CHHATTISGARH STATE JUDICIAL ACADEMY, BILASPUR
MEMO

No.552./CSJA/Online Workshop/2022 Bilaspur, dated 23.07.2022

To,

The District & Sessions Judge,
Balod/Baloda-Bazar/Balrampur at Ramanujganj/Bemetara/Bilaspur/
Dantewada/Dhamtari/Durg/ Janjgir Champa/Jagdalpur/Jashpur/
Kanker/Kawardha/ Kondagaon/Korba/Korea at Baikunthpur /
Mahasamund/Mungeli/Raigarh/ Raipur/ Rajnandgaon/Surajpur/Surguja
at Ambikapur.

Sub.: Regarding **Online Workshop** of Judges of Higher Judicial Services & Lower Judicial Services on **"Effective Trial Process-Criminal Trial Procedure in General: Appreciation of Evidence-Improvement, Corroboration, Contradiction, Inconsistency"** scheduled to be held on **31/07/2022 (Sunday)**.

xxxx xxxx

As per Academic Calendar for the year 2022-23, One day Workshop of Judges of Higher Judicial Services & Lower Judicial Services on **"Effective Trial Process-Criminal Trial Procedure in General: Appreciation of Evidence-Improvement, Corroboration, Contradiction, Inconsistency"** is scheduled to be held on **31/07/2022 (Sunday).**

CSJA is organizing Workshop of Judges of Higher Judicial Services & Lower Judicial Services on **"Effective Trial Process-Criminal Trial Procedure in General: Appreciation of Evidence-Improvement, Corroboration, Contradiction, Inconsistency" on 31/07/2022 (Sunday) at 11.30 a.m.** through **Online mode**.

It is further to inform you that Digital Platform/link to join the online workshop will be shared with all the participants by CSJA.

You are, therefore, requested to circulate it amongst all the concerned Judicial Officers posted in your District as per the table below with a request that they shall attend the **Online Workshop from the court premises on 31/07/2022 by 11.00 a.m. positively in the prescribed uniform.** They shall maintain social distancing in case more than one are attending the online workshop in a single room and follow the guidelines and norms issued by the Central Government and the State Government as well as advisories issued by the Hon'ble High Court during the period Covid-19.

The table is as under:

District	HJS	LJS
Ambikapur	1. Shri Om Prakash Jaiswal IV Additional District And Sessions Judge, Ambikapur	1. Ku. Shweta Goswami I Civil Judge Class-II, Ambikapur
Baikunthpur	1. Shri Manvendra Singh I Additional District & Sessions Judge, Manendragarh	1. Shri Mohammad Jahagir Tigala Civil Judge Class-II, Manendragarh
Balod	1. Ku. Saroj Nand Das I Addtional District & Sessions Judge, Balod	1. Smt. Shyamwati Maravi I Civil Judge Class-I & Chief Judicial Magistrate, Balod
Baloda-Bazar	1. Shri Niranjan Lal Chauhan II Additional District & Sessions Judge, Baloda Bazar	1. Ku. Mrinalini Katulkar Civil Judge Class-II, Baloda-Bazar
Balrampur	1. Shri Madhusudan Chandrakar II Additional District & Sessions Judge, Balrampur-Rganj	1. Ku. Akansha Beck Civil Judge Class-II, Rajpur
Bemetara	1. Shri Pankaj Kumar Sinha I Additional District & Sessions Judge, Bemetara	1. Smt. Tanushri Gavel II Civil Judge Class-I, Bemetara
Bilaspur	1. Shri Shailesh Achyut Patwardhan II Additional District & Sessions Judge, Bilaspur 2. Shri Sumit Kapoor III Additional District & Sessions Judge, Bilaspur 3. Shri Ashok Kumar Lal VI Additional District & Sessions Judge, Bilaspur	1. Ku. Rajeshwari Suryawanshi IV Civil Judge Class-I , Bilaspur 2. Shri Girish Pal Singh I Civil Judge Class-II, Bilaspur 3. Ku. Ruchita Agrawal VI Civil Judge Class-II, Bilaspur 4. Ku. Prerna Ahire III Civil Judge Class-II, Bilaspur
Dantewara	1. Shri Praveen Kumar Pradhan I Additional District & Sessions Judge, Dantewara	1. Smt. Shanti Prabhu Jain I Civil Judge Class-II, Dantewara
Dhamtari	1. Shri Vijay Kumar Sahu, Additional District & Sessions Judge, Dhamtari	1. Bhavesh Kumar Watti, Civil Judge Class-II, Nagri, Dhamtari
Durg	1. Shri Rakesh Kumar Verma II Additional District & Sessions Judge, Durg	1. Shri Tajuddin Asif, II Civil Judge Class-I, Durg 2. Shri Umesh Kumar Upadhyay

	2. Shri Bhanu Pratap Singh Tyagi VIII Additional District & Sessions judge, Durg 3. Shri Vivek Kumar Verma, IV Additional District & Sessions Judge, Durg 4. Shri Satish Kumar Jaiswal, III Additional District & Sessions Judge, Durg	IV Civil Judge Class-I, Durg 3. Ku. Amita Jaiswal Civil Judge Class-II, Bhilai-3, District Durg. 4. Smt. Amrita Dinesh mishra II Civil Judge Class-II, Durg
Jagdalpur	1. Smt. Nidhi Sharma Tiwari III Additional District And Sessions Judge, Jagdalpur	1. Smt. Anita Dhruw II Civil Judge Class-I, Jagdalpur
Janjgir-Champa	1. Smt. Geeta Neware I Additional District And Sessions Judge, Sakti	1. Ku. Leenam Bansode Civil Judge Class-II, Jaijaipur
Jashpur	1. Shri Krishna Pal Singh Bhadauriya Additional District & Sessions Judge, Jashpur	1. Shri Anil Kumar Chauhan Civil Judge Class-II, Jashpur
Kanker	1. Shri Gopal Krishna Neelam, Additional District & Sessions Judge, Bhanupratappur	1. Shri Shankar Kashyap Civil Judge Class-II, Kanker
Kabirdham	1. Shri Pankaj Sharma Additional Judge to the Court of Additional District & Sessions Judge, Kawardha	1. Shri Roopnarayan Pathare II Civil Judge Class-I & Additional Chief Judicial Magistrate, Kawardha
Kondagaon	-	1. Ku. Anjali Singh Civil Judge Class-II, Keshkal
Korba	1. Shri Jitendra Kumar Singh II Additional District & Sessions Judge, Katghora	1. Shri Ramesh Kumar chauhan II Civil JudgGarima Sharma e Class-I, Katghora
Mahasamund	1. Smt. Shobhna Koshta, I Additional District & Sessions Judge , Saraipali	1. Shri Rahul Shroff I Civil Judge Class-II, Mahasamund
Mungeli	------	1. Smt. Shruti Dubey II Civil Judge Class-I, Mungeli
Raigarh	1. Shri Kamlesh Jagdalla V Additional District & Sessions Judge, Raigarh	1. Shri Bhaskar Mishra, II Civil Judge Class-I, Raigarh

Raipur	1. Smt. Vandana Deepak Dewangan, VII Additional District And Sessions Judge, Raipur 2. Shri Yashwant Wasnikar XI Additional District & Sessions judge, Raipur 3. Shri Vijay Kumar Minj II Additional District & Sessions Judge, Raipur 4. Shri Balram Sahu, VI Additional District & Sessions Judge, Raipur	1. Shri Om Prakash Sahu, IV Civil Judge Class-I, Raipur 2. Ku. Sakshee Dixit VIII Civil Judge Class-I, Raipur 3. Shri Girish Kumar Mandavi II Civil Judge Class-I, Raipur 4. Shri Mohit Singh IV Additional Judge to the Court of I Civil Judge Class-I, Raipur
Rajnandgaon	1. Shri Deepak Kumar Gupta II Additional District & Sessions Judge, Rajnandgaon 2. Shri Anish Dubey, Additional District & Sessions Judge, Dongargarh.	1. Shri Sarv Vijay Agrawal II Civil Judge Class-I, Rajnandgaon 2. Shri Ashish Bhagat, III Civil Judge, Class-II, Rajnandgaon
Surajpur	1. Shri Rajendra Kumar Verma III Additional District & Sessions Judge, Surajpur	1. Shri Sameer Kujur Civil Judge Class-I, Pratappur

For ready reference, copy of Reading Material is enclosed herewith.

All the participants nominated by the District & Sessions Judges shall prepare the paper on the subject and one of them will present in the Workshop.

A further request is made that in case of exigency any of the abovesaid Judicial Officers is not present in his/her headquarter or place of posting and is present in other district within the State, he/she shall attend the On-line Workshop from nearest Civil Court building where he/she is at present with an oral information to the concerned District & Sessions Judge. The said District & Sessions Judge is requested to accommodate him/her.

Encl: Copy of Reading Material.

Sushma Sawant 23/07/2022

(Sushma Sawant)
Director

Endt.No. 953 /CSJA/Online Workshop/2022 Bilaspur, dated 23.07.2022

Copy to :

1. S.O. to Registrar General, High Court of C.G. Bilaspur for information.

2. CPC for directing the In-charge, NIC for uploading the memo on official website of CSJA.

3. All Judicial Officers of Higher Judicial Services & Lower Judicial Services as per the table above with a request that they shall attend the **Online Workshop from the court premises on 31/07/2022 (Sunday) by 11.00 a.m. positively in the prescribed uniform.** They shall maintain social distancing in case more than one are attending the Online workshop in a single room and follow the guidelines and norms issued by Central Government and State Government as well as advisories issued by Hon'ble High Court during the period Covid-19.

23/07/2022

(SushmaSawant)
Director

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1952 SCR 377 : AIR 1952 SC 54 : 1952 SCJ 46 : 1952 Cri LJ 547

In the Supreme Court of India
(BEFORE SAIYID FAZL ALI AND VIVIAN BOSE, JJ.)

RAMESHWAR

Versus

THE STATE OF RAJASTHAN.

Decided on December 20, 1951

Advocates who appeared in this case :

P.C. Agarwal, Agent, for the Appellant;

P.A. Mehta, Agent, for the Respondent.

The Judgment of the Court was delivered by

VIVIAN BOSE, J.— The appellant Rameshwar was charged with committing rape on a young girl Mst. Purni, eight years of age. He was committed to Sessions and was convicted by the Assistant Sessions Judge, Sawai Jaipur, and sentenced to one year's rigorous imprisonment and a fine of Rs 250.

An appeal was made to the Sessions Judge at Jaipur, that being the appropriate appellate tribunal in that area. The learned Sessions Judge held that the evidence was sufficient for moral conviction but fell short of legal proof because, in his opinion, the law requires corroboration of the story of the prosecution in such cases as a matter of precaution and the corroborative evidence, in so far as it sought to connect the appellant with the crime, was legally insufficient though morally enough. He was satisfied however that the girl had been raped by somebody. Accordingly, he acquitted the accused giving him the benefit of the doubt.

The State of Sawai Jaipur and Gangapur appealed against the acquittal to the High Court at Jaipur. The learned High Court Judges held that the law requires corroboration in such cases but held that the girl's statement made to her mother was legally admissible as corroboration and considering that sufficient they set aside the acquittal and restored the conviction and sentence.

The High Court later granted leave to appeal under article 134(1)(c) of the Constitution as the case involved questions of law of general importance.

The first point taken before us related to the admissibility of the evidence of the girl herself. Her age was stated to be seven or eight years at the time of the examination by the learned Assistant Sessions Judge who recorded her testimony. He certified that she did not understand the sanctity of an oath and accordingly did not administer one to her. He did not certify that the child understood the duty of speaking the truth.

The proviso to section 5 of the Indian Oaths Act, 1873, prescribes that— "Provided that where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth."

The question is whether the opinion referred to must be formally recorded or whether it can be inferred from the circumstances in which the deposition was taken.

The proviso quoted above must be read along with section 118 of the Evidence Act and section 13 of the Oaths Act. In my opinion, an omission to administer an oath,

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even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with in section 118. Every witness is competent unless the Court considers he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. It will be observed that there is always competency in fact *unless the court considers otherwise*. No other ground of incompetency is given, therefore, unless the Oaths Act adds additional grounds of incompetency it is evident that section 118 must prevail.

Now the Oaths Act does not deal with competency. Its main object is to render persons who give false evidence liable to prosecution. It is true a subsidiary object is to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, but in view of section 118 these matters only touch credibility and not admissibility. In my opinion, section 13 of the Oaths Act places this beyond doubt. It states—

> "No omission to take any oath or make any affirmation.....and no irregularity whatever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever....."

Section 5 is the main provision regarding the administration of oaths. The proviso only sets out the cases in which the oath is not to be administered. If, therefore, an omission to take the oath does not affect the admissibility of the evidence, it follows that an irregularity of the kind we are considering which arises out of the proviso cannot affect the admissibility either. Section 118 remains and *unless the judge considers otherwise* the witness is competent.

I do not think it will be useful to consider English authorities on the point because we are governed here by the terms of the various sections I have referred to. But a decision of the Judicial Committee of the Privy Council is in point. Their Lordships stated in *Mohamed Sugal Esa* v. *The King*([1]):—

> "Section 13, Oaths Act, is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs *per incuriam*. If that had been the intention of the Legislature, it would have been simple to insert words in the section to that effect.....It may be observed that this question can no longer arise in India because in 1939 the Legislature passed the Oaths (Amendment) Act (Act XXXIX of 1939) which settles the law in accordance with the Bengal and Oudh decisions referred to above."

The decisions to which their Lordships refer are *R* v. *Sewa Bhogta*([2]) and *Ram Samujh* v. *Emperor*([3]). The decisions there were that the section being unqualified in terms did apply to a case where the Court accepted the evidence of a child to whom the oath was not administered on the ground that the witness did not understand its nature. The principle of the decisions applies here because, as their Lordships observe, the section is unqualified in its terms.

I would add however that it is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the magistrate or judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate. In the present case, it is plain that the learned Judge had the proviso in mind because he certified that the witness does not understand the nature of an oath and so did not administer one but despite that went on to take her evidence. It is also an important fact that the accused, who was represented by counsel, did not object. Had he raised the point the Judge would doubtless have made good the omission. I am of opinion that Mst. Purni was a competent witness and that her evidence is admissible. In the Privy Council

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case which I have just cited, their Lordships said—

> "It is not to be supposed that any judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a witness."

