SUPREME TODAY

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SUPREME COURT OF INDIA
ROHINTON FALI NARIMAN, K.M. JOSEPH, V. RAMASUBRAMANIAN, JJ.
SOMASUNDARAM @ SOMU – APPELLANT(S)
VERSUS
THE STATE REP. BY THE DEPUTY COMMISSIONER OF POLICE – RESPONDENT(S)
CRIMINAL APPEAL NO. 403 OF 2010 WITH CRIMINAL APPEAL NO. 827 OF 2013 CRIMINAL APPEAL NO. 828 OF 2013 CRIMINAL APPEAL NO. 1504 OF 2017 CRIMINAL APPEAL NO(s). 2006-2007 OF 2017 AND CRIMINAL APPEAL NO(s). 2008-2009 OF 2017
Decided On : 03-06-2020

(A) Indian Penal Code, 1860 – Sections 108 and 109 – Abetment of offence – Abetment of an offence being an offence, abetment of such abetment is also an offence under Explanation IV – It is not necessary to commission of offence of abetment by conspiracy that abettor should concert offence with person who commits and it is sufficient if he engages in conspiracy in pursuance of which offence is committed – Offence of abetment would be committed irrespective of whether act abetted is committed or not or whether effect which would constitute offence is caused or not – In order that act or offence, be committed within meaning of Section 109 of IPC, in consequence of abetment, it must be as a consequence of instigation or in pursuance of conspiracy or with aid which constitutes abetment – Explanation to Section 109 of IPC must be read in conjunction with Section 107 of IPC which creates offence of abetting. (Paras 42, 46 and 47)

(B) Indian Penal Code, 1860 – Sections 107 and 109 – Abetment of offence – Anything done which facilitates commission of criminal act and promotes commission of the act, would bring the person within scope of abetment – Based on their involvement constituting abetment, a person or any number of persons without even knowing identity of all principal participants to conspiracy, can be prosecuted with aid of Section 107 read with Section 108 of IPC – In order to attract Section 109 of IPC, act abetted must be committed in consequence of abetment – Sections 115 and 116 of IPC deal with punishments for abetment of offences when offence is not committed in consequence of abetment and where no express provision is made in IPC for punishment of such abetment. (Paras 49, 50 and 51)

(C) Indian Penal Code, 1860 – Sections 107 and 109 – Abetment of offence – Abetment, as defined is a substantive offence – Punishment for it varies according to different circumstances – If act which is abetted is done in pursuance to abetment, punishment is graver – Punishment is for offence which is committed based on abetment – Offence of abetment is punishable even if act which is abetted is not committed – At the heart of offence of abetment, however, is presence of any of three requirements in Section 107 of IPC – Key and indispensable elements under law to constitute abetment is instigation, conspiracy or intentional aiding by any act or illegal omission, doing of the thing – Law does not permit abettor to escape punishment for abetment even if actual player who commits offence is not criminally liable for actual act which results in commission of an offence. (Paras 53 and 54)

(D) Indian Evidence Act, 1872 – Section 133 and illustration (b) to Section 114 – Accomplice evidence – Courts have evolved, as a rule of prudence, requirement that it would be unsafe to convict an accused solely based on uncorroborated testimony of an accomplice – Corroboration must be in relation to material particulars of testimony of an accomplice – An accomplice would be familiar with general outline of crime as he would be one who has participated in the same and indeed, be familiar with matter in general terms – Connecting link between a particular accused and crime, is where corroboration of testimony of an accomplice would assume crucial significance – Evidence of an accomplice must point to involvement of a particular accused – It would be sufficient, if his testimony in conjunction with other relevant evidence unmistakably makes out case for convicting an accused – Every material circumstance against accused need not be independently confirmed – Corroboration must be such that it renders testimony of approver believable in facts and circumstances of each case –

Testimony of one accomplice cannot be, ordinarily, be supported by testimony of another approver – An accomplice, to be believed, he must be corroborated in material particulars of his testimony – Evidence which is used to corroborate an accomplice need not be a direct evidence and can be in form of circumstantial evidence. (Paras 65 and 66)

(E) Criminal Procedure Code, 1973 – Section 308 – Accomplice and Approver – An accomplice or an approver are competent witnesses – As between an accomplice and an approver, latter would be more beholden to version he has given having regard to adverse consequences which await him as spelt out in Section 308 of Cr.P.C. – Competency of an accomplice is not impaired, though, he could have been tried jointly with the accused and instead of so being tried, he has been made a witness for prosecution. (Para 67)

(F) Criminal Procedure Code, 1973 – Section 164 – Evidentiary value of Section 164 statement – Ordinarily, prosecution which is conducted through State and police machinery would have custody of person – Though, Section 164 does provide for safeguards to ensure that statement or a confession is a voluntary affair it may turn out to be otherwise – Substantive evidence is evidence rendered in Court. (Paras 68 and 71)

(G) Constitution of India – Article 136 – Appellate Jurisdiction – In a criminal appeal by special leave, this Court at the hearing examines evidence and judgment of High Court with limited purpose of determining whether or not High Court has followed settled principles – Where Court finds that High Court has committed no violation of various principles laid down by this Court and has made a correct approach and has not ignored or overlooked striking features in evidence which demolish prosecution case, findings of fact arrived at by High Court on an appreciation of evidence in circumstances of case would not be disturbed. (Para 72)

(H) Indian Penal Code, 1860 – Sections 364 and 365 – Kidnapping differs from abduction – Section 364 of IPC, more graver than Section 365 of IPC, occurs when abduction, is done with intention to commit murder or that he is so disposed of so as to put abducted person in danger of being murdered – Section 365 of IPC is attracted when abduction takes place to cause abducted person to be secretly and wrongfully confined – In a given case, a person may be abducted to be secretly and wrongfully confined and also to commit murder – Such a situation may attract both Sections 364 and 365 of IPC. (Paras 79, 80 and 81)

(I) Indian Penal Code, 1860 – Sections 365/109, 387, 302/109, 347/109 and 120B – Indian Evidence Act, 1872 – Section 106 – Kidnapping for ransom and murder – Conspiracy, abetment and disappearance of evidence – Conviction and sentence – This is a case where accused have not only carried out a grave crime of murder but they have also attempted to efface most important evidence relating to the same, viz., corpus delicti – Evidence in this case establishes that deceased was indeed cremated under name of a fictitious person mentioned in death certificate – A16 was amongst accused who brought deceased – His role in abduction becomes clear – Deceased was done away by way of murder – Having abducted deceased, role of A16, as assessed by Trial Court and further accepted by High Court, does not require interference – Principle that abduction followed by murder raises presumption that abductor was instrumental in murder was rightly invoked by Trial Court – A12 would be criminally liable for only those acts done with requisite mens rea – Fact that appellants have been acquitted under Section 120B will not extricate them from criminal liability for their acts which would constitute substantive offences under Sections 302, 347 and 387 of IPC – There can be any number of accused charged with aid of Section 109 of IPC – There is no illegality involved in convicting appellants in the manner done under Section 302 of IPC – There cannot be medical evidence relating to murder in a case where body stood cremated – Abduction followed by murder in appropriate cases can enable a court to presume that abductor is murderer – Section 106 of Evidence Act would come to assistance of prosecution – For a conviction under Section 364 actual abduction is necessary – A person could be liable under Section 364 read with Section 34 or under Section 364 read with Section 149 or under Section 364 read with Section 109 or if he is found guilty under Section 120B – In this case there is no scope for either 120B or 149 – However just as they have been found guilty under Section 365, Court would support the conviction under Section 364 in same manner namely abduction within meaning of Section 364 – Criminal Appeals dismissed. (Paras 106, 121, 126, 127, 130, 133, 136, 137, 139, 141, 142, 153 and 154)

Facts of the Case:

Appeals arise out of a common judgment rendered by the High Court confirming the conviction and sentence of the appellants by the Trial Court. The earliest of the aforesaid appeals, i.e., Criminal Appeal No. 403 of 2010, is filed by the fourth accused. Criminal Appeal No. 827 of 2013 and Criminal Appeal No. 828 of 2013 are filed by the third and the fifteenth accused, respectively. appeals filed by the third, fourth and fifteenth accused came to be heard by a Bench of two Judges. There was a cleavage of opinion among Judges. One learned Judge (Justice V. Gopala Gowda), by his Judgment, proceeded to acquit the accused while Justice Arun Mishra dismissed the appeals. That is why this Three-Judges Bench.

Findings of the Court:

Essence of abduction is forced movement, inter alia, from any place. The offence would be committed by anyone who effects such abduction at any or all points of the route. We have already noticed that in a given case, an abduction may attract both Sections 364 and 365. The distinguishing feature between the two kinds of abduction, is the difference in the intent with which the abduction, inter alia (as Sections 364 and 365 also deal with kidnapping), is carried out. But so far as the intention attracts both provisions in a given case, conviction under both sections is not impermissible.

Result : ***Criminal Appeals 2007 of 2017 and 2009 of 2017 dismissed as withdrawn. Rest of Criminal Appeals dismissed.***

Acts Referred:
CONSTITUTION OF INDIA : Art.136
CRIMINAL PROCEDURE CODE : S.308, S.164
EVIDENCE ACT : S.133, S.114(b), S.106
INDIAN PENAL CODE : S.108, S.109, S.107, S.364, S.365, S.387, S.302, S.347, S.120(b)

Cases Referred:
Somasundaram alias Somu v. State Represented by Deputy Commissioner of Police, (2016) 16 SCC 355 – Referred [Para 2]
R.V. Baskerville, 1916 (2) KB 658 – Relied [Para 56]
George and others v. State of Kerala and another, (1998) 4 SCC 605 – Referred [Para 18]
George and others v. State of Kerala and another, AIR 1998 SC 1376 – Relied [Para 69]
Vijayan v. State of Kerala, (1999) 3 SCC 54 – Referred [Para 21]
State of W.B. v. Mir Mohamad Omar, (2000) 8 SCC 382 – Relied [Para 142]
Sucha Singh v. State of Punjab, AIR 2001 SC 1436 – Relied [Para 142]
Ranganayaki v. State by Inspector of Police, (2004) 12 SCC 521 – Referred [Para 58]
Ram Batra and others v. Financial Commissioner, Delhi and others, (2004) 12 SCC 52 – Referred [Para 18]
K. Hashim v. State of Tamil Nadu, (2005) 1 SCC 237 – Relied [Para 64]
Nanak Chand v. State of Punjab, AIR 1955 SC 274 – Relied [Para 33]
Willie (William) Slaney v. State of Madhya Pradesh AIR 1956 SC 116 – Relied [Para 151]
Sarwan Singh Rattan Singh v. State of Punjab, AIR 1957 SC 637 – Relied [Para 61]
Pramatha Nath Talukdar v. Saroj Ranjan Sarkar, AIR 1962 SC 876 – Relied [Para 44]
Haroom Haji Abdulla v. State of Maharashtra, AIR 1968 SC 832 – Relied [Para 62]
Mohd. Husain Umar Kochra Etc. v. K.S. Dalipsinghji and another Etc., (1969) 3 SCC 429 – Relied [Para 56]
Sheshanna Bhumanna Yadav v. State of Maharashtra, AIR 1970 SC 1330 – Relied [Para 63]
Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra, (1970) 1 SCC 696 – Relied [Para 55]
Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra and others, (1976) 2 SCC 17 – Referred [Para 20]
Dalbir Kaur v. State of Punjab, (1976) 4 SCC 158 – Relied [Para 72]
Chonampara Chellapan Etc. v. State of Kerala Etc., (1979) 4 SCC 312 – Relied [Para 56]
Baldev Singh v. State of Punjab, (1990) 4 SCC 692 – Referred [Para 19]
Mohanlal Shamji Soni v. Union of India and another, 1991 Supp1 SCC 271 – Referred [Para 22]
Kehar Singh and others v. State (Delhi Administration), (1988) 3 SCC 609 – Relied [Para 56]
Arjun Singh v. State of Himachal Pradesh, AIR 2009 SC 1568 – Relied [Para 52]
Chandran and Others v. State of Kerala, (2011) 5 SCC 161 – Relied [Para 67]

R. Shaji v. State of Kerala, AIR 2013 SC 651 – Relied [Para]
Jagjit Singh v. State of Punjab, (2018) 10 SCC 593 – Relied [Para 72]

IMPORTANT POINTS
(1) Offence of abetment would be committed irrespective of whether act abetted is committed or not or whether effect which would constitute offence is caused or not.
(2) Corroboration must be in relation to material particulars of testimony of an accomplice.
(3) An accomplice or an approver are competent witnesses – As between an accomplice and an approver, latter would be more beholden to version he has given having regard to adverse consequences which await him as spelt out in Section 308 of Cr.P.C.
(4) There can be any number of accused charged with aid of Section 109 of IPC.
(5) Kidnapping differs from abduction.

JUDGMENT

K.M. JOSEPH, J.

1. Six appeals arise out of a common judgment rendered by the High Court confirming the conviction and sentence of the appellants by the Trial Court. The earliest of the aforesaid appeals, i.e., Criminal Appeal No. 403 of 2010, is filed by the fourth accused. Criminal Appeal No. 827 of 2013 and Criminal Appeal No. 828 of 2013 are filed by the third and the fifteenth accused, respectively.

WHY THIS THREE-JUDGES BENCH?

2. The appeals filed by the third, fourth and fifteenth accused came to be heard by a Bench of two learned Judges. There was a cleavage of opinion among the learned Judges. One learned Judge (Justice V. Gopala Gowda), by his Judgment, proceeded to acquit the accused while Justice Arun Mishra dismissed the appeals. The Judgment rendered by the two learned Judges is reported in **Somasundaram** alias Somu v. State Represented by Deputy Commissioner of Police, (2016) 16 SCC 355. After the judgment was rendered, it is that the other appeals came to be filed by the other accused. They are as follows:

a. A5 and A8 have filed Criminal Appeal Nos. 2008 of 2017;

b. A6 has filed Criminal Appeal No.1504 of 2017;

c. A7, A11, A14, A16 and A17 have together filed Criminal Appeal No. 2006 of 2017;

d. Though Criminal Appeal No.2007 of 2017 and Criminal Appeal No. 2009 of 2017 were also filed, subsequent to the hearing, applications have been filed seeking to withdraw the aforesaid two appeals and they are liable to be dismissed as withdrawn.

THE PROSECUTION CASE

3. On M.K. Balan (hereinafter referred to as 'the deceased', for short), who was an Ex. M.L.A., was reported to be missing by his son-PW1 after he went for his morning walk on 30.12.2001. On the basis of the complaint, law was set in motion. PW67-Inspector of Police, took over the investigation on 12.01.2002 from PW66. It was, in fact, PW66, who initially conducted investigation. PW66 has spoken about information of the absconding person being given to the Police Control Room and to all Police Stations by wireless. He has sent photograph of absconding person to be published in the daily newspapers. Inquiry was conducted in hospitals. He has examined a large number of witnesses. It is, as noted, on 12.01.2002, further investigation was taken over by PW67-Deputy Superintendent of CBCID. The evidence of PW67 would show that from 13.01.2002, the Officer has examined several witnesses. According to the prosecution, the breakthrough came on the basis of information, as per which, the A5 (fifth accused) came to be arrested on 18.03.2002. On the very next day, A6 came to be arrested. Still, within the space of twenty-four hours, viz., on 20.03.2002, A7 came to be arrested. A8 was arrested on 22.03.2003. A1 was arrested on 23.03.2002. A3 was arrested on 25.03.2002. A4 came to be arrested on 09.04.2002. A15 was arrested on 25.04.2002. It is the prosecution case that the accused made confessional statements within the meaning of Section 27 of the Indian Evidence

Act, 1872 (hereinafter referred to as ‘the Evidence Act’, for short) yielding information leading to recoveries. It is the case of the prosecution that the deceased had been abducted (though it is shown as kidnapped) on 30.01.2002, taken and kept in a factory premises which belonged to PW34-Krishna Pandi with whom PW10 and PW11 had become partners. A huge sum, running into several crores, motivated the accused to hatch the conspiracy to abduct the deceased. It was the further case of the prosecution that the accused decided to do away with the deceased in case he did not yield to the demand. As it transpired as the deceased did not yield, he was murdered while he was kept captive in the first floor of the vermicelli factory, which, as already noted, was being operated by PW34. A3 was noted as leader of the ADMK. A12, it was alleged, who was married to the A2, was made to speak in the voice of an AIADMK leader Shashikala to A3. In this, the A1 and A2 played a role. It is, according to the prosecution, on being so spurred by the command given by A12, apparently mimicking the voice of the AIADMK leader, A3 acts. A9 contacted PW10 and PW11. It is alleged that PW10 and PW11 were persuaded to search for houses. Not satisfied with many of the houses shown to A3 and A9, they finally found favour with the factory premises which is located in Mudichur. It is the further case of the prosecution that after he was murdered, the body of the deceased came to be cremated at the Corporation cremation ground on 01.01.2002 and, in order to accomplish the same, PW33-an employee working in a Government Hospital, was roped in by A3 to procure a false death certificate. Accordingly, PW33, it was alleged, approached PW32-a Medical Practitioner. The Medical Practitioner gives a death certificate wherein the name of a person is indicated in the certificate, and allegedly residing at an address, which, the Police, on investigation, found, was not the abode of the person. In other words, the name of a non-existing and a fictional person was used to concoct a death certificate and, under the cover of the same, the body of the deceased came to be cremated.

4. On the basis of the charge-sheet and after complying with the formalities, the Trial Court framed charges against the accused. The following are the charges framed against the various accused as evident from the Trial Court Judgment:

> "The following charges were framed against the accused in this case: That during the month of November 2001, the 1st, 2nd and 3rd accused conspired together and discussed about the matter as to how the Ex.M.L.A. M.K. Balan could be kidnapped and extract money from him and it was decided to murder him in case if he refuses to pay any amount and that consequent upon such conspiracy on 30.12.01 early morning, he was kidnapped near MRC Nagar and he was illegally kept at T.K.P. Vermicelli factory at Mudichur and on account of committing him murder on 1.1.02 night at about 9:00 p.m., thereby a charge under section 120.B. IPC has been framed as against the accused 1 to 18 in this case.
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> Secondly for the purpose fulfilling the object of such conspiracy, while the said Ex.M.L.A. M.K. Balan was walking in the morning on 30.12.01 near MRC Nagar, at the knife point he was kidnapped near Iyyapan temple at about 5.30 am by the accused 4,7,10,11,14,15,16 and 17 in the Maruti van bearing Regn. No.: TN-A-7484 and at that time the 15th accused went in front of that van in a Hero Honda to show the route for them and lastly the said M.K. Balan was kept illegally at Vermicelli factory belonging to one Krishnapandi at Mudichur road, thereby the said accused have been charged under Section 365 IPC and for abetment of the said offence the accused 1,2,3,5,6,8,9 and 13 to 18 accused in going in a car bearing Regn. No.: TN-10-F-5555 have been charged under Section 365 read with Section 109 IPC.
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> Thirdly in order to fulfil the object of such conspiracy, in the said place on the said date the said M.K. Balan (Ex.M.L.A.) was tied with iron chain and rope in a cot and he was threatened to part with Rs.16 crores of Rupees or else to execute the document in respect of his properties in their favour, thereby the accused 1 to 11 and 14 to 18 have been charged under Section 387 IPC.
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> Fourthly, in order to fulfil such conspiracy and in pursuant of the same at the instance and instigation of the accused 1 and 2, the 12th accused spoke to the third accused over phone by changing the voice as that of Smt. Sasikala uttering the words” if possible get the amount or else close him and come along with Senthil and meet me and Senthil would tell you everything later, thereby the said accused have been framed charges under Section 419, 420 and 387 IPC read with 109 IPC.
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> Fifthly in order to fulfil the object of the said conspiracy and consequent upon the said occurrence on 1.1.02 night at about 9:00p.m. the accused 3,4,6 to 8,10,11 and 14 to 18 committed the murder of M.K.

Balan who refused to pay any money or to execute any documents in respect of his properties, by tying a rope around the neck and tightened, thereby all the above said accused persons had committed the offence punishable under section 302 IPC. Likewise the accused 1,2,5,9,12 and 13 were charged under section 302 read with section 109 IPC for having committed the offence of abetment for the act of committing the murder.

Sixthly, consequent upon the same on the same day in the said occurrence, with an object of extracting the property from the deceased M.K. Balan, he was kidnapped thereby accused 3 to 11 and 13 to 18 were framed charge under section 347 and 364 IPC and for being abetment for the said offence, the accused 1,2 and 12 have been framed charge under section 347 read with 109 and 364 read with 109 IPC.

Seventhly, after committing the murder of the deceased M.K. Balan, the body was taken to the cremation ground and cremated in Perambur cremation ground by getting false death certificate as if one Rajamani Chettiar died due to heart ailment and that therefore by suppressing the real facts in order to screen the crime, accused 8,10,11 and 13 to 18 have been framed charge under section 201 IPC."

5. The prosecution has sought to discharge its burden by examining 67 witnesses. It has also produced and proved a large number of documents (P1 to P86) and also material objects (MO1 to MO39). Five witnesses were examined by the accused. D1 to D8 were proved on their behalf. The Trial Court, on appreciation of the evidence, found merit in the case of the prosecution, except in regard to the A12 and A18. Resultantly, the Trial Court convicted the accused as follows:

(i) A1 and A2 were found guilty of the offences under Sections 120B of The Indian Penal Code, 1860 (hereinafter referred to as 'the IPC', for short), Section 365 read with Section 109 of the IPC, Section 387 of the IPC, Section 302 read with Section 109 of the IPC, Section 347 read with 109 of the IPC and under Section 364 read with Section 109 of the IPC.

