so long as its maker remains alive, cannot be used as substantive evidence. Its user is limited to corroboration or contradiction of the testimony of its maker".***

43. In the circumstance of the declarant surviving, the dying declaration recorded by a Magistrate cannot have evidentiary value under S. 32 nor can it be termed *res gestae* under S. 6 of the Evidence Act, if there is an interval; however slight it be, held the Hon'ble Supreme Court. *Sunil Kumar v State of M.P [(1997) 10 SCC 570]* also held that a statement recorded as a dying declaration can be used as one under Section 164, for the purpose of contradicting and corroborating the declarant if he survives. *State of U.P. v. Veer Singh, [(2004) 10 SCC 117* / followed the cited decisions to hold so:

> ***"5. It is trite law that when the maker of a purported dying declaration survives, the same is not statement under Section 32 of the Indian Evidence Act, 1872 (for short "the Evidence Act") but is a statement in terms of Section 164 of the Code. It can be used under Section 157 of the Evidence Act for the purpose of corroboration and under Section 155 for the purpose of contradiction. … ".***

Needless to say, for corroboration or for contradiction the declarant or the author of the statement has to be examined as a witness *Baij Nath Sah v. State of Bihar [(2010)6 SCC 736*]. Ext. P28 is not a dying declaration, as found by the trial court.

44. Now we come to the question whether the statement under S.164 with respect to the injuries caused on the child can be relied on, as a confession, to find the guilt of the accused who is the declarant. The accused has retracted from the confession in the S.313 questioning. Even a retracted confession is admissible, but the rule of prudence is that it cannot solely be relied on to convict without substantial and independent corroboration. S.164 enables recording of confessions and statements by a Magistrate whether or not he has

jurisdiction in the case, in the course of an investigation or at any time afterwards before the commencement of the enquiry or trial. Sub Section (2) to (4) of S.164 clearly mandates the procedure for recording a confession which is mandatory, for the Courts to accept it in the trial of the declarant or any of his co-accused.

45. *Shivappa* (supra) while holding that a confession is an efficacious proof of guilt, emphasised the need to examine whether it was voluntary, true and trust worthy. It was held so on the various mandates in recording of confession as extracted here under:

> ***"6. From the plain language of Section 164 CrPC and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164 CrPC, it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 CrPC. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same.***

Full and adequate compliance not merely in form but in essence with the provisions of Section 164 CrPC and the rules framed by the High Court is imperative and its non-compliance goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of sub-section (2) of Section 164 namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody".

46. The procedure to be followed by a Magistrate in recording confessions is clearly spelt out in The Criminal Rules of Practise, 1982; made by the High Court of Kerala. Chapter X is dedicated to 'Recording of Confessions'; Rules 70 & 71. *Inter alia* it requires the Magistrate, to record reasons for believing that the statement is voluntary after having explained to the accused that there is no obligation on him to answer any questions and warning the accused that it may be used against him. If necessary, under Rule 3(c), the Magistrate has to ask whether the statement to be made is induced by ill-treatment and if so by whom. This especially assumes relevance in the setting from which the accused comes; ie: from a circumstance of a battered domestic life. True the patient from whom the statement was recorded was not in police custody but an investigation was commenced on an FIR, in which the patient was arrayed as the accused. The Magistrate was brought to the Hospital, also at the instance of the Police. Rule 70 (4) also mandates that the accused be

given a few hours for reflection, which was possible since the accused was not in any critical state; affirmed by the Doctor.

47. ***Parmanand Pegu*** **(supra) was another case in which the statement under S.164 was disbelieved by Court. Sub Sections (2) to (4) of S.164 and the procedural requirements there under were held to be salutary safeguards to ensure that a confession is made voluntarily by the accused after being appraised of the implications of making such a confession. The need to appraise the declarant of such a statement being used against him/her and the necessity to afford time for reflection, were specifically stressed upon. Even when the statutory procedural requirements are complied with, it was held that the Court called upon to consider such evidence should still examine whether there are any circumstances appearing from the record which may cast a doubt on the voluntary nature of the confession and that the accused was free from threat duress or inducement.**

