IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE CRIMINAL JURISDICTION

CONFIRMATION CASE NO.01 OF 2016

The State of Maharashtra .... Appellant
Vs.
Nazir Javed Khan & Ors. .... Respondents

WITH
CRIMINAL APPEAL NO.293 OF 2016

Vinod Mukund Meher .... Appellant
Vs.
The State of Maharashtra .... Respondent.

WITH
CRIMINAL APPEAL NO.853 OF 2018

Nazir Javed Khan .... Appellant
Vs.
The State of Maharashtra .... Respondent.

- -

Ms. M. M. Deshmukh, APP for the Appellant in Confirmation Case No. 1 of 2016 and for Respondent in Appeal.
Dr. Yug Mohit Chaudhary for the Respondent in Confirmation Case No. 1 of 2016 and for Appellant in Appeal No. 853 of 2018.
Mr. Ajeet A. Manwani for the Appellant in Appeal No. 293 of 2018.

- -

CORAM :B. P. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.

RESERVED : 03rd May, 2019
PRONOUNCED ON :03rd June, 2019

JUDGMENT: (Per B. P. Dharmadhikari, J.)

The confirmation case arises from judgment dated 28.03.2016 delivered by Special Judge under the Protection of

Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act" for the sake of brevity) in POCSO Special Case No. 230 of 2013. The trial court has vide its judgment and order convicted accused Nazir Javed Khan for offences punishable under Section 302 of IPC and sentenced him to death. He is also directed to pay fine of Rs.500/- and in default, to suffer rigorous imprisonment for six months. He is also convicted under Section 376 of IPC with life imprisonment and to pay fine of Rs.500/- or in default to undergo rigorous imprisonment for six months. For conviction under Section 201 of IPC, he is sentenced to rigorous imprisonment for 7 years and to pay fine of Rs.3000/- or in default to undergo rigorous imprisonment for six months. This forms subject of challenge in Criminal Appeal No. 853 of 2018.

2. Accused no. 2 Vinod Meher is convicted under Section 201 of IPC and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.5000/- or in default, to suffer rigorous imprisonment for six months.

3. Accused no. 2 Vinod has filed Criminal Appeal No.293 of 2016 challenging his conviction and it is being heard alongwith Confirmation Case.

4. Story of prosecution is that on 01.01.2012, informant Varis Ali lodged report about his minor daughter going missing. On 02.01.2012, Varis Ali received a message from police about finding of unidentified dead-body of minor child. He identified the dead body in morgue as that of his missing daughter. On 03.01.2012, Varis Ali learnt that a person working in advertising firm in his area caused death of small girl and had disposed of her body in Sambhaji Nagar area. He gave that information to police and then accused no. 1 Nazir was arrested on 03.01.2012.

5. Initially, A.D. No. 1 of 2012 was recorded and after Varis Ali informed that some abnormal incident occurred in gala near his house and after arresting suspected Nazir, after investigation the police filed charge-sheet under Sections 302 and 201 of IPC.

6. Varis Ali had learnt that in an abnormal incident in gala a dead body of minor girl was found and Nazir Khan, who worked in that gala had disposed of that body on Western Express Highway near Sambhaji Nagar, Vile Parle, Mumbai. He, therefore, suspected that Nazir Khan had murdered his daughter and had lodged report accordingly against Nazir Khan and his employer i.e. accused no. 2. Employer was

manufacturing advertising boards in that gala.

7. It appears that charge-sheet under Sections 302 and 201 of IPC was filed on 30.03.2012. Varis Ali then filed Writ Petition No. 372 of 2012 in High Court pointing out faulty investigation and this Court on 01.08.2012 disposed of that petition with direction for further investigation. After further investigation, second charge-sheet was filed on 04.02.2013 when Section 376 of IPC was added alongwith Sections 3 and 4 of the POCSO Act and Section 109 of IPC. It appears that first post-mortem of the victim was conducted by PW 20 Dr. Pankaj Gajare and post-mortem report given by him is at Exh. 74. This doctor on request of police on 15.09.2012 also issued a certificate at Exh. 75.

8. Because of High Court's directions second opinion report was obtained and PW 22 Dr. Bhalchandra Chikhalkar has been examined to prove it. Expert opinion provided by him is at Exh. 83. This opinion shows that injury seen in vagina and anus of victim might have been caused because of sexual assault. It also mentions that the mark of injuries on neck and injury on jaw may be due to strangulation of neck and closing of nose and mouth. This certificate also states that death may have occurred 12 to 36 hours before

postmortem.

9. It is on the basis of this material and witnesses examined by prosecution to bring home the charge that impugned judgment has been delivered.

10. We have heard arguments of learned APP Ms. M. M. Deshmukh for the State, Dr. Y. M. Chaudhary for the accused-Nazir and Mr. Manwani for the accused-Vinod in appeal.

11. Advocate Shri Chaudhary submits that material on record does not show any death caused by strangulation or any rape or any other offence of physical violence. He relied upon post-mortem report submitted by Dr. Gajare for this purpose. He points out that smear obtained from anus of victim is found not to contain any male DNA by Chemical Analyzer. The body was decomposed and injuries to external genital are found to be due to decomposition. The post-mortem report does not find any injury in neck and does not show any culpable homicide at all.