(ii) A3 is found to have acted upon the conspiracy of A1 and A2. He was found guilty of the offences under Section 365 read with Section 109 of the IPC, Section 387 of the IPC, Section 302 of the IPC, Section 347 of the IPC, Section 364 of the IPC and Section 201 of the IPC. He was acquitted under Section 120B of the IPC. (See paragraph 194 of the Trial Court Judgment);

(iii) A4 was found guilty of the offences under Section 365 of the IPC, Section 387 of the IPC, Section 302 of the IPC, Section 347 of the IPC, Section 364 of the IPC and Section 201 of the IPC. He was acquitted under Section 120B of the IPC;

(iv) A5 was found guilty under Section 365 read with Section 109 of the IPC, Section 387 of the IPC, Section 302 read with Section 109 of the IPC, Section 347 of the IPC, Section 364 of the IPC and Section 201 of the IPC. He was, however, acquitted under Section 120B of the IPC.

(v) A6 was found guilty under Section 365 read with Section 109 of the IPC, Section 387 of the IPC, Section 302 of the IPC, Section 347 of the IPC, Section 364 of the IPC and Section 201 of the IPC. He stood acquitted under Section 120B of the IPC;

(vi) A7 was found guilty under Section 365 of the IPC, Section 387 of the IPC, Section 302 of the IPC, Section 347 of the IPC, Section 364 of the IPC and Section 201 of the IPC. He stood acquitted under Section 120B of the IPC;

(vii) A8 was found guilty under Section 365 read with Section 109 of the IPC, Section 387 of the IPC, Section 302 read with Section 109 of the IPC, Section 347 of the IPC, Section 364 of the IPC and Section 201 of the IPC and he stood acquitted under Section 120B of the IPC;

(viii) A11, who is one of the appellants before us, was convicted, Section 365 of the IPC, Section 387 of the IPC, Section 302 of the IPC, Section 347 of the IPC, Section 364 of the IPC and Section 201 of the IPC and was acquitted under Section 120B of the IPC;

(ix) A12 was acquitted of all the charges;

(x) A14, A15, A16 and A17 were convicted under Section 365 of the IPC, Section 387 of the IPC, Section 302 of the IPC, Section 347 of the IPC, Section 364 of the IPC and Section 201 of the IPC and the charge under Section 120B of the IPC was found not proved against them and they stood acquitted.

6. It is necessary to notice the details of the findings against each of the accused (appellants):

"211. The accused 3,6 and 8 for having abetted the crime of conspiracy of the accused 1 and 2, on 30.12.01 at about 5:30 a.m. the former M.L.A. M.K. Balan was kidnapped and kept in a secret place at Vermicelli factory at Mudichur road, Tambaram, committed the offence under section 365 read with 109 IPC and for having made an attempt to extract money or property from the said M.K. Balan, former MLA, committed the offence under section 387 IPC and when it was not able to get the same, by committing the murder of the said M.K. Balan, committed the offence under section 302 IPC and before committing murder him, for having kept him in a secret place unlawfully and illegally, committed the offence under section 347 IPC and for having kidnapped him for the purpose of murdering him, committed the offence under section 364 IPC and after the murder of the said M.K. Balan, former M.L.A., the body was cremated at the crematorium at Erukkancherry, Perambur and with a view to screen the traces and giving false information, committed the offence under section 201 IPC and accordingly they are found guilty of the above said offences.

212. In order to fulfil the object of on 30.12.01 at about 5.30 a.m. the former M.L.A. M.K. Balan was kidnapped and kept in a secret place at Vermicelli factory at Mudichur road, Tambaram, committed the offence under section 365 read with 109 IPC and for having made an attempt to extract money or property from the said M.K. Balan, former MLA, committed the offence under section 387 IPC and when it was not able to get the same, by committing the murder of the said M.K. Balan, committed the offence under section 302 IPC and before committing murder him, for having kept him in a secret place unlawfully and illegally, committed the offence under section 347 IPC and for having kidnapped him for the purpose of murdering him, committed the offence under section 364 IPC conspiracy of the accused 1 and 2, the 4th accused has been charged for the above said offences.

213. The 5th accused is found guilty of the offences for having fulfilled the conspiracy of the accused 1 and 2 on 30.12.01 at about 5:30 a.m. the former M.L.A. M.K. Balan was kidnapped and kept in a secret place at Vermicelli factory at Mudichur road, Tambaram, committed the offence under section 365 read with 109 IPC and for having made an attempt to extract money or property from the said M.K. Balan, former MLA, committed the offence under section 387 IPC and when it was not able to get the same, by committing the murder of the said M.K. Balan, committed the offence under section 302 IPC and before committing murder him, for having kept him in a secret place unlawfully and illegally, committed the offence under section 347 IPC and for having kidnapped him for the purpose of murdering him, committed the offence under section 364 IPC and after the murder of the said M.K. Balan, former MLA, the body was cremated at the crematorium at Erukkancherry, Perambur and with a view to screen the traces and giving false information, committed the offence under section 201 IPC and accordingly he is found guilty of the above said offences.

214. The 7th, 10th, 11th and 14th accused were charged for the offences for having colluded with the accused 1 and 2 in fulfilling their conspiracy by stating that on 30.12.01 at about 5.30 a.m. the former M.L.A. M.K. Balan was kidnapped and kept in a secret place at Vermicelli factory at Mudichur road, Tambaram, committed the offence under section 365 read with 109 IPC and for having made an attempt to extract money or property from the said M.K. Balan, former MLA, committed the offence under section 387 IPC and when it was not able to get the same, by committing the murder of the said M.K. Balan, committed the offence under section 302 IPC and before committing murder him, for having kept him in a secret place unlawfully and illegally, committed the offence under section 347 IPC and for having kidnapped him for the purpose of murdering him, committed the offence under section 364 IPC and after the murder of the said M.K. Balan, former M.L.A., the body was cremated at the crematorium at Erukkancherry, Perambur and with a view to screen the traces and giving false information, committed the offence under section 201 IPC and accordingly, they are found guilty of the above said offences as decided in this case.

215. It is stated as against the accused 9 and 13 that for fulfilling the object of conspiracy of the accused 1 and 2 on 30.12.1 at about 5.30 a.m. the former M.L.A. M.K. Balan was kidnapped and kept

in a secret place at Vermicelli factory at Mudichur road, Tambaram, committed the offence under section 365 read with 109 IPC and for having made an attempt to extract money or property from the said M.K. Balan, former M.L.A., committed the offence under section 387 IPC and when it was not able to get the same, by committing the murder of the said M.K. Balan, committed the offence under section 302 IPC and before committing murder him, for having kept him in a secret place unlawfully and illegally, committed the offence under section 347 IPC and for having kidnapped him for the purpose of murdering him, committed the offence under section 364 IPC and accordingly they were found guilty of the above said offences."

7. The sentencing is as follows:

"220. Further the accused 3, 6 and 8 are convicted for the offence under section 365 read with 109 IPC and sentenced to undergo 7 years RI and to pay fine of Rs. 5000/- each in default to undergo one year RI each; convicting them for the offence under section 387 IPC and sentencing them to undergo 7 years RI and to pay fine of Rs. 5000/- in default to undergo one year RI each and that convincing them for the offence under section 302 IPC and sentencing them to undergo life imprisonment and to pay fine of Rs. 50000/- each and convicting them for the offence under section 347 IPC and sentencing them to undergo three years RI each and to pay fine of Rs. 5000/- in default to undergo six months RI each; also convicting them for the offence under section 364 IPC and sentencing them to undergo 10 years RI and to pay fine of Rs. 5000/- in default to undergo two years RI each; convicting them for the offence under section 201 IPC and sentencing them to undergo 7 years RI and to pay fine of Rs. 10000/- in default to undergo one year RI each and that the total fine amount imposed on them each Rs. 80000/- (Rupees eighty thousand only) and that it is ordered that all the sentences imposed on these accused shall run concurrently.

221. The 4th accused is convicted for the offence under section 365 IPC and sentenced to undergo 7 years RI and to pay fine of Rs. 5000/- and in default to undergo one year RI and convicting him for the offence under section 387 IPC and sentenced to undergo 7 years RI and to pay fine of Rs.5000/- in default to undergo one year RI; that convicting him for the offence under section 302 IPC and sentencing him to undergo life imprisonment and to pay fine of Rs. 50,000/- convicting him for the offence under section 347 IPC and sentencing him to undergo 3 years and to pay fine of Rs. 5000/- in default to undergo six months RI; convicting him to undergo 10 years RI and to pay fine of Rs. 5000/- in default to undergo 2 years RI and that it is ordered that all the sentences imposed on this accused shall run concurrently (total fine amount imposed on him is Rs. 70,000/- Rupees seventy thousand only).

222. The 5th accused is convicted for the offence under Section 365 read with 109 IPC and sentenced to undergo 7 years RI and to pay fine of Rs.5000/- in default to undergo one year RI; convicting him for the offence under section 387 IPC and sentencing him to undergo 7 years RI and to pay fine of Rs. 5000/- in default to undergo one year RI; convicting him for the offence under section 302 IPC read with 109 IPC and sentencing him to undergo life imprisonment and to pay fine of Rs.50,000/- convicting him for the offence under section 347 IPC and sentencing him to undergo 3 years RI and to pay fine of Rs. 5000/- in default to undergo six months RI and convicting him for the offence under section 364 IPC and sentencing him to undergo 10 years RI and to pay fine of Rs. 5000/- in default to undergo two years RI; convicting him for the offence under section 201 IPC and sentencing him to undergo 7 years RI and to pay fine of Rs. 10,000/- in default to undergo one year RI and that total fine imposed on this accused is Rs. 80,000/- (Rupees eighty thousand only) and that all the sentences imposed on this accused shall run concurrently;

223. The 9th accused is convicted for the offence under section 365 read with 109 IPC and sentenced to undergo 7 years RI and to pay fine of Rs. 5000/- in default to undergo one year RI, convicting him for the offence under section 387 IPC and sentencing him to undergo 7 years RI and to pay fine of Rs.5000/- in default to undergo one year RI; convicting him for the offence under section 302 read with 109 IPC and sentencing him to undergo life imprisonment and to pay fine of Rs. 50,000/- and also convicting him for the offence under section 347 IPC and sentencing him to undergo 3 years RI and to pay fine of Rs. 5000/- in default to undergo six months RI; and also convicting the accused for the offence under section 364 IPC and sentencing him to undergo 10 years RI and to pay fine of Rs. 5000/-

in default to undergo 2 years RI as decided. It is ordered that all the sentences imposed on him in this case shall run concurrently (total fine amount is Rs. Seventy thousand only).

224. Further the 13th accused is convicted for the offence under section 365 read with 109 IPC and sentenced to undergo 7 years RI and to pay fine of Rs. 5000/- in default to undergo one year RI; convicting the accused for the offence under section 302 read with 109 IPC and sentencing him to undergo life imprisonment and to pay fine of Rs. 50000/- and also convicting him for the offence under section 347 IPC and sentencing him to undergo 3 years RI and to pay fine of Rs. 5000/- in default to undergo six months RI; convicting him for the offence under section 364 IPC and sentencing him to undergo 10 years RI and to pay fine of Rs. 5000/- in default to undergo two years RI; convicting him for the offence under section 201 IPC and sentencing him to undergo 7 years RI and to pay fine of Rs. 10000/- in default to undergo one year RI as ordered. All the sentences imposed on him shall run concurrently. (Total fine amount imposed on this accused is Rs. Seventy five only). It is further ordered that this 13th accused shall undergo the sentences imposed on him in respect of the case in S.C. No. 206/03 along with the sentences imposed on him in this case concurrently.

225. Further the accused 7,10,11,14,15,16 and 17 are convicted for the offence under section 365 IPC and sentenced to undergo seven years RI and to pay fine of Rs.5000/- in default to undergo one year RI each; convicting them for the offence under section 387 IPC and sentencing them to undergo 7 years RI and to pay fine of Rs. 5000/- in default to undergo one year RI each; convicting them for the offence under section 302 IPC and sentencing them to undergo life imprisonment and to pay fine of Rs. 50000/- each and also convicting them for the offence under section 347 IPC and sentencing them to undergo 3 years RI and to pay fine of Rs. 5000/- in default to undergo six months RI each; convicting them for the offence under section 364 IPC and sentencing them to undergo 10 years RI and to pay fine of Rs. 5000/- in default to undergo two years each; convicting them for the offence under section 201 IPC and sentencing them to undergo 7 years RI and to pay fine of Rs. 10,000/- in default to undergo one year RI each as decided. (The total fine amount being Rs. 80,000/- each) All the sentences imposed on these accused shall run concurrently as ordered."

8. The High Court confirmed the judgment of the Trial Court except as regards A10 who was acquitted.

9. We heard the learned Counsel for the appellants.

10. We have also heard the learned Counsel appearing for the respondent-State in all the appeals.

11. Learned Counsel for A3 would submit that the case of the prosecution was based on the theory of conspiracy. It is accordingly that the charge under Section 120B was framed against the accused including A3. The case of the prosecution in this regard was, A12, who was married to A2, made phone calls to A3. A3 was told over phone by A12 allegedly in the voice of Shashikala that A1 and A2 would meet A3 and he was asked to do what they would ask him to do. There were further calls. In fact, the conspiracy was, according to the prosecution, hatched in the minds of A1 and A2. A1 flaunted his proximity to M.K. Stalin (a political leader) stating that he was about to marry his daughter. A2 was in dire financial straits. He had contracted an inter-religious marriage with A12. They hit upon the idea of abducting the deceased and to compel him to part with a large sum of money (Rs.16 crores) and, in case he refused, to do away with him. It is pointed out that the Trial Court has disbelieved the case of the prosecution relating to criminal conspiracy which culminated in the court acquitting A12 of the charge against her. The appellant also stood acquitted under Section 120B of the IPC. The entire edifice of the prosecution case was built on the alleged criminal conspiracy which involved A12. Once this edifice was knocked out by the acquittal of A12, the superstructure sought to be built by the prosecution must necessarily fall to the ground.

12. Next, it is pointed out that the prosecution case is otherwise based on the testimony of PW10 and PW11. He would point out that PW10 and PW11 were unreliable witnesses. It is clear that PW10 and PW11 were accomplices. They were untrustworthy witnesses. It is pointed out that it is settled law that the court would not act on the deposition of accomplices unless they are found reliable and, furthermore, there is corroboration of their testimony from other reliable evidence. Neither are PW10 and PW11 reliable nor is there any corroborative evidence forthcoming in this case, it is submitted. As far as conviction employing Section 109 of the IPC is concerned, learned Counsel submitted that in order that Section 109 may apply apart from mere conspiracy, some act or illegal omission in pursuance of the so-called conspiracy is

indispensable. He would further submit that though V. K. Shashikala was interrogated by PW67-Officer, she has not been examined as a witness. There is no evidence relating to what her voice is. Unless the voice of Shashikala was known to A12, it would be well-nigh impossible to believe that the A12 could speak in her voice to A3 which ultimately is what the prosecution case is all about. There is no evidence of Shashikala having made a public speech. Though A3 may be familiar with her voice being a party functionary, it hardly suffices as there is no evidence to conclude that A12 was familiar with her voice without which it is incredible that she could mimic Shashikala.

13. He would further contend that in this case once the prosecution case relating to conspiracy under Section 120B of the IPC failed, reliance placed on Section 109 of the IPC, which contemplates a conspiracy and something more would have no legs to stand on. Leave alone any illegal act or omission based on a conspiracy, no conspiracy itself is proved. Therefore, Section 109 of the IPC can have no play. Regarding the recovery of Maruti Zen car at the instance of A3, it is pointed out that A3 is not the owner of the car. PW10 and PW11 were active participants. They were not tendered pardon under Section 306 of The Code of Criminal Procedure, 1973 (hereinafter referred to as 'the CrPC' for short). He would further contend that the evidence of PW3 does not establish involvement of A3. PW3 has merely stated that at 05.30 A.M., he saw three persons and that he was at the distance of 75 meters when he saw three persons pushing another person into a Maruti Van. Evidence of PW1, who is the son of the deceased, would show that the shoes allegedly recovered as was worn by the deceased, did not belong to his father. The case of abduction is not proved on the basis of the evidence tendered by PW3. The Van, which was recovered, has not been identified. The Motorcycle, which was recovered, again was not identified. The recovery was also not proved, he contends. The prosecution has failed to prove that A3 brought the deceased to the factory. PW34, on whose testimony prosecution has placed considerable reliance, is also an accomplice. He drew our attention to the judgment, (2016) 16 SCC 355 of Justice Arun Mishra in paragraph 115, which reads as follows:

> "115. With respect to charge of murder against A-3 and A-4 it is apparent that MO 31 is in the handwriting of A-1. It was read out by A-12 and heard by A-3 and was acted accordingly. Evidence of Sahul Hameed, PW 47 also proves recovery of chain with which M.K. Balan was tied and that of other articles. It is apparent that M.K. Balan was abducted. There was an attempt to extract money when it was not possible, he was murdered in factory premises. The appellants were charged for committing the murder by putting nylon rope around his neck and tightening it. Though there is no direct evidence with respect to that but it can be inferred in the circumstances that they committed the offence of murder also. Once they had abducted M.K. Balan it was for them to explain how they dealt with him. The dead body of M.K. Balan could not be found as it was cremated in the name of a fictitious person —Rajamani Chettiar. His post-mortem also could not be conducted but the evidence clearly indicates that the dead body of M.K. Balan was taken from the vermicelli factory. It gives an inference that the accused persons had murdered the victim. It is not necessary for recording a conviction that corpus delicti to be found. There is ample evidence leading to an inescapable conclusion that M.K. Balan was done to death by the appellants. His dead body was seen by the witnesses."

14. He complains that this approach involves shifting of the burden to be shouldered by the prosecution to the accused. Since abduction itself has not been proved, in order that the prosecution should succeed in the matter of securing conviction under Section 302 of the IPC, the prosecution ought to have proved the case as set out by it. A chain was allegedly used to commit murder of the deceased. A14 and A16 were in jail. The chain and the nylon rope were recovered on the basis of the statements given by them. He would point out that however the said recoveries cannot be used against the other accused. He reminds the court of the backdrop in which the investigation proceeded following the missing of a high-profile person, as the deceased was an Ex- MLA. A Habeas Corpus Petition was filed in the Madras High Court. There was much pressure. The matter engaged the attention of the media also. This forced the Investigating Officers to manufacture the version indeed in order to cater to the general public. PW 21 and PW35 are Police Officers. They are alleged to have identified some of the accused as loitering in a public road after midnight on 01.01.2002, which was immediately after the alleged commission of the crimes including murder. But this cannot result in conviction of A3. PW12 and PW19 are prosecution witnesses produced to prove the case under Section 201 of the IPC, viz., destruction of the body of the deceased after the commission of the crime, PW12 and PW19 worked at the cremation ground. It is pointed out that as far as PW12 is concerned, he has turned hostile. It is pointed out, in this regard, that the ashes were not recovered. The bones of the deceased person were not recovered or sent for scientific investigation.

15. He would submit that the body of the deceased itself is not found or not produced, and therefore, the case of the prosecution cannot be accepted. There is evidence to show that for a person above 60 years, a death certificate is not required for conducting cremation. This is the submission made in the context of evidence relied on by both the courts and also a learned Single Judge of this Court to conclude that A3 was involved in procuring a false death certificate. According to the prosecution, PW32-Doctor was approached by PW33 at the instance of A3. It was mentioned to the Doctor that another person had passed away. Believing PW33, PW32-Doctor has deposed that he gave a death certificate. According to PW19, the dead body was cremated in the night on 01.01.2002. The death certificate is, no doubt, dated 02.01.2002. [But what weighed with the courts is the role played by A3 in setting up a false case that a person, other than deceased, involved in this case, had passed away and securing a death certificate which paved the way for cremation of the body of the deceased resulting in the destruction of the evidence relating to the body of the deceased].

16. Learned Counsel for the A3 pointed out that A3 must be connected with the matter as sought to be done by both courts which was not the case.

17. Regarding the recovery effected from A3, it is pointed out that, MO12 is the Maruti Zen Car. He would point out that the relevance of the recovery (apart from the infirmity attached with the recovery) is not established. MO28 are the audio cassettes. Regarding the same, it is pointed out that it was incumbent upon the prosecution to establish the content by providing the transcript. The audio was supposed to contain conversation of the deceased but it cannot be relied on in the absence of a transcript. The relevancy of the content has not been established. The voice of the speaker has not been proved. Regarding MO12-Maruti Zen Car, recovery at the instance of A3, it is contended that the evidence would show that the owner of the said car had given MO12 to A3 in November, 2001 and A3 has given back the car in February, 2002. There is no particular role which is attributed to the Maruti Zen Car.

18. Regarding audio evidence, it is submitted that it did not satisfy the requirements of Section 3 of the Evidence Act. MO33 is a bit of paper on which, in the alleged handwriting of A1, the message from A12 to A3 was written [it will be remembered that it is the case of the prosecution that A12, imitating the voice of Shashikala, had commanded A3, a party functionary, to oblige A1 and A2 and this set in motion the chain of events culminating in the gruesome murder of the deceased]. It is the acquittal of A12 who allegedly messaged to A3, which is the subject matter of MO33, which is pressed before us to remove any importance it may otherwise have had. Till 10.04.2002, the evidence of PW67 would show that it was not sealed thus robbing the material object of any legal efficacy it may have otherwise had, it is contended. It is further contended that the voice of the deceased, is not proved through PW1. Learned Counsel would submit that if statement under Section 27 is made and a person making it is acquitted, such statement cannot be used against other accused. Learned Counsel would contend that in the case of a conviction employing Section 109 of the IPC, the principal offender must be identified. He drew our attention in regard to the judgment reported in Siri Ram Batra and others v. Financial Commissioner, Delhi and others, (2004) 12 SCC 52. He pointed out that Justice Arun Mishra, has proceeded on the basis that a confession under Section 164 of the CrPC is a substantive piece of evidence, which, it is not. In this regard, our attention is drawn to the judgments of this Court. In George and others v. State of Kerala and another, (1998) 4 SCC 605 it was held as follows:

> "36. We may now turn to the evidence of PW 50, detailed earlier. From the judgment of the trial court we notice that the substantial parts of its comments, (quoted earlier) are based on his statement recorded under Section 164 CrPC and not his evidence in court. The said statement was treated as substantive evidence; as would be evident from the following, amongst other observations made by the learned trial court:
>
> "If Ext. P-42 (the statement recorded under Section 164 CrPC) is found to be a genuine statement it can be used as an important piece of evidence to connect the accused with the crime."
>
> In making the above and similar comments the trial court again ignored a fundamental rule of criminal jurisprudence that a statement of a witness recorded under Section 164 CrPC cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating him."(Emphasis supplied)

19. Learned Counsel for A3 relied upon the following decisions. In Baldev Singh v. State of Punjab, (1990) 4 SCC 692 this Court noted that the High Court had fallen into error in relying upon the statement of the witness under Section 161 of the CrPC as well as on the FIR regarding identification of the accused in a case where, in his cross-examination in the court, he deposed that he could not, due to darkness, identify the culprits. The court emphasised that the statement under Section 161 of the CrPC is not to be used for any purpose except to contradict the witness in the manner provided in Section 162 of the CrPC. Obviously, this judgment is invoked against the court relying upon the evidence of PW19.