That is the very point here. One can presume that the learned Judge had that in mind from the fact that he examined the child after referring to a fact which arises out of the proviso.

As regards her credibility, the learned trial Judge, who recorded her evidence and saw her in the box, has believed her, so has the High Court; and it is important to note that the learned Sessions Judge who acquitted the accused has not disbelieved her. On the contrary he says he is morally convinced. All he says is that in the absence of corroboration it will be unsafe to convict because the Privy Council and other cases advise corroboration as a matter of prudence.

We were taken carefully through the evidence, as elaborately as in a court of first appeal. I am of opinion that the learned High Court Judges were fully justified in accepting the evidence of Purni and in believing her mother Mst. Ghisi. I consider it unnecessary to recapitulate their reasons. After the careful analysis given by three Courts it is sufficient to say that I agree with the learned High Court Judges. We are left therefore with the questions of law.

The first question is whether the law requires corroboration in these cases. Now the Evidence Act nowhere says so. On the other hand, when dealing with the testimony of an accomplice, though it says in section 114(*b*) that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars, it makes it clear in section 133 that—

> "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."

Now a woman who has been raped is not an accomplice. If she was ravished she is the victim of an outrage. If she consented there is no offence unless she is a married woman, in which case questions of adultery may arise. But adultery presupposes consent and so is not on the same footing as rape. In the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned, but if she consented her testimony will naturally be as suspect as that of an accomplice. So also in the case of unnatural offences. But in all these cases a large volume of case law has grown up which treats the evidence of the complainant somewhat along the same lines as accomplice evidence though often for widely differing reasons and the position now reached is that the rule about corroboration has hardened into one of law. But it is important to understand exactly what the rule is and what the expression "hardened into a rule of law" means.

In my judgment, this branch of the law is the same as in England and I am of opinion that the lucid exposition of it given by Lord Reading, the Lord Chief Justice of England, in *The King* v. *Baskerville*([4]) cannot be bettered.

In that case, Baskerville had been convicted of having committed acts of gross indecency with the two boys. (There the boys were accomplices because they were freely consenting parties and there was no use of force). The learned Chief Justice says at page 663:—

> "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law……But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed

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evidence.....

This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal came into operation this Court has held that, in the absence of such a warning by the judge, the conviction must be quashed.....If after the proper caution by the judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated."

That, in my opinion, is exactly the law in India so far as accomplices are concerned and it is certainly not any higher in the case of sexual offences. The only clarification necessary for purposes of this country is where this class of offence is sometimes tried by a judge without the aid of a jury. In these cases it is necessary that the judge should give some indication in his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case. I am of opinion that the learned High Court Judges were wrong in thinking that they could not, as a matter of law, convict without corroboration.

There is a class of cases which considers that though corroboration should ordinarily be required in the case of a grown-up woman it is unnecessary in the case of a child of tender years. *Bishram* v. *Emperor*([5]) is typical of that point of view. On the other hand, the Privy Council has said in *Mohamed Sugal Esa* v. *The King*([6]) that as a matter of prudence a conviction should not ordinarily be based on the uncorroborated evidence of a child witness. In my opinion, the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the judge. In a jury case he must tell the jury of it and in a non-jury case he must show that it is present to his mind by indicating that in his judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case before him, either the jury, or, when there is no jury, he himself, is satisfied that it is safe to do so. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, *coupled with other circumstances appearing in the case*, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

I turn next to the nature and extent of the corroboration required when it is not considered safe to dispense with it. Here, again, the rules are lucidly expounded by Lord Reading in *Baskerville's case*([7]) at pages 664 to 669. It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear.

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

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> detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony."

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."

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 particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identity 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."

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.

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."

Next, I turn to another aspect of the case. The learned High Court Judges have used Mst. Purni's statement to her mother as corroboration of her statement. The question arises, can the previous statement of an accomplice, or a complainant, be accepted as corroboration?

That the evidence is legally admissible as evidence of conduct is indisputable because of Illustration (*j*) to section 8 of the Evidence Act which is in these terms:

> "The question is whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made are relevant."

But that is not the whole problem, for we are concerned here not only with its legal admissibility and relevancy as to conduct but as to its admissibility for a particular purpose, namely *corroboration*. The answer to that is to be found in section 157 of the Evidence Act which lays down the law for India.

Section 157 states that—

> "In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

The section makes no exceptions, therefore, provided the condition prescribed, that is to say, "at or about the time etc.," are fulfilled there can be no doubt that such a statement is legally admissible in India *as corroboration*. The weight to be attached to it is, of course, another matter and it may be that in some cases the evidentiary value

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of two statements emanating from the same tainted source may not be high, but in view of section 118 its legal admissibility as *corroboration* cannot be questioned. To state this is, however, no more than to emphasise that there is no rule of thumb in these cases. When corroborative evidence is produced it also has to be weighed and in a given case, as with other evidence, even though it is legally admissible for the purpose on hand its weight may be nil. On the other hand, seeing that corroboration is not essential to a conviction, conduct of this kind may be more than enough in itself to justify acceptance of the complainant's story. It all depends on the facts of the case.

In the present case, Mst. Purni told her mother about the incident about four hours after it occurred. The reason for the delay was that her mother was not at home when she went there. She says that when she went home she lay down and went to sleep and that when her mother returned she asked her why she was sleeping and then she told her mother what had happened. Her mother tells much the same story. She says she had gone out to her field in the morning and did not return till about 4 p.m. When she reach home she found her daughter lying there weeping. She has been believed by the learned trial Judge as also by the High Court and has not been disbelieved by the learned Sessions Judge. All he says is that she is not an "independent" witness and is therefore not sufficient for corroboration.

The first question is whether this delay fulfills the "at or about" condition. In my opinion, here also there can be no hard and fast rule. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction. It was suggested that the child could have complained to some women who were working in the neighbourhood, but that would not be natural in a child. She would be frightened and her first instinct would be to run home to her mother. The High Court was satisfied on these points and so am I. Consequently, the matter does fall within the ambit of section 157 read with section 8, Illustration (*j*).

The next question is whether the mother can be regarded as an "independent" witness. So far as this case is concerned, I have no doubt on that score. It may be that all mothers may not be sufficiently independent to fulfill the requirements of the corroboration rule but there is no legal bar to exclude them from its operation merely on the ground of their relationship. Independent merely means independent of sources which are likely to be tainted. In the absence of enmity against the accused there is no reason why she should implicate him falsely. It is true the accused suggested that they were on bad terms but that has not been believed by anyone.

The third question is whether there is independent corroboration connecting the accused with the crime. The only corroboration relied on for that is the previous statement of the child to her mother. That might not always be enough but this rule can be waived in a given case just as much as the necessity for any corroboration at all. In the present case, the learned High Court Judges would have acted on the uncorroborated testimony of the girl had they not felt pressed by the corroboration rule. Viewing all the circumstances I am satisfied that the High Court was right. I am satisfied that *in this case*, considering the conduct of the girl and her mother from start to finish, no corroboration beyond the statement of the child to her mother was necessary. I am satisfied that the High Court was right in holding that that was enough to make it safe to act on her testimony.

I would dismiss the appeal and direct the appellant to surrender to his bail in accordance with the terms of his bond, serve out his sentence and pay the fine.

SAIYID FAZL ALI, J.— I agree.

Appeal dismissed.

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(1) A.I.R. 1946 P.C. 3 at 5

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(2) 14 Beng. L.R. 294 F.N.

(3) (1907) 10 O.C. 337

(4) [1916] 2 K.B. 658.

(5) A.I.R. 1944 Nag. 363.

(6) A.I.R. 1946 P.C. 3 at 5.

(7) [1916] 2 K.B. 658.

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1953 SCR 94 : AIR 1952 SC 354 : 1953 Cri LJ 154

In the Supreme Court of India

(BEFORE MEHR CHAND MAHAJAN, N. CHANDRASEKHARA AIYAR AND N.H. BHAGWATI, JJ.)

PALVINDER KAUR ... Appellant;

Versus

STATE OF PUNJAB (I) ... Respondent.

RUP SINGH (FATHER OF JASPAL SINGH, DECEASED) ... Caveator.

Criminal Appeal No. 41 of 1952[*], decided on October 22, 1952

Advocates who appeared in this case:

J.G. Sethi, Senior Advocate (R.L. Kohli, Advocate, with him), instructed by Sardar Bahadur, Agent, for the Appellant;

H.S. Gujral, Advocate, instructed by P.A. Mehta, Agent, for the Respondent;

Bhagat Singh Chawla, Advocate, instructed by Harbans Singh, Agent, for the Caveator.

The Judgment of the Court was delivered by

MEHR CHAND MAHAJAN, J.— Palvinder Kaur, was tried for offences under Sections 302 and 201 of the Indian Penal Code, in connection with the murder of her husband, Jaspal Singh. She was convicted by the Sessions Judge under Section 302 and sentenced to transportation for life. No verdict was recorded regarding the charge under Section 201 of the Indian Penal Code. On appeal to the High Court she was acquitted of the charge of murder, but was convicted under Section 201 of the Indian Penal Code, and sentenced to seven years' rigorous Imprisonment. Her appeal by special leave is now before us.

2. Jaspal Singh, deceased, was the son of the Chief of Bhareli (Punjab). He was married to Palvinder Kaur a few years ago and they had two children. The husband and wife were living together in Bhareli house, Ambala. It is said that Jaspal's relations with his father and grandfather, were not very cordial and the two elders thought that Palvinder Kaur was responsible for this. It is also said that Jaspal lived on the allowance he got from his father and supplemented his income by selling milk and eggs and by doing some odd jobs. Mohinderpal Singh (a fugitive from justice) who is related to the appellant and was employed as a storekeeper in Baldevnagar Camp, Ambala, used occasionally to reside in Bhareli house. It is suggested that he had started a liaison with Palvinder.

3. The prosecution case is that Sardar Jaspal was administered potassium cyanide poison by the appellant and Mohinderpal on the afternoon of 6th February, 1950. The dead body was then put into a large trunk and kept in one of the rooms in the house in Ambala city. About ten days later i.e. on 16th February, 1950, Mohinderpal during the absence of the appellant, removed the trunk from the house in a jeep when he came there with Amrik Singh and Kartar Singh (PWs), two watermen of the Baldevnagar Camp. The trunk was then taken to Baldevnagar Camp and was kept in a store room there. Three days later, 19th February, 1950, Mohinderpal accompanied by Palvinder and a domestic servant, Trilok Chand (PW 27), took the trunk a few miles on the road leading to Rajpura, got to a *katcha* road and in the vicinity of Village Chhat took the jeep to a well on a mound and threw, the box into it. The jeep was taken to a gurdwara where it was washed.

4. After the disappearance of the deceased, his father made enquiries from Mohinderpal regarding the whereabouts of his missing son. Mohinderpal made various

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false statements to him. On 8th March, 1950, the father advertised in the *Daily Milap* begging his son to return home as soon as possible as the condition of his wife and children and parents had become miserable owing to his absence.

5. On 10th March, 1950 i.e. a, month and ten days after the alleged murder and 19 days after the trunk was thrown into the well, obnoxious smell was coming out of the well, and the matter being reported to the lambardars of village Chhat, the trunk was taken out. The matter was reported to the police and Sardar Banta Singh, Sub-Inspector of Police, on 11th March arrived at the scene and prepared the inquest report and sent for the doctor. The postmortem examination was performed the spot the next day. No photograph of the body was taken and it was allowed to be cremated. After more than two and a half months, on 28th April, 1950, the first information report was lodged against the appellant and Mohinderpal and the 26th June a challan was presented in the court of the committing Magistrate. Mohinderpal was not traceable and the case was started against the appellant alone.

6. There is no direct evidence to establish that the appellant or Mohinderpal or both of them administered potassium cyanide to Jaspal and the evidence regarding the murder is purely circumstantial. The learned Sessions Judge took the view that the circumstantial evidence in the case was incompatible with the innocence of the accused, and held that the case against the appellant was proved beyond any reasonable doubt. The High Court appeal arrived at a different conclusion. It held that though the body found from the well was not capable of identification, the clothes recovered from the trunk and found on the body proved that it was the body of Jaspal. It further held that the cause of death could not be ascertained from the medical evidence given in the case. The evidence on the question of the identity of the dead body consisted of the statement of constable Lachhman Singh, of the clothes and other articles recovered from inside the trunk and of an alleged confession of the accused. As regards the first piece of evidence the High Court expressed the following opinion:

> "There is in our opinion considerable force in the contention that not only are foot constable Lachhman Singh and Assistant Sub-Inspector Banta Singh testifying to the facts which are false to their knowledge *but that the prosecution are responsible for deliberately introducing a false witness and for asking the other witnesses to support the story narrated by Lachhman Singh that he identified the body to be that of Jaspal Singh on the 11th March* and communicated the information to the father of the deceased on the following day."

7. As regards the extra-judicial confessions alleged to have been made to Sardar Rup Singh and Sardar Balwant Singh, father and grandfather of the deceased, they were held inadmissible and unreliable. The confession made by Palvinder to the Magistrate on 15th April, 1950, was however used in evidence against her on the following reasoning:

> "It is true that strictly speaking exculpatory statements in which the prisoner denies her guilt cannot be regarded as confessions, but these statements are often used as circumstantial evidence of guilty consciousness by showing them to be false and fabricated."

8. It was also found that though Palvinder might have desired to continue her illicit intrigue with Mohinderpal she may not have desired to sacrifice her wealth and position at the altar of love. She may have had a motive to kill her husband but a stronger motive to preserve her own position as the wife of a prospective chief of Bhareli and that in this situation it was by no means impossible that the murder was committed by Mohinderpal alone without the consent and knowledge of Palvinder, and that though a strong suspicion attached to Palvinder, it was impossible to state with confidence that poison was administered by her. Therefore it was not possible to

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convict her under Section 302 of the Indian Penal Code.