12. The report of the Expert PW-22 Dr. Chikhalkar is objected to by him on the ground that said expert has not seen the body at all. Victim was a Mohammedan person and

hence as per law, body could have been exhumed and examined again. This doctor or then experts allegedly accompanying him, have looked into only photographs and arrived at their findings at Exh. 83. Evidence of Doctor (PW-22) does not show any exercise of deliberation or discussion with experts and hence Exh. 83 is not duly proved or established. Learned counsel submits that in the wake of post-mortem report at Exh. 74 or then certificate at Exh. 75 issued by Dr. Gajare, it was incumbent for Experts to record reasons for arriving at a different opinion. Section 51 of the Indian Evidence Act obliges them to give such reasons and in absence of such reasons, mere opinion expressed by them can not substitute Exh. 74.

13. Inviting attention to letter Exh. 75, he points out that photographs were not clear and on the basis of such defective photographs, PW-22 Dr. Chikhalkar has given a contrary opinion. He, therefore, contends that report at Exh. 83 is liable to be discarded.

14. Without prejudice he has read out Exh. 83 to submit that it does not give any firm opinion and conviction cannot be passed upon it.

15. He points out the long rope given by trial court to prosecution while examining PW-22 and various opportunities given by trial court to PW-22. He also relied upon cross-examination of PW-22 to urge that his evidence does not establish strangulation in any manner as cause of death. He further states that due to decomposition, prolapse of anus is already noted and in absence of male DNA, sexual assault is also ruled out.

16. According to him, investigating officer has also not supported evidence of PW-22. The trial court has erred in ordering conviction only because of doubts felt by PW-22.

17. He invites attention to statement of accused under Section 313 of Cr.P.C.. He points out that while answering various questions like questions nos. 218, 219, 222, 223 and 224 etc. accused no. 1 Nazir has pointed out that the body of child was found by him lying dead below plywood. Plywood stored there had fallen on body of child. Advocate Chaudhary relied upon evidence of PW-15 to show size and weight of plywood. Huge plywood sheet, therefore, hurt/crushed child aged about 4 years and Nazir, thereafter to avoid any untoward attack on him or on his employer's establishment, attempted to dispose of body. As nobody has not committed

any offences, his attempt was not to screen anybody and, therefore, Section 201 of IPC is also not attracted.

18. Learned counsel appearing for the accused no. 2 Vinod submits that accused no. 2 was not even in town at the relevant time and necessary facts are brought on record by examining Manager Krishna PW-18. Even PW-7 Mohammad supports innocence of Vinod in the matter. He submits that deposition about instructions allegedly given by Vinod to Nazir by him is hearsay and cannot be relied upon. He, therefore, claims that conviction of accused no. 2 in the matter is unwarranted and arbitrary. He points out that material on record shows that accused no. 2 was informed about a girl getting hurt and he was not informed about any death or then about attempt to dispose of the body.

19. Learned APP submitted that here conviction of both accused is based on circumstantial evidence, presence of victim in godown (gala) is not disputed by them. Fact that she died in said block is also not in dispute. The answers given by accused no.1 Nazir to questions during Section 313 of Cr.P.C. examination accept the role of both the accused persons and hence, there is nothing wrong with the judgment of trial court. The plywood board which was sold to a bhangar purchaser

Rawabali Khan (Exh. 15) shows that it could not have caused death of victim.

20. Learned APP relies heavily upon order of High Court dated 01.08.2012 and submits that evidence of PW 22 Dr. Chikhalkar proves report at Exh. 83. This report is by three experts and hence, the post-mortem report at Exh. 74 becomes insignificant. The report at Exh. 83 indicates cause of death, its probable time and also points out sexual assault.

21. Our attention is invited to the report of Chemical Analyzer (Exh. 62 Colly) to show that black coloured plain tericot cloth piece at Exh. 1 and Exh. 2 forwarded by police are analyzed and Exh. 1 which was wrapped on neck of deceased is found to be matching with Exh. 2. According to her, therefore, the fact that black colour netted cloth around the neck of deceased was from establishment of accused, is also conclusively established.

22. She has taken us through deposition of Investigating Officer Mr. Shantilal Bhamare (PW 21) to urge that after High Court orders, he has carried out re-investigation and in it has found material against both the accused persons.

23. In brief reply in respect of learned counsel for accused no.1 and accused no.2 urged that Exh.83 cannot be looked into, it does not contain any definite opinion and also lacks reasons to enable one to overlook earlier post-mortem report. The opinion of Dr. Gajare PW 20 who had actually seen the body, has to prevail.

24. Commending upon Section 201 of IPC, it is reiterated that intention to screen real culprit needs to be established. The convict under Section 201 of IPC, therefore, must possess knowledge that some offence has been committed earlier. Here accused no.1 Nazir does not have any such knowledge and answers given by him did not point any culpable homicide. Accused no. 1 only points out an accidental death. Accused no.2 was not in town and, therefore, was not aware of an offence or even nature of accident. His conviction under Section 201 of IPC is perverse.

25. Both counsels relied upon evidence of Investigating Officer PW 19 Shri Sawant, evidence of PW 1 Varis Ali and evidence of scrap purchaser PW 15 Rawabali Khan.

26. Learned Advocate Chaudhary relies upon judgment reported at ***AIR 1952 SC 354 – Palvinder Kaur vs. State***

of Punjab *particularly paragraph 14* to show that Section 201 of IPC becomes relevant when accused is shown to have knowledge of commission of some offence and proceeds to screen offender therein.

27. He sites ***(2013) 5 SCC 762 – Vinay Tyagi vs. Irshad Ali Alias Deepak and Ors.*** *paras 41 and 42* to urge that earlier charge-sheet presented by Investigating Officer on 30.03.2012 cannot be ignored. ***(1997) 7 SCC 156 – Tanviben Pankajkumar Divetia vs. State of Gujarat*** *paras 34,35 and 38* are relied upon to submit that opinion of doctor who has seen the body needs to be preferred over the opinion of doctor who has not seen the body. ***(1999) SCC Online Bom 858 – Dhanaji @ Dhanraj Bagwan Jagdhane vs. The State of Maharashtra*** *paras 39 and 40* is relied upon to submit that if in such a situation two opinions are possible, one which favours accused needs to be accepted and acted upon.