48. As has already been held by us, the declaration made by the accused cannot be brought under the definition of a dying declaration. The statement obviously was attempted to be recorded by the police through a Magistrate as an abundant caution since the child died and the mother perceivably had attempted suicide. We once again look at *Shivappa* (supra) and extract hereunder Paragraph 7:

> ***"7. The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a 'voluntary' statement within the meaning of the provisions of Section 164 CrPC and the rules framed by the High Court for the guidance of the subordinate courts. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with".***

49. The Magistrate is not merely acting as a scribe. It is the status as a Judicial Officer, well versed in law, which motivated the Legislators to treat the statement recorded under S.164 at a higher plane than those recorded by the police under S.161, which would also inspire the Court analysing the evidence. The moment, a dying declaration transforms itself into a confession, with the possibility of the declarant being accused of the offence itself, it is incumbent upon the Magistrate to pause and comply with the salutary statutory procedure prescribed under sub-sections (2) to (4) of S.164. If we look at the statement recorded and the clear expression of opinion of the Doctor that she is not in a critical stage; when statements were made inculpating herself of a homicide, the Judicial Officer ought to have cautioned her of the implications of the further statements. The Judicial Officer definitely was aware of the implications, also when the patient's condition was not critical, as opined by herself. The Magistrate ought to have cautioned her and given her time

for reflection and complied with sub-sections (2) to (4) of S.164 in its letter and spirit.

50. Sarwan Singh v. State of Punjab [AIR 1957 SC 637] **held that while recording a confession, after the initial cautioning, Magistrate should at least grant 24 hrs. to the accused to consider whether the confession should be made. *Shankariya v. State of Rajastan [(1978) 3 SCC 435]* found that there is no statutory provision that the accused should be given 24 hrs. for reflection and that the time would depend upon the circumstances of each case. In that case though only 15 to 20 minutes were granted for reflection, the accused was in judicial custody for more than 30 hrs, free from fear or influence by the Police. However, it was stressed that the Magistrate should be satisfied that confession is voluntary. The said view was reiterated in *Bhagwan Singh v. State of Madhya Pradesh [(2003) 3 SCC 21]*.In *State of Rajastan v. Ajit Singh [(2008)1 SCC 601]* the time granted of 15 to 30 minutes for reflection was found to be insufficient. *State [NCT of Delhi] v. Navjot Sandhu @***

Afsan Guru [(2005) 11 SCC 600] **also found 5 to 10 minutes insufficient. No such compliance, even as a formality, has been carried out in the present case, which makes the declaration inadmissible in evidence as a confession.**

51. Lord Atkin's definition of the expression 'confession' in *Pakala Narayana Swami* v. *Emperor (AIR 1939 PC 47)* was as follows:

> ***"confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession…."***

If the admission is sufficient to prove the guilt of the maker, then it is a confession, the recording of which has to strictly follow the formalities as prescribed under S.164 (2) to (4). Ext.P28 conclusively incriminates the accused and the statutory mandate had to be followed; failing which it is not admissible as a confession of the accused, worthy to find the guilt of the accused. *Kashmira Singh v. State of Madhya Pradesh [AIR 1952 SC 159]* held that a confession is admissible without examining the Magistrate, who recorded it, but if it is

not in conformity with law, even the examination of the Magistrate will not cure the illegality. The trial court also has not relied on Ext.P28 as a confession.

52. The trial court has relied on S.21 of the Evidence Act to find relevant, the statement under S.164 made to the Magistrate. Admissions and confessions are dealt with under S.17 to S.31 under a separate nominal heading of 'Admissions' under Chapter II of the Evidence Act. It is trite that 'Admissions' is the genus and 'Confessions', the specie. In the book, '*An Introduction To The Indian Evidence Act, The Principles Of Judicial Evidence*' by James Fitzjames Stephen, in its IInd Impression at page 170 & 171 it is so stated:

> *"i. The general rule with regard to admissions, which are defined to mean all that the parties or their representatives in certain degrees say about the matter in dispute, or facts relevant thereto, is that they may be proved as against those who made them, but not in their favour. …*
>
> *ii. Admissions in reference to crimes are usually called confessions. I may observe upon the provisions relating to them that sections.25,26 & 27 were transferred to Evidence verbatim from the Code of Criminal Procedure, Act XXV of 1861. They differ widely from the law of England and were inserted in the Act of 1861*

> ***in order to prevent the practice of torture by the Police for the purpose of extracting confessions from persons in their custody."***

This does not, as already held, digress from the fact that any confession recorded by a Magistrate from a person who is not accused in a crime, can be without following the procedure prescribed under sub-sections (2) to (4) of Section 164.