9. Concerning the charge under Section 201 of the Indian Penal Code, the High Court held that the most important piece of evidence in support of the charge was the confession which Palvinder made on 15th April, 1950, and this confession, though retracted, was corroborated on this point by independent evidence and established the charge.

10. The judgment of the High Court was impugned before us on a large number of grounds. Inter alia, it was contended that in examining Palvinder Kaur at great length the High Court contravened the provisions of the Code of Criminal Procedure and that the Full Bench decision of the High Court in *Dhara Singh case*[1] was wrong in law, that the alleged confession of the appellant being an exculpatory statement, the same was inadmissible in evidence and could not be used as evidence against her, that it had been contradicted in most material particulars by the prosecution evidence itself and was false and that in any case it could not be used piecemeal; that the offences under Sections 302/34 and 201 of the Indian Penal Code, being distinct offences committed at two different times and being separate transactions, the appellant having been convicted of the offence under Section 302 of the Indian Penal Code only by the Session Judge, the High Court had no jurisdiction when acquitting her of that offence to convict her under Section 201 of the same Code; that the statements of Mohinderpal to various witnesses and his conduct were not relevant against the appellant; that Karamchand and Mst Lachhmi were in the nature of accomplices and the High Court erred in relying on their testimony without any corroboration that the High Court having disbelieved eight of the witnesses of the prosecution and having held that they were falsely introduced into the case, the investigation being extremely belated and the story having been developed at different stages, the High Court should not have relied on the same; and lastly, that the pieces of circumstantial evidence proved against the appellant were consistent with several innocent explanations and the High Court therefore erred in relying on them without excluding those possibilities.

11. The decision of the appeal, in our view, lies within a very narrow compass and it is not necessary to pronounce on all the points that were argued before us. In our judgment, there is no evidence to establish affirmatively that the death of Jaspal was caused by potassium cyanide and that being so, the charge under Section 201 of the Indian Penal Code, must also fail. The High Court in reaching a contrary conclusion not only acted suspicions and conjectures but on inadmissible evidence.

12. The circumstances in which Jaspal died will for ever remain shrouded in mystery and the material placed the record it is not possible to unravel them. It may well be that he was murdered by Mohinderpal without the knowledge or consent of Palvinder and the incident took place at Baldevnagar Camp and not at the house and that Mohinderpal alone disposed of the dead body and that the confession of Palvinder is wholly false and the advertisement issued in “Milap” correctly reflected the facts so far as she was concerned. The evidence led by the prosecution, however, is of such a character that no reliance can be placed on it and no affirmative conclusions can be drawn from it. The remarks of the Sessions Judge that the consequences had definitely revealed that justice could not always be procured by wealth and other worldly resources and that the case would perhaps go down in history as one of the most sensational cases because of the parties involved and the gruesome way in which the murder was committed, disclose a frame of mind not necessarily judicial. It was unnecessary to introduce sentimentalism in a judicial decision. The High Court was not able to reach a positive conclusion that Palvinder was responsible for the murder of her husband.

13. Whether Jaspal committed suicide or died of poison taken under a mistake or

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whether poison was administered to him by the appellant or by Mohinderpal or by both of them are questions the answers to which have been left very vague and indefinite by the circumstantial evidence in the case. In view of the situation of the parties and the belated investigation of the case and the sensation it created it was absolutely necessary for the courts below to safeguard themselves against the danger of basing their conclusions on suspicions howsoever strong. It seems to us that the trial court and to a certain extent the High Court fell into the same error against which warning was given by Baron Alderson in *Reg.* v. *Hodge*[2] where he said as follows:

> "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to over-reach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

We had recently occasion to emphasize this point in *Nargundkar* v. *State of Madhya Pradesh*[3].

14. In order to establish the charge under Section 201 of the Indian Penal Code, it is essential to prove that an offence has been committed, — mere suspicion that it has been committed is not sufficient, — that the accused knew or had reason to believe that such offence had been committed and with the requisite knowledge and with the intent to screen the offender from legal punishment causes the evidence thereof to disappear or gives false information respecting such offences knowing or having reason to believe the same to be false. It was essential in these circumstances for the prosecution to establish affirmatively that the death of Jaspal was caused by the administration of potassium cyanide by some person (the appellant having been acquitted of this charge) and that she had reason to believe that it was so caused and with that knowledge she took part in the concealment and disposal of the dead body. There is no evidence whatsoever on this point. The following facts, that Jaspal died, that his body was found in a trunk and was discovered from a well and that the appellant took part in the disposal of the body do not establish the cause of his death or the manner and circumstances in which it came about. As already stated, there is no direct evidence to prove that potassium cyanide was administered to him by any person. The best evidence on this question would have been that of the doctor who performed the post-mortem examination. That evidence does not prove that Jaspal died as a result of administration of potassium cyanide. On the other hand, the doctor was of the opinion that there were no positive post-mortem signs which could suggest poisoning. He stated that potassium cyanide being corrosive poison, would produce hypermia, softening and ulceration of the gastro-intestinal track and that in this case he did not notice any such signs. He further said that potassium cyanide corrodes the lips and the mouth, and none of these signs was on the body. This evidence therefore instead of proving that death was caused by administration of potassium cyanide, to the extent it goes, negatives that fact.

15. The High Court placed reliance on the confession of Palvinder made on 15th April, 1950, to hold this fact proved. The confession is in these terms:

> "My husband Jaspal Singh was fond of hunting as well as of photography. From hunting whatever skins (khalls) he brought home he became fond of colouring them. He also began to do the work of washing of photos out of eagerness. One day in December 1949, Jaspal Singh said to my cousin (Tay's son) Mohinderpal Singh to get him material for washing photos. He (Mohinderpal Singh) said to Harnam Singh, who is head clerk in Baldev Nagar Camp, to bring the same from the Cantt. Harnam Singh went to the Cantt. and on return said that the material for washing photos could be had only by a responsible government official. He told so to

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> Mohinderpal Singh, who said that Harnam Singh should take his name and get the medicine. Thereupon Harnam Singh went to the Cantt. and brought the medicine. I kept this medicine. As the medicine was sticking to the paper I put it in water in a small bottle and kept it in the almirah. In those days my husband was in Ambala and I lived with him in the kothi in the city. He went for hunting for 2-3 days and there he developed abdominal trouble and began to purge. He sent for medicine 3-4 days from Dr Sohan Singh. One day I placed his medicine bottle in the almirah where medicine for washing photos had been placed. I was sitting outside and Jaspal Singh enquired from me where his medicine was. I told him that it was in the almirah. By mistake he took that medicine which was meant for washing photos. At that time, he fell down and my little son was standing by his side. He said "Mama, Papa had fallen". I went inside and saw that he was in agony and in short time he expired. Thereafter I went to Mohinderpal Singh and told him all that had happened. He said that father of Jaspal Singh had arrived and that he should be intimated. But I did not tell him, because his connections were not good with his son and myself. Out of fear I placed his corpse in a box and Mohinderpal Singh helped me in doing so. For 4-5 days the box remained in my kothi. Thereafter I said to Mohinderpal Singh that if he did not help me I would die., He got removed that box from my kothi with the help of my servants and placing the same in his jeep went to his store in Baldevnagar Camp and kept the same there. That box remained there for 8-10 days. Thereafter one day I went to the camp and from there got placed the trunk in the jeep and going with Mohinderpal Singh I threw the same in a well near Chhat Banur. I do not remember the date when Jaspal Singh took the medicine by mistake. It was perhaps in January 1950."

16. The statement read as a whole is of an exculpatory character. It does not suggest or prove the commission of any offence under the Indian Penal Code by any one. It not only exculpates her from the commission of an offence but also exculpates Mohinderpal. It states that the death of Jaspal was accidental. The statement does not amount to a confession and is thus inadmissible in evidence. It was observed by Their Lordships of the Privy Council in *Narayanaswami* v. *Emperor*[4] that the word "confession" as used in the Evidence Act cannot be construed as meaning a statement by an accused suggesting the inference that he committed the crime. A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact, which if true, would negative the offence alleged to be confessed. In this view of the law the High Court was in error in treating the statement of Palvinder as the most important piece of evidence in support of the charge under Section 201 of the Indian Penal Code. The learned Judges in one part of their judgment observed that strictly speaking exculpatory statements in which the prisoner denies her guilt cannot be regarded as confessions, but went on to say that such statements are often used as circumstantial evidence of guilty consciousness by showing them to be false and fabricated. With great respect we have not been able to follow the meaning of these observations and the learned counsel appearing at the Bar for the prosecution was unable to explain what these words exactly indicated. The statement not being a confession and being of an exculpatory nature in which the guilt had been denied by the prisoner, it could not be used as evidence in the case to prove her guilt.

17. Not only was the High Court in error in treating the alleged confession of Palvinder as evidence in the case but it was further in error in accepting a part of it after finding that the rest of it was false. It said that the statement that the deceased took poison by mistake should be ruled out of consideration for the simple reason that if the deceased had taken poison by mistake the conduct of the parties would have

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been completely different, and that she would have then run to his side and raised a hue and cry and would have sent immediately for medical aid, that it was incredible that if the deceased had taken poison by mistake, his wife would have stood idly by and allowed him to die. The court thus accepted the inculpatory part of that statement and rejected the exculpatory part. In doing so it contravened the well accepted rule regarding the use of confession and admission that these must either be accepted as a whole or rejected as a whole and that the court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible. Reference in this connection may be made to the observations of the Full Bench of the Allahabad High Court in *Emperor* v. *Balmakund*[5] with which observations we fully concur. The confession there comprised of two elements, (*a*) an account of how the accused killed the women, and (*b*) an account of his reasons for doing so, the former element being inculpatory and the latter exculpatory and the question referred to the Full Bench was : Can the court, if it is of opinion that the inculpatory part commends belief and the exculpatory part is inherently incredible, act upon the former and refuse to act upon the latter? The answer to the reference was that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. The alleged confession of Palvinder is wholly of an exculpatory nature and does not admit the commission of any crime whatsoever. The suspicious circumstance from which an inference of guilt would be drawn were contained in that part of the statement which concerned the disposal of the dead body. This part of the statement could not be used as evidence by holding that the first part which was of an exculpatory character was false when there was no evidence to prove that it was so, and the only material on which it could be so held was the conduct mentioned in the latter part of the same statement and stated to be inconsistent with the earlier part of the confession.

18. The result therefore is that no use can be made of the statement made by Palvinder and contained in the alleged confession and which the High Court thought was the most important piece of evidence in the case to prove that the death of Jaspal was caused by poisoning or as a result of an offence having been committed. Once this confession is excluded altogether, there remains no evidence for holding that Jaspal died as a result of the administration of potassium cyanide.

19. The circumstantial evidence referred to by the High Court which according to it tends to establish that Jaspal did not die a natural death is of the following nature : That Palvinder and Mohinderpal had a motive to get rid of the deceased as she was carrying on with Mohinderpal. The motive, even if proved in the case, cannot prove the circumstances under which Jaspal died or the cause which resulted in his death. That Mohinderpal was proved to be in possession of a quantity of potassium cyanide and was in a position to administer it to the deceased is a circumstance of a neutral character. Mere possession of potassium cyanide by Mohinderpal without its being traced in the body of Jaspal cannot establish that his death was caused by this deadly poison. In any case, the circumstance is not of a character which is wholly incompatible with the innocence of the appellant. The other evidence referred to by the High Court as corroborating the latter part of Palvinder's alleged confession in the view of the case that we have taken does not require any discussion because if the confession is inadmissible, no question of corroborating it arises.

20. Mr Sethi argued that the statements contained in the alleged confession are contradicted rather than corroborated by the evidence led by the prosecution and that the confession is proved to be untrue. It is unnecessary to discuss this matter in the view that we have taken of the case.

21. The result, therefore, is that we are constrained to hold that there is no material

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direct or indirect for the finding reached by the High Court that the death of Jaspal was caused by the administration of potassium cyanide. If we believe the defence version his death was the result of an accident. If that version is disbelieved, then there is no proof as to the cause of his death. The method and manner in which the dead body of Jaspal was dealt with and disposed of raise some suspicion but from these facts a positive conclusion cannot be reached that he died an unnatural death necessarily, Cases are not unknown where death is accidental and the accused has acted in a peculiar manner regarding the disposal of the dead body for reasons best known to himself. One of them might well be that he was afraid of a false case being started against him. Life and liberty of persons cannot be put in jeopardy on mere suspicions, howsoever strong, and they can only be deprived of these on the basis of definite proof. In this case, as found by the High Court, not only were the Sub-Inspector of Police and police constables and other witnesses guilty of telling deliberate lies but the prosecution was blameworthy in introducing witnesses in the case to support their lies and that being so, we feel that it would be unsafe to convict the appellant on the material that is left after eliminating the perjured, false and inadmissible evidence.

22. For the reasons given above we allow this appeal, set aside the conviction of the appellant under Section 201 of the Indian Penal Code and acquit her of that charge also.

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* On Appeal by Special Leave from the Judgment and Order dated 3rd October, 1951 of the High Court of Judicature for the State of Punjab at Simla (Bhandari and Son, JJ. in Criminal Appeal No. 86 of 1951, arising out of the Judgment and Order dated 31st January, 1951 of the Court of the Sessions Judge, Ambala in Case No. 23 of 1950 and Trial No. 2 of 1951.

[1] 54 PLR 58

[2] (1838) 2 Lew 227

[3] Crl Appls Nos 56 & 57 of 1951

[4] AIR 1939 PC 47

[5] ILR 52 All 1011

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1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465

In the Supreme Court of India

(BEFORE MEHR CHAND MAHAJAN, VIVIAN BOSE AND B. JAGANNADHADAS, JJ.)

1. DALIP SINGH, SONS OF PAL SINGH
2. BATTAN SINGH?
3. SADHU SINGH, SON OF KEHR SINGH; AND
4. KUNDAN SINGH, SON OF WARYAM SINGH, CONDEMNED PRISONERS, CONFINED IN CENTRAL JAIL, FEROZEPORE ... Appellants;

Versus

STATE OF PUNJAB ... Respondent.

Versus

STATE OF PUNJAB ... Respondent.