28. While answering the Court question, learned counsel for the accused invite attention to provisions of Section 39 and Section 76 of IPC to show that alleged omission on the part of Nazir to inform accidental death does not constitute an offence at all. Learned Advocate Shri Chaudhary submits that

though the police investigation revealed no offence and even evidence adduced in Court does not make out any offence, here the State Government/Police has abused its powers. The victim was aged about 23 years, when alleged offence took place and is in custody since 03.01.2012. He is in solitary confinement after the delivery of judgment dated 23.03.2016 and has thus put in three years there. According to him an innocent person has been made a scapegoat and his future has been spoiled in the process. He, therefore, seeks compensation from State. He relies upon judgment reported in ***(1985) 2 Bom.C.R. 518 - Surendrasingh B. Saud and ors. Vs. The State of Maharashtra*** *paras 26, 31, 32* and the judgment dated 06.07.2018 in Criminal Appeal No. 812 of 2008 of Gwalior Bench of Madhya Pradesh High Court.

29. Learned APP submits that the trial court has sentenced accused no.1 Nazir to death penalty and post-mortem report at Exh. 74 itself shows that the anal opening had widened, thereby sexual assault has been established. In this situation, belated arguments and demand for compensation should not be looked into by this Court. She adds that victim might have been alive also when Nazir allegedly first found her and a timely report to police by him would have saved her.

30. The consideration of present controversy can conveniently commence by pointing out answers given by the accused no.1 Nazir during Section 313 Cr. P.C. examination. While answering question no. 20, he has stated that incident of death of girl occurred in shop. He, however, denied that he had concealed her in the godown. While answering question no.21, he accepted that he had shown the body of girl to PW7 Asif. This answer, therefore, shows that accused no. 1 Nazir accepted that he took PW 7 to mezzanine floor and there with the help of torch in mobile, he did show the body of small girl. Accused, however, has claimed that he had not seen the colour of cloths on the person of that girl or then cloth around her neck. Question no. 22 shows that PW 7 after seeing body got frightened and advised Nazir to call accused no. 2 Vinod immediately. Accordingly, Nazir had a talk with accused no. 2 Vinod and then accused no. 1 informed PW 7 Asif that accused no. 2 Vinod had instructed accused no. 1 to dispose of body of girl. He also told PW 7 Asif that Vinod inquired whether Asif had arrived and accused no. 1 had told Vinod that Asif did not come there. Vinod then advised Nazir not to disclose anything to PW 7 Asif. All these facts are accepted to be true by accused no. 1.

31. Answer given by Nazir to question no. 23 shows that

PW 7 Asif told Nazir to come alongwith him to police station but Nazir refused. Asif told Nazir to handover body of girl to her parents but then Nazir told Asif that father of victim was kasai (Butcher) and would kill Nazir. After sometime, two helpers Sadam and Azad arrived in godown. Sadam and accused Nazir then cleared the godown floor while Asif went away alongwith Azad. Accused Nazir has accepted this to be true. While answering question no. 26, accused no. 1 Nazir accepted that PW 8 Shankar Prasad was driving tempo which was means of transport used by his employer. In question no. 27, evidence of PW 8 Shankar Prasad that on 01.01.2017, he reached godown at 07.30 p.m. and there accused Nazir and one more person from godown loaded one box in his tempo, that box was totally packed, Nazir was sitting on front seat and told PW 8 that box contained sample to be shown to the client is put to Nazir. Accused Nazir accepted all these facts to be true. He, however, had stated that box was not completely packed but it was open. His affirmative answer to question no. 28 shows that tempo then proceeded towards Life Style Mall at Mulund. Accused Nazir and one new boy sat in tempo, they reached Nirmal Life Style Mall at about 09.30 p.m. and four boxes were unloaded there. This fact is again accepted to be correct by Nazir. Answer given to question no. 30 explains the fact that as per request made by Nazir, PW 8 Shankar Prasad

dropped him and one box loaded earlier in godown at Andheri Highway Hanuman Road Bus Stop, Vile Parle at about 10.30 p.m.. While answering question no. 43, Nazir accepted that he left the dead body of girl at Vile Parle Highway. He also accepted statement made to PW 19 Suryakant Sawant, Senior P.I. regarding the place where he had kept the dead body. While answering question no. 50, accused Nazir accepted that he kept the box on Vile Parle Highway but denied that Sadam was with him at that time or then he had removed plastic which was rapped on the box. While answering last question no. 57, he has stated that girl died due to fall of heavy plywood on her body. When he saw her under plywood outside the godown, he took that girl in the godown, put the water on her face and she appeared to be dead, he became afraid of people. He, therefore, kept her dead body at Vile Parle. He claims that he was involved in a false case. These answers given by him, therefore, show that the girl met with an accident and her body was seen by him outside the godown. He then took that body inside the godown at mezzanine floor and concealed it. He has shown that body to PW 7 Asif and then he disposed of the body by putting it on highway at Vile Parle/Andheri. For this purpose, he used tempo of PW 8.

32. It is now necessary to examine what is the cause of death of girl as per prosecution & whether it stands proved. To bring this on record, prosecution has relied upon post-mortem report at Exh. 74 and evidence of Dr. Gajare PW 20. It has also relied upon evidence of PW 22 Dr. Bhalchandra Chikhalkar and the report of Experts at Exh. 83.