20. In Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra and others, (1990) 4 SCC 692 is relied on to point out that while taking record of speeches as documents under Section 3 of the Evidence Act, the admissibility would depend upon the following conditions being fulfilled:

> "(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.
>
> (b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.
>
> (c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."

21. He also pointed out that if the photograph of the accused is shown to the witnesses and the witnesses then depose about identifying the accused, it would deprive the identification of any value it would have otherwise. He relied on the judgement of this Court in Vijayan v. State of Kerala, (1999) 3 SCC 54:

> "8. Another circumstance sought to be established was through the evidence of PW 4, a young girl living a few yards away from the house of the deceased. According to her, she heard the sound of somebody running and when she turned, she saw accused Vijayan running away after crossing a water channel and wearing a blue pant and blue shirt. It is no doubt true that she identified accused Vijayan in the test identification parade but for the reasons already advanced while discussing the evidence of PWs 3 and 9, the identification of the accused in the test identification parade cannot be relied upon. The High Court unfortunately appears to have taken a view that the identification of the accused by PW 4 in the test identification parade should be relied upon. We are unable to agree with this conclusion particularly when it is apparent from the prosecution material that much before the holding of the test identification parade, the photograph of the accused Vijayan had been published in the newspaper and because of a certain sensation in the locality, it had a lot of publicity and there was sufficient opportunity for the witnesses being shown the accused person. In this view of the matter, in our considered opinion, the High Court erroneously interfered with the conclusion of the learned Sessions Judge in this regard and came to hold that the identification of Vijayan by PW 4 could be relied upon. We have examined the evidence of the said PW 4 in great detail and we are unable to subscribe to the view the High Court has taken on the evidence of the aforesaid witness. We also really fail to understand how a witness seeing an unknown man running away could be able to identify him at a later point of time. No special feature was also indicated by the witness. In our view, the evidence of PW 4 is totally unworthy of credit and, as such, cannot be relied upon for bringing home the charge." (Emphasis supplied)

It was a case where also just before the Test Identification Parade, someone told her to identify the tallest man in the Parade.

22. Learned Counsel would point out that the accused are entitled to request the Court to draw an adverse inference against the prosecution when the best evidence has not been produced [See Mohanlal Shamji Soni v. Union of India and another, 1991 Supp (1) SCC 271. Clearly, the accused was entitled to at least the benefit of doubt.

CRIMINAL APPEAL NO. 2006 OF 2017

23. The learned Counsel for A3 also adopted arguments in Criminal Appeal No. 2006 of 2017 where he appeared for A7, A11, A14, A16 and A17 about PW10 and PW11 and other submissions.

CRIMINAL APPEAL NO. 403 OF 2010 APPEAL BY ACCUSED NO.4(A4)

24. The learned Counsel would submit that no value can be given to the Test Identification Parade (TIP) conducted insofar as A4 is concerned. He would point out that PW10 and PW11 are proved to be familiar with A4 by having seen him on a number of occasions prior to the TIP. This would deprive the alleged identification of any value it would have. MO6 is the Ford Escort Car, which is recovered from A4 on the basis of the statement given under Section 27 of the Evidence Act. The recovery is attacked by the learned Counsel on the basis that it is planted evidence. He took us through the deposition of PW25 to impugn the recovery. According to PW67, he points out that car was parked outside. He would complain that the courts have relied on PW10 and PW11 as if they were reliable witnesses, which they were not. He would also emphasise that being accomplices, they should not only be reliable but their evidence must stand the test of corroboration. He points out that the prosecution has tried to build up the case that the said witnesses had not approached the Police out of fear for their lives and that of their family members but he would point out that on a perusal of their evidence, it would be clear that they were involved with the matter right from the beginning and nothing prevented them from approaching the law enforcement authorities. Their evidence, therefore, should not inspire the confidence of the court. He would point out that PW10 and PW11 were in police custody for about more than two months. They would have bargained with the police and their testimony is suspect. The TIP was held after 45 days on 24.05.2002. He would point out contradiction between the testimony of PW10 and PW11. In other words, he would point out that leave alone corroboration from other evidence available on record, there is no corroboration of evidence of PW10 even from the evidence of PW11 as their deposition reveal contradictions. The learned Counsel otherwise adopts arguments of A3.

25. Substantially, similar arguments are addressed in regard to A5 as in respect of A3. It is also contended that PW67 was aware of the involvement of all and the evidence of PW10 and PW11 was unreliable.

CRIMINAL APPEAL NO. 1504 OF 2017

26. Herein the appellant is A6. The learned Counsel for the appellant would address the following submissions. He would submit that there are four circumstances used against A6. It is first sought to be contended by the prosecution that A6 was seen on 05.12.2001. Next, his presence on 31.12.2001 at the factory, where the deceased was allegedly done to death, is used against him. Still further, the deposition of PW10 that he saw him on 01.01.2002 and that he threatened PW10, are used against him. He would also point out the contradiction between PW10 and PW11, in this regard. MO8 is the white colour Maruti Van recovered at the instance of A6. The said vehicle bore Number - TN-22-BO/343. He would point out that there is no evidence to show that the said vehicle was used for abduction or transportation. He would, in other words, question its very relevance to secure conviction of his client. He would further point out that PW24-Police Officer has in fact identified A8 as A6. In this regard, he drew our attention to paragraph 147 of the Trial Court judgement. He further submitted that PW12-the employee at the crematorium, did not identify A6 though PW19 identified A6. Identification by PW19 is unreliable as he did not mention about physical features of A6. He would complain that PW19 would have seen photographs in the media, a complaint which is being echoed on behalf of the other accused, also. Next, the circumstance used against A6 is deposition of PW21 and PW35, Police Head Constable and Constable, respectively. He would, in fact, submit that even accepting their deposition, it would prove nothing more than the fact A6 was there on the public road on the midnight of 01.01.2002. It would not connect A6 with the crime. He would further point out that the deposition of PW35 would show that contrary to the usual practice in the Beat Note, there is nothing noted about A6 though he has deposed that along with three others, A6 presence was noted. The identification of A6 by the Police Officers is not reliable, it is contended. It is pointed out that the Police Officer would have visited the jail and also been in the court premises where he would have seen A6. Therefore, the identification of A6 by the Police Officers loses all meaning.

27. He also relied on deposition of PW1 that the Reebok Shoes did not belong to his father-the deceased. There is no corroboration of the evidence relating to the presence of A6 on 30.01.2001 and 31.01.2001. There is no evidence to establish the presence of A6 on 01.01.2002. PW10 and PW11, accomplices, were tutored by the Police Officers considering the pressure on the Investigating Officers consequent upon the fact that the case attracted considerable publicity as a result of the Habeas Corpus Petition being filed in the High Court. He would submit that PW67-Investigating Officer, after the arrest of A5 on 18.03.2002, was completely aware of involvement of all the persons.

28. It is also the case of the appellant-A15 that no reliance could be placed on the recovery of the shoe when PW1-son of the deceased, has himself deposed that the shoe which is recovered was not the one which was worn by his father. It is also the contention that PW31 has not been able to identify the person who took away allegedly the shoe from the factory.

29. Per contra, the learned Counsel appearing on behalf of the State would begin by submitting that PW10 and PW11 were not accomplices. Their evidence would, therefore, not require corroboration. He tried to make good this submission by pointing out that qua the offence under Section 302 of the IPC, PW10 and PW11 had no involvement and the mere fact that they were familiar with the developments leading to the murder and other acts of the accused, they could not be treated as accomplices. He would point out, in fact, that accused nos. 1 and 2, have been convicted under Section 120B read with 302 of the IPC. He would draw considerable support from the deposition of PW34. He further submitted that A1 and A2 were the principal conspirators. The other accused, who have been convicted under Section 109 of the IPC, have aided and connived, within the meaning of Section 109 of the IPC, with A1 and A2. He would submit that the acquittal of A12 would have no impact on the conviction of the appellants. He would point out that this Court, in the case of this nature, which is based on circumstantial evidence, what is to be looked into is the cumulative effect of all the circumstances put together. In regard to any defect in charge, he drew our attention to Section 460 of the CrPC and contended that there is no incurable illegality involved in this case. He drew our attention to the deposition of PW60. He referred us to the recoveries which have led to relevant evidence believed in by two courts, and what is more, a learned Single Judge of this Court. He would further point out to the deposition of PW19. He points out that both PW12 and PW19 had made statements under Section 164 of the CrPC. Statement under Section 164 of the CrPC could be used for the purpose of corroborating though it could not be used as a substantive evidence by itself. He also drew considerable support from deposition of PW32 read with PW33. The hand of A6 in the murder of a public man is clearly made out, runs the argument. He fairly does not dispute the contention of A6 in regard to MOs 28 and 33. He assures the Court that the Court can eschew the said items of evidence but he would submit that even dehors the same, there is sufficient material before the Court to confirm the conviction of the appellants. Learned Counsel for A3, in reply, would point out that in fact, even A1 and A2 have also been convicted with the aid of Section 109 of the IPC. In other words, it is his case that even A1 and A2 are not the principal actors so that the other accused could be convicted for abetting them. They were themselves convicted on the basis that they abetted the crimes in question. He further pointed out that PW10 and PW11 have been treated as accomplices by the High Court contrary to what is sought to be espoused by the learned Counsel for the State.

SECTIONS 120A, 107, 108, 109, 141 AND 149 OF THE IPC

30. Section 120A of the IPC defines “criminal conspiracy”, which reads as follows:

> **“120A. Definition of criminal conspiracy.—** When two or more persons agree to do, or cause to be done,—
>
> (1) an illegal act, or (2) an act which illegal means, is not illegal such an agreement by is designated a criminal conspiracy:
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.
>
> Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.”

31. Section 141 of the IPC falls under Chapter VIII, viz., offences against the public tranquillity. Section 141 defines unlawful assembly as assembly of five or more persons, the common object of the persons being any one of the five mentioned thereunder. It includes the common object to commit any mischief or criminal trespass or other offence. Section 142 of the IPC declares that if a person, being aware of facts which render an assembly an unlawful assembly, either initially joins it or continues in it is a member of such unlawful assembly.

32. Section 149 of the IPC declares the Principle of Vicarious Criminal Liability. Upon an offence being committed by any member of an unlawful assembly in prosecution of the common object, every person, who

at the time of the offence being committed is a member of such assembly is guilty of such offence. Equally, in the second part of Section 149, the Law Giver has provided that upon an offence being committed by any member of the unlawful assembly which was such that members of that assembly, viz., the unlawful assembly, knew to be likely to be committed in prosecution of that object, every member of the assembly, though he may not have committed the offence, is rendered guilty of the offence.

33. In Nanak Chand v. State of Punjab, AIR 1955 SC 274 the Court had to deal with a contention on behalf of the prosecution that Section 149 of the IPC did not create any offence at all and hence a separate charge, was not obligatory.

This Court, therefore, found it necessary to decide a question whether Section 149 of the IPC creates a specific offence. The Court held, inter alia, as follows:

> "6. … Under this section a person, who is a member of an unlawful assembly is made guilty of the offence committed by another member of the same assembly, in the circumstances mentioned in the section, although he had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. Without the provisions of this section a member of an unlawful assembly could not have been made liable for the offence committed not by him but by another member of that assembly. Therefore when the accused are acquitted of riot and the charge for being members of an unlawful assembly fails, there can be no conviction of any one of them for an offence which he had not himself committed. …"

34. The Court, thereafter, went on to notice the distinction between Sections 34 and 149 of the IPC. Dealing with the argument that Section 149 of the IPC cannot be understood as creating an offence because it did not itself provide for the punishment, this Court held as follows:

> "7. … There is a clear distinction between the provisions of Sections 34 and 149 of the Indian Penal Code and the two sections are not to be confused. The principal element in Section 34 of the Indian Penal Code is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation Section 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone. There is no question of common intention in Section 149 of the Indian Penal Code. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence, although there may have been no common intention and no participation by the other members in the actual commission of that offence. In Barendra Kumar Ghosh v. Emperor [(1925) ILR LII Cal 197] Lord Sumner dealt with the argument that if Section 34 of the Indian Penal Code bore the meaning adopted by the Calcutta High Court, then Sections 114 and 149 of that Code would be otiose. In the opinion of Lord Sumner, however, Section 149 is certainly not otiose, for in any case it created a specific offence. It postulated an assembly of five or more persons having a common object, as named in Section 141 of the Indian Penal Code and then the commission of an offence by one member of it in prosecution of that object and he referred to Queen v. Sabid Ali [(1873) XX Weekly Reporter (Cr), p 5]. He pointed out that there was a difference between object and intention, for although the object may be common, the intentions of the several members of the unlawful assembly may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of Section 34, was replaced in Section 149 by membership of the assembly at the time of the committing of the offence. It was argued, however, that these observations of Lord Sumner were obiter dicta. Assuming though not conceding that may be so, the observations of a Judge of such eminence must carry weight particularly if the observations are in keeping with the provisions of the Indian Penal Code. It is, however, to be remembered that the observations of Lord Sumner did directly arise on the argument made before the Privy Council, the Privy Council reviewing as a whole the provisions of Sections 34, 114 and 149 I.P.C."(Emphasis supplied)

35. Further, this Court proceeded to hold that a person charged with an offence under Section 149 of the IPC cannot be convicted of the substantive offence without there being a specific charge framed as required under Section 233 of the CrPC, 1898. This Court held as follows:

> “10. After an examination of the cases referred to on behalf of the appellant and the prosecution we are of the opinion that the view taken by the Calcutta High Court is the correct view, namely, that a person charged with an offence read with Section 149 cannot be convicted of the substantive offence without a specific charge being framed as required by Section 233 Cr.P.C.”

36. Section 107 falls in Chapter V of the IPC. It reads as follows:

> **“107. Abetment of a thing.**—A person abets the doing of a thing, who—
>
> **(First) —** Instigates any person to do that thing; or
>
> **(Secondly) —** Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> **(Thirdly) —** Intentionally aids, by any act or illegal omission, the doing of that thing.
>
> **Explanation I.—** A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.
>
> Illustration A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.
>
> **Explanation II.—** Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.”

37. Section 108 of the IPC provides that a person abets an offence who abets either the commission of an offence or the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor. The first Explanation provides that abetment of an illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act. Explanation (2) declares that it is not necessary to constitute abetment that the act abetted should be committed or that the effect requisite to constitute the offence should be caused. The Illustration(a) under Explanation II provides as follows:

> “ (a) ’A’ Instigates ‘B’ to murder ‘C’. ‘B’ refuses to do so. ‘A’ is guilty of abetting ‘B’ to commit murder.”

38. The second limb of the Explanation (II) is illumined by the illustration(b) and it reads as follows:

> “(b) ‘A’ instigates ‘B’ to murder ‘D’, ‘B’ in pursuance of the instigation stabs ‘D’. ‘D’ recovers from the wound.
>
> ‘A’ is guilty of instigating ‘B’ to commit murder.”

39. Explanation (3) declares that it is not necessary that the person abetted should be capable by law of committing an offence or that he should have the same guilty intention or knowledge as that of the abettor or any guilty intention or knowledge. The first illustration is as follows:

> “(a) ‘A’, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as ‘A’. Here ‘A’, whether the act be committed or not, is guilty of abetting an offence.”

40. Another illustration(d) is as follows:

> "(d) 'A', intending to cause a theft to be committed, instigates 'B' to take property belonging to 'Z' out of 'Z's possession. 'A' induces 'B' to believe that the property belongs to 'A'. 'B' takes the property out of Z's possession, in good faith, believing it to be A's property. 'B', acting under this misconception, does not take dishonestly, and therefore does not commit theft. But 'A' is guilty of abetting theft, and is liable to the same punishment as if 'B' had committed theft."

41. Thus, Explanation (3) constitutes an exception to the main provisions of Section 108 of the IPC.

42. Abetment of an offence being an offence, the abetment of such abetment is also an offence under Explanation IV. Explanation V makes it clear that it is not necessary to the commission of offence of abetment by conspiracy that the abettor should concert the offence with the person who commits and it is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. The illustration under Explanation V is as follows:

> "'A' concerts with 'B' a plan for poisoning 'Z'. 'A' was to under the agreement administer the poison. 'B' then explains the plan to 'C' without taking the name of 'A'. 'C' agrees to procure the poison and deliver it to 'B' for it being used in the manner explained. 'Z' dies pursuant to the poison being administered. However, 'A' and 'C' have not conspired together yet since 'C' has been engaged in the conspiracy in pursuant to which 'Z' was murdered, 'C' has committed an offence of abetment who is guilty for punishment for murder."(Emphasis supplied)

43. Thus, abetment of a thing is defined in Section 107 of IPC and the concept of "abettor" is explained in Section 108 of the IPC. Sections 107 and 108 of the IPC must be read together to glean the intention of the Law Giver. So read, abetment can happen in three situations (a) It may happen when a person instigates another person to do the thing which is abetted; (b) Secondly, abetment takes place if a person engages with one or more other person or persons in any conspiracy for doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing. Finally, there is abetment when a person intentionally aids, by an act or omission, the doing of that act. At this juncture, we may have to take a deeper look at the concept of

44. In Pramatha Nath Talukdar v. Saroj Ranjan Sarkar, AIR 1962 SC 876 this Court spoke about the distinction between the offence of abetment by conspiracy and the offence of criminal conspiracy (Section 120A of IPC):

> "16. … The gist of the offence of criminal conspiracy is in the agreement to do an illegal act or an act which is not illegal by illegal means. When the agreement is to commit an offence, the agreement itself becomes the offence of criminal conspiracy. Where, however, the agreement is to do an illegal act which is not an offence or an act which is not illegal by illegal means, some act besides the agreement is necessary. Therefore, the distinction between the offence of abetment by conspiracy and the offence of criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this. For abetment by conspiracy mere agreement is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for. But in the offence of criminal conspiracy the very agreement or plot is an act in itself and is the gist of the offence. Willes, J. observed in Mulcahy v. Queen [(1868) LR 3 HL 306 at 317]:
>
> "When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means."
>
> Put very briefly, the distinction between the offence of abetment under the second clause of Section 107 and that of criminal conspiracy under Section 120-A is this. In the former offence a mere combination of persons or agreement between them is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence the mere agreement is enough, if the agreement is to commit an offence." (Emphasis supplied)

45. Section 109 of the IPC provided for the punishment of abetment if the act abetted is committed and where there is no express provision made for punishment. It provides that where no express provision is made for the punishment of the abetment, the punishment will be the same as is that which is provided for the offence. The Explanation provides as follows:

> "An act or offence is said to be committed in consequence of abetment when it is committed in consequence of the instigation or in pursuance of the conspiracy or with the aid which constitutes the abetment."

46. Explanation II to Section 108 of the IPC makes it clear that the offence of abetment would be committed irrespective of whether the act abetted is committed or not or whether the effect which would constitute the offence is caused or not. Illustrations(a) and (b) are clear that the person who abets, as declared in law, cannot extricate himself from criminal liability for the offence of abetment on the ground that the act which was abetted was not done or that the offence which was actually abetted was not committed. Section 109 of the IPC contemplates, on the other hand, the situation that there is abetment and the act abetted is committed, and what is furthermore, it is committed as a result of the abetment. Should these ingredients be present and if there is no express provision under the IPC for the punishment of the act of such abetment, the person renders himself liable for being punished with the punishment for that offence which stands committed in consequence of the abetment by the accused.

47. In order that the act or offence, be committed within the meaning of Section 109 of the IPC, in consequence of the abetment, it must be as a consequence of the instigation or in pursuance of the conspiracy or with the aid which constitutes the abetment. Explanation to Section 109 of the IPC must be read in conjunction with Section 107 of the IPC which creates the offence of abetting. As far as instigating any person to do an act, it is relatable to the first part of Section 107 which declares that abetment is done when the person who abets instigates any person to do that thing.

48. As far as conspiracy within the meaning of Explanation to Section 109 of the IPC is concerned, it deals with secondly under Section 107 of the IPC which speaks about engaging of a person with one or more other person or persons in any conspiracy for the doing of that thing provided an act or illegal omission takes place in pursuance of the conspiracy.

49. As far as the last part of the Explanation to Section 109 of the IPC is concerned, which speaks about an act or offence being committed in consequence of abetment being committed with the aid which constitutes abetment, it is relatable to thirdly under Section 107 of the IPC. Section 107 of the IPC under this head requires intentional aiding by the act or illegal omission. Instigation takes place in terms of Explanation I to Section 107 of the IPC when (i) a person by wilful representation; (ii) by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures or attempts to causes or procure a thing to be done and he would be guilty of instigating the doing of that thing. Explanation (2) to Section 107 declares that whoever, either prior to or at the time of the commission of the act, does anything in order to facilitate the commission of that act and thereby facilitate its commission, is said to aid the doing of that act. Thus, anything done which facilitates the commission of the criminal act and promotes the commission of the act, would bring the person within the scope of abetment.