Criminal Appeal No. 22 of 1953[*], decided on May 15, 1953

Advocates who appeared in this case :

Jai Gopal Sethi, Senior Advocate (R.L. Kohli and Deva Singh, Advocate, with him), instructed by Naunit Lal, Agent, for the Appellants;

Gopal Singh, Advocate, instructed by G.H. Rajadhyaksha, Agent, for the Respondent.

The Judgment of the Court was delivered by

VIVIAN BOSE, J.— Four persons appeal against sentences of death passed upon them in convictions for a double murder, the victims being two brothers, Rattan Singh and Bawa Singh. The learned Sessions Judge convicted three others also but sentenced all, including the four appellants, to transportation for life. The High Court acquitted three of the seven but sustained the convictions of the four appellants and enhanced their sentences in each case to death.

2. The prosecution story is simple. All seven accused belong to the same village and belong to the same faction or “party”, as Punnan (PW 2) calls it. Of the seven, the appellants Dalip Singh and Battan Singh are brothers. Jarnail Singh who was acquitted is a son of Battan Singh. The remaining four, including the appellants Sadhu Singh and Kundan Singh, are not related to the other three and, except for the evidence that they belong to the same party, are not shown to have any common interest with the other three.

3. The appellants Dalip Singh and Battan Singh are said to have assaulted the two dead men Rattan and Bawa about twenty years before the occurrence. They were prosecuted and convicted and served short terms of imprisonment. Dalip Singh and Battan Singh are also said to be dacoits and it is said that they believed that the two dead men used to furnish information against them to the police. This is said to be the motive for the murders. Why the others should have joined in, except on the basis that they belong to the same “party”, is not disclosed.

4. The prosecution case is as follows: On 16th June, 1951, Rattan Singh was taking some food out to a well a short distance from his house for himself and his son. This was about 2 p.m. Just as he left the house, his wife Punnan (PW 2) heard cries of alarm and on rushing out with her daughter Charni (PW 11) saw all seven accused assaulting her husband. They beat him up till he fell to the ground.

5. As soon as Rattan Singh fell down, they left him and rushed to his (Rattan

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Singh's) Haveli where the other brother Bawa Singh was lying on a cot, shouting that they would also make short work of him. All seven belaboured him on the cot, then they dragged him out and beat him up some more.

6. After this they returned to where Rattan Singh was still lying on the ground and gave him some more blows. Then they ran away.

7. Bawa Singh died very shortly after the assault. The other brother survived a little longer but he also died not long after.

8. According to Punnan (PW 2) the accused were armed as follows: The appellants Dalip Singh and Sadhu Singh with *barchhas*; the appellant Battan Singh and two of the accused who have been acquitted with lathis; the appellant Kundan Singh had a *takwa* — a hatchet with a long handle, and the accused Kehar Singh, who has been acquitted, had a *kunda* — a hefty stick with a curved iron end.

9. The medical evidence discloses that Rattan Singh had nineteen injuries on his person. Of these, only two on the head, would have been fatal in themselves. The rest were on non-vital parts like the foot, ankle, leg, w knee, thigh, buttock, forearm and wrist, but of these six were grievous. The doctor says death was caused by shock produced by the multiple injuries aided by haemorrhage in the brain due to Injury 14.

10. The other brother Bawa had sixteen injuries but except for two the rest were on non-vital parts. One of the two was on the head and the other ruptured the spleen. The rest were on the ankle, leg, knee, thigh, elbow, thumb and wrist, but eleven of them were grievous. In his case the doctor put the death down to rupture of the spleen.

11. In *Rattan Singh's case*, only one of the injuries was inflicted by a sharp-edged pointed weapon and all the rest by blunt weapons. The two on the head were inflicted by blunt weapons.

12. In *Bawa Singh's case*, four wounds were caused by a sharp-edged or pointed sharp-edged weapon. The others were all inflicted by blunt weapons. Here again, the fatal injury which ruptured the spleen was caused by a blunt weapon.

13. This analysis would appear to indicate that neither of the appellants Dalip Singh and Sadhu Singh, who carried spears, nor the appellant Kundan Singh, who carried a hatchet, aimed at any vital part; and of those who had blunt weapons, the appellant Battan Singh who had a lathi has alone been convicted while Indar Singh and Jarnail Singh, who also had lathis, and Kehar Singh, who had a *khunda*, have all been acquitted; and yet Battan Singh alone could hardly have been responsible for eighteen injuries on Rattan Singh and nine on Bawa Singh.

14. The appellant Dalip Singh was arrested on the 17th June and the other three on the 18th. Each was wearing bloodstained clothes.

15. The learned Sessions Judge did not attach much importance to the bloodstained clothes, nor did he regard the recovery of certain weapons, some of which were bloodstained, as of much consequence. But he was impressed with the evidence of the two eyewitnesses Punnan (PW 2) and Charni (P.W. 11) and believing them convicted each of the seven accused under Section 302 read with Section 149 IPC. He said that as the fatal injuries could not be attributed to any one of the accused he refrained from passing the sentence of death. All the assessors considered all seven accused guilty.

16. The learned High Court Judges did not attach any importance to the recovery of the weapons because for one thing they were not recovered till the 30th, that is to say, not until fourteen days after the murders, and when found, one set pointed out by Jarnail Singh, who has been acquitted, was found in Dalip Singh's field and another set, pointed out by Sadhu Singh, was found in Kehar Singh's field. But they considered the bloodstained clothes an important factor. They were not prepared to believe the two eye-witnesses all the way, partly because they were of opinion that a

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part of their story was doubtful and seemed to have been introduced at the instance of the police and partly because they considered that when the fate of seven men hangs on the testimony of two women "ordinary prudence" requires corroboration. They found corroboration in the case of the four appellants because of the bloodstained clothes and none in the case of the others. Accordingly, they convicted the four appellants and acquitted the others.

17. Now this has led the learned Judges into an inconsistency and it is that which led to the granting of special leave to appeal. The learned Judges say that their conclusion is that

> "(1) generally the story related by Punnan and Charni is true:
>
> (2) that certainly not less than five persons took part in the beating of the two deceased; and
>
> (3) that the corroboration required by prudence is afforded by the presence of the bloodstained clothes found on the persons of the four appellants who have been convicted."

As regards the three accused whom they acquitted the learned Judges say—

> "The other three accused may or may not have taken part in the affair."

18. Now it is clear from the above that it is impossible to ascribe any particular injury to any particular person. Therefore, it is impossible to convict any one of the accused of murder simpliciter under Section 302, nor do the learned Judges attempt to do that. They convict under Section 302 read with Section 149. But Section 149 requires the presence of five persons who share the common object. It is true that in one place the learned Judges say that there were certainly not less than five present but in the very next breath they say that the three whom they acquit "may or may not have taken part in the affair". If those three are eliminated, then we are left with only four and that militates against their previous finding that they were at least five.

19. Before Section 149 can be called in aid, the court must find with *certainty* that there were at least five persons sharing the common object. A finding that three of them "may or may not have been there" betrays uncertainty on this vital point and it consequently becomes impossible to allow the conviction to rest on this uncertain foundation.

20. This is not to say that five persons must always be convicted before Section 149 can be applied. There are cases and cases. It is possible in some cases for Judges to conclude that though five were unquestionably there the identity of one or more is in doubt. In that case, a conviction of the rest with the aid of Section 149 would be good. But if that is the conclusion it behoves a court, particularly in a murder case where sentences of transportation in no less than four cases have been enhanced to death, to say so with unerring certainty. Men cannot be hanged on vacillating and vaguely uncertain conclusions.

21. In fairness to the learned Judges we have examined the evidence with care to see whether, if that was in their minds, such a conclusion could be reached in this particular case on the evidence here. That it might be reached in other cases on other facts is undoubted, but we are concerned here with the evidence in this case.

22. Now mistaken identity has never been suggested. The accused are all men of the same village and the eyewitnesses know them by name. The murder took place in daylight and within a few feet of the two eyewitnesses. If the witnesses had said, "I know there were five assailants and I am certain of A, B and C. I am not certain of the other two but think they were D and E", a conviction of A, B and C, provided the witnesses are believed, would be proper. But when the witnesses are in no doubt either about the number or the identity and there is no suggestion about mistaken identity and when further, the circumstances shut out any reasonable possibility of

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that, then hesitation on the part of the Judge can only be ascribed, not to any doubt about identity but to doubt about the number taking part. The doubt is not whether D and E have been mistaken for somebody else but whether D and E have been wrongly included to swell the number to five.

23. Again, it is possible for a witness to say that "A, B, C, D, E and others, some ten or fifteen in number, were the assailants". In that event, assuming always that the evidence is otherwise accepted, it is possible to drop out D and E and still convict A, B and C with the aid of Section 149. But that again is not the case here. No one suggests that there were more than seven; no one suggests that the seven, or any of them, were, or could be, other than the seven named.

24. Nor is it possible in this case to have recourse to Section 34 because the appellants have not been charged with that even in the alternative, and the common intention required by Section 34 and the common object required by Section 149 are far from being the same thing. In the circumstances, we find ourselves unable to allow the conviction to rest on the insecure foundations laid by the High Court. We have accordingly reviewed the evidence for ourselves. Mr Sethi took us elaborately through it. In our opinion, the learned Sessions Judge's conclusions are right.

25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *Rameshwar* v. *State of Rajasthan*[1]. We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel.

26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

27. This is not to say that in a given case a Judge for reasons special to that case and to that witness cannot say that he is not prepared to believe the witness because of his general unreliability, or for other reasons, unless he is corroborated. Of course, that can be done. But the basis for such a conclusion must rest on facts special to the particular instance and cannot be grounded on a supposedly general rule of prudence enjoined by law as in the case of accomplices.

28. Now what is the ground for suspecting the testimony of these two witnesses? The only other reason given by the learned High Court Judges is that they have introduced a false element into their story at the instigation of the police in order to save the "face" of the lambardars. But if that is so, it throws a cloak of unreliability over the whole of their testimony and, therefore, though it may be safe to accept their story where the corroborative element of the bloodstained clothes is to be found, it would be as unsafe to believe, on the strength of their testimony, that at least five persons were present as it would be to accept that the ones who have been acquitted

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were present; and once we reach that conclusion Section 149 drops out of the case.

29. We have carefully weighed the evidence of these women in the light of the criticisms advanced against them by Mr Sethi, most of which are to be found in the judgments of the lower courts, and we are impressed by the fact that the learned Sessions Judge who saw them in the witness box was impressed with their demeanour and by the way they stood up to the cross-examination, and also by the fact that the learned High Court Judges appear to believe them to the extent that at least five persons were concerned.

30. Some of the accused have made general and sweeping statements to the effect that the prosecution witnesses are inimical to them but no one has suggested why. In the long cross-examination of these witnesses not a single question has been addressed to them to indicate any cause of enmity against any of the accused other than the appellants Dalip Singh and Battan Singh. A general question was asked, and it was suggested that there was some boundary dispute between Punnan's husband and the accused Indar Singh and Kundan Singh but that was not followed up by other evidence and neither Kundan Singh nor Indar Singh suggests that there was any such dispute in their examinations under Section 342 of the Criminal Procedure Code. Kehar Singh says vaguely that he has inherited land which will pass to the line of Rattan and Bawa if he dies without heirs but he has made no effort to substantiate this. The questions put in cross-examination therefore remain just shots in the dark and leave the testimony of the two women unimpaired.

31. The first information report was made by Punnan (PW 2) herself. It was made very promptly though this was attacked by Mr Sethi. It was made at 8.30 p.m. within 6½ hours of the occurrence at a place 12 miles from the police station. The victims did not die at once and it was only natural that Punnan's first thoughts should have been to tend them. Next, she had to walk part of the distance and the rest she covered in a lorry, and above all she has not been cross-examined regarding delay. We consider that a report made within 6½ hours in such circumstances is prompt.

32. Now the important thing about this report is that it names the seven accused, no less and no more, and from start to finish Punnan has adhered to that story without breaking down in cross-examination and without any attempt to embellish it by adding more names; and in this she is supported by Charni (PW 11).

33. Next, the bloodstained clothes found on the persons of the four appellants afford strong corroboration as against them, and as two courts have believed the witnesses to that extent all we need do is to concentrate on the other three accused who have been acquitted in order to see whether there were seven persons as Punnan says and to see whether the conclusion of the High Court that there were at least five present is sound.

34. We do not think the discovery of the weapons can be lightly excluded. One set was pointed out by Jarnail Singh. In itself that might not mean much but it is unquestionable corroboration as against Jarnail Singh unless the fact of discovery is disbelieved or is considered to be a fraud. But that is not the finding of either court. The first court believes the evidence and the High Court does not disbelieve it but considers the incident as of small probative value. It may be in itself, but it is a corroborative element in the case of two witnesses who do not require corroboration and that makes it all the more safe to accept their testimony.

35. Next comes the discovery of another set of weapons by Sadhu Singh. He was already implicated by reason of some bloodstained clothes but the importance of the discovery in his case lies in the fact that the weapons were found in the field of Kehar Singh. It is certainly a circumstance to be taken into consideration that these weapons should be found in the field of a man who was named from the start.

36. Then comes the fact that Punnan (PW 2) not only named the various assailants

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in her first information report but stated exactly what sort of weapon each was carrying. Here again she is consistent from start to finish except for an unessential difference in the case of *Jarnail*. In the first information report she said he had a *dang* while in her evidence she says he had a lathi, but as a *dang* is a big lathi that is not a real discrepancy. This, in our opinion, is impressive consistency, especially as it tallies in general with the post-mortem findings. Now the fact that weapons of this description, four stained with human blood, are discovered at the instance of two persons she has named from the beginning in the fields of others whom she has also named from the start certainly does not tend to weaken her testimony.

37. The only accused who is not in some way independently linked up with the testimony of these two women is Indar. But when their stories find corroboration on so many important particulars we see no reason why they should be disbelieved as regards Indar, always remembering that these are not witnesses who require corroboration under the law. In our opinion, the High Court was unnecessarily cautious in acquitting the other three accused when the learned Judges were convinced that at least five persons were concerned.