33. The Eeidence of first doctor who conducted the post-mortem of deceased viz. Dr. Pankaj Gajare (PW 20) shows that he has conducted post-mortem of victim girl on 02.01.2012 and she was aged about 8 years. He found traumatic asphyxia (natural) to be the cause of death. He deposed that death was possible due to accident or homicide. His report of post-mortem is at Exh. 74. His cross-examination reveals that there were no external injuries on the body and there were no injuries on her private part. There was no evidence of sexual assault and there was no evidence of strangulation. There were no fracture injuries on her neck bone. He accepted that traumatic asphyxia can be caused due to the pressure on chest. He also accepted that if heavy weight falls on a person, death can be caused. He stated that as requested by A.C.P. vide letter dated 10.09.2012, he issued certificate at Exh. 75 on 15.09.2012.

34. This certificate at Exh. 75 reveals that Dr. Gajare has issued it after going through post-mortem report, perusing photographs which were not very clear, chemical analysis report and HB report, a spot visit to crime scene and after considering circumstances surrounding death. Police sent this letter on 10.09.2012 i.e. almost ten months after the incident and this certificate Exh. 75 is issued five days thereafter. It shows absence of any ligature mark or injury mark on neck. It also mentions that deceased had worn black duppata as seen in photographs. It is important to note that the inquest report Exh. 36 dated 02.01.2012 mentions a black ribbon and not a duppata. Doctor has invited attention to findings in column 15 of post-mortem report and reiterated that no injury to cervix and vagina and to anal opening was seen. He has added that body was in a decomposing stage. He has further mentioned that no evidence of sexual assault was noted in post-mortem examination. In paragraph 3 of this certificate, he has explained the reasons for froth or liquid oozing from body. He has also stated that death may have occurred 36 to 46 hours before receipt of the body in morgue and there was no injury mark over and around nose and mouth. There was no injury mark, external as well as internal over neck region. His remark in column 15 of post-mortem report shows that there was rectal collapse, and vagina & cervix were soft and

swollen. Anal mucous had loosened, soft and anal opening had widened perhaps due to decomposition changes. He had preserved anal smear. Report of the Chemical Analyzer on this anal smear at Exh. 68 (collectively) shows that no male DNA is detected in it.

35. Other doctor who has been examined by prosecution is PW 22 Dr. Chikhalkar. In his examination-in-chief, he has spoken of second opinion and that opinion is at Exh. 83. Exh. 83 is communication addressed to A.C.P., Shri Bhamare (PW 21). It is on the subject of sexual assault on deceased and it mentions letter dated 31.07.2012 sent by said A.C.P.. This certificate Exh. 83 is signed by PW 22 and his two other colleagues. It appears that four questions were put before the Board of Experts which presumes or presupposes an injury on neck and jaw and at vagina and anus. These questions, therefore, overlook the categorical findings in post-mortem report Exh. 74 that there were no external or internal injuries. The Board has opined that injury on neck and jaw may be caused due to pressing of neck and/or due to closing of mouth and nose. Board has also opined that possibility of sexual assault leading to injury in anus and vagina, can not be denied. While answering question no. 3, the Board has mentioned that those symptoms may be on account of violent

asphyxial death. These experts have mentioned that death may have occurred 12 to 36 hours before the post-mortem.

36. These experts, therefore, have not conducted the fresh post-mortem and Exh. 83 contains only answers to questions put by Investigating Officer. These three doctors who have signed Exh. 83 obviously after 31.07.2012 had no reason and occasion to watch the dead body. Two of them have not been examined by the prosecution.

37. If, PW 21 ACP had already received this Exh. 83, there was no reason for him to send the letter on 10.09.2012 to Dr. Pankaj Gajare and to obtain certificate at Exh. 75 dated 15.09.2012 from him. Certificate dated 15.09.2012 militates with Exh. 83 issued by Experts. It is to be noted that High Court disposed of Writ Petition No. 372 of 2012 on 01.08.2012 and Certificate Exh. 75 was sought thereafter. Information in Exh. 83 was sought from Dean of J.J. Hospital on 31.07.2012. This inconsistency or incongruency in stance of Investigating Officer, therefore, cannot be understood.

38. Report at Exh. 83 is prepared by Experts who had no occasion to see body. The trial court is permitted prosecution to conduct examination-in-chief of PW 22 Dr. Chikhalkar at

some length on different dates. In paragraph 12, this witness stated that alongwith letter dated 27.07.2012 sent by police, he got photographs of post-mortem and post-mortem report. Only on perusal of these documents, he gave his opinion and he had not gone beyond it. He further stated that because of photographs only he gave opinion regarding asphyxia due to strangulation and possibility of rectal penetration. He has not stated anywhere that post-mortem report at Exh. 74 was incorrect. His deposition does not show that three experts shown as privy to Exh. 83 deliberated and then recorded their findings jointly. On the contrary, paragraphs 12, 13 and 15 of his deposition show it to be his personal view and exercise. He has in cross-examination, in paragraph 5, accepted that violent asphyxia can be caused due to crushing due to accident. This witness also accepted that he had not personally examined the dead-body of victim girl. According to him, Exh. 83 is submitted to I.O. on 11.09.2012.