50. Explanation III to Section 108 also contemplates a situation where the principal player meant to describe the person who actually commits the act which is abetted, would not be guilty of the offence such as a child or a lunatic but the abettor, would remain guilty of the offence of abetment of that offence and if it attracts Section 109 of the IPC, would be punishable for that offence under the appropriate provision. Also, as we have noticed, under Explanation V to Section 108 of the IPC for the offence of abetment by conspiracy to be committed, the principal player, meaning a person who commits the act which results in the offence being committed (as in the case of murder by poisoning) need not be in league with the abettor. All that is required is that the abettor also engages in the conspiracy which must be understood as meaning participate in the concert between two or more others even if he may not have seen or known, by face or otherwise, one or more persons who are privy to the conspiracy. Thus, based on their involvement constituting abetment, a person or any number of persons without even knowing the identity of all the principal participants to the conspiracy, can be prosecuted with the aid of Section 107 read with Section 108 of the IPC.

51. In order to attract Section 109 of the IPC, the act abetted must be committed in consequence of the abetment. Sections 115 and 116 of the IPC deal with punishments for abetment of offences when the offence is not committed in consequence of the abetment and where no express provision is made in the IPC for the punishment of such abetment.

52. In Arjun Singh v. State of Himachal Pradesh, AIR 2009 SC 1568 this Court held as follows:

> "11. … Law does not require instigation to be in a particular form or that it should only be in words. The instigation may be by conduct. Whether there was instigation or not is a question to be decided on the facts of each case. It is not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetting was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abettor. The instigation must be with reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation.
>
> …" (Emphasis supplied)

53. Thus, to sum-up, abetment, as defined is a substantive offence. The punishment for it varies according to different circumstances. If the act which is abetted is done in pursuance to the abetment, the punishment is graver, as can been seen from Section 109 of the IPC, as the punishment is for the offence which is committed based on the abetment. The offence of abetment is punishable even if the act which is abetted is not committed. As noted, Sections 115 and 116 provide for punishment in such cases. There are several other aspects relating to offences including Section 114 of the IPC which provides cumulative punishment for the act abetted and also for the act done.

54. At the heart of the offence of abetment, however, is the presence of any of the three requirements in Section 107 of the IPC. The key and indispensable elements under the law to constitute abetment is instigation, conspiracy or the intentional aiding by any act or illegal omission, the doing of the thing. The law does not permit the abettor to escape punishment for abetment even if the actual player who commits the offence is not criminally liable for the actual act which results in the commission of an offence (See in this regard, the situation contemplated in illustrations in Explanation III of Section 108 of the IPC). Equally, there need not be meeting of minds between all the persons involved in a conspiracy and it is sufficient if a person is engaged in the conspiracy following which the offence is committed (See Explanation V to Section 108 of the IPC). This means that it is not even necessary that the persons who are engaged in the conspiracy, to even know the identity, leave alone physically meet the other players. There can be any number of persons depending on their guilty mind and acts or omissions which may render them liable.

55. In Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra, (1970) 1 SCC 696 this Court had an occasion to deal with Sections 34, 107 and 120B of the IPC and this is what this Court lay down:

> "7. So far as Section 34 IPC is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109 IPC on the other hand may be attracted even if the abettor is not present when the offence abetted is committed, provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission. Turning to the charge under Section 120-B IPC criminal conspiracy was made a substantive offence in 1913 by the introduction of Chapter V-A in the Penal Code, 1860. Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by Section 107 IPC….." (Emphasis supplied)

THE APPROACH OF THE TWO LEARNED JUDGES

THE APPROACH OF JUSTICE V. GOPALA GOWDA

56. The learned Judge proceeds to find that PWs 10 and 11 are accomplice witnesses. The two tests to test accomplice evidence are referred to, viz., that the evidence must be credible and, secondly, there must be corroboration of accomplice evidence. The learned Judge noted that PWs 10 and 11 have not been granted pardon by any court but further notes that the mere fact that pardon was not tendered, did not make the

accomplice cease to be an accomplice. It was further found that it was a well-settled position of law that the evidence of two accomplices cannot be used to corroborate with each other as laid in R.V. Baskerville, 1916 (2) KB 658. Support in this regard was sought from precedent in India in the form of judgment of this Court in Mohd. Husain Umar Kochra Etc. v. K.S. Dalipsinghji and another Etc., (1969) 3 SCC 429 wherein this Court, inter alia, laid down that corroboration must be from an independent source. One accomplice cannot corroborate another. This position was noted to be reiterated in a still later decision of this Court in Chonampara Chellapan Etc. v. State of Kerala Etc., (1979) 4 SCC 312. Corroboration must be in regard to material particulars or rather it must be in relation to the crime as well as identity of the accused. Noting that the accused before the Court were A3, A4 and A15, it was found crucial that they were acquitted of the charge under Section 120B of the IPC. They were found convicted for the offence under Section 302 of the IPC read with Section 109 of the IPC and Section 365 of the IPC read with Section 109 of the IPC. Nothing on record was found to show the direct involvement of the accused in the abducting of the deceased or his murder. The Ford Escort Car-MO12 recovered at the instance of PW10 did not trace back its ownership to A4. Thereafter, it is stated that the requirement of corroboration from independent sources in material particulars, has not been met in the instant case and made it impossible for the accused to be convicted under Sections 302 and 364 of the IPC. PWs 10 and 11 were not witnesses to the abduction of the deceased. PW3, who witnessed the abduction, it is stated, did not witness the accused at the site of the abduction. Though, PW10 placed A3 and A4 in the meeting on 05.12.2001, significance of the same was lost in view of their acquittal under Section 120B of the IPC. PWs 10 and 11 have not placed any of the three accused (A3, A4 and A15) at the site when the body of the deceased was brought down in the factory. A3, according to the deposition of the accomplices, was found staying downstairs while PW11, who went upstairs, actually saw the deceased tied to chains in the room where he was kept. PW11 only saw A5 at the site on the night of 30.12.2001 carrying a tiffin parcel. The death certificate of the deceased issued by PW32, which PW33 has stated was got at the instance of A3, was found, even if genuine, did not connect A3 in any way to the deceased. As far as A15 is concerned, MO1-Reebok Shoe, which was recovered, was brushed aside by noticing that the courts had failed to consider that PW31-a worker in the factory, has stated that she could not remember the person who came to get it as there is lapse of more than two years. Therefore, PW31 cannot be used against A15. PWs 1 and 2 in their testimony (the son and driver, respectively, of the deceased) stated that the Reebok Shoes did not belong to the deceased. Evidence of PWs 10 and 11 was not found reliable. Finding the accused not guilty under Section 120B of the IPC, the learned Judge noted that it was the duty of the Trial Court to establish the involvement of each of the accused persons individually for each offence for which they have been charged. Reference was made to Section 107 of the IPC, and thereafter, to the Judgment of this Court in Kehar Singh and others v. State (Delhi Administration), (1988) 3 SCC 609 that something more than a mere conspiracy, viz., some act or illegal omission in pursuance of the conspiracy, is required to be established for abetment by conspiracy. Once a charge under Section 120B of the IPC fails, what was needed to convict the appellants was the happening of some overt act on the part of the appellants. The learned Judge noted that there was no evidence except the testimony of PWs 10 and 11 which linked the appellants to the crime. The charge under Section 109 of the IPC could not be sustained.

THE APPROACH OF JUSTICE ARUN MISHRA

57. The learned Judge divided the circumstances into fifteen circumstances. They are as follows:

(i) Prosecution case - Evidence of PWs. 10 and 11;

(ii) Prior relationship of accused;

(iii) Selection of premises where M.K. Balan was kept/and other arrangements;

(iv) Abduction of deceased M.K. Balan on 30.12.2001 in white omni van;

(v) Taking of M.K. Balan to factory premises/meeting dated 30.12.2001 at the residence of A9;

(vi) Commission of offence under section 302 IPC;

(vii) Removal of dead body from factory premises;

(viii) Cremation of dead body;

(ix) Procurement of death certificate by A3;

(x) Confessions and recoveries from accused;

(xi) Commission of offence under section 387 IPC;

(xii) Effect of acquittal under section 120B IPC;

(xiii) Evidence of accomplices;

(xiv) Holding TIP/recording of statement under section 164 CrPC.;

(xv) Cell phones/cassettes/forensic evidence.

58. The learned Judge proceeded to discuss the evidence of PWs 10 and 11 elaborately. Thereafter, the prior relationship between the accused came to be discussed. The circumstance relating to selection of premises where the deceased was kept and other arrangements as also “abduction of the deceased” was discussed. The learned Judge referred to the deposition of PW1-son of the deceased. He also referred to evidence of PW3 and, at paragraph 20, it stated that PW3 has clearly stated that the former MLA was abducted at 05.30 A.M.. [Actually PW3 has stated that a person was put inside a van by three persons]. Thereafter, motorcycle followed the said van. That his friend Selvam also came there. PW13 has also stated that he has seen the deceased taking morning walk at about 05.45 A.M.. The learned Judge finds that it is apparent that the deceased in this case was abducted from M.R.C. Nagar. After abduction, the evidence discloses meeting at the residence of A9. He further finds that on 30.12.2001, PWs 10 and 11 have stated about A3 stating that the abduction of the deceased has been made and money remains to be collected. Thereafter, the learned Judge discusses evidence relating to taking of the deceased to the factory premises. In this regard, apart from PWs 10 and 11, the learned Judge refers to the evidence of PW56 also. In regard to the commission of offence under Section 302 of the IPC, it is found that abduction is proved and the deceased was murdered soon after abduction in two days and the body cremated under the name of a fictitious person. The learned Judge finds that in the aforesaid circumstances, it is for the accused person to satisfy the Court how the abducted victim was dealt with by them. Undoubtedly, he noted that there is no direct evidence with respect to the murder by putting nylon rope around the neck and tightening it but it can be inferred, in the circumstances, that they committed the offence of murder also. There is evidence which clearly indicated that the dead body of the deceased was taken from the factory. Thereafter, the Court discusses again evidence of PWs 10, 11, 21 and 35 in regard to the removal of the dead body from the factory premises. Next, the learned Judge discusses the evidence relating to the cremation of the dead body. The evidence referred to include PWs19 and 36 apart from noting that PW12 has resiled from part of his statement. Next, the learned Judge elaborately discusses the evidence relating to the procuring of the death certificate by A3. The confessions and recoveries by the accused were next discussed. The effect of acquittal under Section 120B of the IPC next engaged the learned Judge. It was found that mere acquittal under Section 120B of the IPC when the charge under Section 109 of the IPC was found established, was of no avail to them. Charges, which were framed, were specific. Ingredients of Section 109 of the IPC were there and have been rightly found to be present by both the courts below. Section 120B of the IPC was found established against accused A1 and A2 and other charges against the accused appellants. Sections 120B and 109 of the IPC were found to be distinct offences. He referred to the judgment of this Court in Ranganayaki v. State by Inspector of Police, (2004) 12 SCC 521 which, inter alia, held that for an offence under Section 120B of the IPC, a charge under Section 109 of the IPC was unnecessary and inappropriate. The commission of offence under Section 109 of the IPC was found established along with other offences. The acquittal under Section 120B of the IPC was found not to adversely impinge upon the ingredients of Section 109 of the IPC. The evidence of PWs 10 and 11, even taken as accomplices, was found corroborated by overwhelming evidence on record on each and every aspect. Regarding holding of TI/Recording of Statement under Section 164 of the CrPC, it was proved by PWs 60, 59, 61, 32, 33, 62, 12 and 19. The last circumstance discussed was the cell phone/cassette/forensic evidence. Cassettes were recovered with suitcase-MO2 from A2 which was supported by PW43. Regarding the contention that no value is to be attached to the recovery of the Ford Car at the instance of A4 based on ownership, it was found that ownership was irrelevant. PW10 may have purchased the car in the name of Shri Ranjit Kumar. The evidence disclosed that the car in the possession of PW10 was given by him to the accused. Total six cars were used in the offence including the Ford Escort Car and one motorcycle. As regards the recovery of the remains from the cremation ground not being proved to be that of the deceased, it

was found that as the case of the prosecution, the body was fully burnt, their seizure and forensic report was of no value. This broadly is the basis for the learned Judge to uphold the conviction.

ACCOMPLICE EVIDENCE

59. Section 133 of the Evidence Act declares that an accomplice is a competent witness and further that a conviction based on the uncorroborated testimony of an accomplice is not illegal only on account of it being so. Section 133 reads as follows:

> “133. Accomplice.- An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.”

60. It is apposite to notice Section 114 of the Evidence Act, Illustration ‘b’, the Court may presume:

> “(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars.”

61. Thus, there appears to be a contradiction between these provisions. The matter is no longer res integra. We may notice the following statement of the law contained in an early judgment of this Court reported in Sarwan Singh Rattan Singh v. State of Punjab, AIR 1957 (SC) 637:

> “7. It is hardly necessary to deal at length with the true legal position in this matter. An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious stain in his evidence and courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence.
>
> It would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true.
>
> But it must never be forgotten that before the court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then there is an end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered.
>
> In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver.” (Emphasis supplied)

62. We may profitably also refer to the views expressed in Haroom Haji Abdulla v. State of Maharashtra, AIR (1968) SC 832:

> “8. The law as to accomplice evidence is well settled. The Evidence Act in Section 133 provides that an accomplice is a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The effect of this provision is that the court trying an accused may legally convict him on the single evidence, of an accomplice. To this there is a rider in Illustration (b) to Section 114 of the Act which provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This cautionary provision incorporates a rule of prudence because an accomplice, who betrays his associates, is not a fair witness and it is possible that he may, to please the prosecution, weave false details into those which are true and his whole story appearing true, there may be no means at hand to sever the false from that which is true. It is for this reason that courts, before they act

on accomplice evidence, insist on corroboration in material respects as to the offence itself and also implicating in some satisfactory way, however small, each accused named by the accomplice. In this way the commission of the offence is confirmed by some competent evidence other than the single or unconfirmed testimony of the accomplice and the inclusion by the accomplice of an innocent person is defeated. This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law." (Emphasis supplied)

63. The dichotomy between the mandate of Section 133 and illustration (b) to Section 114, of the Evidence Act has been explained as follows in Sheshanna Bhumanna Yadav v. State of Maharashtra, AIR (1970) SC 1330:

"12. The law with regard to appreciation of approver's evidence is based on the effect of Sections 133 and 114, illustration (b) of the Evidence Act, namely, that an accomplice is competent to depose but as a rule of caution it will be unsafe to convict upon his testimony alone. The warning of the danger of convicting on uncorroborated evidence is therefore given when the evidence is that of an accomplice. The primary meaning of accomplice is any party to the crime charged and someone who aids and abets the commission of crime. The nature of corroboration is that it is confirmatory evidence and it may consist of the evidence of second witness or of circumstances like the conduct of the person against whom it is required. Corroboration must connect or tend to connect the accused with the crime. When it is said that the corroborative evidence must implicate the accused in material particulars it means that it is not enough that a piece of evidence tends to confirm the truth of a part of the testimony to be corroborated. That evidence must confirm that part of the testimony which suggests that the crime was committed by the accused. If a witness says that the accused and he stole the sheep and he put the skins in a certain place, the discovery of the skins in that place would not corroborate the evidence of the witness as against the accused. But if the skins were found in the accused's house, this would corroborate because it would tend to confirm the statement that the accused had some hand in the theft." (Emphasis supplied)

64. We may finally advert to a recent pronouncement of this Court in K. Hashim v. State of Tamil Nadu, (2005) 1 SCC 237:

"38. First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. As Lord Reading says:

"Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case; it would be merely confirmatory of other and independent testimony." (Baskerville case [(1916) 2 KB 658 : (1916-17) All ER Rep 38 (CA)] , All ER p. 42 B-C)

39. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

40. Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material parti.cular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identification must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that:

"A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all.… It would not at all tend to show that the party- accused participated in it."

41. Thirdly, the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But of course the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in

> those special circumstances a conviction so based would not be illegal. I say this because it was contended that the mother in this case was not an independent source.
>
> 42. Fourthly, the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Were it otherwise, "many crimes which are usually committed between accomplices in secret, such as incest, offences with females" (or unnatural offences) "could never be brought to justice". (See M.O. Shamsudhin v. State of Kerala [(1995) 3 SCC 351 : 1995 SCC (Cri) 509].)" (Emphasis supplied)

65. To summarize, by way of culling out the principles which emerge on a conspectus of the aforesaid decisions, we would hold as follows:

> The combined result of Sections 133 read with illustration (b) to Section 114 of Evidence Act is that the Courts have evolved, as a rule of prudence, the requirement that it would be unsafe to convict an accused solely based on uncorroborated testimony of an accomplice. The corroboration must be in relation to the material particulars of the testimony of an accomplice. It is clear that an accomplice would be familiar with the general outline of the crime as he would be one who has participated in the same and therefore, indeed, be familiar with the matter in general terms. The connecting link between a particular accused and the crime, is where corroboration of the testimony of an accomplice would assume crucial significance. The evidence of an accomplice must point to the involvement of a particular accused. It would, no doubt, be sufficient, if his testimony in conjunction with other relevant evidence unmistakably makes out the case for convicting an accused.

66. As laid down by this Court, every material circumstance against the accused need not be independently confirmed. Corroboration must be such that it renders the testimony of the approver believable in the facts and circumstances of each case. The testimony of one accomplice cannot be, ordinarily, be supported by the testimony of another approver. We have used the word 'ordinarily' inspired by the statement of the law in paragraph-4 in K. Hashim (supra) wherein in this Court, did contemplate special and extraordinary cases where the principle embedded in Section 133 would literally apply. In other words, in the common run of cases, the rule of prudence which has evolved into a principle of law is that an accomplice, to be believed, he must be corroborated in material particulars of his testimony. The evidence which is used to corroborate an accomplice need not be a direct evidence and can be in the form of circumstantial evidence.

ACCOMPLICE AND APPROVER

67. An accomplice is in many cases, pardoned and he becomes what is known as an approver. An elaborate procedure for making a person an approver, has been set out in Section 306 of the CrPC. Briefly, the person is proposed as an approver. The exercise is undertaken before the competent Magistrate. His evidence is recorded. He receives pardon in exchange for the undertaking that he will give an unvarnished version of the events in which he is a participant in the crime. He would expose himself to proceedings under Section

308 of the CrPC. Section 308 contemplates that if such person has not complied with the condition on which the tender of pardon was given either by wilfully concealing anything essential or by giving false evidence, he can be put on trial for the offence in respect to which the pardon was so tendered or for any other offence of which he appears to be a guilty in connection with the same matters. This is besides the liability to be proceeded against for the offence of perjury. Sub-section (2) of Section 308 declares that any statement which is given by the person accepting the tender of pardon and recorded under Section 164 and Section 306 can be used against him as evidence in the trial under Section 308(1) of the CrPC. An accomplice or an approver are competent witnesses. An approver is an accomplice, who has received pardon within the meaning of Section 306. We would hold, that as between an accomplice and an approver, the latter would be more beholden to the version he has given having regard to the adverse consequences which await him as spelt out in Section 308 of the CrPC. as explained by us. It is also settled principle that the competency of an accomplice is not impaired, though, he could have been tried jointly with the accused and instead of so being tried, he has been made a witness for the prosecution.

See the judgment of this Court reported in Chandran and Others v. State of Kerala, (2011) 5 SCC 161.

PURPORT AND VALUE OF SECTION 164 OF CRPC

68. Section 164 of the CrPC enables the recording of the statement or confession before the Magistrate. Is such statement substantive evidence? What is the purpose of recording the statement or confession under Section 164? What would be the position if the person giving the statement resiles from the same completely when he is examined as a witness? These questions are not res integra. Ordinarily, the prosecution which is conducted through the State and the police machinery would have custody of the person. Though, Section 164 does provide for safeguards to ensure that the statement or a confession is a voluntary affair it may turn out to be otherwise. We may advert to statements of law enunciated by this Court over time.

69. As to the importance of the evidence of the statement recorded under Section 164 and as to whether it constitutes substantial evidence, we may only to advert to the following judgment, i.e., in George and others v. State of Kerala and another, AIR 1998 SC 1376:

> "In making the above and similar comments the trial Court again ignored a fundamental rule of criminal jurisprudence that a statement of a witness recorded under S. 164, Cr.P.C., cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating him."

70. What is the object of recording the statement, ordinarily of witnesses under Section 164 has been expounded by this Court in R. Shaji v. State of Kerala, AIR 2013 SC 651:

> "15. So far as the statement of witnesses recorded under Section 164 is concerned, the object is two fold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in Court should be discarded, is not at all warranted. (Vide: Jogendra Nahak & Ors. V. State of Orissa & Ors., AIR 1999 SC 2565: (1999 AIR SCW 2736); and Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. & Ors., AIR 2000 SC 2901) : (2000 Air SCW 3150).
>
> 16. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Cr.P.C., such statements cannot be treated as substantive evidence."

71. Thus, in a case where a witness, in his statement under Section 164 of the CrPC, makes culpability of the accused beyond doubt but when he is put on the witness stand in the trial, he does a complete somersault, as the statement under Section 164 is not substantial evidence then what would be the position? The substantive evidence is the evidence rendered in the Court. Should there be no other evidence against the accused, it would be impermissible to convict the accused on the basis of the statement under Section 164.