38. We have taken into consideration the fact that the High Court considers that the portion of Punnan's story regarding the lambardars has been falsely introduced by the police, also that both courts have rejected the evidence about the dying declaration. Despite that, we agree with the learned Sessions Judge that Punnan and Charni are to be believed regarding the main facts and that they correctly named all seven accused as the assailants. On that finding the conviction under Section 302 read with Section 149 can be sustained. We accordingly uphold these convictions. The acquittals in the other three cases will of course stand but the mere fact that these persons have, in our opinion, been wrongly acquitted cannot affect the conviction in the other cases.

39. On the question of sentence, it would have been necessary for us to interfere in any event because a question of principle is involved. In a case of murder the death sentence should ordinarily be imposed unless the trying Judge for reasons which should normally be recorded considers it proper to award the lesser penalty. But the discretion is his and if he gives reasons on which a judicial mind could properly found an appellate court should not interfere. The power to enhance a sentence from transportation to death should very rarely be exercised and only for the strongest possible reasons. It is not enough for an appellate court to say, or think, that if left to itself it would have awarded the greater penalty because the discretion does not belong to the appellate court but to the trial Judge and the only ground on which an appellate court can interfere is that the discretion has been improperly exercised, as for example where no reasons are given and none can be inferred from the circumstances of the case, or where the facts are so gross that no normal judicial mind would have awarded the lesser penalty.

40. None of these elements is present here. This is a case in which no one has been convicted for his own act but is being held vicariously responsible for the act of another or others. In cases where the facts are more fully known and it is possible to determine who inflicted blows which were fatal and who took a lesser part, it is a sound exercise of judicial discretion to discriminate in the matter of punishment. It is an equally sound exercise of judicial discretion to refrain from sentencing all to death when it is evident that some would not have been if the facts had been more fully known and it had been possible to determine, for example, who hit on the head or who only on a thumb or an ankle; and when there are no means of determining who dealt the fatal blow, a judicial mind can legitimately decide to award the lesser penalty in all the cases. We make it plain that a Judge is not bound to do so, for he has as much right to exercise his discretion one way as the other. It is impossible to lay down a hard and fast rule for each case must depend on its own-facts. But if a Judge does do

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so for reasons such as those indicated above, then it is impossible to hold that there has not been a proper exercise of judicial discretion.

41. Now the High Court do not consider these facts at all. They give no reasons and dispose of the matter in one sentence as follows:

> "I would ...dismiss the appeals of the other four and accepting the revision petitions change their sentences ... from transporation ... to death".

That, in our opinion, is not a proper way to interfere with a judicial discretion when a question of enhancement is concerned. We are unable to hold that the discretion was improperly exercised by the learned Sessions Judge. Whether we ourselves would have acted differently had we been the trial court is not the proper criterion. We accordingly accept the appeals on the question of sentence and reduce the sentence in each case to that of transportation for life. Except for that, the appeal is dismissed.

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* On Appeal by Special Leave granted by the Supreme Court on 28th January, 1953 from the Judgment and Order dated 19th November, 1952 of the High Court of Judicature for the State of Punjab at Simla in Criminal Appeal No. 102 of 1952, and Criminal Revisions Nos. 423 and 499 of 1952 of the Court of the Sessions Judge, Jullundur in Sessions Case No. 30 of 1951 and Sessions Trial No. 5 of 1951.

[1] 1952 SCR 377 at 390

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1957 SCR 953 : AIR 1957 SC 637 : 1957 Cri LJ 1014

In the Supreme Court of India

(BEFORE B. JAGANNADHADAS, B.P. SINHA AND P.B. GAJENDRAGADKAR, JJ.)

1. SARWAN SINGH S/O RATTAN SINGH (IN CRIMINAL APPEAL NO. 22/57) 2. HARBANS SINGH S/O BHAN SINGH (IN CRIMINAL APPEAL NO. 23/57) ... Appellants;

Versus

STATE OF PUNJAB ... Respondent.

Criminal Appeals Nos. 22 and 23 of 1957*, decided on April 10, 1957

Advocates who appeared in this case :

Gyan Chand Mathur, Advocate (at State expense), for the Appellant in Criminal Appeal 22/57;

E.L. Kohli, Advocate, for the Appellant in Criminal Appeal 23/57;

Gopal Singh and T.M. Sen, Advocates, for the Respondent (in both the Appeals).

The Judgment of the Court was delivered by

P.B. GAJENDRAGADKAR, J.— Harbans Singh, Gurdial Singh and Sarwan Singh were charged in the court of the learned Additional Sessions Judge at Ludhiana with having committed an offence of murder punishable under Section 302 of the Indian Penal Code. The case against them was that they, along with Banta Singh, the approver, had intentionally caused the death of Gurdev Singh by inflicting injuries on his person with Kirpan, toki and dang on November 23, 1955, within the limits of the Village Sohian, police station Jagraon. The learned trial Judge held that the charge framed against all the three accused had been proved beyond a reasonable doubt. That is why he convicted them of the offence charged and sentenced each one of them to death. On appeal to the High Court of Punjab, the order of conviction and sentence imposed against Harbans Singh and Sarwan Singh was confirmed whereas the order of conviction and sentence against Gurdial Singh was set aside and he was ordered to be acquitted and discharged. Accused 1 Harbans Singh and Accused 3 Sarwan Singh have come to this Court in appeal by Special Leave.

2. It would be convenient to state the prosecution case very briefly at the outset. Gurdev Singh, the victim of the assault, was the brother of Accused 1. It appears that the father of the two brothers had left the village some years ago and is apparently no longer alive. Harbans Singh was a shirker and a waster and that made Gurdev Singh impatient. When Gurdev Singh tried to improve Harbans Singh, Harbans Singh resented Gurdev Singh's efforts and his irritation and annoyance had reached such a stage and extent that he began to plan his murder. According to the story of the prosecution, Harbans Singh got in touch with his friends Sarwan Singh and Gurdial Singh and requested them to assist him in his plan to get rid of his brother. It appears that Gurdial Singh himself was on inimical terms with Gurdev Singh because he was angry with Gurdev Singh for having cut jokes with his sister. A few days before the commission of the offence, Harbans Singh and Sarwan Singh were sitting on a canal bank near their village enjoying their drink when Banta Singh joined them. He was also asked to partake of the liquor and was told about the plan to murder Gurdev Singh. A few days later there was another meeting between these three men and it was agreed that an attempt should be made to procure arms for the purpose of carrying out the plan. Rakha was accordingly approached and as a result of the negotiations he sold a country-made pistol and a cartridge for Rs 40 to Sarwan Singh.

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Rakha was also requested to join the conspiracy. He was however unwilling to respond and though he did not openly say "no" to the proposal, at the material time he refused to join the conspirators. On the day of the offence itself, Sarwan Singh, Gurdial Singh and Banta Singh went by a bus together and got down near the road which leads to the village Sohian. Then they proceeded on foot until they met Harbans Singh near the canal minor. Harbans Singh then advised his co-conspirators to hide themselves in the bushes. He then fetched a bottle of liquor and all the four drank from it. This took them to sunset time, when Harbans Singh left the place and promised his friends that he would send his brother to the place where they would lie concealed. He also told them that he would give a signal as soon as his brother would approach the place of their concealment by clapping his hands. In accordance with this plan Harbans Singh persuaded his brother to go ahead. Sarwan Singh then coughed and this raised an apprehension in the mind of Gurdev Singh that some people may be lying in wait for him. So he called out to his brother Harbans Singh and said that he suspected that there were some people there. Harbans Singh assured him that he would soon join. Meanwhile, according to plan, the three assailants emerged from their place of concealment and attacked Gurdev Singh. Harbans Singh also arrived on the scene and joined them in the assault. The prosecution case is that Harbans Singh was armed with a kirpan, Gurdial Singh with a lathi, the approver Banta singh with a toki and Sarwan Singh used a kirpan. The attack was undoubtedly brutal and callous and it resulted in as many as 69 incised wounds and two contused injuries which had been caused with a blunt weapon. Having assaulted Gurdev Singh in this brutal manner his assailants ran away.

3. Harbans Singh returned to his village and raised a hue and cry. He complained that his brother had been carried away by a number of persons and he pretended that his brother's assailants were Darshan Singh, Jagat Singh, Gurnam Singh and Bant Singh of the village Pona. The Villagers, however, found that Harbans Singh was not keen on joining them in rendering help to the victim or in pursuing his assailants. Finally, however, he was persuaded to accompany the villagers and the villagers in the company of Harbans Singh reached the spot where Gurdev Singh's body was found in a pool of blood. Thereafter Harbans Singh went to the police station and made a report of the occurrence at about 10.30 p.m. He alleged in his report that his brother had been murdered by the aforesaid four persons of the village of Pona. Purporting to act on this report, the police reached the spot in the early hours of the next morning and so the investigation commenced.

4. It is clear that the police had their own doubts about the truth of the report made by Harbans Singh from the start and they suspected that it was Harbans Singh and his friends who were concerned with the commission of this foul offence. Sarwan Singh, Gurdial Singh and Banta Singh were arrested on November 25 and Harbans Singh on November 26. The investigating officer recovered from the person of Sarwan Singh a bloodstained shirt and chadar and obtained from Sarwan Singh's house a pistol and an empty cartridge on information given by him. From the person of Gurdial Singh a bloodstained turban was recovered and the information given by him led to the discovery of a stick or lathi. This lathi was blood stained. From Banta Singh's person a bloodstained chadar was recovered and the information given by him led to the discovery of a kirpan and a toki from a well in which they were thrown after the commission of the offence. The prosecution also alleges that, on the information given by Harbans Singh, some bloodstained clothes were recovered from Gurdev Kaur sister of Gurdial Singh. It appears that, on November 30, Sarwan Singh offered to make a confessional statement and the confession was in fact recorded on the same day. On December 2, Banta Singh was given pardon and made an approver. That in brief is the prosecution case.

5. All the three accused deny any connection with the commission of the offence.

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The learned Sessions Judge held that Banta Singh was a reliable witness. Since Banta Singh is, however, an approver the learned Judge considered whether his evidence had received the requisite corroboration in material particulars and he held that it did. The learned Judge also found that the confession made by Sarwan Singh was voluntary and true and in his opinion the evidence of Rakha and the other circumstantial evidence with regard to the bloodstained clothes of the respective accused persons and the recovery of the weapons afforded sufficient corroboration in material particulars. That is how he reached the conclusion that the charge of murder has been proved against all the three accused. On appeal, it has been held by the learned Judges of the High Court of Punjab that the evidence given by the approver, Banta Singh, against accused Gurdial Singh was very discrepant and therefore unreliable and so they found that the case against Gurdial Singh had not been proved beyond a reasonable doubt. In the result Gurdial Singh was acquitted; but the view taken by the learned Judges in respect of the prosecution case against Harbans Singh and Sarwan Singh was that the approver's evidence supplied the basis for the prosecution case against them and since it was corroborated by circumstantial evidence to which reference has already been made and by the confession of Sarwan Singh, there was no difficulty in confirming the order of conviction and sentence passed against these two accused persons. It is this view which is challenged before us by the two appellants in the present appeals.

6. Since the present appeals have been filed by Special Leave under Article 136 of the Constitution, it would normally not be open to the appellants to raise questions of fact before us. Prima facie the orders of conviction and sentence passed against the appellants are based on concurrent findings of fact and we would be slow to interfere with such findings unless we are satisfied that the said findings are vitiated by errors of law or that the conclusions reached by the courts below are so patently opposed to well established principles of judicial approach, that they can be characterised as wholly unjustified and even perverse.

7. On behalf of Harbans Singh, it has been urged before us by Mr Kohli that the judgment of the High Court of Punjab suffers from a serious infirmity in that, in dealing with the evidence of the approver, the learned Judges do not appear to have addressed themselves to the preliminary question as to whether the approver is a reliable witness or not. The problem posed by the evidence given by an approver has been considered by the Privy Council and courts in India on several occasions. 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

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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. Mr Kohli's contention is that since the learned Judges of the High Court of Punjab have failed to address themselves to this initial question, their appreciation of the approver's evidence suffers from a serious infirmity. In our opinion, this contention is well-founded. We have carefully read the judgment delivered by the High Court but we find no indication in the whole of the judgment that the learned Judges considered the character of the approver's evidence and reached the conclusion that it was the evidence given by a reliable witness. The only statement which we find in the judgment dealing with this topic is that "since the main evidence in the case consists of the testimony of the approver it is necessary to consider the case of each appellant individually". With respect, this observation is open to the criticism which has been made against it by Mr Kohli.