39. Law on the point needs brief mention at this stage. Probative worth of expert evidence is explained in paragraph 254 by the Hon. Apex Court in **State of Karnataka v. J. Jayalalitha, (2017) 6 SCC 263**, at page 535, as under --“254. In re the probative worth of experts evidence, a host of decisions in *Mahmood* v. *State of U.P.*, *Chatt Ram* v. *State*

of Haryana, *State of H.P.* v. *Jai Lal*, *Ramesh Chandra Agrawal* v. *Regency Hospital Ltd.* and *Dayal Singh* v. *State of Uttaranchal* have been cited at the Bar. As all these decisions postulate identical propositions, the gravamen of these authorities would only be referred to avoid inessential prolixity. These renderings explicate that an expert is one who has made a subject upon which he speaks or renders his opinion, a matter of particular study, practice or observation and has a special knowledge thereof. His knowledge must be within the recognised field of expertise and he essentially has to be qualified in that discipline of study. It has been propounded that an expert is not a witness of fact and his evidence is really of an advisory character and it is his duty to furnish to the judge/court the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge/court to form his/its independent judgment by the application of such criteria to the facts proved by the evidence. Referring to Section 45 of the Evidence Act, 1872, which makes the opinion of an expert admissible, it has been underlined that not only an expert must possess necessary special skill and experience in his discipline, his opinion must be backed by reason and has to be examined and cross-examined to ascertain the probative worth thereof. That it would be unsafe to convict the person charged on the basis of

expert opinion without any independent corroboration has also been indicated. It has been held that the evidentiary value of the opinion of an expert depends on the facts upon which it is based and also the validity of the process by which the conclusion has been reached. The decisions underline that the court is not to subjugate its own judgment to that of the expert or delegate its authority to a third party but ought to assess the evidence of the expert like any other evidence. In **State of H.P. v. Jai Chand, (2013) 10 SCC 298** , Hon. Apex Court observes in para 21 that the post-mortem report is not a substantive piece of evidence. But the evidence of such doctor cannot be insignificant. Apex Court in *State of Haryana* v. *Ram Singh* held as under: (SCC p. 429, para 1)--"*1.* While it is true that the post-mortem report by itself is not a substantive piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis-à-vis the injuries appearing on the body of the deceased person and likely use of the weapon therefor and it would then be the prosecutor's duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses."

40. We have commented on contents of Exh. 83 above. It

does not show any definite opinion as to cause of death or about sexual assault on deceased. It only points out possibilities. It appears that these experts were not required to comment on correctness or otherwise of Exh. 74 or Exh. 75 and hence, there are no reasons recorded as required by Section 51 of Indian Evidence Act**.** From Secion 46 of the Evidence Act it is clear that the facts bearing upon opinion of experts are germane. It lays down that facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant. If Ex. 83 is relevant, it can not become decisive unless it with reasons, counters the details noted in postmortem report at Ex. 74 or certificate at Ex. 75. As per Section 51, whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant. Ex. 74 & 75 are based upon the facts noted therein and are supported by evidence of Dr. Gajre who conducted the postmortem. Dr. Chikhalkar or the Board which issued Ex. 83 does not counter the deposition of Dr. Gajre or Exs. 74 & 75. His evidence does not counter with reasons Ex. 74 or 75. Ex. 51 only answers queries of the investigating officer but does not support those answers with any grounds. The answers are also based upon factually wrong premise. In view of this position, it is not necessary for us to examine whether after cross-examination,

trial court was justified in permitting prosecution to re-examine PW 22 Dr. Chikhalkar and whether it was used to fill in any lacunae.

41. Judgment of *Hon'ble Apex Court reported in* ***(1997) 7 SCC 156 – Tanviben Pankajkumar Divetia vs. State of Gujarat*** shows that in case of any dispute or doubt, the opinion of doctor who has seen the dead body needs to be preferred. The contrary view has to point out why the conclusions of a doctor who recorded the same after conducting actual postmortem, are wrong. Similarly, judgment of this Court reported at ***(1999) SCC Online Bombay 858 – Dhanaji @ Dhanraj Bagwan Jagdhane vs. The State of Maharashtra*** shows that in case of difference of opinion and doubt in such matters, benefit has to go to accused.

42 Here the post-mortem report at Exh.75 and evidence of Dr. Gajare PW 20 rules out any sexual assault on deceased. It does not show any homicidal death and points out traumatic asphyxia (natural) as cause of death. This doctor had accepted that such traumatic asphyxia can be caused due to pressure on chest. His conclusions are backed by the observations during actual process of the postmortem. Exh.

83 does not in any way militate with categorical findings therein. At Exh. 75, the Experts while answering question nos. 1 and 2 have acted on findings of injury marks or injuries on body part, though they had no occasion to see the body of deceased at all. They have expressed possibility of strangulation and there is no definite opinion about it. Similarly, they have not categorically recorded any findings on sexual assault. We, therefore, find that this document and deposition on record does not support a conclusion of death caused due to strangulation or closing of nose and mouth. It does not support theory of any sexual assault on deceased.

43. It is to be noted that accused was arrested on 03.01.2012 from the place where he was working and it is not the case of prosecution that any injury was found on his palms or other body parts to support the theory of homicide or sexual assault.

44. At this stage, it will be important to note that the Inquest Panchnama of deceased was conducted on 02.01.2012 between 13.35 hours to 14.45 hours. This Panchanama Exh. 89 while describing clothes on the person of deceased states that there was a black ribbon. It does not mention any black cloth around neck. It also shows age of

deceased to be 7 to 8 years. It mentions that the body was not having any external injuries even on private parts.

45. This Panchnama at Exh. 36, therefore, supports evidence and post-mortem by Dr. Gajare and his findings in Exh. 74 that there were no external injuries on the body. Manipulation if any, could have commenced only after accused persons were traced out and on 02.01.2012 when Exh. 36 was drawn, there was no question or scope of therefor.