53. ***Gulam Hussain v. State [1949 SCC Online VC 67]*** **was quoted by the trial court but misread in our humble opinion. That was a case in which one among the accused; all of whom were charged with rape, wished to make a confession and was taken before a Magistrate. After the required formalities, the statement made was exculpatory and did not amount to a confession. The statement made constituted an admission that on the day of the crime he came to the house of the prosecutrix and acted as a watchman at the gate. While accepting the view, that a statement made by a witness under S.164 could not be used against the accused, as substantive evidence; a statement under S.164, which does not amount**

to a confession, it was held, can be used against the maker, as an admission within the purview of S's.18 to 21 of the Evidence Act. Under S.164 a Judicial Magistrate may record a confession, but there is a clear distinction between Admission and Confession as has been held in *Navjot Sandhu @ Afsan Guru* (supra). It was held by their Lordships that *'every confession must necessarily be an admission, but every admission cannot necessarily amount to a confession'* (sic).

54. *Harjagdev Singh* (supra), also relied on by the trial court, was another case in which the principles were reconsidered and the recording of confession declared to be a solemn act in discharge of the duties of a Magistrate. The quotation from the cited decision: *'Extra-judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code or a Magistrate so empowered but*

receiving the confession at a stage when Section 164 of the Code does not apply.' (sic) **was wrongly applied by the trial court. It is applicable in circumstances where the Magistrate acts in a private capacity as a relative, an invitee to a function or so on. Here the Magistrate was brought by the I.O itself and it cannot be said that he was acting in a private/personal capacity. The Magistrate was summoned to take the dying declaration on the requisition of the S.I of Police, Angamally in Crime No. 901/2016 under Section 302 & 309 IPC, as seen from the first recital in Ext. P28. Ext. P20 is the FIR which shows the accused as the appellant herein. In the case of a confession made to a police officer, interpreting Section 25 and the words employed, it was held in** ***Aghnoo Nagesia v. State of Bihar, (1966) 1 SCR 134*** **that** ***'The expression '"accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession'*** **(sic). The words employed in Section 164, with reference to a confession is 'any person' and there is not even a**

requirement that the person should be an accused.

55. The trial court brushed aside the reliance placed on *Parmanand Pegu* (supra) and *Kishanlal* (supra); according to us erroneously and without carefully scanning the decisions. It was found that there, the confession was of strangulation while the death was of head injury; which facts were of *Parmanand Pegu* (supra). In *Kishanlal (supra)* the confession was of burning, while the death was due to heart ailments. Likewise; even if the admissions herein are accepted it does not reveal the cause of death, which is strangulation. We are also of the opinion that Ext. P28 cannot be accepted under S.21 of the Evidence Act since it is a clearly inculpatory statement falling under the *specie* of confession; which we already held has to be eschewed. *Ammini*(supra) and the declaration made therein is specifically under S.10 of the Evidence Act, which provides that where there is reasonable ground to believe that there is a conspiracy to commit an offence, anything said done or written by any one of the conspirators, with reference to the common

intention, after the intention was first entertained by any one of them is a relevant fact as against each of the conspirators and can be utilized for the purpose of proving the existence of a conspiracy and the participation of that person in the conspiracy. This has no application to the present case.

56. Yet again, admissions have to be proved and once Ext.P28 is neither a dying declaration or a confession then it has the status of a S.164 statement, which can be used for contradiction under S.145 or corroboration under S. 157. *Bandlamuddi Atchuta Ramaiah v. State of A.P., [(1996) 11 SCC 133]* noticed the following decisions. *Nisar Ali v. State of U.P.[1957 SCR 657]*, a three-Judge Bench decision observed that: *"A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 157, Evidence Act, or to contradict it under Section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or*

contradict other witnesses. In this case, therefore, it is not evidence." **(supra)** ***Faddi v. State of M.P. [(1964) 6 SCR 312]*** **struck a slightly different note and stated that** ***'if the FIR given by the accused contains any admission as defined in Section 17 of the Evidence Act there is no bar in using such an admission against the maker thereof as permitted under Section 21 of the Act, provided such admission is not inculpatory in character.' (sic).*** **A caution was struck by a three Judge Bench of the Hon'ble Supreme Court** ***in Aghnoo Nagesia (supra)*** **that when the statement in the FIR given by an accused contains incriminating materials and it is difficult to sift the exculpatory portion there from, the whole of it must be excluded from evidence.** ***Bandlamuddi Atchuta Ramaiah (supra) then*** **held:**