8. The argument that the character of the approver's evidence has not been considered by the High Court cannot be characterised as merely academic or theoretical in the present case because, as we will presently point out, the evidence of the approver is so thoroughly discrepant that it would be difficult to resist the conclusion that the approver in the present case is a wholly unreliable witness. Indeed it may be legitimate to point out that the learned Judges of the High Court have themselves criticised the evidence of the approver in dealing with the prosecution case against Gurdial Singh and have ultimately found that the account given by the approver is unreliable and, though there was circumstantial evidence which raised an amount of suspicion against Gurdial Singh, that would not be enough to sustain his conviction. It seems to us that if it was found that the approver's account against one of the accused persons was wholly discrepant, this finding itself should inevitably have led the court to scrutinise his evidence in respect of the other accused persons with greater caution. Besides, it is somewhat unfortunate that the attention of the learned Judges of the High Court was presumably not drawn to the still more serious discrepancies in the evidence of the approver in regard to the part assigned to Harbans Singh in the commission of the offence. In the evidence given by the approver before the trial court, he has definitely and unequivocally implicated Harbans Singh in the commission of the offence. It has been brought out in the cross-examination that in the very first statement made by the approver before the investigating officer on November 25, he had made statements about Harbans Singh which are wholly inconsistent with the subsequent story. In this statement, the approver had definitely stated that only the three of them were concerned with the commission of the offence, himself, Sarwan Singh and Gurdial Singh. He had also stated clearly in the said statement that Harbans Singh did not join in murdering Gurdev Singh. It is remarkable that in regard to almost every material particular about the part played by Harbans Singh in the commission of the offence the story disclosed by the approver at the trial is inconsistent with his first statement before the police. In his statement at the trial, the approver assigns Gurdial Singh the possession of lathi and according to him Gurdial Singh subsequently took up the kirpan from Sarwan Singh and murdered Gurdev Singh after which Harbans Singh himself gave a blow with it at the neck of the victim. In his statement before the police, the approver had said that Gurdial Singh had carried a kirpan. We are deliberately not referring to the several other minor discrepancies which have been brought out in the evidence of the approver in his cross-examination. In our opinion, the discrepancies brought out in the evidence of the approver qua the prosecution case against Gurdial Singh coupled with the more serious discrepancies in his evidence in the prosecution case against Harbans Singh lead to only one conclusion and that is that the approver has no regard for truth. It is true that in his second statement recorded on November 29, the approver

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substantially changed his first story and involved Harbans Singh in the commission of the offence, and in that sense, his second statement can be said to be consistent with his evidence at the trial. But we cannot lose sight of the fact that, within three days after the recording of his second statement, he was granted pardon and his statement was recorded under Section 164 of the Code of Criminal Procedure on the same day. Therefore it would be legitimate for the accused to contend that the additions made by the approver in his subsequent statement may be the result of promise held out to him that he would be granted pardon. Apart from this consideration, in view of the positive statements made by the approver in his first recorded statement, there can be no doubt that the subsequent allegations against Harbans Singh are improvements and are the result of his decision to involve Harbans Singh in the commission of the offence. If this was a case where the statements made by the approver on subsequent occasions merely added details which were not included in the first statement, it may perhaps have been a different matter. It is true that omissions have not always the same significance as contradictions; but in the present case it is patent that the two sets of statements are wholly inconsistent and irreconcilable and that obviously leads to a very serious infirmity in the character of the witness. It is indeed to be regretted that the attention of the learned Judges of the High Court was not drawn to this aspect of the matter and they were not invited to consider the initial question as to whether the approver Banta Singh was a reliable witness at all. Every person who is a competent witness is not a reliable witness and the test of reliability has to be satisfied by an approver all the more before the question of corroboration of his evidence is considered by criminal courts.

9. If the evidence of the approver is discarded as being unreliable the case against Harbans Singh must inevitably fail. No doubt there are some circumstances against him on which the prosecution relies. The evidence of Rakha (PW 8) would show that Harbans Singh and the other accused persons were concerned with the purchase of a pistol from Rakha. Incidentally this pistol has not been used in the commission of the offence at all and that, in the circumstances, it is difficult to explain. However, the purchase of a pistol from Rakha may merely raise a suspicion against Harbans Singh but suspicions, however strong, cannot take the place of proof. Harbans Singh had injuries on his person and the conduct of Harbans Singh soon after the commission of the offence was very suspicious. That again may raise a suspicion against Harbans Singh but without the basis of the approver's evidence these suspicious circumstances can play no effective part in a criminal trial. The discovery of clothes alleged to have been made at the place of Gurdev Kaur cannot be pressed into service against Harbans Singh because Gurdev Kaur herself has not been examined and the importance of the recovery of a kirpan and a red scabbard from the spot cannot obviously be exaggerated. In our opinion, there is no doubt whatever that, if the approver's evidence is rejected as unreliable, the other evidence on which the prosecution relied against Harbans Singh cannot possibly sustain his conviction of the offence of murder. We must, therefore, hold that the finding of the learned Judges of the High Court that the offence of murder has been proved against Harbans Singh is vitiated by a serious infirmity to which we have just referred and must be reversed. If the learned Judges have failed to address themselves to the initial question of law before dealing with the merits of the approver and if, in dealing with his evidence, they have failed to take into account the glaring and obvious inconsistencies in the account given by the approver, it is open to the appellant to challenge the validity of their conclusion. In the result, the appeal preferred by Harbans Singh must be allowed, the order of conviction and sentence passed against him must be set aside and he must be acquitted and discharged.

10. That takes us to the case of Accused 3 Sarwan Singh. We have already pointed out that the order of conviction passed against Sarwan Singh is in the words of the

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judgment of the High Court based on the fact that "there is the evidence of the approver and it is corroborated in every particular by his own confessional statement". Besides, there is other circumstantial evidence to which reference has already been made in narrating the prosecution story at the beginning of this judgment. It would at once be noticed that, if we come to the conclusion that the approver is an unreliable witness, the basis of the evidence of the approver on which the learned Judges of the High Court proceeded even while dealing with the case against Sarwan Singh has been shaken. If, in our opinion, the approver is unworthy of credit, then it would not be possible to consider the question of the corroboration that his evidence receives from the confessional statement made by Sarwan Singh himself. It is, however, true that Sarwan Singh has made a confession and in law it would be open to the court to convict him on this confession itself though he has retracted his confession at a later stage. Nevertheless usually courts require some corroboration to the confessional statement before convicting an accused person on such a statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case. In the present case, the learned Sessions Judge has considered the question about the voluntary character of the confession made by Sarwan Singh and has found in favour of the prosecution. The judgment of the High Court shows that the learned Judges agreed with the view of the learned trial Judge mainly because the evidence of the Magistrate who recorded the confession appeared to the learned Judges to show that the confession was voluntary. It is this view which is seriously challenged before us by Mr Mathur on behalf of Sarwan Singh. Prima facie whether or not the confession is voluntary would be a question of fact and we would be reluctant to interfere with a finding on such a question of fact unless we are satisfied that the impugned finding has been reached without applying the true and relevant legal tests in the matter. As in the case of the evidence given by the approver, so too unfortunately in the case of the confession of Sarwan Singh the attention of the learned Judges below does not appear to have been drawn to some salient and grave features which have a material bearing on the question about the voluntary character of the confession. Sarwan Singh was arrested on November 25. His clothes were found bloodstained and he is alleged to have been inclined to help the prosecution by making the statement which led to the discovery of incriminating articles. All this happened on the 25th itself and yet, without any ostensible explanation or justification, Sarwan Singh was kept in police custody until November 30. That is one fact which is to be borne in mind in dealing with the voluntary character of his confession. What happened on November 30 is still more significant. On this day he was sent to the Magistrate to record his confessional statement. The evidence of the Magistrate Mr Grover shows that the accused was produced before him at about 2.30 p.m. He was given about half-an-hour to think about the statement which he was going to make and soon thereafter the confessional statement was recorded. It is true that the Magistrate did put to the accused the questions prescribed by the circulars issued by the High Court of Punjab. Even so, when the learned Magistrate was asked why he did not give more time to the accused before his confessional statement was recorded, his reply was frank and honest. He said that the accused seemed to insist upon making a statement straightaway. The Police Sub-Inspector who had taken the accused to the Magistrate was apparently standing in the verandah outside in the Magistrate's office. The doors of the office were closed but the fact still remains that the Sub-Inspector was standing outside. The evidence of the Magistrate also shows that, soon after the statement was finished, the Sub-Inspector went to the Magistrate's room again. The person of the accused showed some injuries and yet the learned Magistrate did not enquire how the accused came to be injured. It is in the light of these circumstances that the question falls to be considered whether the confession made by the accused can be regarded as voluntary.

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It is hardly necessary to emphasize that the act of recording confessions under Section 164 of the Code of Criminal Procedure is a very solemn act and, in discharging his duties under the said section, the Magistrate must take care to see that the requirements of sub-section (3) of Section 164 are fully satisfied. It would of course be necessary in every case to put the questions prescribed by the High Court circulars but the questions intended to be put under sub-section (3) of Section 164 should not be allowed to become a matter of a mere mechanical enquiry. No element of casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confessional statement which the accused wants to make is in fact and in substance voluntary. Incidentally, we may invite the attention of the High Court of Punjab to the fact that the circulars issued by the High Court of Punjab in the matter of the procedure to be followed, and questions to be put to the accused, by Magistrates recording confessions under Section 164 may be revised and suitable amendments and additions sade in the said circulars in the light of similar circulars issued by the High Courts of Uttar Pradesh, Bombay and Madras. The whole object of putting questions to an accused person who offers to confess is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise having reference to the charge against the accused person as mentioned in Section 24 of the Indian Evidence Act. There can be no doubt that, when an accused person is produced before the Magistrate by the investigating officer, it is of utmost importance that the mind of the accused person should be completely freed from any possible influence of the police and the effective way of securing such freedom from fear to the accused person is to send him to jail custody and give him adequate time to consider whether he should make a confession at all. It would naturally be difficult to lay down any hard and fast rule as to the time which should be allowed to an accused person in any given case. However, speaking generally, it would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession. Where there may be reason to suspect that the accused has been persuaded or coerced to make a confession, even longer period may have to be given to him before his statement is recorded. In our opinion, in the circumstances of this case it is impossible to accept the view that enough time was given to the accused to think over the matter. Indeed, any Magistrate with enough criminal experience would have immediately decided to give longer time to Sarwan Singh in the present case for the obvious reason that Sarwan Singh appeared to the learned Magistrate to be keen on making a confession straightaway. The learned Magistrate himself has fairly stated that he would have given him longer time but for his insistence to make a confession without delay. This insistence on the part of Sarwan Singh to make a confession immediately should have put the learned Magistrate on his guard because it obviously bore traces of police pressure or inducement. Unfortunately, the effect of the failure of the learned Magistrate to grant enough time to the accused to consider the matter has not been considered by the learned Sessions Judge and has been wholly ignored by the learned Judges of the High Court. Besides, in neither court below has any attention been paid to the fact that Sarwan Singh appeared to have been kept in police custody without any justification between November 26 and November 30. We have carefully considered all the relevant facts bearing on this question and we see no escape from the conclusion that the failure of the learned Judges of the High Court to take into account these material facts has introduced a serious legal infirmity in their conclusion that the confession made by Sarwan Singh is voluntary. That is why we think we must reverse this conclusion.

11. There is, besides, another fact which is equally fatal to the prosecution case. Even if the confession is held to be voluntary, it must also be established that the confession is true and for the purpose of dealing with this question it would be necessary to examine the confession and compare it with the rest of the prosecution

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evidence and the probabilities in the case. In our opinion, some material points mentioned in the confessional statement are not shown to be true. Sarwan Singh says that when Gurdev Singh was assaulted he and his brother Harbans Singh were walking together. On the other hand the prosecution story is that Harbans Singh had first contacted his accomplices and had told them that he would send Gurdev Singh towards the spot where the accomplices would lie in wait for him. The story further is that when Gurdev Singh suspected that there were some people near about he shouted to Harbans Singh and before Harbans Singh came on the spot assault had begun. This part of the prosecution story as deposed to by the approver is inconsistent with the material statement in the confession. According to the confession, Dial Singh gave a Dang blow to Gurdev Singh on the head from the front. This statement is not borne out by medical evidence. There does not appear to be a corresponding injury on the head of the victim. Sarwan Singh says that he took the kirpan which was first used by Harbans Singh and gave two blows to Gurdev Singh on his thigh. This statement again is not borne out by the medical evidence about the injuries on the body of the victim. Similarly, the statement of Sarwan Singh that the handle of the kirpan was broken and he got his finger injured with it is not easily reconcilable with the medical evidence about the injury itself. Unfortunately these discrepancies between the confessional statement and the main prosecution evidence given by the approver have not been noticed by the learned Judges of the High Court. Indeed, after having found that the confession was voluntary it appears to have been *assumed* by the learned Judges that the confession was true and that, in our opinion, is another infirmity in the conclusion reached by the High Court.

12. That leaves the other circumstances which have been proved against Sarwan Singh to be considered. There were injuries on his person. They are thus described by the doctor:

> "1. A superficial incised wound with a scab, 3/8" × 1/12" on the left side of the face, just above the left moustache.
>
> 2. An abrasion with a scab 1/2" × 1/4" on the outer surface of the middle digit of the left ring finger.
>
> 3. An abrasion with a scab 1/8" × 1/8" on the outer surface of the middle digit of the left little finger.
>
> 4. An abrasion with a scab 1/4" × 1/4" on the outer surface of the terminal inter-digital joint of the left little finger.
>
> All the injuries were simple and of about two days duration. Injury 1 was caused by sharp-edged weapon and the rest by some blunt weapon."

In his cross-examination Dr Singh admitted that Injury 1 could have been caused by razor blade as suggested by the counsel for Sarwan Singh and Injuries 2 to 4 could have been caused by rubbing against some hard substance. In other words, on medical evidence it is difficult to reject the explanation of the accused as unreasonable or palpably untrue. Then we have the evidence of bloodstains on the shirt and chadar worn by Sarwan Singh. If the explanation given by Sarwan Singh about his injuries is not unreasonable then the presence of bloodstains on his dress cannot be seriously pressed against him. The evidence of Rakha about the negotiations and purchase of a pistol from him and about the part of Sarwan Singh in that transaction no doubt may suggest that Sarwan Singh was associated with the criminals but that is very far from proving the charge of murder against him. Incidentally, as we have already observed, if the pistol was purchased it is difficult to understand why it was not used. Then we have the evidence of the shoes which were found on the spot. The evidence of the shoe-maker Santa Singh suggests that he had identified the pair of shoes as belonging to Sarwan Singh that very night. According to him, he has been manufacturing shoes like this pair though not on a large scale. Unfortunately, in his

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examination under Section 342 of the Code, no question had been put to Sarwan Singh about these shoes. It is not unlikely that Sarwan Singh may have offered to demonstrate that the shoes did not fit in with his feet. In any event, failure to give him an opportunity to explain the circumstances by putting an appropriate question to him under Section 342 justifies his argument that this circumstance should not be used against him. Besides, like the evidence given by Rakha, the identity of the shoes would also be a very minor circumstance in relation to the charge of murder for which Sarwan Singh is being tried. The result is that, if the approver's evidence is discarded as unworthy of credit and his own retracted confession is excluded from consideration as not being voluntary or true, whatever circumstantial evidence remains is obviously insufficient to bring home to Sarwan Singh the charge framed against him. If that be the true position, we must hold that the learned Judges of the High Court were in error in convicting Sarwan Singh of the offence of murder. It is no doubt a matter of regret that a foul cold-blooded and cruel murder like the present should go unpunished. It may be as Mr Gopal Singh strenuously urged before us that there is an element of truth in the prosecution story against both the appellants. Mr Gopal Singh contended that, considered as a whole, the prosecution story may be true; but between "may be true" and "must be true" there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence. We have carefully considered all the arguments which Mr Gopal Singh urged before us; but we do not think it would be possible to regard the approver as a reliable witness or to hold that the confession of Sarwan Singh is voluntary or true. In the result, the appeal preferred by Sarwan Singh must be allowed, the order of conviction and sentence passed against him must be set aside and he must be acquitted and discharged.