46. The investigation shows disclosure by accused no. 1 Nazir that it was accidental death. Investigating Officer either before orders of High Court or then after orders of High Court has not taken any steps to rule out the accident. The Panchnama Exh. Nos. 60 and 60-A show the memorandum under Section 27 of Evidence Act about wooden box used by Nazir to move the body out of godown and its seizer. There, the godown blocks(gala) mentioned are E-3 and A-4. Size of block mentioned is 70 ft. x 35 ft. with mezzanine floor of 45 ft. x 35 ft. Thus, the alleged accident if any, took place in or near this godown.

47. Evidence of PW 15 Rawabali Khan shows that he

purchased from accused Nazir wooden scrap worth Rs.300/-. He had purchased four pieces of plywoods. He identified those four pieces produced in Court as the same. His cross-examination reveals that each piece was approximately 8 ft. x 3 ft and weighing about 9 kilograms. Question whether these pieces or any of them were standing inside the godown or its vicinity to support story of an accident has not been answered by prosecution on record. Whether, its fall on body of deceased child could not have resulted in death is also not answered anywhere. This question was not put either to PW 20 Dr. Gajare and then to PW 22 Dr. Chikhalkar. The Investigating Officer has not completed the investigation consistent with the requirements of law relating to circumstantial evidence. The prosecution is relying upon circumstantial evidence only and answers given by accused Nazir during investigation and also in his Section 313 Cr.P.C. examination. Whether that material is sufficient to rule out accidental death or absence of rape, has remained unanswered.

48. In a case based upon circumstantial evidence, the prosecution has to indicate a chain of circumstances which is so complete that it does not permit implication of any other person except accused. Chain has to, therefore, unerringly

point at accused only as the person responsible for the ofence. It has also to rule out involvement or possibility of involvement of any other person. As already noticed *supra*, we have found that the post-mortem report Exh. 74, certificate at Ex. 75 or then report of Experts at Exh. 83 does not support the prosecution in this respect. The material on record does not record a finding of rape, also do not show a culpable homicide and do not rule out an accidental death. Investigating Officer, therefore, has left the material lacunae in the entire exercise and that has not been rectified even after directions dated 01.08.2012 issued by this Court in Writ Petition No. 372 of 2012.

49. Though judgments cited before us show that earlier charge-sheet cannot be totally discarded, in present facts, we do not find it necessary to dwell more on ***Vinay Tyagi vs. Irshad Ali Alias Deepak and Ors. reported in (2013) 5 SCC 762***. Similarly, though judgment shows that precedece is to be given to opinion of doctor who has seen body of deceased, or then in case of two conflicting expert opinions, benefit must go to accused, in present facts, it is not necessary for us to consider even those judgments in more details. The report of Forensic Laboratory on identity of cloth found with body of deceased and similar cloth taken from

establishment of accused no. 2 employer does not, therefore, assist the case of prosecution. We have already noted *supra* that at inquest, a black ribbon was found with the body and it does not mention that black ribbon was tied around the neck of deceased. There is no mention of any “dupatta”. There is, therefore, no legal evidence to convict accused no. 1 Nazir either under Section 376 or Section 302 of Indian Penal Code. .

50. This brings us to consideration on offence under Section 201 of IPC. Answer to question 22 by accused no. 2 Vinod shows that he had directed accused no. 1 Nazir to inform the incident to parents of victim and to call doctor for immediate aid. Investigating Officer Shri Sawant in cross-examination states in paragraph 11 that PW 18 Krishna who happens to be Business Development Manager of accused no.2, had told that victim died as plywood sheet fell on her person. His further cross-examination shows that upon instruction given by accused no. 2, Manager in his establishment Pallavi Jaykar came to police station at about 8.30 p.m. to 9.00 p.m. on 02.01.2012 and I.O. recorded her statement. In that statement, she disclosed that accused no. 2 employer had asked her to report the incident to police.

51. PW 18 Krishna has in his cross-examination stated that he got knowledge of incident on 02.01.2012 and accordingly, he communicated it to police. He has also stated that accused Vinod was out of station on 02.01.2012. PW 7 Mohammad Shaikh who worked as a Supervisor states that at about 3.30 p.m. on 01.01.2012, he got knowledge of accident from accused no. 1 Nazir. This evidence is already discussed by us above.

52. This material, therefore, shows that accused no. 2 was not present in establishment/godown at the time of incident or immediately thereafter and he had given necessary instructions to his Business Development Manager PW 18 and to Manager Pallavi Jaykar. Accordingly, Pallavi Jaykar had also gone to Investigating Officer. Material does not support his role in removal of body or sale of plywood sheets.

53. The relevant provisions contained in Indian Penal Code and Criminal Procedure Code need to be perused to find out whether accused no. 1 or accused no. 2 had violated any legal provision and thereby have committed an offence under S. 201 IPC.

54. Section 39 of Cr.P.C. casts obligation upon public to give information of certain offences. Section 39(1) in its clauses I to XII mentions various Sections of IPC and thus any member of public not reporting any of said offence without reasonable excuse can be said to have violated obligation imposed upon him under this section. Clause V mentions offences under Sections 302, 303 and 304 of IPC. To this clause, the Parliament has added (“offences affecting life”). Thus, general member of public not concerned with such offence affecting life, is also under obligation to give intimation to police officer, if he is aware of its commission.