> ***"17. The legal position, therefore, is this: A statement contained in the FIR furnished by one of the accused in the case cannot, in any manner, be used against another accused. Even as against the accused who made it, the statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it is as an admission under***

> ***Section 21 of the Evidence Act against its maker alone unless the admission does not amount to confession".***

Sita Ram Bhau Patil v. Ramchandra Nago Patil, [(1977) 2 SCC 49] **held** ***: 'It, therefore, follows that admission is relevant and it has to be proved before it becomes evidence." (sic);*** **which is the general purport of S. 21 too. Ext.P28 qualifies neither as a dying declaration nor a confession nor an admission and fails to even serve the purpose of a plain and simple prior statement; under S.164, enabling contradiction or corroboration; since here the accused has made the statement.**

VIII. *THE CHAIN OF CIRCUMSTANCES:*

57. We have expressed our inability to accept the extra judicial confession, the accused is said to have made to PW20, Doctor and have also eschewed from our consideration Ext.P28; either as a dying declaration under S. 32 or a confession as required to be made under sub-sections (2) to (4) of Section 164 or an admission under Section 21. Though a statement under S.164, it

cannot be used either for corroboration or contradiction. The prosecution has then relied on the last seen together theory, of a neighbour, PW6, having seen the mother and child together in the backyard of their house. The learned Prosecutor relied on S.106 of the Evidence Act and the lack of explanation by the mother with reliance placed before us, on, *Trimukh Maroti Kirkan v. State of Maharashtra, [(2006) 10 SCC 681]* which held :

> ***"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of H.P. (1972) 2 SCC 80. … xxx".***

It is only one circumstance and would not suffice to hold the accused guilty if it is the only circumstance. In *Arjun Marik v. State of Bihar[(1994) 2 SCC 372]* though the accused were last seen together with the deceased,

having stayed together for the night in another persons house, it was observed :

> ***"31. … it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record [a] finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction, on that basis alone, can be founded."***

Sahadevan v. State of T.N., [(2012) 6 SCC 403] **followed** ***Arjun Marik*** **(supra) to hold** ***:***

> ***"The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and the deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt".***

58. Even otherwise, admittedly the mother and child were together in the house and PW8 also had access to the house. According to PW8, he had gone for work in the morning and returned only at 8.30 p.m; his return having been vouched by another neighbour, PW7. But the fact remains that the house was locked and the key was kept '*in the usual place*', using which the husband entered the house. The wife, the accused has a case that

the husband had returned in the afternoon and had physically assaulted her and their child. The prosecution has not attempted to establish that the husband was employed throughout the day, which they could have easily done by examining the employer. In failing to have, so established the fact of the husband being elsewhere, specifically in his work place, the prosecution has failed to exclude every possible hypothesis other than the guilt of the accused as has been held in *Sharad Birdi Chand Sarda V. State of Maharashtra [*(1984) 4 SCC 116)]. We notice that the trial court had considered it possible that the accused locked the front door, kept the key outside and entered the house through the back door. This could equally apply to the husband or a third party, who could have committed the act and left the house locked. PW8 also is said to have arrived at 8.30 p.m and enquired to his neighbour as to why there were no lights in his house, possibly to establish an alibi; of not having been inside the house, especially in the context of PW8 having admitted to strained relationship with his wife, for the

last few days. The last seen together theory does not impress us since the key of the house was kept outside and anybody could have accessed the house.