CONTOURS OF JURISDICTION IN APPEAL BY SPECIAL LEAVE

72. Before we embark upon a consideration of the contentions, we think it is necessary to remind ourselves of the contours of this Court's jurisdiction in an appeal generated by Special Leave under Article 136 of the Constitution of India. This question, far from being res integra, is the subject matter of a large number of decisions of this Court. We would only advert to one out of many decisions, rendered by one of us (K.M. Joseph, J.), in Jagjit Singh v. State of Punjab, (2018) 10 SCC 593. Therein, the Court noted the principles laid down by this Court in Dalbir Kaur v. State of Punjab, (1976) 4 SCC 158 wherein this Court culled out the principles in paragraph-8 as follows:

> "8. Thus the principles governing interference by this Court in a criminal appeal by special leave may be summarised as follows:
>
> "(1) that this Court would not interfere with the concurrent finding of fact based on pure appreciation of evidence even if it were to take a different view on the evidence;
>
> (2) that the Court will not normally enter into a reappraisement or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on error of record,

misreading of evidence or is inconsistent with the evidence, for instance, where the ocular evidence is totally inconsistent with the medical evidence and so on;

(3) that the Court would not enter into credibility of the evidence with a view to substitute its own opinion for that of the High Court;

(4) that the Court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provision of law or procedure resulting in serious prejudice or injustice to the accused;

(5) this Court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence."

It is very difficult to lay down a rule of universal application, but the principles mentioned above and those adumbrated in the authorities of this Court cited supra provide sufficient guidelines for this Court to decide criminal appeals by special leave. Thus in a criminal appeal by special leave, this Court at the hearing examines the evidence and the judgment of the High Court with the limited purpose of determining whether or not the High Court has followed the principles enunciated above. Where the Court finds that the High Court has committed no violation of the various principles laid down by this Court and has made a correct approach and has not ignored or overlooked striking features in the evidence which demolish the prosecution case, the findings of fact arrived at by the High Court on an appreciation of the evidence in the circumstances of the case would not be disturbed."

A LOOK AT THE OFFENCES INVOLVED

73. Section 201 of the IPC, inter alia, is as follows:

> **"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."

74. Section 347 of the IPC reads as follows:

> **"347. Wrongful confinement to extort property, or constrain to illegal act.—** Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security or of constraining the person confined or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine."

75. Section 364 of the IPC, inter alia, deals with abducting in order to murder. It reads as follows:

> **"364. Kidnapping or abducting in order to murder.—** Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with 1[imprisonment for life] or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

76. The offence of abduction is described in Section 362 of the IPC and it reads as follows:

> **"Abduction.-** Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person."

It is to be distinguished from kidnapping which is of two kinds as stated in Section 359 of the IPC, viz., kidnapping from India and kidnapping from lawful guardianship. Both kidnapping and abducting, are referred to in Sections 364 and 365 of the IPC.

77. Section 365 of the IPC reads as follows:

> "365. Kidnapping or abducting with intent secretly and wrongfully to confine person.
>
> —Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

78. Section 302 of the IPC, no doubt, deals with the offence of murder. Lastly, Section 387 of the IPC is a heightened, a more serious form of offence of extortion and it reads as follows:

> **"387. Putting person in fear of death or of grievous hurt, in order to commit extortion.—** Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

79. It is clear that kidnapping differs from abduction. Kidnapping is of two kinds. Kidnapping from India involves taking a person against his consent or consent of legally authorised person out of India (Section 360). Kidnapping from lawful custody is occasioned if a male below 16 years or female below 18 years or person of unsound mind is taken out of custody of lawful guardian without his consent (Section 361).

Abduction, as defined in Section 362 of the IPC, occurs when by force or deceitful means, a person is induced to go from any place. In this case, under Sections 364 and 365, though, it could be kidnapping and abduction, what is involved is abduction.

80. Section 364 of the IPC, more graver than Section 365 of the IPC, occurs when abduction, inter alia, is done with the intention to commit murder or that he is so disposed of so as to put the abducted person in danger of being murdered. Section 365 of the IPC is attracted when the abduction takes place to cause the abducted person to be secretly and wrongfully confined.

81. It is true that in a given case, a person may be abducted to be secretly and wrongfully confined and also to commit murder. Such a situation may attract both Sections 364 and 365 of the IPC.

82. As with any other offence, there could be the actual offender, who abducts. Any other person could be roped in with the aid of Section 120A of the IPC or Section 109 of the IPC (abetting). Also, principle of vicarious liability, under Section 34 of the IPC or a charge under Section 149 of the IPC, if proved, could visit another with criminal liability.

<u>ABDUCTION, THE EVIDENCE</u>

83. PW1 is the son of the deceased. He has deposed, inter alia, as follows:

> His father is an MLA of Saidapet Constituency. He is Director of Mahilapur Hindu Saswatha Nidhi Limited for a period of ten years. He used to go walking in the morning as he was suffering from diabetes. He used to leave the house at 05.30 A.M. in the morning for walking in MRC Nagar near Ayyapan Temple and return home at about 07.30 A.M.. He also used to go for walking in the morning along with one Ramesh residing near their house. On 30.12.2001, his father went for walking at about 05.30 A.M.. Normally, his father used to wear t-shirt, black track pant and black shoes. The shoes were of one Reebok company. He did not return home on 30.12.2001. He went in search of his father. He contacted his friends. Then, he went and lodged a complaint marked as Exhibit PSEI. In cross-examination, PW1 deposed that he did not state that his father used to walk by using the Reebok shoes. The shirt and the pant were not shown to him by the Crime Branch who investigated him. The Police asked him to remove certain averments made by him in his complaint. The complaint, after removal of the averments, is PSE1. He went, at 08.00 P.M., to the Anna Nagar Police Station. They have told him that the father was in Tirumangalam Police Station. Then, he went to Tirumangalam Police. He was told that he was not there. He speaks about learning that his father was kept in the Police Station and, sensing danger, he filed a Habeas Corpus Petition. In the complaint, he has averred that when his father went for walking, he was illegally detained by the Police for procuring certain statements from him. He has read the Nakeeran Journal of 05.03.2002. He says that he has stated that the arrest of the A3 and A5 was mere eyewash. On 30.12.2001, when his father went for walking only his mother had seen him. The shoes worn by his father was bought from the Mount Road Vasant Complex Reebok

Company. Then he says that the size of shoes was told by him to the Police (CBCID) and then, they showed the shoes to him. PW1 told that the shoes did not belong to his father. Thereupon, permission was sought and granted to declare PW10 as hostile and he was cross-examined. On 30.12.2001, his father had gone for walking and had not returned till today. He has not contacted them through letter or phone. He has not challenged the dismissal of Habeas Corpus petition. The age of his father is disclosed as 52 years on 30.12.2001. His father did not fight with any private person and only fought with political adversaries. To the question, whether the Police had given him any audio cassette containing the voice of his father and played it before his mother and brother, he answers in the affirmative. He says there was no dispute between his father and A3 and other accused. In answer to the question, whether the persons of ADMK had any grudge against his father for changing his party to DMK, he said, yes, there were serious disputes regarding this. He still believed that his father was alive. The prosecution conducted re-examination of PW1. He states that when the CBCID examined him on 06.04.2002, he has not stated that the voice in the audio cassette was of his father. Suggestion that he was purposefully deposing in favour of the accused, was denied.

84. PW2-Ramesh deposes that he is a car driver by profession. He knew the deceased. He used to go to the house at 08.45 A.M. or 09.00 A.M.. He speaks about taking the deceased to the company of which he was the Director. He speaks about coming at about 09.00 A.M. on 30th and the wife of the deceased informed him that her husband has not returned home after he had gone for walking. He says, to his knowledge, he did not know about the fact that deceased went for walking on that day. After 29.12.2001, he has not seen the deceased.

85. PW3 is another key witness produced by the prosecution to prove the aspect of abduction. He is a native of Sri Lanka. He came to Chennai in 1991. In 2001, he used to practice wrestling. He would do skipping and running along with others at MRC Nagar. His wrestling master is Selvaraj. On 30.12.2001, at about 05.30 A.M., as usual, he started to run. <u>At that time, at a distance of about 75 meters, he saw three persons forcing a person to get into a van. Thereafter, all of them went in the same van. It was an Omni Van. A motorcycle followed that van</u>. Thereafter, his friend Selvam came there. He told this to him. He told Selvaraj Master. Selvaraj Master told him “why should we bother about others.” He has stood by his statement in the cross-examination. He, no doubt, inter alia says that in December, the sunrise will be late and that 05.30 A.M. will be dark. He saw the incident at a distance of 75 meters as there was street light. No doubt, he says that during Police investigation, he did not mention about the glow of street light. He did not lodge any complaint in the Police Station about the incident.

86. The next witness, who is produced to prove abduction, is PW13. He states as follows:

> His brother is working in the Police Department. From 1999, he has diabetes. He goes for walk at MRC Nagar every day at morning 05.30 A.M.. On 30.12.2001, at 05.45 A.M. in the morning, when he was walking in the MRC Nagar, Kasturi Estate, the deceased came opposite to him. He was wearing bright shoes, sandal colour t-shirt and dark pant. He crossed him. He is shown MO14-photograph and he identified the deceased. In cross-examination, he says that he saw in the newspaper that the deceased was not found but he did not see the TV.
>
> It is, no doubt, true that Justice Arun Mishra has found that it becomes apparent that PW13 clearly stated that the former MLA Balan- the deceased was taking morning walk. The learned Judge concluded that it is apparent that M.K. Balan had been abducted. PW3 has not stated that it was the deceased who was abducted. He has not stated that three persons, who pushed the deceased into the van were from amongst the accused in the case.

87. However, reading the evidence of PWs 1, 2, 3 and 13, the following is established. The deceased used to go for morning walk. He was indeed sighted by PW13 who also used to go for morning walk. PW3 has indeed witnessed a person being pushed into Maruti Omni Van by three persons and the Van going away followed by the motorcycle.

88. These facts are established. The evidence of PW10 and PW11 is to be seen next in this regard. PW10 has, inter alia, stated that first and second accused were there at the house of A9 on 30.12.2001. Both of them told A3 that they have brought the MLA [M.K. Balan (deceased)] and only money had to be collected from him. PW11 has stated that on 30.12.2001, he saw three cars at the factory led by a Tata Sumo (recovered at the

instance of A9), a Ford Escort Car (recovered at the instance of A4) and finally came the Zen Car (recovered at the instance of A3). Four persons identified as A4, A11, A16 and A17 brought the deceased out of the Ford Car. This takes place within hours of abduction on the same day. PW11 also speaks of three persons coming out of the Zen Car. PW10 also says that on 31.12.2001, he found that the deceased was tied-up with chain and his eyes were covered with a cloth and he had been made to sit on a green steel cot provided by them already. He was wearing black pant and sandal colour t-shirt. He has deposed that it was A5, A6, A7, A8, A10, A11 and A14, who were present. Still further, he says that A3 threatened him that he would kill him and his family members if he discloses anything about the matter. He further stated that "we had kidnapped ex-MLA Balan itself, you are nothing to me". Unless PW10 and PW11, PW3 and PW13 are disbelieved, the conclusion is inevitable that the deceased was indeed abducted. The trial court finds that no one else was kidnapped on the same day. The Trial Court finds that A3, A4 to A8, A10, A11 and A14 to A17 kidnapped the deceased (A10 stands acquitted by the High Court).

THE CIRCUMSTANCES RELATING TO OBTAINING OF FALSE DEATH CERTIFICATE

89. PW32-a Medical Practitioner has proved Exhibit- P27-Death Certificate. He has deposed that PW33-Kamaraj, who was working in the Government General Hospital, Chennai and acquainted with him for fifteen years, came to him. He deposed that PW33 told that one person known to him, viz., Rajamani Chettiar was 61 years and poor, died on 01.01.2002 at 06.00 P.M. due to cardiac arrest. There was no body to cremate him and he alone had to do all the work for him. He wanted death certificate. Then, PW32 told PW33 that he would go to see him (apparently, the deceased). PW33 told him, he very well knows PW32 for the past fifteen years, would he lie to him and that no one else was with him (deceased) and PW33 has to do everything and he did not have time. Believing what he stated to be true, PW32 says that he issued P27-death certificate without seeing the dead body. No doubt, PW32 has deposed in cross-examination that PW33 came to his house and stated that his younger paternal uncle working as a watchman in the company had passed away. He has given the certificate on 02.01.2002. Though, it is not written that it was issued on 02.01.2002, and in P27, it was shown that it was issued on 01.01.2002.

90. PW33 states, inter alia, as follows:

> He knew A3 for the last five years. He corroborates statement of PW32 that they were known to each other for fifteen years. On 01.01.2002, he was lying sick in his house. One Samikannu-A13 came and told him that he was called by A3. He was taken by Samikannu to the house of A3. A3 told him that one watchman died in Kollathur. PW33 was asked whether a vehicle could be arranged. He tried in vain. He was given Rs.50/- by A3 on noting that he had reached the next day by auto. A3 told him that one Rajamani Chettiar expired and asked him to get a certificate. PW33 told about PW32 being known to him for the last fifteen years. He went to his place by auto. PW32 was there and he told him that a watchman in Kollathur Company had died. PW32 believed PW33 and gave it in writing in a letterhead. He gave it to A3. He identifies P27 as the certificate. He also identifies A3 and A13 (Samikannu). He states that the certificate is dated 01.01.2002 as he had asked so. He says that he is giving the deposition like this because he will lose his job if he does not do so. He did not identify A13 to the Police or the Magistrate in the TI Parade. He also says, inter alia, that it is false to say that accused-Samipannu did not call him or take him to A3. He also says it is not correct to state that he is giving false deposition in the fear of losing his job. We see no reason to take a different view. The irresistible inference would be as follows:
>
> A3 engaged A13, and at the behest of A3, a certificate is issued by PW32- medical practitioner certifying that one Rajamani Chettiar had passed away on 01.01.2002.

91. Now, the next question to be decided would be whether such a person as Rajamani Chettiar had indeed passed away and whether he was residing at the place reported? PW38 has deposed that no person, as shown in the Certificate, died. Then, PW36-Office Assistant In- Charge also supported the prosecution version. It is to be noted that going by the evidence of PW32 and PW33, A3 wanted such a certificate. The evidence of PW19 does support the prosecution case though he may not have identified the '8' persons who came. The Trial Court, noted that he had identified them in the Test Identification Parade. It is clear as daylight that the person cremated on 01.01.2002 by PW19 and PW12 late in night was the deceased under a fake name though.

THE EVIDENCE RELATING TO VEHICLES USED

THE VEHICLES RECOVERED

92. The evidence relating to vehicles used is as follows:

i. M09 is van bearing No. TNA 7484. A5 made a statement to the Police. PW30 has spoken about the vehicle being given to A9 and PW44 is a witness to the seizure. It is the vehicle which is used in the abduction of the deceased.

ii. The next vehicle is TN02P343. This is marked though PW10 as MO8 and is another Van. PW10 states that on 24.12.2001, A9 told him that A3 wanted a Maruti Van. He speaks about complaining about not receiving rent for the Ford Escort-MO6 and non-return of Motorcycle- MO10. He further says that A9 called later and said that he had arranged for vehicle of Kennedy and brother-in-law of PW30, Jayprakash (MO9) and sent it to A3. PW24-Sub-Inspector deposes to witnessing confessional statement of A6 leading to the recovery of MO8, the Van bearing No. TN-22-BO-343. But he stated "I can identify A6 who also identifies A8". Pw37 IS John Keneddy who has deposed about buy MO8 on 24.12.2001. PW10 called him on cell-phone and asked for Van for two days. It was given to him. It was returned back in two days. Apart from the fact that PW24 identifies A8 as A6, the connection with the offences is not clear.

No doubt, PW37 was declared hostile and cross- examined by the State.

iii. A3 gave P20 statement leading to the recovery of MO12-Maruti Zen having No. TN9-Z-99. PW16 has been examined to establish that MO12 was given by him to A3 in November, 2001 and it was returned back only in February, 2002. This is the vehicle which is used on 30.03.2001, the crucial day, along with two other vehicles. The Trial Court has also, no doubt, relied on the evidence of PWs 10 and 11.

iv. A9 gave P37 statement. PW41 is a witness.

Pursuant to the same, MO7-Maruti Omni Van, having golden colour and bearing No. TN22B8853, was recovered. PW18 is acquainted with A9 since childhood. He has deposed to giving MO7-golden colour Maruti Omni van to A9 four times. He has deposed that the last time he gave was on 01.01.2002 and it was not returned on the same day, as was the case on the earlier occasions, but was returned only on 02.01.2002. It is this van which has been used to take the body of the deceased away after the murder at the factory building. The evidence of PW11 and, more appropriately PW35-Police Constable, clinches the issue as to its use.

v. The statement of A9 has also led to the recovery of a Tata Sumo and it stood marked as MO13. The number of the vehicle is TN04D9657. PW15 is the Dealer in cars, inter alia. He has deposed that he knew A9 for 30 years. He further deposed that A9 went to him for buying the Tata Sumo and gave advance of Rs.15,000/- in September, 2001 and sold his Maruti Zen and took the Sumo. Later, he came, he left the Tata Sumo saying that it was not auspicious and took away the car. The Tata Sumo makes its appearance along with the Ford Escort on 30.12.2001. The link is undeniable.

vi. A4 has given statement leading to the recovery of the Ford Escort White Car having No. TN-10F-5555. It was marked as MO6. It was entrusted to A3 through A9 by PW10 for the car. On the basis of statement given by A4, the said car came to be recovered. We notice that Justice Arun Mishra has correctly rejected the contention that since the car stood registered in the name of another person, and therefore, it could not be relied upon. It is to be noticed that the connection of the car with the crime is that the deceased is brought to the factory in the Ford Escort car, according to evidence (PW10).

vii. A15 has given P51-statement pursuant to which MO10-Hero Honda Motorcycle and the black colour Reebok shoe (the shoe which the prosecution alleges was worn by the deceased and kept in the side pocket of the motorcycle, were recovered).

The shoe was marked as MO1. More about the motorcycle, will be discussed later on.

This shoe has been marked as MO1. There is the evidence of Pw48. More about this vehicle will follow in discussion relating to A15.

WHAT THE ACCOMPLICES SAID

93. We think it is appropriate that we should consider the evidence of PWs 10 and 11. We have already set out the principles which govern the appreciation of evidence of accomplices. Proceeding on the basis that PWs 10 and 11 are accomplices (though the Counsel for the State has a case that PWs 10 and 11 cannot be considered as accomplices insofar as it related to offence under Section 302 of the IPC), we notice the following.

94. PW10 was examined on 30.10.2003. We are referring to the date of his deposition only to bear in mind that this is not a case where the witness is examined after a long gap from the date of crime as the murder is alleged to have taken place on 01.01.2002.

95. Let us examine what he has stated. He was doing rice business in Tambaram from 1984 to 1995. From 1995, he ran a business under the name and style of Valluvar Travels from 1985 with Uday Kumar (the ninth accused), his friend. In 1998, he started a wine shop in which PW11 was also a partner. It was in 1999, the ninth accused informed that Krishna Pandi-PW34 was running a vermicelli company in Mudichur. He was facing a loss. PWs 10 and 11 invested in the venture of Krishna Pandi. There is reference to the relationship between PW10 and the ninth accused turning sour. PW10 purchased a Ford Escort car though in the name of one Ranjit Singh with whom he had business connections. The registration number of the car was TN-10F-5555. He speaks about his reconciliation with Uday Kumar. In 2001, Uday Kumar approached him and told him that he was to join ADMK with the help of the A3 for which he had to do certain works. For the same, he needed some houses. A search was mounted for an appropriate house. The third accused comes upon the scene. PWs 10 and 11, along with Uday Kumar-A9 and A3, finally, finalise the vermicelli factory at Mudichur Road. He identified the third accused. Instructions were given by the third accused for a screen to be put up on the windows of the factory building. As ninth accused asked for two cots, PW10 asked for two cots from one Guru, his friend. Chairs from the house of PW10, fan from the house of ninth accused and bedpan were kept in the factory by PW10, A9 and PW11. Screen for the windows was put. Third accused told PW34 to give a weeks' leave for the company. Believing that he would get rent, PW10, upon being asked for his Ford Escort car, sent the car to the house of the ninth accused. There is reference to what happened on 05.12.2001. On the said day, he was called by the ninth accused to come over to the residence of the third accused. There were two or three other persons. PWs 10 and 11 followed the ninth accused who went inside the house. Third accused was telling the persons and the ninth accused that the deceased had to be brought and some money to be collected from him. PW10 identifies A4, A6 and A11 as persons who were present at the residence of A3 and who followed them in another car. There is reference to the involvement of A1, A2 and A12. PW10 has identified A5 as the person who came along with A3, A9 and A1 by his Ford Escort car. A1 was shown and he was talked about as a VIP, a very big VIP. PWs 10 and 11 were to get food for him and to do other works. PW10 has spoken about Rs.1,10,000/- being given, as requested by Uday Kumar- A9, as money needed by A3. Money was handed over to A2.

WHAT TRANSPIRED ON 30.12.2001 AS PER VERSION OF PW10 - THE SALIENT ELEMENTS

96. On the said date, at 08.30 a.m., A9 called him over phone to his house. PW10 called PW11. A boy working in his office, dropped him in residence in his motorcycle and went back. A5 was asked to drop him at the factory by a bike which was at the residence of A9. On reaching factory, he received a phone call from A9 asking him whether he had got the key. He further asked to handover the cell-phone to PW34-Krishna Pandi. After the conversation, PW34-Krishna Pandi agreed to handover the key. He handed over the key to A3 who came by auto. The key came to be handed over to A5. A3 thereafter sat as a pillion rider with PW10 and went to the house of A9. PW10 followed A3 to the upstairs portion. Therein, A1 and A2 were there. They told A3 that they had brought the Ex. MLA (deceased) and only the money had to be collected from him. There is reference to Hotel Henkala where room was booked for A1. On the same day, at 05.00 p.m., the Ford Escort car was left in his office by the driver of A3.