55. Our attention was also invited to Section 176 of Cr.P.C. However, that section is regarding inquiry into cause of death which takes place in situations contemplated in S. 174 which appears to be material here. It shows that after the receipt of information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, the police officer is required to be processed as stipulated therein. Police officer getting it has to immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed

by any rule prescribed by the State Government, or by any general or special order of the District or Sub-Divisional Magistrate, to proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, has to make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted. This report is to be signed by such police officer and other persons, or by so many of them as concur therein, and forthwith forwarded to the District Magistrate or the Sub-Divisional Magistrate. We need not here refer to other subsections of this Section but special care is envisaged when such death is of a woman or when circumstances appear doubtful. It shows the care & precaution to be taken by the Police and the State, when the death is not natural. Here the death is of minor girl & it is also not natural. No person aware of such death or incident resulting into it, can suppress its knowledge from the Police or try to expunge it altogether. Law does not enable such person failing to intimate to claim that the death was a pure & simple accident and nobody was negligent in it. It is the obligation of the police officer to investigate & report on the

cause & nature of incident. S. 176 envisages a parallel inquiry by the Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate in certain circumstances as specified therein.

56. Section 32 of Indian Penal Code specifically states that words employed in Penal Code which referred to acts done extend also to illegal omissions. Section 33 clarifies that series of acts and series of omissions are to be treated as single act or single omission. Section 35 points out liability of each person who joins in the act with knowledge or intention that the act is being done with criminal knowledge or intention. Section 36 stipulates the effect caused partly by act and partly by omission. Section 39 points out when a person can be said to cause an effect voluntarily. Section 40 defines what is an offence. A thing made punishable under Penal Code is, defined as offence for the purpose of Chapter IV and V-A and in relation to sections specified in first paragraph of Section 40, “offence” also includes a thing made punishable under a special or local law as defined therein.

57. A brief mention of certain provisions in chapter 4 of IPC dealing with General Exceptions is necessary. Section 76 excepts act done by person bound or by mistake of fact (not

by mistake of law) believing himself to be bound by law from the concept of offence. Section 79 similarly, excepts act done by person justified or by mistake of fact (not by mistake of law) believes himself justified by law. Section 80 excepts accident in doing a lawful act from concept of offence. Section 81 also excepts an act which is likely to cause harm when it is done without criminal intent and to prevent harm to other. The riders or limitations in which such exceptions are made applicable show requirement of good faith or absence of criminal intention etc. It is therefore apparent that the legislative provisions dealing with the "act" or "omission" contain a scheme & it covers all such acts or omissions which are "offences". General exceptions therefore exclude only such "acts" as are specified therein for the obvious lack of any malice in it. Excepted acts are therefore undertaken bonafide & there is no dishonest intention right from inception till end.

58. Section 43 is an important section and it defines the word "illegal" and phrase "legally bound to do". The manner adopted to explain these concepts is rather peculiar. This Section 43 reads as under:--

"43. "Illegal", "Legally bound to do" -

The word "illegal" is applicable to <u>everything</u> which

is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit."

59. Section 176 of Indian Penal Code is on subject of omission to give notice or information to public servant by person legally bound to give it. This Section makes such omission an offence punishable with simple imprisonment for a term which may extend to one month or with fine of Rs.500/- or with both. If such information pertained to an offence, the simple imprisonment may extend to 6 months or fine may be Rs. 1000/.

60. Section 43 does not stipulate what is legal. It points out act or omission which is illegal and obligation to report flowing from "legally bound to do" needs to be construed in that light. So an incident like accident leading to death of a minor girl which may also sustain a civil cause, being viewed as illegal, therefore, must be reported to police or concerned competent authority. Omission to report it is illegal. Not only Section 43 of Penal Code is widely worded but its Section 176 is also made equally wide by the legislature. Use of words such as **"**any subject" or "information" in said section is in

consonance with spirit underlying Section 43. Owner or occupier of a godown where accident occurs, therefore, cannot avoid the obligation cast upon him by these provisions. Any other person in that establishment present legally there as an employee, who sees such an accident or learns about it also cannot avoid the duty to report. Various provisions in Penal Code noted by us *supra* including "exceptions" carved out by legislature therein do not support the contentions of accused that the omission to report an accident resulting into death, is not an offence at all. Machinery mandated under S. 174 Cr.P.C. can not be allowed to be rendered nugatory. All unnatural deaths are covered under provisions of IPC. Whether it is an offence or not, is for the Investigating Officer to decide. Otherwise it will provide an escape route for the offender and he may clean or destroy all evidence under a specious plea that the un-natural death was not an offence but an unfortunate accident for which he is not liable. Such a loophole is not envisaged by the Legislature. If the arguments on these lines are accepted, S. 304A IPC will be rendered nugatory. S.176 IPC therefore employs the word "on any subject".

61. This brings us to Section 201 of Indian Penal Code. This section is on the subject of causing disappearance of

evidence of offence or giving false information to screen offenders. Its substantive part reads as under;

> ***"201. Causing disappearance of evidence of offence, or giving false information to screen offender.-*** *Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false;"*

62. As against Section 201, Section 202 is on intentional omission to give information of offence by a person bound to inform. Section 202, therefore, springs into effect after an offence is already committed and there is failure to report it. This section also employees the phrase "legally bound to give".

63. Section 299 (Explanation 2) of Indian Penal Code states that whenever death is caused by bodily injury, the person who causes such bodily injury is deemed to have

caused such death and it constitutes a culpable homicide. Section 304 prescribes punishment, if such culpable homicide does not amount to murder. Section 304-A prescribes punishment for causing death by negligence.

64. Therefore, whether plywood sheets stored in the godown of accused persons slipped and fell on the person of deceased victim because of its negligent storing or then because of some human act is the moot question which needed investigation and answer. Unfortunately, in the present matter Investigating Officer has not brought on record any material in that respect. The situation has not undergone any change even after order of this Court dated 01.08.2012.