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* On Appeals by Special Leave from the Judgment and Order dated 7th August, 1956, of the Punjab High Court at Chandigarh in Criminal Appeals Nos. 253 and 250 of 1956 and Murder Reference No. 38 of 1956 arising out of the Judgment and Order dated 21st May, 1956, of the court of Additional Sessions Judge at Ludhiana in Trial No. 17 of 1956 and Case No. 9 of 1956.

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1957 SCR 981 : AIR 1957 SC 614 : 1957 Cri LJ 1000

In the Supreme Court of India

(BEFORE B. JAGANNADHADAS, B.P. SINHA AND P.B. GAJENDRAGADKAR, JJ.)

1. VADIVELU THEVAR (Appellant in 24/57)
2. CHINNIAH SERVAI (Appellant in 25/57) ... Appellants;

Versus

STATE OF MADRAS ... Respondent.

Criminal Appeals Nos. 24 and 25 of 1957*, decided on April 12, 1957

Advocates who appeared in this case :

H.J. Umrigar and S. Subramanian, Advocates, for the Appellants;

P.S. Kailasham and T.M. Sen, Advocates, for the Respondent.

The Judgment of the Court was delivered by

B.P. SINHA, J.— These two appeals by special leave, which arise out of the same occurrence, are directed against the Judgment and Order dated July 25, 1956, of the Madras High Court, confirming the sentence of death passed by the Court of Sessions, East Tanjore Division, at Nagapattinam, under Section 302 of the Indian Penal Code, against appellant in Criminal Appeal No. 24 of 1957, for the murder of Kannuswami, and modifying the order of conviction and sentence under Section 302, read with Section 109 of the Indian Penal Code, to one under Section 326, Indian Penal Code, and reducing the sentence of imprisonment for life to one for 5 years, in respect of the appellant in Criminal Appeal No. 25 of 1957. In the course of this Judgment, we shall call the appellant in Criminal Appeal No. 24 of 1957, as the “first appellant”, and the appellant in Criminal Appeal No. 25 of 1957, as the “second appellant”.

2. The occurrence which was the subject-matter of the charges against the two appellants took place at about 11.30 p.m. on November 10, 1955, at Muthupet, in front of the tea stall of Kannuswami, husband of Shrimati Dhanabagyam — Prosecution Witness 1 — who will be referred to, in the course of this Judgment, as the “first witness”, and who is the principal witness for the prosecution, because, as will presently appear, the prosecution case and the convictions and sentences of the appellants depend entirely upon her testimony.

3. The occurrence took place in the immediate vicinity of a cinema-house in which the second show was in progress at the time of the alleged cold-blooded murder. As there were no customers at that time at the tea shop run by Kannuswami, his wife called him for his dinner to be served to him behind the tea stall, as the husband and wife used to live there. Kannuswami was about to attend to the call for dinner when an old man came into the shop and asked for a cup of tea. When Kannuswami got busy preparing the tea, the two appellants rushed into the premises. The old man — the intending customer — naturally ran away, and the two accused dragged Kannuswami out of the shop on to the road-side; and the first appellant gave him several blows on the front part of his body in the region of the chest with an *aruval* — a cutting instrument about 2 feet long including the handle. Kannuswami fell down on his back and cried out for help. His wife, the only other inmate of the house, tried to come to his rescue by raising and putting his head into her lap after the two accused had left him. But soon after, perhaps, realising that Kannuswami was not dead as a result of the first blows, as deposed by the wife, both the accused returned. Kannuswami's wife who figures in court as the sole witness to the killing, placed his head on the ground and went and stood on the steps of the tea stall. The first appellant, this time, made

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the body of Kannuswami lie with face downwards and gave a number of cuts in the region of the head, the neck and back. Those injuries were such as to cause instantaneous death. At the time of the second assault, according to the evidence of the first witness, Shunmuga Thevar — Prosecution Witness 3, one of the proprietors of the cinema-house — came and remonstrated with the accused but to no purpose. After inflicting the injuries, both the accused ran away. According to the testimony of the first witness, it was the first appellant, the second accused (A-2 in the record), who inflicted cutting injuries with the *aruval*. The second appellant, the first accused (A-1 in the record), was standing nearby at the time the cutting injuries were inflicted. There were two electric lights burning in the tea shop, a Panchayat Board light burning on the road; as also a light burning on the pathway leading to the cinema-house. The wife of the deceased, finding her husband thus murdered, went and told Ganapathi — Prosecution Witness 4 — who had a tea stall on the other side of the road, and informed him as to what had taken place. He asked her to lodge information of the occurrence at the Police Station. She then went to the Muthupet Police Station, but found it shut. She went to the house of the Sub-Inspector of Police, who took her to the Police Station, and recorded her statement as the first information report (Exhibit P-1). After recording the first information report, the Sub-Inspector came along with the first informant to the scene of occurrence. He held an inquest early in the morning.

4. At the trial, the Prosecution examined, besides the widow of the murdered man (PW 1), PW 2 — an assistant in the tea shop of Ganapathi Thevar, PW 3 — one of the proprietors of the cinema-house and PW 4 — Ganapathi who kept another tea stall near the cinema-house, in support of the prosecution case. PW 2 — Singaram — testified to the occurrence and stated that he had seen Vadivelu 'cut' Kannuswami and Chinniah standing by the side of Vadivelu, a few feet away; but he added that the accused persons were not those concerned with the crime though they bore the same names. The Public Prosecutor was permitted to cross-examine this witness who admitted that he knew that the Police were searching for the accused in the dock and that he did not tell the Police that these were not the persons who had committed the murder. He went to the length of admitting that he did not tell anybody that the accused in the dock were not the persons who had committed the murder and that it was in the committal court that he stated, for the first time, that the accused persons were not concerned with the crime. He also admitted that at the time of the occurrence, lights were burning at the place of occurence, in the tea shop and in the theatre. PW 3, one of the proprietors of the cinema-house, when examined in court, admitted that he had been examined by the police two days after the occurrence, but stated that he did not tell the Police that he had seen the accused assaulting Kannuswami. It appears that, though the record of the examination-in-chief of this witness would itself indicate that the Public Prosecutor had put questions to him in the nature of cross-examination, yet it is not recorded, unlike the record of the depositions of PW-2 and PW-4, that this witness had been declared hostile and the Public Prosecutor had been permitted to cross-examine him. That appears to be a slip of the learned Sessions Judge, as he had been so treated even in the committal court. The Investigating Sub-Inspector, PW 14, stated, with reference to his diary, that PW 3 had stated before him that he had seen Accused 2 cutting the deceased on the head and neck with an *aruval*, and Accused 1 standing by the side of the second accused. Witness 4 for the Prosecution — Ganapathi — who ran a tea stall near the cinema-house, about 50 to 60 feet away from the tea stall of the deceased Kannuswami, stated in court that the first witness came to him weeping and saying that Chinniah and Vadivelu Thevar had cut her husband, but added that the two accused in court were not those persons. Thus, whatever may have been the previous statements of Prosecution Witnesses 2 to 4, aforesaid, their evidence in court does not directly support the prosecution case. The orders of conviction and sentence, as passed by the

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courts below, as indicated above, rest solely on the testimony of the first witness.

5. It has been argued by the learned counsel for the appellants that the conviction and sentences of the appellants should not be upheld because they rest on the sole testimony of the first witness, particularly, because, it is further argued, her testimony is not free from all blemish. In this connection, her statement in court that it was the second accused (first appellant) who gave the number of cut injuries with the *aruval* to the deceased Kannuswami, was challenged in cross-examination. She has been cross-examined with reference to her statement (Exhibit D-2) recorded by the committing Magistrate, and she has categorically stated:

> "Accused 1 had no weapon of any kind with him. He did not give any cut. I have not stated in the committal court that Accused 1 continued to cut even after Shanmugham Thevar asked him not to cut". Exhibit D-2 is in these terms:
>
> "Even while he was asking not to cut, Accused 1 was cutting. Soon after, Accused 1 stopped cutting and went away."

6. With reference to the statement of the first witness, as recorded in Exhibit D-2, the learned Sessions Judge has observed that it was a mistake of recording by the committing Magistrate. We have looked into the whole evidence of the first witness, as recorded by the committing Magistrate — not printed in the record, but supplied to us by the learned counsel for the appellants — and in our opinion, there is no doubt that the learned Sessions Judge was correct in his conclusion that the recording by the Magistrate is defective in the sense that Accused 1 has been recorded in place of Accused 2, in as much as, throughout her deposition, the first witness had consistently stated that it was Accused 2 who actually used the deadly weapon against her husband and that Accused 1 was only aiding and abetting him and lending him strength by his presence. That this conclusion is well-founded, is also substantiated by the state of the record of the appeal in the High Court. Each of the two appellants in the High Court filed a separate memorandum of appeal through his own counsel. In neither of the memoranda of appeal, any ground has been taken that the first witness had materially contradicted herself with reference to her previous statement in the committal court. Her testimony was assailed only as "interested, artificial and unnatural". It is not even suggested that the learned Sessions Judge's conclusion in respect of the recording by the committing Magistrate (Exhibit D-2) was not based on any material. When the matter was argued before a Bench of the High Court, there is no indication in the judgment that any point was sought to be made of this alleged serious discrepancy in the statement of the first witness at different stages. In the High Court, it was sought to be argued only that she was an interested witness though her testimony throughout had been consistent, as will appear from the following observations of the High Court:

> "To prove that it was the two accused that caused these injuries to the deceased, the prosecution put forth as many as four witnesses. Of these four witnesses, PWs 2, 3 and 4 turned hostile both in the committal court as also in the Sessions court. The only witness that remained constant throughout was PW 1 who is no other than the wife of the deceased."

7. The same was the position with reference to the petition for leave to appeal to this Court filed in the High Court. It was a joint petition on behalf of both the appellants, and as many as 13 grounds had been taken. There is not even a suggestion that the testimony of the first witness was vitiated by any such discrepancy as has been sought to be made out in this Court. It was after the High Court refused to grant the necessary certificate that for the first time, in the petition for special leave to appeal, filed in this Court, the ground is taken that the High Court failed to appreciate that the testimony of the first witness was untrustworthy for the reason that there was the alleged discrepancy between her statement in the committal

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court and in the Court of Sessions. Thus, it is abundantly clear that the finding of the learned Sessions Judge about the mistake in recording the evidence of the first witness, by the committal court, has not been challenged at any stage in the court below.

8. The second ground of attack against the veracity of the first witness is that she had stated that Shanmugham Thevar — Prosecution Witness 3 — had also seen the first appellant giving the deadly blows to her husband, and that the assailant continued giving his blows in spite of protests of PW 3. This argument proceeds upon the assumption that Prosecution Witness 3 is telling the truth and that, therefore, his evidence effectively contradicts that of the first witness. PW 3 was, as indicated above, cross-examined by the Public Prosecutor with reference to his previous statement before the Investigating Police Officer (PW 14). PW 14 has stated that before him PW 3 had stated just the contrary of what he stated in court. The statements of PW 3 at the earlier stage, before the Police, and later when examined in court, may or may not have been false, but certainly both cannot be true. Hence, it cannot be said that the evidence of PW 3 in court was the true version. That being so, his evidence in court is not strong enough to wipe out the evidence of the first witness on the ground that it is contrary to what PW 3 had stated. It is, thus, clear that none of the grounds urged in support of the contention that the evidence of the first witness is unreliable, has been made out. On the other hand, the first witness, being the most important witness from the point of view of the prosecution, was put to a severe test in her cross-examination. She has frankly made admissions in her cross-examination, which throw a very lurid light on the past life of her deceased husband. She admitted that he had been transported for life for having committed a murder and that after his release also, he had been sent to jail twice for having caused cut injuries to others. If the first witness were inclined to tell falsehoods or at least to conceal her husband's past, she could have taken shelter behind failing memory or want of information — not an uncommon characteristic of prevaricating witnesses. Her evidence, read as a whole, rings quite true, and we have no hesitation in acting upon it. It is true that her evidence in court has been sought to be contradicted by the evidence of PWs 2 to 4, but the latter set of witnesses have been shown to be not reliable because they appear to have made different statements at different stages for reasons of their own. Their testimony does not inspire confidence and we cannot, therefore, brush aside the testimony of the first witness as compared to the evidence of PWs 2 to 4. The testimony of the first witness is consistent with what she has stated in her first information report at the police station without any avoidable delay, within less than an hour of the occurrence. It cannot, therefore, be said that her statement in court, is an afterthought, or the result of tutoring by other interested persons. Her story of the double attack, first on the front, and subsequently on the back and side of the victim, is also consistent with the medical evidence as deposed to by the Medical Officer — PW 8. It is not necessary to set out in detail the dozen incised gaping wounds on the person of the deceased, which are all set out in *extenso* in the judgment of the learned Sessions Judge who has written a very careful and satisfactory judgment.

9. Alternatively, it has been argued on behalf of the appellants that it is not safe to convict the appellants on the testimony of a single witness even though she may not have been demonstrated to have been a lying witness. It has not even been claimed by counsel for the appellants that this is a rule of law. He has only put it on the ground of prudence that, ordinarily, the court should not, in a case involving a charge of murder, convict an accused person upon the testimony of a single witness. In this connection, our attention was drawn to the observations of Their Lordships of the Judicial Committee of the Privy Council in the case of *Mohamed Sugal Esa Mamasan Rer Alalah* v. *King*[1]. In that case, their Lordships looked for corroboration of the testimony of a single witness in a murder case. It is true that in that case, the court

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had to look for and found corroboration of the testimony of the single witness in support of the murder charge, but the testimony of that witness suffered from two infirmities, namely:

(*1*) The witness was a girl of about 10 or 11 years at the time of occurrence.

(*2*) The girl witness had not been administered oath because the Court did not consider that she was able to understand the nature of the oath though she was competent to testify.