31.12.2001 – THE IMPORTANT FEATURES

97. Udai Kumar-A9 calls PW10 at 08.30 a.m. He was asked to come to Hotel Henkala. He went there. After some time, A3 came. A3 told A9 that he needed a Maruti van. Apparently, A9 went outside and brought

sandal colour Maruti van. A3 took PW10, A9 and A1 in that Maruti van and went to the factory. A9 alone got down and was standing there. One person came from upstairs and took him (PW10) and A1 upstairs. There were about five or six persons. The deceased was tied up with the chair and his eyes were also closed with cloth. He had been made to sit on the green steel cot which was provided by them already. He was wearing black pant and sandal colour t-shirt. Navy blue shoes were lying in the room somewhere far away from the steel cot. A1 asked A9 to go to his house to get the recorded cassettes (two in number) and two empty cassettes from A2. This is besides the tape recorder. A3 approached PW10 and A9 to get the things. PW10 speaks about the A9 getting Philips two-in-one tape recorder from his house and two recorded cassettes from A2. Also, two empty cassettes were purchased from a shop. One person came from upstairs and A3 told him to remove the cloth tied around the eyes of the deceased. PW10 speaks about feeling frightened. A3 came to him and told him that he suspected only PW10 and his suspicion was that he would tell to somebody. A3, it is deposed, threatened PW10 that if he disclosed anything about the matter, he would actually kill him and his family members. A3 further stated that "we have kidnapped Ex. MLA Balan itself, you are nothing to me". He speaks about being very much frightened. Around 07.30 p.m., on 30.12.2001, A9 called over phone and asked him to stay in the hotel.

<u>01.01.2002</u>

98. He went at 10.30 a.m. to the hotel after coming back from the hotel in the morning from the hotel to his house. After some time, A3 came there. A3 asked A9 for an ambulance. PW10 and A9 went in search for an ambulance. Not finding one, and on being told so, A3 told A9 to arrange for one Maruti van and to fix an Alumax light as fixed in an ambulance. There is reference to driver Vigi of A3 pointing out that shops were closed as it was a holiday (being the New Year Day). By 08.00 p.m., a Maruti van was taken away by two persons from the ninth accused. PW10 identifies these persons as sixth accused and accused-Sampath (A11). PW10 speaks with PW11 about the ambulance being required and arranging up of a vehicle like ambulance. PW10 deposed that both of them suspected that something was going on in the company. They started at 08.45 p.m. and reached Mudichur by 09.00 a.m.. The gate was closed. A6 was standing near the gate. He saw them and made them go from there. A golden colour Maruti van was standing there. Because they were scared, they came by walk. A5 went in a motorbike to the company. The motorbike went inside and it was standing in the light. Four persons came from upstairs carrying the body of the deceased, two holding his legs and two his hands. PW10 refers to the deceased wearing black colour pant and sandal colour t-shirt. Body was kept on a slab like place. There was no movement in the body. The body was loaded in the van and it started very fast. A5 went on the motor bike. This, in short, is the account by PW10 about what he saw and what he knows about the incident.

PW10 identifies A5, A6, A7, A8, A10, A11 and A14 as the persons whom he saw near the deceased when he was tied- up on the first floor of the factory (this is apparently on 31.12.2001). He also identified the four persons who carried the body of the deceased as A6, A7, A8 and A11.

99. PW10 has this to say in his cross examination:

> On 30.12.2001 he did not go to the Vermicilli factory [this is a point which is also pressed by counsel for the appellant for the reason that in his chief examination he had said that he had gone to the factory on 30.12.2001]. However, it is pertinent to note that in cross examination itself PW10 has stated that on 30th at about 8.30 am he went to get the key, from there he went back at 9.30 am. He did not go thereafter [which makes it clear that that PW10 indeed did go on 30th] as deposed by him in his cross examination. He, no doubt, says that till he was there a person called M.K. Balan was not brought there. He further says in his cross examination that he had given a cheque for the room rent for the hotel from which he has vacated on 02.01.2002. He states that he did not tell anyone outside about the matter, he had mentioned the police for the first time what he has seen on 01.05.2002. It was due to fear he did not say. He further says that after seeing the Police, his fear had gone. He further states that he denies having met Nakkeran Gopal and discussed with him. He no doubt says that if it is asked whether he is accurately aware of the incident that had happened in the factory from 31.12.2001, he did not know. About 15-20 days before 5.12.2001 he had seen A3. He saw A4 for the first time on 5.12.2001 at the house of the 3rd accused. He says after hearing A3 telling the persons available there that the Ex. MLA M.K. Balan had to be brought and some money had to be collected from him, it did not strike that it could be a violent act. He further says in cross that all the accused were not to known him earlier. He denies having identified A10 and A14 after they were identified by the Police to him.

He says that he had finally shown his house also. His house was also shown to them as he could get commission. There is toilet facility in the Vermicilli factory. (In the re-examination he states that toilet is in the ground floor. The significance of this aspect is that a bedpack was also used when the deceased was kept in the first floor) He further states that he did not ask Krishan Pandi (PW34) how long it is to let out and what is the monthly rent and what is the advance amount and what is the commission for the same, he also did not tell him. He does not know how many workers were working in the factory, he could not approximately also. He does not have the details about men and women who are working in the factory. He was standing at a distance of 50ft. away from the place of occurrence (apparently on 01.01.2002). He next says that if it is asked that why it was not informed to PW34 about the incident witnessed by him when this incident took place, he was not a partner in the factory but then he says that he received the interest amount for the amount given to PW34.

100. It is time to look what PW11, the other accomplice has deposed. This is for the reason also that there is an argument that PW10 and PW 11, the two accomplices do not even corroborate each other.

101. He identifies A9 as the person with whom PW10 was doing sand quarry business. He states about PW9 and PW 10 conversing with each other at the Polling Booth, A9 telling PW10 that he is going to join the ADMK and about A3, he is going to arrange for a position for him. He speaks about the need for some houses, the hunt for houses and various houses being shown and the involvement of A3 in this matter. He speaks about investment which A9 persuaded him and PW10 to make in the factory run by PW34. A3 told A9 that the factory is the correct place. He is able to identify A3 and identifies him. The Ford Escort car was obtained from PW10 on rental basis by A9 and given to A3. On 05.12.2001, A9 informed him and PW10 that A3 has asked them to go to his house. Three persons were present at the residence of A3. He identifies them as A4, A6 and A7. He further states that A3 told A9 that the deceased had to give money and the same had to be collected by bringing him. He speaks about A3 going before them in the Ford Escort Car. He speaks about A12. He identifies A5 as the person who assisted A1 Senthil Kr. On 30.12.2001, at round 8.30 A.M., PW10 called him and asked him to go to the house of A9. He went there and saw that PW10 was not there. A9 took him in Tata Sumo and they were waiting at Mudichur Road Junction. After half an hour, the Ford Escort car came and A3 came out of the car and was talking to A9. A9 told him to take A3 by an auto and go to the factory. PW 10 and A5 was there at the factory. A3 saw him and asked A5 whether the company is ready? Then he took the company key from PW10 and gave the same to A5. After about half an hour, A9 called him over phone and told him to open the gate of the company. The Tata Sumo came first, followed by Ford Escort and Maruti Zen. Four persons got down from Ford car. Those four persons brought the deceased by closing his eyes, mouth and tying his hands and took him to the first floor. The deceased was wearing black colour pant, sandalwood colour t-Shirt and shoes. Three persons came out of the Zen. A9 came to him and asked him whether he knew that he is N.K. Balan (deceased) and he also threatened him that if he discloses the same to anybody A3 will kill him and his family members. He identified the four persons who brought the deceased in the Ford Escort car as A4, A11, A16 and A17. He speaks about further details, like three more persons coming with the tiffin parcels and that he could identify them, viz., A6, A15 and A7. He went to his house. The same day after PW10 called him over phone and asked him to go Hotel Henkala. In Room No.207, he saw A9, PW10 and A1. He stayed with A1 during that night. The next day, viz., on 31.12.2001 at 6.00 A.M., he went from the Hotel where he stayed in the night on 30.12.2001. He speaks about buying lunch for 10 persons in the factory. By 12 noon he was asked to buy lunch for 10 persons, BP tablet and headache tablet and hand them over to A5 in the factory. He bought them the same and went home (on 1.1.2001), he was called at 10.00 am by A9 and to get tiffin and he got the lunch for them in the afternoon. A5 told him that there is no need for getting dinner in the night and they are going to start from there and asked him to convey the same to A9. After 8.00 pm in the night PW 10 called him over phone and asked him to come to Hotel Henkala… He went there and PW10 told that they need not to get lunch and PW10 told him that A3 and A9 asked to arrange for a van and for that he had replied that he cannot do and A9 arranged one van. PW10 told him that something is going and he is not aware of the same. Then PW10 told him that let us go and see in the factory. Both of them went to the company by the motorcycle. Two persons were near the gate. Both of them told them that they have no work there and they can go from there. Then PW12 left the bike adjacent to the company and when PW10 crossed the company gate they saw A5 going into the factory. At that time four persons came from upstairs of the factory carrying N.K. Balan who was wearing the black colour pant and T-shirt sandalwood colour and they left him on the floor. They tied up the deceased with a dhoti brought by A5 and carried him to the van and the van started from there. A5 went by motorbike. The van registration number is TN 22-B-8853 (MO7). The Ford Escort number stated by him is TN 10-F 5555 (MO6). Maruti van number is TN 02- Z-99 (MO12) and Tata Sumo number is TN-04-B-

9657 (MO13). PW11 speaks about him and PW10 being scared and they went back home. PW10 told him that he was called by A3 and told him that if this matter is leaked out anywhere, he will kill him and his family. This, in substance is, what PW11 has spoken in his chief examination. No doubt, in cross he states inter alia as follows:

> He has TV in his house. He did not know of news that deceased was missing was announced on TV. He has seen that in the paper. He did not see the deceased on 30.12.2001 at 10.30 A.M. in the upstairs of the vermicelli company. He has seen the deceased but he did not have any contact with him. PW10 had left (MO6)-CAR in the travels for rent. The house being selected and arrangements in the factory at Mudichur Road were known to him, A9, A3, PW34 and Venugopal PW 10 and the arrangement at the factory was known to PW10 and PW11 alone. He speaks about the cot being purchased from Nirmala industries on Shanmugham Road. He, A9 and PW10 has purchased the same. Three cots were purchased. The cot is of green colour and he could identify it. He reiterates that on 5.12.2001 he had been to the house of A3. The identification marks of the three persons seen in the home of A3 and age was mentioned during police investigators. He mentions A4, A11 and A17 as among the four. He also says another person came. He says he did not remember. In the identification parade he did not say that he did not tell him that he has seen three persons in the house of A3- Manickam. He has identified nine persons at the time of identification parade. He had only given the tiffin and meals to the accused in the factory. He does not know whether on the 1st deceased was upstairs. He says that we went from there after 9.00 P.M. on the 1st. PW34 did not give the interest to him in January. Till date he has not given the interest to him. He knew the accused already. He saw A3 only on 05.12.2001 for the first time. Thereafter he had seen him on the 30th. He did not see him thereafter. A3 was not identified by him during the identification parade. Police did not call him to identify any of the accused. He also did not go. He did not identify (MOI). He denies it as incorrect that he did not mention about the accused Guna either during the police investigation or before the judicial magistrate. He knows A16 having seen him in the factory. He does not remember whether he was also of the four persons. He does not remember two persons who told PW10 and him at the factory that they do not have any work. He denied having seen the Nakkeeeran Magazine. He studied up to Plus 2. He denies as incorrect that he and PW10 were not asked by anyone to get a house for them. A9 is a member in the Puratchi Bharatem Party at state level. He is not a member of ADMK. A9 has own car. He says it is correct to state that there is no need of A9 to either believe him or PW10 to do the work. During the police investigation the identification, colour, height etc. of the deceased was not asked from him and he had also not stated about the same. When a person stands outside the gate of the factory, the incident taking place there could be seen. During the night there was no light outside the factory. The police did not take him to show the factory. They did not show him the van TN22-B-8853 and asked him to identify. They did not show MO6 also and examine him. Photographs of the deceased was not shown. The Tata Sumo, Maruti van car was not shown.

PW34, AN INDEPENDENT WITNESS?

102. It is next necessary to have a look at the testimony of PW34. PW 34 is none other than the owner of the factory and as per the prosecution case PW10 and PW11 came to invest in the business of PW34 when he was undergoing financial problems. He states, inter alia, as follows:

> In 1999, he approaches A9 owing to some problems. He accepted PW10 and PW11 as partners. He has the entire responsibility of the company. PW10 and PW11 used to come occasionally and go. On 29.11.2001 at 6.00 P.M. PW10 and PW11 asked for company premises to conduct a meeting. He refused. They insisted. He locked the articles of the company in a room and handed over room in the upstairs and went away. They asked him not to come till the meeting was over. On December 5 they told him the meeting was not over. When looked inside the office they saw cot, dining table, chair, pedestal fan. On 10th, PW10 and PW11 brought a person and introduced him as Poonga Nagar Manickam- A3 and told them that he was a big shot. (It is true that PW10 places the meeting with PW34 as having taken place earlier.) He was a Secretary at the same time for two Districts. He was organising meeting and went immediately. On 30.12.2001, at 08.30 A.M., PW 10 brought a person by name Balamurugan-A5 and told him that a meeting was called and asked him (PW34) to vacate the company. When he told that they have kept semai for drying and ladies are working and it will go waste, they told the meeting is set and asked him to contact A9 who said he would compensate the loss for the semai. PW34 sent the employees and announced leave.

At 05.00 P.M., he came to the company for collecting wet semiya with company employees Chandru, Venu, Driver Karuppia. At that time, PW11 and A5 were standing downstairs. They loaded the semiya in the van and PW11 and A5 helped them to gather it. They took the semiya and went away. He speaks about taking the semiya to Ezhichur and dried the semiya and sent it to the market. The employees were asked to come early and on 01.01.2002, the company was on holiday. He called PW10 on the 1st and he told him to call on the next day. He came to the company on the 2nd at 11.00 A.M.. His employees Rathnam, Chamundeswan were there with doors open and lights burning but the outside gate locked. He immediately went to the public booth and called PW10 but got PW11. When he saw the lock, it was merely wound by chain but not locked. They went upstairs and saw cigarettes, two case beer bottle and two shoes. The cot was damaged and there was a bedpan. PW34 poured the urine inside it outside. At 12 to 12.30 P.M., a Maruti Van came and a person came out and asked for articles lying there. He went upstairs and took away a cardboard box, shoes kept in a car and asked if there were anything left behind. He took the articles that were kept near the wood storing place in the company kept in a plastic sack. He again came at 02.00 P.M. and asked that he has been sent to clean the place. The employee PW34 Chamundeswari admonished him saying that he has spoilt a place where women are working and sent him back saying that they will clean it themselves. He identifies the shoes as MO1 series. He identified A3, A9, and A5.

In cross examination, inter alia, he states as follows:

He saw A3 on December 10, 12. He further says he has not seen the deceased and he did not know him. On 30.12.2001, at 08.30 A.M., he went to the company office. He did not give the key to anyone. A5 did not allow us to go upstairs and he did not go upstairs. He says that disappearance of the deceased had come as news in papers and TV also. PW10 requested the company premises for meeting and he has told that it will interfere in the business and refused him the place for holding the meeting to which PW10 insisted again. In the records there was nothing to show that PW10 and PW 11 were shareholders.

YET ANOTHER INDEPENDENT WITNESS PW31

103. In context would be the deposition of a worker of PW34, Samundeswari examined as PW31. She says, inter alia, as follows:

PW34 is the proprietor of the company. PW10 and PW11 became partners during 1999 and 16 persons are working. She was the supervisor. She speaks about attendance being maintained. The company was closed for a period of one week from 29.11.2001 treating as leave. Then they came to the company on 6th December. They were informed that there were no meeting convened. On 30th December she did not go for duty as it was Sunday. On 31st December, they were asked by PW34 to go to Ezhichur to dry up the vermicelli and to pack the same and on the 1st January the company was on leave. On 2nd January, PW 31, Nagarathinam and PW34 went and saw the company. The main gate was found locked. While returning after making a phone call, the owner found that the gate was not locked and only chain along with was put. When they went upstairs, the cot was found smashed and the lights were burning and the bottles and the bits of cigarette were found in an ugly scene and about 11.30 A.M. one person came upstairs saying that he has come to take a thing from there and he has taken Rebook shoe marked as MOI and for the second time, the same person came in a car and taken away something in a gunny bag. At the same time at about 02.30 P.M., one person came in a motorcycle and asked whether it is cleaned and at that time she told him as to why you are making the place ugly where the ladies are working. She states further that on 18th March, one person was brought by the police to the company and enquired from her and at that time on seeing that person, told the police that she only shouted him and that if it is asked her whether she could identify the said person she could say that as it is a lapse of more than 2 years, she could not remember that person. Regarding the cot she says that cot is in green colour and if she is asked to identify she could say that she could not remember. The company owner PW34 declared holiday on the suggestion of PW10. During police interrogation she did not say that there was a bedpan. Her husband Vijay Kumar had acted as partner, she deposes with PW10. Her husband had died of heart attack. She had seen the shoe when it was taken away.

THE MATERIALS AGAINT THE ACCUSED WHO ARE APPELLANTS

THE MATERIALS AGAINST A3

104. On the basis of his(A3) arrest on 25.3.2002, he gave a confession statement, which has been recorded in the presence of PW26. His statement led to the discovery of Maruti Zen Car bearing No.TN-02-EZ-99. PW16 has also supported prosecution version and it is from him ultimately the vehicle came to be seized. P20 is the admissible portion. PW16 has identified A3. The Maruti car which has been marked MO12, according to PW16, was taken in November, 2001 by A3 and returned to PW16 only during February, 2002. The relevant aspect of the Maruti car is as follows:

> PW11 has deposed that on 30.12.2001 at the factory premises, A9 called him over phone and told him to open the gate. Then, he deposes about a Tata Sumo car coming first, followed by Ford Escort Car and a Maruti zen car. The eyes and mouth of the deceased was closed. His hands were tied. The deceased was taken to the first floor. PW11 has identified the four persons who brought the deceased in the position we have described a little earlier. They are A4, A11, A16 and A17. A5 went in the zen car which left the company. He had given further statement on 05.04.2002 wherein he stated that if taken to his office, he will surrender the cassette, and bit paper given by A1 from the near side of his wife's photograph which are marked as MO28 and MO33.

105. The next circumstance appearing against the third accused which corroborates the testimony of PW10 and PW11, is the circumstance relating to the creation of a false death certificate of the deceased. In our view, the prosecution has, indeed, succeeded in proving the following:

> At the instance of A3, PW32 (medical practitioner) who was known to PW33 was persuaded to issue a false certificate. The certificate was got issued in the name of a fictional person which is proved by the evidence of PW38 who has deposed that no such person (Rajamani Chettiar) who has been certified to have died by PW32 lived in the residence as reported. PW36-Office Assistant In- Charge of the Burial Ground has deposed that on 02.01.2002, PW19 told him after he (PW36) left, (apparently on the previous day) a body came and the Doctor's Certificate would be given on that day. The Certificate is P27. The certificate was, apparently, produced in view of what was requested by PW19, a licence in the cremation ground, PW12 has become hostile but even PW12 has deposed about a person being cremated, on 01.01.2002, in the night and his role along with PW19 in it. The certificate was procured at the instance of A3. It was meant to facilitate the cremation of the dead body on the date of the death. Going by the testimony of PW1, the deceased was around 52 years. We say this because an attempt is made to contend that for a person above 60 years, no certificate is insisted upon to cremate as deposed by PW6. It may be that the age is shown as above 60. The circumstance of A3 creating the document for which purpose A13 was an emissary (A13 has not filed any appeal), goes a long way to strengthen the prosecution case. We see no reason at all not to conclude that the body which was cremated through PW19 and PW12 on 01.01.2002 was that of the deceased. Not only would the cremation and that too under a false name attract the offence under Section 201 of IPC, which deals with the destruction of evidence of committing of offence but it is an important chain in the list of circumstances which unerringly points to the role of A3 and others in the crime of murder also. The circumstance is a vital corroborative link which establishes the case of not only murder but relates back to the abduction. This is for the reason that it will be absurd to believe that the deceased went with the accused voluntarily and willingly, particularly, when the evidence of PW13 and PW3 are also borne in mind. We stand reminded that abduction takes place either when there is force or deceit in causing a person to move from a place under Section 362 of the IPC. PW10 has spoken of seeing the deceased tied and blindfolded in the upstairs portion.

106. This is a case where the accused have not only carried out a grave crime of murder but they have also attempted to efface the most important evidence relating to the same, viz., the corpus delicti. We reject also the contention that the non-production of the body is fatal to the prosecution case. The evidence of PW32, PW33 and PW36 (the Officer of the Corporation before whom the certificate was produced) and PW38 assumes critical significance. The hand of A3 from the beginning, i.e., from the selection of the factory, arranging of vehicles, confinement and cremation, is crystal clear and his role in the murder is established. It is in this context that evidence of PW10 and PW11 falls to be appreciated. The evidence of PW34 clearly confirms clinchingly the role of A3 and sufficiently corroborates PW10 and PW11. We would arrive at the conclusion even excluding MO28 and MO33 as agreed to by the Counsel for the State.

ACCUSED NO. 4 (A4)

107. A4 was arrested on 09.04.2002. He made a confessional statement-P34 witnessed by PW39. It led to the recovery of Ford Escort White Car TN1075554. PW10 deposed that he bought the same car though in the name of one Ranjit Singh. He further deposes that by the end of November, 2001, A9 called him over phone and asked him for the said Ford car. A9 asked for two or three months. PW10 believing that he will pay the rent, sent the car to the house of A9. The driver of A3-Viji came and took that car. The use of the said car is mentioned by PW10 thereafter by deposing that on 05.12.2001, A3 went out in the said car which had been given by him for rent. He also identified A4 as one among the three persons who followed them on that day. Thereafter, the said car makes its appearance when he speaks about A3 telling A9 to be at the Woodlands Hotel and going along with A1 and A2 in the car. He again speaks about A3 coming alone to the Woodlands Hotel by the same car. Again around 07.00 P.M., A3, A9 and A1 came along with one more person by the same car. That other person is none other than A5. Thereafter, he says, on 30.12.2001, at 05.00 P.M., the driver of A3 had left the car in his office. In his cross-examination, PW10 has deposed that he bought the car for Rs.3,60,000/- from one Advocate Durai Pandi. He, no doubt, admits that it is not in his name.