65. Such an investigation also might not have been fruitful because plywood sheets were already disposed of by accused no. 1 Nazir to bhangar purchaser Rawabali Khan. Provisions looked into by us particularly Section 43 of Indian Penal Code shows that even when the consequences furnish a ground for civil action, the person in knowledge is legally bound to give information thereof to the competent authority which may include the police Section 176 of the Code makes omission to give information “on any subject” to any public servant, an offence. In this backdrop, Section 201 of IPC gets

attracted and causing disappearance of evidence of offence under Section 176 becomes punishable thereunder. Section 43, Section 176 and Section 201 of Indian Penal Code clearly obliged first accused No. 1 Nazir before us to report the incident to police and not to wipe it out altogether.

66. We have already found that accused no. 2 was out of station and his involvement in an attempt to remove body of victim or then wiping out evidence of untoward incident is not proved. However, same cannot be said about accused no. 1 Nazir. It is he who has played key role. Witnesses examined on record show his design & act to throw body at a distant place so that nobody could have connected it with his work place. His selling the plywood sheets to PW 15 Rawabali Khan shows that he wanted to paint a picture that no untoward incident whatsoever has occurred in his godown.

67. Whether death of victim was accidental or then it was because of negligence warranting punishment under Section 304-A are the disputed questions. Whether death was culpable homicide amounting to or not amounting to murder also needed factual investigation. Accused no. 1 Nazir attempted to render all this impossible and, therefore, removed body of victim and the plywood boards.

68. Provisions noted by us *supra* and scheme thereof show that accused no. 1 Nazir was legally bound to give information to police about accidental death. The accidental death may have civil consequences or penal effect. He could not have avoided that investigation or to defeat it, he should not have caused disappearance of evidence relating to it. After jeopardizing that investigation, accused Nazir can not take a plea that there was no "offence" involved in the incident of death of victim. Being an employee legally present in the establishment & having noticed the death of a minor, it was his duty to report the accident or incident to the police and to allow them to find out how the victim came below the plywood sheets/s. Court has, therefore, rightly found him guilty of offence punishable under Section 201 of Indian Penal Code.

69. However, material on record does not show that trial court was justified in holding accused no. 2 Vinod also guilty under the said provision.

70. In this situation, we find that it is not necessary to consider the arguments of Advocate Chaudhary on demand of compensation. Accused no. 1 who has indulged in criminal offence is declared not entitled to any such relief. Hence, case

law cited by Advocate Chaudhary on this issue also need not be evaluated.

71. We have already noted *supra* that medical evidence does not permit us to hold that there was any offence punishable under Section 302 of Indian Penal Code or under Section 376 of Indian Penal Code. Going by the story of accused no.1, Investigating Officer ought to have attempted to find out whether fall of plywood sheet/s on victim would have resulted in her death. This would have needed investigation into length, width and weight of plywood sheet and whether only one or all three plywood sheets fell on deceased. This would have also required scrutiny of a place where those sheets were stored and mode and manner in which they were placed. That investigation would have brought on record whether sheets were secured properly so as to avoid any accidental fall.

72. If sheets were stored outside godown and children used to play in that area or frequented that area, whether proper protection/precaution was taken to see that even during such play or other activities of children, the sheet would not fall/slip down. There is absolutely no investigation in this respect. This absence of investigation is despite the

directions dated 01.08.2012 in Writ Petition No. 372 of 2012.

73. Father of deceased had approached this Court promptly for proper investigation and steps taken by Investigating Officer thereafter do not bring on record due diligence. PW 22 Dr. Chikhalkar was consulted and on the strength of vague opinion at Exh. 83, unsustainable charge under Section 376 of IPC was added. Now, it is impossible to find out the truth or the real incident. But omission to conduct proper investigation despite directions of this Court definitely entitles family of victim to reasonable compensation from State Government. In the present facts, we find that grant of amount of Rs.10,00,000/- (Rupees Ten Lakhs only) to her parents for such lapse on the part of Investigating Agency/Officer will meet the ends of justice. However, the State shall recover that amount after proper inquiry and as per procedure from Investigating Agency or Officer and/or others found guilty of lack of diligence in the matter.

74. Accordingly, we proceed to pass following order;

(a) The judgment and order dated 28.03.2016 delivered by Special Judge, City Civil and Sessions Court, Greater Mumbai convicting accused no. 1

Nazir for offences punishable under Section 302 and Section 376 of IPC is quashed and set aside.

(b) Conviction of accused no. 1 Nazir under Section 201 of Indian Penal Code is, however, maintained.

(c) If accused no. 1 Nazir has already undergone rigorous imprisonment of seven years as directed by trial court, he be set free forthwith, if his custody is not required by State Government in any other matter.

(d) Criminal Appeal No. 853 of 2018 filed by accused no. 1 Nazir is thus, partly allowed.

(e) Conviction of accused no. 2 Vinod under Section 201 of Indian Penal Code is set aside and Criminal Appeal No. 293 of 2016 filed by him is accordingly allowed.

(f) Bail bond furnished by accused no. 2 Vinod is cancelled.

(g) We direct State Government to pay to the parents of victim namely PW 1 Varis Ali and mother of victim amount of Rs.10,00,000/- (Rupees Ten Lakhs only) for negligent investigation into death of their daughter on 01.01.2012.

(h) The State of Maharashtra shall recover that amount after proper inquiry and procedure from Investigating Officer and/or others found guilty of lack of diligence in investigation.

(i) Muddemal property be dealt with as directed by trial court after appeal period is over.

(j) Criminal Confirmation Case No. 01 of 2016, Criminal Appeal No. 293 of 2016 and Criminal Appeal No. 853 of 2018 are accordingly disposed of.

(**PRAKASH D. NAIK, J.**) (**B. P. DHARMADHIKARI, J.**)

SMG