59. The attempt to take aid of S. 106 also fails to impress us. Suffice it to notice *State of W.B. v. Mir Mohammad Omar, [(2000) 8 SCC 382]*, at page 393 :

> ***"38. Vivian Bose, J., had observed that Section 106 of the Evidence Act 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. In Shambhu Nath Mehra v. State of Ajmer 1956 SCR 199 the learned Judge has stated the legal principle 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."***

The accused was found unconscious at night, in the house in which herself, her husband and the child were residing. The mother and child were seen in the morning between 10 and 11 and the house was locked from outside with the key kept outside. There is no warrant at all for finding a lack of explanation to be an incriminating circumstance; not to mention the allegation of assault by the husband inside the house, as later spoken of by the accused.

60. The next circumstance relied on by the prosecution is the recovery of the empty strip of Nitrest 10 mg from the waste basket found in the kitchen of the house of occurrence. PW4 was the witness to the recovery, through whom the recovery mahazar was not marked, though confronted. In any event, PW4 does not say that he saw the accused handing over the empty strip of medicine to the I.O, nor does he remember from where he signed the mahazar. The mahazar is seen at Ext.P6, which is dated 12.05.2016. The evidence of PW25 speaks of the recovery made as per Ext.P6 under Ext.P6(a) disclosure. As pointed

out by the learned counsel for the appellant, the said object was not seen on the day when the inquest was prepared and Ext.P5 scene mahazar was recorded. Interestingly, Ext.P6 specifically speaks of the strip recovered of 5 tablets containing 5 perforations with half a tablet remaining in the empty strip. We pause here, a moment, to point out that the statement and declaration allegedly made by the accused speaks of she having administered 5 tablets to the child; which is belied by the half tablet remaining in the strip. Again, this half tablet was not noticed in the property list submitted before Court at Ext.P24 nor was it detected at the time of receipt or examination at the FSL as evident from Ext.P29 Certificate. More intriguingly, Ext.P24 is the property list, by which the empty strip was produced before the Magistrate; which does not contain any date. The same has been received by the Magistrate on 06.08.2016, long after the recovery made on 12.05.2016.

61. Further suspicion arises with respect to the procurement of the sleeping pills by the accused as

spoken of by the prosecution witnesses. PW9 has no acquaintance with the accused and sees her for the first time in Court. She is said to have joined Neethi Medicals, Karukutty as a Pharmacist on 29.04.2016. The purchase of the tablets is said to have been made by the accused on the previous day. PW9 produced Ext.P7 series of bills before the I.O. PW10 had been working in Neethi Medicals from 2014 onwards and she says that the accused came for work last on 28.04.2016. PW10 deposes that she worked with the accused for one month, while the alleged statement of the accused is that she worked in the particular medical shop for two months. It is also very pertinent that PW9 to PW11 does not speak of the accused having left the job on 28.04.2016, which prompted the appointment of PW9, another Pharmacist on the very next day. PW11, the Assistant Secretary of the Co-operative Bank, which runs the medical store also speaks of the accused having worked in the medical store for two months, but does not speak of she having left the job on 28.4.2016. He was examined as a witness to Ext.P8

mahazar, by which Ext.P7 series were seized.

62. Ext.P7 series is proffered by the prosecution to prove the procurement of medicine by the accused. Ext.P7(a) is an invoice by which the Neethi Medical Store, Karukutty purchased medicine from a Pharmaceutical Distributor. Ext.P7(b) is an item wise sales report of Nitrest tablets made between 01.04.2016 to 18.05.2016, dated 18.05.2016, the date of seizure by Ext.P8. It is signed by PW9, who joined the medical store on 29.4.2016. Ext.P7(c) is the bill relied on by the prosecution and the Court to find the procurement of the said tablets by the accused. The bill is in the name of one 'Irfan' and PW10 who speaks of the accused having taken 5 Nitrest tablets and 10 tablets of Phexin has not spoken of a bill having been issued in the name of another for the above purchase. The trial court ought not to have glossed over the factum of the invoice having been issued in another persons name. Surprisingly, the date shown on Ext.R7(c) is 28.4.2018 and it is again signed by PW9, the Pharmacist who joined on 29.4.2016.