108. Passing on to PW11 in connection with the vehicle, PW11 has noted the Ford Escort car on 30.12.2001 as the car from which four persons got down and those persons brought the deceased by closing his eyes and mouth and hands being tied and took him to the first floor. He has marked the Ford Escort Car as MO6. It is this car which stands recovered on the basis of the statement given by A4. This is a case based essentially on circumstantial evidence. The statement made by A4 led to the discovery of the car in the circumstances which have already been explained in the evidence of PW10 and the presence of A4, not only on 05.12.2001 but also on 30.12.2001, has crucial relevance in particular the presence on 30.12.2001. A4 was present along with three others and they emerged out of the very same car, viz., the Ford Escort car, in which, apparently, the deceased was brought. The condition of the deceased, viz., his eyes and mouth being closed and hands being tied and being taken to the first floor, are matters of moment in connecting A4 with the gory episode having its origin in the abduction of the deceased, his illegal confinement and culminating in his murder and cremation.

ACCUSED NO. 5 (A5)

109. PW10 refers to him, in his deposition, as coming along with A3, A9 and A1 around 07.00 P.M. by the Ford Escort Car. He has been identified by PW10. This is on 05.12.2001. A3 introduced him to A5 and though they (PW10 and PW11), provided food to Senthil Kumar-A1, it was to be served only by A5. His involvement is further spoken about by PW10 as having occurred on 30.12.2001. On the said day, PW10 speaks about going to the residence of A9 on being called by him. A9 asked for the keys of the factory. A9 asked A5 to drop him in the factory on a bike. PW10 and A5 went to the factory. There is further reference to the key being handed over by PW34 to PW10. The key was handed over by PW10 to A3 who came in the auto. PW10 deposed about the key being given to A5. On the fateful day, on 01.01.2002, when the murder took place, PW10 has named A5 as going in a motorcycle to the company. It went inside and was standing in the light. A cloth bag was there in the bike. The body of the deceased was brought from upstairs by four persons. PW10 then deposes that a cloth was taken from the bag brought by A5 and tied around the body of the deceased like doing for a dead body. A5 is cited by PW10 as going in his motorcycle.

110. PW11 has also spoken about A3 telling them about the person. He identified him. He also says that A3 told that A1 is a VIP and only A5 will do everything for him and that they should not do anything (apparently directly). He notices presence of A5 along with PW10 on 30.12.2001 at the factory. A3 asked A5 whether the company is ready. A3 and A5 told that they were going to the house of A9 and went from there. He speaks about A5 going by the Zen car on 30.12.2001. Thereafter, about half-an-hour later, the Tata Sumo car came. In the same, A5 and three more persons came with the tiffin parcel. These persons have been identified as A6, A15 and A7. On 31.12.2001, by 12 Noon, on being asked by A9, he purchases lunch and medicine and handed over to A5. On 01.01.2002, A5 told PW11 that there was no need for getting dinner in the night. PW11 has also seen A5 going into the company. He also speaks about dhoti brought by A5 used to tie-up the deceased and A5 leaving on a motorcycle. A5, who was arrested on 18.03.2002[the first arrestee in this case], has, in fact, given statement under which he has identified the Maruti Omni Van MO9 bearing No. TN-A-7484, the place (factory) as also the cremation ground. The Maruti Omni Van-MO9 is the Van which was used for abduction of the deceased. PW3 has spoken about a person being pushed into a Maruti Van. The facts discovered based on statement by A5 are very significant, and hence, most relevant, not only in

revealing his involvement but unravelling the entire prosecution case. A statement under Section 27 of the Evidence Act is not only about the thing as such which is discovered consequent upon the statement but the knowledge attributable to the person who makes the statement about the matter, discovered, based on the statement. The evidence of PW44 who was a Revenue Inspector and witness to the statement of A5 and identification by A5, helps establishing his clear link and sufficiently corroborates PW10 and PW11. Lastly, PW34 has spoken about the presence of A5 on 30.12.01 and identified him.

A6, A7, A8 and A11

111. What is the evidence, as regards, these accused/ appellants before us? Taking the evidence of the accomplices, PW10 has this to say about them – He says that along with A4, A6 and A11 were present on 05.12.2001 as two out of the three persons present in the residence of A3. He speaks about A3 telling the persons and A9 that Balan had to be brought and some money to be collected from him. He also speaks about the three persons as A4, A6 and A11, following him, PW11, A9 in another car. He further speaks about their involvement when he deposed that on 01.01.2002, A9 asked PW10 to wait at the hotel and he came with a golden colour Maruti van. By 8 P.M. that Maruti van was taken by two persons from A9. Those two persons have been identified as A6 and A11. Presence of A6 and his involvement is further deposed by PW10 when he states that the 6th accused was standing near the gate of the factory later on 01.01.2002. PW10 and PW11 were asked to go away. He speaks about PW10 and PW11 being scared after the threat by A6. He further identifies A6, A7 and A11 as among the persons who were present near the deceased when he was tied up in the first floor of the factory. He also identified A6, A7, A8 and A11 as the persons who carried the dead body of the deceased. They go in the van with the body. At this juncture, it is apposite to notice PW18 deposing that he is the owner of van bearing No. TN 22-8853. He has deposed to giving the van to A9 on earlier occasions. More importantly, he has deposed to it being taken by A9 on 01.01.2002 at about 10 A.M. and it being returned only on 2.01.2002 and its seizure by the police on 30.03.2002.

112. Turning to PW11, the other accomplice, this is what he has deposed about the involvement of the accused in question. PW11, for whatever it is worth in law, has also identified A6 and A11 as two out of the three persons who were in conversation at the residence of A3 on 05.12.2001. He has also spoken about A3 telling A9 that the deceased had to give some money and it has to be collected by bringing him. He also speaks about A6 and A11, inter alia, following them in another car. He has identified A11 as one among the four persons who brought M.K. Balan in the Ford car on 30.12.2001. He also identified A6 and A7 as among the persons as two out of the three persons who came with A5 in the Tata Sumo car which came again on 30.12.2001.

113. Now let us look at the other evidence available, pointing to the involvement of the aforesaid accused. PW21 is a Head constable (Police). He has deposed to be on night duty on 01.01.2002. He speaks about being given beat tickets along with PW35. He speaks about a Maruti Omni van standing in the middle of the road. He and PW35 went to the van. He asked the occupants what they were doing at that hour. They told that they were celebrating the new year with drinks. Though, on become suspicious, they searched the van from inside but there was nothing suspicious inside it. They continued with their duty. He has proved P10 beat ticket. He has also identified the accused as A6, A7 and A11. He also spoken about the identification done by him before the Magistrate by way of TIP. He has proved P11 - the duty book.

114. PW35 is the constable referred to by PW21. He also speaks about being on duty on 01.01.2002. He speaks about going with PW21 to Melpatti, Ponnappa Street from 24:00 hours (PW19 speaks about the cremation from being at Melpatti, Ponnapa Mudali Street). He speaks about finding of Maruti vehicle bearing no. TN-22-B8853 in Melpatti New Street. He speaks about interacting with the four persons. The vehicle was standing near Perambur cemetery and the sodium lamp was burning. He has proved P28 as his duty book. PW10 is also his beat book. He has also identified A6, A7, A8 and A11 as the persons who were present. He has also identified the van which he saw as MO7. He has spoken about the identification done in the TIP.

115. It is relevant to remember that PW10 has identified A6, A7, A8 and A11 as the persons who carried the dead body of the deceased on 01.01.2002. It is also to be borne in mind that PW10 and PW11 have spoken about their body being loaded in a golden colour Maruti van which has also been identified by PW10 as MO7 and bearing the very same registration no. TN 22-B-8853. It is corroborated by the evidence of PW35 (Police Constable). The evidence clinchingly points to A6, A7, A8 and A11 being involved apparently at the

behest of A3 and carrying dead body of the deceased on the fateful day in the van and their presence near the place where the deceased came to be cremated. To overlook the testimony of PW10 and PW11 in a case based on circumstantial evidence, being about matters which could not possibly, have been witnessed by any other witnesses other than the accomplices will be asking for the impossible except perhaps concocted evidence.

116. A6 was arrested on 19.03.2002. He gave P16 which is the admissible portion of his confession statement within the meaning of Section 27 of the Evidence Act. He identified the Maruti omni van bearing no. TN-0343 which was parked in front of the house of PW37 and seized under P17. The Maruti van itself has been marked as MO8 but we would exclude the same from consideration for reasons which we have discussed.

117. A7 was arrested on 20.03.2002. He gave the admissible portion of confession statement which is P38. PW42 is a Village Administrative officer who has witnessed the statement. On the basis of the statement, the green colour steel cot was seized. It is marked as MO11. It was produced and seized under P38 which is also witnessed by PW42. PW34 and PW31 have also spoken about the cot apart from PW10. The evidence of PW10 shows that when he went upstairs, he found that the deceased whose eyes were closed was tied with a chain and he was asked to sit in a green colour steel cot. He has been identified by PW21 and PW35 police officers as one of the four, present near the spot of cremation.

118. A8 was arrested on 22.03.2002. He gave a confession statement in the presence of PW23 and another witness, P14 is the admissible portion. PW35 police constable has identified him as one of the four found in MO7 van on 01.012002 near the cremation ground.

119. We have noticed that PW11 has identified A11 as one of the persons who brought the deceased in the Ford car to the factory. It is to be remembered that PW11 has identified the accused in the Identification Parade conducted by the Judicial Magistrate. That apart, after arrest, he gave P53-Statement. He has produced the Philips Stereo Cassette Recorder which was recovered under P54-Mahazar marked as MO2. To lend assurance to this circumstance, PW46, working in the Revenue Department, has been examined. The tape-recorder was hidden in the house of A11.

120. Moreover, PW21 and PW35, Police Constables, have deposed to seeing A11 near the graveyard on 01/02.01.2002. They were standing near MO7. MO7 is the Van in which the deceased was taken from the factory after the murder. It is the Golden Colour Maruti Van bearing No. TN228853. PW11 has, in his deposition, given the same number in his evidence as the number of the Van in which the body of the deceased was taken away from the factory. Therefore, presence of A11, as noted by PW11, from 30.12.2001 till after the murder and near the site of the cremation, as noted by independent witnesses-PW21 and PW35, lend sufficient assurance to the prosecution case against him. PW10 has also deposed to identifying A11 as one of the three persons who were present at the residence of A3 on 05.12.2001. It is on that day A3 said that the deceased had to be brought and some money had to be collected from him.

121. It must be remembered that the evidence in this case establishes that the deceased was indeed cremated under the name of a fictitious person mentioned in the death certificate issued by PW32 (the medical practitioner). It is also clear that such certificate is procured by A3 through PW33. It is clear that A6, A7, A8 and A11 were clearly involved.

A14

122. With regard to A14, his involvement in the matter emerges as one of the persons who stood in the upstairs of the building with the deceased when the deceased was in the state of illegal confinement. This, no doubt, is based on the testimony of PW10. No doubt, as far as A14 is concerned, there is no recovery. It is true that there is no direct evidence that the accused abducted or murdered the victim. The case, as already noticed, hinges on circumstantial evidence. We do notice that A10 has been acquitted by the High Court. A10 himself was also named by PW10 as present along with A14 at the time of the illegal confinement. The High Court has, in paragraph 33, assigned cogent reasons for acquitting A10, including, inter alia, that PW11 though had identified A10 in the Test Identification Parade, could not identify him in the Court. The evidence against A14 has been believed in by both the Courts.

A15

123. A15 is the sole appellant in Criminal Appeal No. 828 of 2013.

124. PW3, the witness to prove the abduction has spoken about a motor cycle following the Omni van. He earlier deposes that he saw three persons were forcing a person to get into the van. A15 gave a statement to the police in the presence of PW44 and another (Mutthu Rekku). The admissible portion of the statement is P50. As per PW44, he stated that he will provide the fashion Hero Honda bearing No. TN-05-C-6475. PW44 says that he identified the motorcycle parked in front of a compound of a house at Gandhiji Street, Bharathi Nagar and also the shoe. PW67 has spoken about recovery of the motor cycle under P51 Mahazer. The motor cycle is MO10 while the shoe is MO1. Justice Arun Mishra confirmed his conviction even after eschewing MO1 shoes. [PW1 the son of the deceased deposed that the shoes showed by the CBCID did not belong to his father]. As regards the motorcycle, PW10 has deposed that A9 wanted an ambassador car and a motor cycle. PW10 got the motorcycle from his friend Akbar which is fashion vehicle and navy blue in colour and gave it to A9. PW10 asked for return of the motorcycle. He marks the motorcycle as MO10.

125. As noticed, A15 has stated that he got the motorcycle from one Akbar. PW48 is the said Akbar. His name is shown as Shaheed Akbar. In his deposition, he has stated that he was having a fashion motor bike Hero Honda but he states that he purchased through financier. He further states that the Registration No. TN-04-J-1878 blue colour. He further states that PW10 was known to him well. He used to take his vehicle often. Last year, during November, 2001, the said Venu (PW10) apparently, had taken his vehicle and did not return it. The RC book related with the vehicle is with the financier. He has produced and marked as P58 photocopy of the RC of the said motor vehicle. He deposes that motor bike seen by him which belongs to him. He further says that the registration number of the vehicle which he saw, was not in the said motor bike. It is that motor bike which is marked as MO10. No doubt, in the cross, he says that he does not know the wheel base and weight of the bike, inter alia. He has neither issued any notice to PW10 nor had he filed any complaint. He says that he has neither repaid any loan nor received any notice from any financier. MO10 was marked by PW10 and under the statement under Section 27 the vehicle which is seized actually, has the registration no. TN-8-6785 whereas the vehicle which PW48 from whom PW10 took the vehicle for giving it to A3 as requested by A9, bears no. TN-04-J-1878. The evidence of PW48 makes it clear that it is the same vehicle and he does, no doubt, say that the registration number of the vehicle was not in the said motorcycle. This means that the vehicle marked as MO10 is, indeed, the vehicle belonging to PW48. He makes it over to PW10. As requested by A9, PW10 handed it over to A9. It would appear that the registration number, as was originally seen on the motorcycle, has been changed. It is the motorcycle which was apparently seen by PW3 and used at the time of abducting the deceased. The vehicle has been recovered at the instance of A15. Even ignoring the shoe which is recovered on the basis of the statement, we would think that the evidence sufficiently implicates A15.

A16

126. PW11 has deposed that they were amongst the four persons who brought the deceased in the Ford car on the 30.12.2001. Moreover, no doubt, in cross, he is unable to remember A16 which he persevered with the names of other three. But he does speak of his presence at the factory. Regarding A16, he was taken into custody, and on questioning in the presence of PW47 and another witness, he gave a confessional statement. He stated that if he is taken, he would produce the black bag, cell phone and knife from the house at Villivakkam. P56 is marked as the admissible portion. On being so taken to the place at No.110/57, Nehru Nagar, Villivakkam, he identified a Panasonic Cell Phone, sim card with charger, one black colour carry bag, nine feet long yellow colour nylon rope and two chains. This is besides knife and three locks. Therefore, it cannot be said that there was no corroboration for the role of A16. It is quite clear that A16 was amongst the accused who brought the deceased. His role in the abduction becomes clear. It is also clear that the deceased is not only not alive but was undoubtedly done away by way of murder. Having abducted the deceased, it is clear that the role of A16, as assessed by the Trial Court and further accepted by the High Court, does not require interference.

Accused No.17 (A17)

127. A17 is again another accused who was one of the four persons identified by PW11 who brought the deceased on 30.12.2001 to the factory. In this case, he was arrested on 01.07.2002. The principle that abduction followed by murder raises a presumption that the abductor was instrumental in murder was rightly invoked by the Trial Court.

AQUITTAL OF A12, THE INVOKING OF SECTION 109 OF THE IPC EVEN AGAINST A1 AND A2 – THE ACQUITTAL OF A3 TO A18 UNDER SECTION 120B OF THE IPC

128. In this regard, it is necessary to have a closer look at the prosecution case. The case of the prosecution, in substance, is as follows:

> The first and second accused were close associates. The twelfth accused is the wife of the second accused. The third accused belongs to ADMK party. The other accused except the twelfth accused, were all the henchmen of the third accused. During the month of November 2001, at the instance of the first accused, the twelfth accused had spoken to the third accused over phone posing herself as Sasikala (a leader of the ADMK party). The twelfth accused told the third accused that she had entrusted a work to the first accused for which the third accused was to help him on the same day evening. A1 to A3 conspired and planned as to how to kidnap the deceased and to take money from him. As per their plan on 30.12.2001, the deceased came to be kidnapped (it must be abducted). He was taken to the factory owned by PW34, illegally detained; was tied with the rope and iron chain in a cot. They threatened him to give Rs. 16 crores and the deceased refused to give the same. He was asked to tell what is his property, and thereafter on 01.01.2002, the twelfth accused, spoke over phone in the voice of Sasikala to the third accused saying that if it is possible to get the money or else finish the matter and to meet her with the first accused and the rest of the matter would be informed by the first accused himself and accordingly what was stated by him was recorded in a tape recorder. The accused on the same day evening at about 09 P.M., by strangulation, murdered the deceased and to screen the crime, the accused had taken the body in a vehicle and cremated the body for which purpose a false death certificate was brought from PW32.

THE ACQUITTAL OF A12 (Accused No.12)

129. It must be remembered that A12 came to be charged under Sections 419, 420 and 387 IPC read with 109 of the IPC. There is also a charge under Section 120B of the IPC against her, as already noticed by us. The Trial Court discusses the case against A-12 in the following manner inter alia:

> It is found that the twelfth accused was an Anglo-Indian lady. On a perusal of P65 which is the confessional statement given by her under Section 164 of The Code of Criminal Procedure, 1973 (hereinafter referred to as 'the CrPC', for short), the Court found that anyone would come to the conclusion that she was living as per the Indian culture. She is a mother of twins and growing them well. The second accused is her husband. The second accused, as per P65 statement, was suffering a loss and facing financial problems. The second accused fell into the cunning trap of first accused. The second accused forced the twelfth accused to fall into the cunning trap of the first accused. The first and twelfth accused got married out of their love affair. The marriage took place at a temple as per Hindu Rites and Customs. Initially, when first accused asked twelfth accused to talk like Sasikala, she refused. Then the twelfth accused did not talk over phone thereafter. The first accused pushed the second accused into his cunning trap and on account of that the twelfth accused was convinced by the second accused and she has talked over cell phone to the third accused as if Sasikala talked to him. There was a threat by the first accused to the twelfth accused. A2 forced his wife to act and to fall into the cunning trap. The Trial Court further goes on to state that normally in foreign countries, it would be commonly seen that while the husband is committing mistakes and misdeeds, the wife would leave her husband and choose anyone as her husband of her choice as that of changing clothes every day. The Trial Court further finds that it is not the State in our country. When the husband is doing any wrong deeds, the wife would mend her husband in some way or the other and when the wife is trying to mend her husband and she is forced to do the same by her husband, she would do it as what her husband is asking her to do so and she thinks that her husband is as God and thereby she is committing such mistakes. The Trial Court goes on to hold that the twelfth accused that if she told anything about her husband, he would be taken by the Police. As a result of that she had been suffering and on account of the fact that she followed the Tamil culture, she did not whisper anything about her husband. It is clearly seen that the Court goes on to hold that A12 did not do anything to attract the offence under Section 34 with the intention or motive and that she did not feel that she had done anything wrong and she was doing anything only as to what was stated by her husband and then she has been arrayed as A12. The Court goes on to find that she cannot be held guilty under the fourth charge which is framed

under Sections 419, 420 and 387 read with Section 109 of the IPC. However, the Court proceeds to find accused Nos. 1 and 2 had committed offences under Sections 419 and 420 of the IPC.

130. A12 was not labouring under any disability. We may have our reservation about exonerating A12 on the reasoning that as it was perceived to be a part of the duty of the wife in the Indian culture to obey her husband even when the demand of the husband is to commit a criminal act. We notice, however, that not only A12 was acquitted by the Trial Court but the appeal by the State against her acquittal has been dismissed by the High Court. The State has also not challenged her acquittal before this Court. No doubt A12 would be criminally liable for only those acts done with the requisite mens rea. Hence, we say no more.

131. What is, however, important is that it is not a case where the Court has not believed the version of the prosecution that the twelfth accused did make the calls posing herself as Sasikala.

132. It is true that arguments have been addressed that there is no evidence to show that A12 knew the voice of Sasikala and contention is seen raised in Section 313 CrPC Statement of A3 that A3 knew the voice of Sasikala. The prosecution would have to prove the negative if it is called upon to prove that A3 did not know the voice of Sasikala. Though it is the duty of the prosecution to prove the case, it may not extend to holding that a matter which could be proved by the defence as something within his knowledge, the accused can sit tight. Further, the case of the prosecution must, at any rate, be judged with reference to the actions of A3 and the other accused who are described as his henchmen. The wealth of evidence, extending even to A3, 'procuring' a totally false death certificate, is formidable. It should be noted that the first charge was essentially framed that A1 to A3 had conspired. A1 and A2 have accepted the verdict and we are not called upon to judge the correctness of their conviction under Section 120B. It may be true that, though, there is a charge against all the accused under Section 120B of the IPC, except A1 and A2, all the other accused stand acquitted under Section 120B of the IPC.

133. The question would, therefore, arise as to what is the effect of acquittal of the appellants before us under Section 120B. We are primarily concerned with their conviction under Section 302 besides Sections 387, 365 read with Section 109 of the IPC and Sections 364 and 201 of the IPC. The fact that the appellants have been acquitted under Section 120B will not, in our view, extricate them from criminal liability for their acts which would constitute substantive offences under Sections 302, 347 and 387 of the IPC.