This totally escaped the notice of the trial court. Ext.P7(c) is a cash bill which is issued to the purchaser and normally the purchaser is given that bill. It is also pertinent that if Ext.R7(c) is relied on, for the purpose of proving the procurement of the medicine by the accused on 28.4.2016, there is no reason why it should contain the signature of PW9, who joined on the next day. Ext. P7 (b) & (c) are obviously computer generated bills which ought to be proved as provided under S.65B of the Evidence Act, which has not been done [*Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal (2020) 7 SCC 1*]. The prosecution has miserably failed to prove the purchase of Nitrest tablets or the recovery of the empty strip from the house of the accused, which strip was also not produced before Court, the same having not been returned by the FSL. As for the evidence of the pesticide bottle; we cannot but say that it is very artificial; without which, imbibing of pesticide by the accused could have been found. The medical evidence and the statement made by the accused to the Doctor at MAGJ Hospital, PW14;

revealed from Ext.P10, proves this aspect without definitely establishing whether it was voluntary or forceful administration. The evidence of PW13 who sold the pesticide to the accused and his identification of the bottle purchased an year back; of a branded product is very artificial and not worthy of credence.

63. The prosecution case is that the mother, the accused, administered sleeping pills to her child, slit the veins on his right wrist and then smothered the child with a turkey towel. Later, the mother is said to have voluntarily consumed pesticide and slit the vein on her wrist in an attempt to commit suicide. The statement made to the Doctor and the confession recorded have been completely eschewed by us for reason of the same being not admissible; which reasons have been stated by us in the earlier paragraphs. The empty strip of the Nitrest tablet and the purchase of the same by the accused, though attempted to be established by examining witnesses and marking documents, the entire exercise has turned futile. The last seen together theory does not have any

legs to stand, since the possibility of intrusion into the house by the husband of the accused or a trespass by a third party cannot be completely ruled out. Though the extra-judicial confession and the so called dying declaration have been disbelieved by us, it is very pertinent that the accused who made the confessions do not at all speak of a smothering. There can be no inference that a mother, who administered sleeping pills to the son and slit the veins of his wrist would then smother the child. The question arises, if she did, why did she not state it before the Doctor or the Magistrate.

64. The Doctor who conducted the post-mortem, PW15 categorically stated that death was caused by smothering and neither by reason of the cut injury found on the wrist nor by imbibing any poison, ruling out the cause of death by administration of sleeping pills. The prosecution has failed to bring home the guilt of the accused and establish it beyond all reasonable doubt. We admit to a lingering suspicion which cannot take the place of proof beyond all reasonable doubt. We entertain

other suspicions also, regarding the cause of death of the child by smothering; reasonable hypothesis. The purchase and administration of sleeping pills also has not been established. We are unable to sustain the conviction found by the trial court, which is based on mere surmises and conjectures.

65. The trial court also failed to consider the existence of a reasonable hypothesis of innocence of the accused. The Hon'ble Supreme Court in *Shankarala Gyarasilal Dixit v. State of Maharashtra [1981(2) SCC 35]* despite existence of many compelling circumstances, both factual and scientific, acquitted the accused of the charge of rape and murder of a five year old girl, for reason of prosecution having not established the presence of the accused in his house, where the girl was found dead. While cautioning that the guilt of the accused needs only to be established beyond the 'shadow of reasonable doubt' and not 'shadow of doubt'; it was also held that 'the test which requires the exclusion of other alternative hypothesis is far

more rigorous than the test of proof beyond reasonable doubt'.(sic) Their Lordships contemplating a legitimate query as to why so many people conspired to involve the accused falsely; it was observed that in criminal cases it is not always easy to answer such questions. Their Lordships succinctly observed: 'B*esides human nature is too willing, when faced with brutal crimes to spin stories out of strong suspicions'(sic)*.

66. We have expressed our views on invocation of S.311 Cr.P.C, specifically to summon the Doctor earlier examined as PW20, who produced the case sheet in which there are interpolations made as found by us and admitted by the witness itself. The learned Sessions Judge also erred in the marshalling of facts, scrutiny of evidence as also understanding the decisions cited. We give the accused, the benefit of doubt and acquit her. The appellant/accused shall be released forthwith, if in custody and if released on bail, the bail bonds in this case shall stand cancelled.

Appeal allowed.

Sd/-
K.VINOD CHANDRAN, JUDGE

Sd/-
C.JAYACHANDRAN, JUDGE

sp/lgk/jma/vku.