A DEEPER GLANCE AT THE CHARGES; THE EFFECT OF ACQUITTAL OF A12

134. The first charge is to the effect that A1, A2 and A3 conspired in November, 2001 to kidnap the deceased and to extract money. It was further agreed to murder him in case he refuses to pay money. Based on the said conspiracy, on 30.12.2001 early morning, he was kidnaped, detained at the factory and murdered on 01.01.2002. Thereby a charge under Section 120B of the IPC was framed against A1 to A18. The second charge is about actual kidnapping (it must be understood as abducting). The abduction is alleged to be done by A4, A7, A10, A11, A14, A15, A16 and A17 in a Maruti Van bearing Registration No. TNA7484. A15 went in a Hero Honda Motorcycle to show the route. The deceased was kept at the factory belonging to PW34. The aforesaid accused were charged under Section 365 of the IPC. For abetment of the said offences, A1 to A3, A5, A6, A8, A9 and A13 to A18 were charged under Section 365 of the IPC read with Section 109 of the IPC for going in a car bearing No. TN10F5555. All the accused, except A12 and A13, were charged under Section 387 for tying the deceased with iron chain and rope in a cot and he was threatened to part with Rs. 16 crores or else execute the documents in regard to his properties. The fourth charge is to the effect that in order to fulfil such conspiracy, and in pursuance to the same, at the instance and the instigation of A1 and A2, A12 spoke to A3 in the voice of Sashikala uttering the words, if possible, to get the amount or else close him and come along with A1 and meet her-A12. Charges were accordingly framed against A12 under Section 419, 420 and 387 of the IPC read with Section 109 of the IPC. The fifth charge was in order to fulfil the object of the said conspiracy, consequent upon the said occurrence, on 01.01.2002, A3, A4, A6 to A8, A10, A11 and A14 to A18 committed the murder of the deceased by tying a rope around the neck and tightening it. Likewise, A1, A2, A5, A9, A12 and A13 were charged under Section 302 of the IPC read with Section 109 of the IPC for abetment of murder. There is a charge under Sections 347 and 364 of the IPC for kidnapping against A3 to A11 and A13 to A18 and A1, A2 and A12 were charged, with the aid of Section 109 of the IPC, under Sections 347 and 364 of the IPC. Charge was also framed against A8, A10, A11 and A13 to A18 under Section 201 of the IPC for cremation of the body and getting the false certificate as if one Rajamani Chettiar had died due to heart ailment.

135. There is the argument addressed before us that the effect of the acquittal of the appellants under Section 120B of the IPC would be that their conviction under Section 302 of the IPC and other offences cannot be sustained. As we have noted, the charge under Section 120B of the IPC is based on the conspiracy hatched between A1 to A3. No doubt, the charges laid against A1 to A18 under Section 120B of the IPC, is essentially based on the conspiracy between A1 to A3. It is to be noted, however, the charge under Section 302 of the IPC is against A3, A4, A6 to A8, A10, A11 and A14 to A18. It was A1, A2, A5, A9, A12 and A13, who were charged under Section 302 of the IPC read with Section 109 of the IPC.

136. We agree that for a charge under Section 109 of the IPC, a minimum of two persons are required. There can be any number of accused charged with the aid of Section 109 of the IPC. In order that there is abetment, it is indispensable also that there is a person who abets another. To take an example, a person shoots with his gun on being intentionally aided or instigated in doing so by another. The latter would be guilty under Section 109 of the IPC along with the person who actually carried out the murder by shooting. Thus, there is a principal player and the abettor. The principal player would be guilty for the acts or omissions which amount to offences under the law. The abettor though does not trigger the gun, if we may use the expression, "is the moving force behind it and becomes liable as such".

137. In this case, the Trial Court has proceeded to find the appellants (except A5) guilty of the fifth charge under Section 302 IPC whereas the A1 and A2 have been found guilty of the charge of conspiracy under Section 120B of the IPC. In other words, the idea to commit the offences came into being in the minds of A1 and A2. The other players have been roped in on the basis of their acts which was in tune with the conspiracy hatched by A1 and A2. The acquittal of A12, who has been charged under Section 120B of the IPC and also for offences under Sections 419, 420 and 387 of the IPC read with Section 109 of the IPC would not detract from the criminality of the acts committed by the other accused and, in the facts of this case, we would think that there is no illegality involved in convicting the appellants in the manner done under Section 302 of the IPC. The Trial Court has found that the plan was the brainchild essentially of A1 and A2

138. We have noticed that the trial Court has essentially proceeded on the basis that the appellants were except A5, charged under Section 302 under the 5th charge were guilty of the said charge (See paragraph-167 for the discussion). We have referred to the paragraphs in the judgment of the trial court wherein the trial court has found A3, A4, A6, A7, A8, A9, A10, A11, A14, A15, A16 and A17 guilty under section 302 IPC. It must be noticed that it is without invoking Section 109 of the IPC. <u>However, it so happened, that in the initial portion of the judgment of the trial Court it is mentioned that Section 109 was also invoked along with Section 302 which is inconsistent with the actual charge which was adverted to and findings by the trial Court. It is on this basis apparently that the High Court and this Court also proceeded in the matter.</u>

<u>This inconsistency must, in our view, be resolved by holding that the finding is to be understood as one in terms of the 5th charge as discussed from paragraph 167 onwards of the judgment of the trial Court</u>. We would proceed to hold further that if it is so understood then the criticism levelled that even A1 and A2 are convicted with the aid of Section 109 and there would be no principal player would not hold good. We must appreciate that the first charge is that a conspiracy was woven between accused No.1, 2 and 3 within the meaning of Section 120B. It has not been found acceptable to the trial Court and only A1 and A2 are found guilty under Section 120B of the IPC. The acquittal of A12 as we have noticed, would not deflect from the factum of the conspiracy between A1 and A2. So also, the acquittal of A3 in this regard. We have also touched upon the provisions of explanation 5 to the Section 108 of the IPC. We further notice that A1 and A2 have been convicted under Section 302 read with Section 109. It is to be noticed that accused 1 and 2 have been held guilty under Section 120B. It is necessary to notice Section 120B.

> **"120B. Punishment of criminal conspiracy.—**
>
> (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death,
>
> 2 [imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, <u>be punished in the same manner as if he had abetted such offence</u>.
>
> (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both." (Emphasis supplied)

139. This means that since accused 1 and 2 are held guilty under Section 120B of the IPC to commit the murder of the deceased, they are to be punished as if they have abetted the said offence. The judgment of the trial Court is to be understood in the said vein. It is true that abetment by conspiracy is only one form of abetment. There can be alternate charges. There can be abetment by instigation and intentional acting even when there is no conspiracy and, therefore, no abetment by conspiracy. The fifth charge against A1, A2, A5, A9, A12 and A13 would be in the form of an alternate charge. We say this as A5 (Appellant before us) in Criminal Appeal No. 2008 of 2017 is charged and found guilty of murder under Section 302 of the IPC read with Section 109 of the IPC. The role of A5, particularly, having regard to the statement under Section 27 of the Evidence Act, leading to recovery of the Van, the discovery of the site of the factory and the cremation ground besides other evidence, cannot be ignored. We have no hesitation in repelling the contention of the appellants on this ground. It is clear that their acquittal under Section 120B of the IPC will not impact their conviction under the other provisions.

CERTAIN CONTENTIONS OF A6

140. PW21 and PW35 have identified A6 in the Test Identification Parade. The contention that there would be possibility of these witnesses being seen before the Parade does not appeal to us. The presence of the Omni Van and A6 besides 3 others on the very date on which murder was committed and near the site of cremation and the fact of cremation of the body being done, is certainly a very important circumstance and not to be ignored as contended. The fact that PW19 has not found it possible to remember A6 though he has identified him in the Test Identification Parade before the Magistrate cannot lead to the obliteration of the evidence relating to the cremation on 01.01.2002 and about 8 persons coming there. The fact that PW 19 has stated that the person identified in MO14 photograph was the person cremated is not liable to be brushed aside. We should also not be oblivious to the principle that in a case of this nature, the total effect of the circumstances, must be borne in mind. It must be safe to believe the accomplice evidence based on other materials available. We find the evidence of PW10 and PW11 credible and the presence and role attributable to A6 cannot be brushed aside. The presence of A6 spoken to by the accomplices on 05.12.2001, 30.12.2001 and, particularly, on 01.01.2002 on which last day in carrying the dead body in the van which is later identified by the police officer at a spot near the cremation ground is certainly a vital circumstance which cannot be brushed aside. The role of A6 in the illegal confinement appears to be established. No doubt there is recovery of MO8 which is attacked on the score that PW 24 “has identified A8 as A6”. We have dealt with it elsewhere and shall not be detained by it.

ABDUCTION, ILLEGAL CONFINEMENT, MURDER AND CREMATION IN FICTITIOUS NAME

141. It is clear that the deceased was abducted on 30.12.2001. It is also established that he was confined illegally at the upstairs portion of the factory at Moudihur owned by PW34. It is clear from the evidence that it was the body of the deceased which was cremated and a fictitious name was used and a certificate issued at the instance of A3(P27) which circumstance is clinching in establishing the prosecution case. As far as the murder is concerned, there is no direct evidence. There is no direct evidence that deceased is murdered by strangulating him. However, it is equally true that on the basis of recovery made at the instance of A16 a nylon rope and chain was recovered which undoubtedly strengthens the prosecution case. There cannot be medical evidence relating to murder in a case where the body stood cremated. We have no hesitation in ignoring the evidence relating to recovery of certain parts of the body of the deceased but that is not sufficient for the accused to persuade us to throw out the prosecution case. A carefully thought out criminal plan has led to the cruel snuffing out of precious life. The players thought it through meticulously by destroying the corpus delicti by cremation.

142. The abduction followed by murder in appropriate cases can enable a court to presume that the abductor is the murderer. Now the principle is that after abduction, the abductor would be in a position to explain what happened to his victim and if he failed to do so, it is only natural and logical that an irresistible inference may be drawn that he has done away with the hapless victim. Section 106 of the Evidence Act would come to the assistance of the prosecution. In this regard it is necessary to look at what this Court has laid down. In State of W.B. v. Mir Mohamad Omar, (2000) 8 SCC 382 this Court held as follows:

> “13. Section 364 IPC says, whoever abducts any person “in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered” he commits the offence punishable under the section. So the important task of the prosecution was to demonstrate that abduction of

> Mahesh was for murdering him. Even if the murder did not take place, the offence would be complete if the abduction was completed with the said objective. Conversely, if there was no such objective when the abduction was perpetrated, but later the abductors murdered the victim, Section 364 IPC would not be attracted, though in such a case the court may have to consider whether the offence of culpable homicide (amounting to or not amounting to murder) was committed."

In this case the trial Court has convicted the appellants under Section 364 IPC. This is apart from also convicting them either under Section 365 or under Section 365 read with Section 109 as already discussed.

This Court in a later judgment reported in Sucha Singh v. State of Punjab, AIR 2001 SC 1436 turned down the request of the appellant to reconsider the ratio laid down in State of W.B. V. Mir Mohd. Omar (supra). In the said case, the conviction appears to have been only under Section 302 though read with Section 34 of the IPC. It is pertinent to note what this Court held speaking through Justice K.T. Thomas:

> "19. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.
>
> 20. We have seriously bestowed our consideration on the arguments addressed by the learned Senior Counsel. We only reiterate the legal principle adumbrated in State of W.B. v. Mir Mohd. Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516] that when more persons than one have abducted the victim, who is later murdered, it is within the legal province of the court to justifiably draw a presumption depending on the factual situation, that all the abductors are responsible for the murder. Section 34 IPC could be invoked for the aid to that end, unless any particular abductor satisfies the court with his explanation as to what else he did with the victim subsequently, i.e., whether he left his associates en route or whether he dissuaded others from doing the extreme act etc. etc.
>
> 21. We are mindful of what is frequently happening during these days. Persons are kidnapped in the sight of others and are forcibly taken out of the sight of all others and later the kidnapped are killed. If a legal principle is to be laid down that for the murder of such kidnapped there should necessarily be independent evidence apart from the circumstances enumerated above, we would be providing a safe jurisprudence for protecting such criminal activities. India cannot now afford to lay down any such legal principle insulating the marauders of their activities of killing kidnapped innocents outside the ken of others."

143. We would think that the aforesaid principle would also apply to those persons who illegally confine the person who stands abducted even if there is no evidence that they have themselves carried out the abduction. Section 387 is heightened form of extortion in which the victim is put in the fear of death or grievous hurt. Section 347 involves wrongful confinement of a person for the purpose of committing extortion. The appellants have been convicted under Sections 347 and 387 of the IPC. This is not an inexorable rule but to be applied based on the factual matrix presented before the court. Where abduction is followed by illegal confinement and still later by death, the inference becomes overwhelming that the victim died at the hands of those who abducted/confined him. Nobody has a case that the deceased died a natural death. In State of W.B. (supra) therein, the Court, inter alia, held as follows:

> "34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.
>
> 35. During arguments we put a question to learned Senior Counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was

made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.

36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference."

144. The deceased was brought in a Ford Escort car. He was brought by A4, A11, A16 and A17. It is to be remembered that the case of the prosecution is that except A12, A4 to A18 were the henchmen of A3. We have referred to the evidence against A6, A11 and A16. There are material other than the deposition of PW11. We hold that the accomplices are credible witnesses when the whole circumstances are borne in mind. Their evidence may not be immaculate in character. By their very nature, that is being accomplices, any such claim would be incongruous. But the test is whether it is safe to convict the accused believing such witnesses. We are of the view that as regards the crime and the accused, their testimony brings home the truth, as regards accused who are appellants before us. There is no motive attributed to PW10 and PW11 to falsely implicate. The presumption of murder was rightly drawn.

145. The role of A15 is clear who was not only been referred to in the accomplice evidence but corroborates his link in the abduction with the recovery of motorcycle at his instance. It has rightfully earned him conviction under Section 365 IPC. There were two cars apart from the Ford Escort on 30.12.2001 at the site of the illegal confinement. From the Maruti Zen, three persons emerged as witnessed by PW11. It is true that PW11 has not identified them. That apart there was also a Tata Sumo, PW11 no doubt identified A5 and A7 apart from A15 as the persons who came back on 30.12.2001 with tiffin after leaving the factory.

146. The trial Court has convicted A4, A11, A15, A16 and A17 under Section 365 which in our view is unassailable in regard to these accused who are also appellants before us. We do not see any error in the court drawing the presumption that they are also guilty of murdering the deceased.

147. PW3, it must be remembered has spoken of three men pushing another into a van on 30.12.2001. The van moved and it was followed by a motorcycle. It must be remembered that A15 gave a statement leading to the recovery of a motorcycle. The evidence is relied by the two courts and we see no reason to take a different view.

148. As far as A3, A5, A6 and A8 are concerned, they stand convicted under Section 365 read with Section 109. Abetting is to be understood in the context of their acting on the conspiracy which stood proved against A1 and A2. No doubt, abetting also takes place when there is instigation or intentional aiding. The role of A3 looms large. It is clear that he organised the whole thing and it commenced with the search for an appropriate house where the victim could be confined after the abduction. His role along with his men in carrying out the crime culminating in the cremation under fictitious name of the abducted person is clear.

Not only there is evidence of PW10 and PW11 but other evidence which includes PW32, PW33, PW36 and PW8.

149. As far as A7 and A14 are concerned, they have also been convicted under Section 365 and also under Section 364. The involvement of A7 is clear. He makes his maiden appearance in the accomplice evidence as early as on 05.12.2001. PW10 has witnessed him standing along with certain other accused by the side of the deceased who was then clearly in the state of illegal confinement. He further establishes his complicity by bringing down the body of the deceased on 01.01.2002 along with three others. His role is also corroborated by the testimony of PW21 and PW35, Police officers.

150. A7 and A14 we would think ought to have been convicted under Section 365 read with Section 109 of the IPC. We notice that A3, A5, A6 and A8 stood convicted under Section 365 read with Section 109. We

notice however that the charge as against A7 and A14 was under Section 365. We further notice the charge as against A14 is concerned is also under Section 365 read with Section 109 of the IPC. As already noticed all the appellants have been convicted also under Section 364 of IPC.

151. In this connection as regards the lack of a charge or defect in a charge is concerned, it is one which is essentially intertwined with the question of prejudice to the accused. See in this regard the judgment of this Court in Willie (William) Slaney v. State of Madhya Pradesh AIR 1956 SC 116. We do not think that prejudice is caused in this regard in the facts.

152. It must be noticed that the evidence in this case no doubt through the mouth of PW10 and PW11 who alone have witnessed what truly happened would establish that on 31.12.2001, PW10 saw A5, A6, A7, A8, A11 and A14 when he saw the deceased who was at that time tied up on the first floor. We notice indeed that A10 has been acquitted by the High Court, for which reason, stands given by the High Court. Thus A5, A6, A7, A8, A11 and A14 are persons who can be and have also been convicted in connection with the illegal confinement of the deceased.

153. A4, A7, A11, A14, A15, A16 and A17 are persons who have been found guilty under Section 365 of the IPC. A3, A5, A6 and A8 stand convicted under Section 365 of the IPC with the aid of Section 109 of IPC. All of them have also been convicted under Section 364 of the IPC. In this regard there is a dichotomy involved. The law attaches criminality to the act or omission by a person. Another person may become liable as an abettor, a person who has conspired and thus liable under Section 120B, a person who has shared a common object and thus become vicariously liable and if there be 5 or more persons under Section 141 read with Section 149 or if the principle of vicarious liability embedded in Section 34 of the IPC is attracted. In other words, for a conviction under Section 364 actual abduction is necessary. A person could no doubt be liable under Section 364 read with Section 34 or under Section 364 read with Section 149 or under Section 364 read with Section 109 or if he is found guilty under Section 120B. In this case there is no scope for either 120B or 149. However just as they have been found guilty under Section 365 we would support the conviction under Section 364 in the same manner namely the abduction within the meaning of Section 364. The abduction is alleged to have been taken place on 30.12.2001. Be it remembered, that essence of abduction is forced movement, inter alia, from any place. The offence would be committed by any one who effects such abduction at any or all points of the route. We have already noticed that in a given case, an abduction may attract both sections 364 and 365. The distinguishing feature between the two kinds of abduction, is the difference in the intent with which the abduction, inter alia (as Sections 364 and 365 also deal with kidnapping), is carried out. But so far as the intention attracts both provisions in a given case, conviction under both sections is not impermissible. However, when some of the appellants are convicted under Section 365 simpliciter and others are convicted under Section 365 read with Section 109, then the position of those accused/ appellants in regard to conviction under Section 364 must also be the same. However, this difference in our approach in the matter of conviction under Section 364, cannot advance the case of the appellants, as abduction whether it is with the aid of Section 109 or which is under Section 364 simpliciter, enables the Court to raise the presumption of murder, in the absence of any explanation offered within the meaning of Section 106 of the Evidence Act. In other words, while we would find A4, A11, A15, A16 and A17 guilty under Section 364 which is already found by the courts below, we would support the conviction under Section 364 of other appellants on the basis that they have been actively aided the abduction. In other words they would be guilty under Section 364 read with Section 109 IPC. Also as far as A5, A6, A7, A8, A11 and A14 are concerned, there is the evidence of PW10 that when he saw the deceased in a clear state of wrongful confinement, as he was found tied on the first floor of the factory, A5, A6, A7, A8, A11 and A14 were present. They have also been convicted under Sections 347 and 387 of the IPC. Also, in fact, we have already noted that on 30.12.2001, PW11 has deposed about three cars out of which the deceased emerged out of one of them, viz., the Ford Escort. A4, A11, A16 and A17 have been referred in the evidence of PW 11 as emerging out of the car along with the deceased but it is quite clear that there were more persons than A4, A11, A16 and A17 who were involved in the abduction. In this regard it is profitable to remember that PW3 has witnessed three persons pushing another into a Maruti Van early in the morning on 30.12.2001. No doubt there is also a man on the Motorcycle. Within hours when he is brought to the factory building, he comes out of a Ford Escort. There were two other cars which accompanied it. We must bear in mind that under Section 362 of the IPC, abduction has been defined, inter alia, as compelling a person to go from any place. It, no doubt, also includes, such movement procured by deceitful means. To make it more clear, if we see the plot unravelling, viz., the abduction, the illegal confinement, the death of the deceased and his subsequent cremation, the role of A3, A5, A6, A7, A8 and A14 in aiding the abduction,

appears to be made out. It is also clear that A5, A6, A7, A8, A11 and A14 were involved in the wrongful confinement of the deceased. We, no doubt, noticed that as far as A14 is concerned, there is no recovery, as such, effected from him under Section 27 of the Evidence Act and there is essentially the evidence of PW10, as aforesaid. The same is position about A17, whose involvement has been referred to by PW11, the other accomplice. We, however, find that that the accomplice witnesses, who have been relied upon by two courts, are to be treated as credible witnesses and, even in the absence of corroborative evidence, in the facts and circumstances of this case, we see no reason to disturb that conviction. If that is so, even in the absence of any direct evidence relating to murder, the presumption of murder, being committed by the appellants before us, would apply. In fact, the courts below have drawn a presumption about murder being committed. This is a presumption which cannot be said to be drawn without any basis. Having regard to the facts and circumstances before us, we are of the view that it cannot be contended that no case is made out against the appellants.

154. Applications for withdrawal of Criminal Appeal No.2007/2017 and Criminal Appeal No.2009 of 2017 are allowed. Criminal Appeals 2007 of 2017 and 2009 of 2017 are dismissed as withdrawn. Rest of the Criminal Appeals are dismissed. The bail bonds of the appellants who have been released on bail under orders of this Court shall stand cancelled and they shall surrender within three weeks to serve their sentences.