That was a case from Somaliland to which the provisions of the Indian Evidence Act, (1 of 1872), and of the Indian Oaths Act, (10 of 1873), had been made applicable. Special leave had been granted to appeal to His Majesty-in-Council on the ground that the local courts had admitted and acted upon the unsworn evidence of a girl of 10 or 11 years of age. Their Lordships upheld the conviction and sentence of death, holding that the evidence, such as it was, was admissible. In the course of their Judgment, they made the following observations (at p. 5-6) which are pertinent to the present controversy:

> "It was also submitted on behalf of the appellant that assuming the unsworn evidence was admissible the Court could not act upon it unless it was corroborated. In England where provision has been made for the reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

10. The decision of this Court in the case of *Vemireddy Satyanarayan Reddy* v. *State of Hyderabad*[2] was also relied upon in support of the contention that in a murder case the court insists on corroboration of the testimony of a single witness. In the said reported decision of this Court, PW 14 has been described as "a *dhobi* boy named Gopai". He was the only person who had witnessed the murder and his testimony had been assailed on the ground that he was an accomplice. Though this Court repelled the contention that he was an accomplice, it held that his position was analogous to that of an accomplice. This Court insisted on corroboration of the testimony of the single witness not on the ground that his was the only evidence on which the conviction could be based, but on the ground that though he was not an accomplice, his evidence was analogous to that of an accomplice in the peculiar circumstances of that case as would be clear from the following observations at p. 252:

> "...Though he was not an accomplice, we would still want corroboration on material particulars in this particular case, as he is the only witness to the crime and as it would be unsafe to hang four people on his sole testimony unless we feel convinced that he is speaking the truth. Such corroboration need not, however, be on the question of the actual commission of the offence; if this was the requirement, then we would have independent testimony on which to act and there would be no need to rely on the evidence of one whose position may, in this particular case, be said to be somewhat anologous to that of an accomplice, though not exactly the same."

It is not necessary specifically to notice the other decisions of the different

High Courts in India in which the court insisted or corroboration of the testimony of a single witness, not as a proposition of law, but in view of the circumstances of those cases. On a consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions maybe safely stated as firmly established:

(*1*) As a general rule, a court can and may act on the testimony of a single

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witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

(*2*) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.

(*3*) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes.

11. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that "no particular number of witnesses shall, in any case, be required for the proof of any fact". The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in *Sarkar's Law of Evidence* — 9th Edn., at pp. 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in Section 134 quoted above. The section enshrines the well recognized maxim that "Evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(*1*) Wholly reliable.

(*2*) Wholly unreliable.

(*3*) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way — it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by

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reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution.

13. Lastly, it was urged that assuming that the court was inclined to act upon the testimony of the first witness and to record a conviction for murder as against the first appellant, the court should not impose the extreme penalty of law and in the state of the record as it is, the lesser punishment provided by law should be deemed to meet the ends of justice. We cannot accede to this line of argument. The first question which the court has to consider in a case like this, is whether the accused has been proved, to the satisfaction of the court, to have committed the crime. If the court is convinced about the truth of the prosecution story, conviction has to follow. The question of sentence has to be determined, not with reference to the volume or character of the evidence adduced by the prosecution in support of the prosecution case, but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime. If the court is satisfied that there are such mitigating circumstances, only then, it would be justified in imposing the lesser of the two sentences provided by law. In other words, the nature of the proof has nothing to do with the character of the punishment. The nature of the proof can only bear upon the question of conviction — whether or not the accused has been proved to be guilty. If the court comes to the conclusion that the guilt has been brought home to the accused, and conviction follows, the process of proof is at an end. The question as to what punishment should be imposed is for the court to decide in all the circumstances of the case with particular reference to any extenuating circumstances. But the nature of proof, as we have indicated, has nothing to do with the question of punishment. In this case, there are no such extenuating circumstances which can be legitimately urged in support of the view that the lesser penalty under Section 302 of the Indian Penal Code, should meet the ends of justice. It was a cold-blooded murder. The accused came for the second time, determined to see that their victim did not possibly escape the assassins' hands.

14. As regards the second appellant, we need not say anything more than that he was lucky enough to escape conviction under Section 302 of the Indian Penal Code, for the reasons given by the High Court, which may not bear close scrutiny. He amply deserves the punishment of 5 years' rigorous imprisonment under Section 326 of the Indian Penal Code.

15. For the reasons aforesaid, both the appeals fail and are dismissed.

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* Appeals by special leave from the Judgment and Order dated 25th July, 1956 of the Madras High Court in criminal Appeals Nos. 247 & 248 of 1956 and Referred Trial No. 41 of 1956 arising out of the Judgment and Order dated 28th March, 1956 of the Court of Sessions, East Tanjore Division at Nagapatam, in case S.C. No. 5 of

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1956.

[1] AIR 1946 PC 3

[2] (1956) SCR 247

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1958 SCR 552 : AIR 1958 SC 22 : 1958 Cri LJ 106

In the Supreme Court of India
(BEFORE B.P. SINHA, P. GOVINDA MENON AND J.L. KAPUR, JJ.)

KHUSHAL RAO ... Appellant;

Versus

STATE OF BOMBAY ... Respondent.

Criminal Appeal No. 184 of 1956*, decided on September 25, 1957

Advocates who appeared in this case :

Dr J.N. Banerjee, Senior Advocate (P.C. Agarwala, Advocate, with him), for the Appellant;

Jindra Lal and R.H. Dhebar, Advocates, for the Respondent.

The Judgment of the Court was delivered by

B.P. SINHA, J.— This appeal on a certificate of fitness under Article 134(1)(*c*), granted by the High Court at Nagpur (as it then was), is directed against the concurrent judgment and orders of the courts below, so far as the appellant Khushal is concerned, convicting and sentencing him to death under Section 302 of the Indian Penal Code, for the pre-meditated murder of Baboolal on the night of February 12, 1956, in one of the quarters of the city of Nagpur.

2. It appears that there are two rival factions in what has been called the mill area in Nagpur. The appellant and Tukaram who has been acquitted by the High Court, are the leaders of one of the factions, and Ramgopal, PW 4, Inayatullah, PW 1, and Tantu, PW 5, are said to be the leaders of the opposite faction. Before the time and date of the occurrence, there had been a number of incidents between the two rival factions in respect of some of which, Inayatullah and Tantu aforesaid had been prosecuted. Even on the date of the occurrence, apart from the one leading to the murder of Baboolal, which is the subject-matter of the present appeal, Tantu and Inayatullah had made two separate reports about the attacks on them by Khushal's party. There was another report lodged by Sampat — one of the four persons placed on trial along with the appellant, for the murder of Baboolal. That report was lodged at Ganeshpeth Police Station at about 9.30 p.m. on the same date — February 12, 1956 — against, Inayatulah *alias* Kalia and Tantu, that they had attacked the former with sharp-edged weapons (Ex. P-26). The prosecution case is that the appellant Khushal was on bad terms with Baboolal who was on very friendly terms with the leaders of the opposite faction aforesaid. Being infuriated by the conduct of Baboolal in associating with the enemies of the party of the accused, Sampat, Mahadeo, Khushal and Tukaram suddenly attacked Baboolal with swords and spears and inflicted injuries on different parts of his body. The occurrence took place in a narrow lane of Nagpur at about 9 p.m. Baboolal was taken by his father and other persons to the Mayo hospital where he reached at about 9.25 p.m. The doctor in attendance Dr Kanikdale (PW 14) at once questioned him about the incident and Baboolal is said to have made a statement to the doctor which the latter noted in the bed-head ticket (Ex. P-17) that he had been assaulted by Khushal and Tukaram with swords and spears. After noting the statement aforesaid, of Baboolal, the doctor telephoned to the Ganeshpeth Police Station where the information was noted at 9.45 p.m. On receiving the information Sub-Inspector A.K. Khan recorded (Ex. P-1) and registered an offence under Section 307 of the Indian Penal Code, and immediately went to the Mayo hospital along with a head-constable and several constables. He found Baboolal in a serious condition and suspecting that he might not survive and apprehending that it might take time for the

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Magistrate to be informed and to be at the spot, to record the dying declaration, he consulted Dr Ingle, the attending doctor, whether Baboolal was in a fit condition to make a statement. The doctor advised him to have the dying declaration recorded by a Magistrate. The Sub-Inspector decided that it would be more advisable for him to record the dying declaration without any delay. Hence, he actually recorded Baboolal's statement in answer to the questions put by him (Ex. P-2) at 10.15 p.m. In the meantime, Shri M.S. Khetkar, a Magistrate, First Class, was called in, and he recorded the dying declaration (Ex. P-16) between 11.15 and 11.35 p.m., in the presence of Dr Ingle who certified that he had examined Baboolal and had found him mentally in a fit condition to make his dying declaration. Besides these three dying declarations recorded in quick succession, as aforesaid, by responsible public servants, Baboolal is said to have made oral statements to a number of persons, which it is not necessary to set out because the High Court has not acted upon those oral dying declarations. We shall have to advert, later, to the recorded dying declarations in some detail, in the course of this judgment. It is enough to say at this stage that the courts below have founded their orders of conviction of the appellant mainly on those dying declarations. Baboolal died the next morning at about 10 a.m. in hospital.

3. Having come to know the names of two of the alleged assailants of Baboolal from his recorded dying declarations, the police became busy apprehending those persons. They could not be found at their respective houses. The appellant was arrested four days later in an out-house locked from outside, of a bungalow on Seminary Hill in Nagpur. The other person named as one of the assailants, Tukaram, was arrested much later. The prosecution case is that these persons were absconding and keeping out of the way of the police.

4. After investigation and the necessary inquiry, four persons were placed on trial and the appellant was one of them. The Additional Sessions Judge acquitted two of them and convicted the remaining two — the appellant and Tukaram — under Section 302 of the Indian Penal Code, or in the alternative, under Section 302 read with Section 34 of the Indian Penal Code. He sentenced the appellant to death because in his opinion, he had caused Baboolal's death intentionally, and there were no extenuating circumstances. He sentenced Tukaram to imprisonment for life, because in the learned Judge's view of the case, Tukaram had acted under the instigation of the appellant. Accordingly, the learned Additional Sessions Judge made a reference to the High Court for confirmation of the sentence of death. That reference was heard along with the appeal filed by the condemned prisoner. The reference, the appeal by the convicted accused persons, as also the appeal by the Government of Madhya Pradesh, against the two accused persons who had been acquitted by the learned trial Judge, and the revisional application for enhancement of sentence passed upon Tukaram, also filed by the State Government, were all heard together and disposed of by one judgment, by a Bench consisting of Hidayatullah, C.J., and Mangalmurti, J. The High Court, apparently with a view to understanding the evidence adduced in the case on behalf of the parties, made a local inspection on September 17, 1956, and recorded their impressions in a note which forms part of the record of the High Court. In a very well-considered judgment, the High Court, by its judgment and orders dated October 13, 1956, acquitted Tukaram, giving him the benefit of the doubt caused chiefly by the fact that in the dying declaration (Ex. P-16) recorded by the Magistrate as aforesaid, he has been described as a *Teli*, whereas Tukaram before the Court is a *Kolhi*, as stated in the charge-sheet. The doubt was further accentuated by the fact that there were three or four persons of the name of Tukaram, residing in the neighbourhood and some of them are *Telis*. The High Court examined, in meticulous details, the evidence of the eyewitnesses, Inayatullah, PW 1, and Sadashiv, PW 3, and agreed with the trial Judge in his estimate of their testimony that those witnesses being partisan, their evidence could not be relied upon, to base a conviction. The High

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Court went further and came to the conclusion that their evidence being suspect, could not be used even as corroboration, if corroboration was needed of the three dying declarations made by Baboolal, as aforesaid. They upheld the conviction and sentence of the appellant on the ground that the dying declarations were corroborated by the fact that the appellant had been absconding and keeping out of the way of the police, and had been arrested under very suspicious circumstances. The circumstances and the alleged absconding by Tukaram, were not so suspicious as to afford corroboration against him. In that view, the High Court "very reluctantly" gave the benefit of the doubt to Tukaram and allowed his appeal. The High Court also agreed with the trial Judge in acquitting the other two accused persons — Sampat and Mahadeo — because these two persons had not been named in the dying declarations, and the oral testimony was not of such a character as to justify conviction. Accordingly, the Government appeal and application in revision, were dismissed. As against the appellant, the reference made by the learned trial Judge was accepted and his appeal dismissed. Thus, under the orders of the High Court, only the appellant stood convicted on the charge of murder with a sentence of death against him. He moved the High Court for a certificate under Article 134(1)(*c*) of the Constitution, and the High Court granted a "certificate of fitness". Hence, this appeal.

5. At the outset, we must repeat what this Court has observed in a number of appeals coming upto this Court on certificates of fitness granted by High Courts, mainly on questions of fact. The main ground for the grant of the certificate, may be reproduced in the words of the High Court itself:

> "The main ground is that there is not enough evidence against the accused and that there is an error in our judgment in holding that there was no evidence to show that Khushal whose absconding has been held to corroborate the dying declaration, was involved in a liquor case. During the course of the argument neither side drew our attention to the documents which were in the record; nor was any point made of it, though we questioned why the absconding should not be taken into consideration. Now it seems that there are one or two defence exhibits in which it has been shown that Khushal was not found in his house when he was wanted in a liquor case after a search on 5th February, 1956. In view of the fact that there is this error and the sufficiency of the evidence might be a matter for consideration in the light of this additional evidence, we think this is a fit case for a special certificate under Article 134(1)(*c*) of the Constitution."

6. It is clear that the High Court granted the certificate of fitness under Article 134 (1)(*c*) of the Constitution not on any difficult question of law or procedure which it thought required to be settled by this Court, but on a question which is essentially one of fact, namely, whether there was sufficient evidence of the guilt of the accused. The latest reported case of this Court, bearing on this aspect of this appeal, is *Haripada Dey* v. *State of West Bengal*[1] to the effect that a High Court exceeds its power of granting a certificate of fitness under that article if the certificate discloses that the main ground on which it was based, related to a question of fact, and that the High Court is not justified in sending up such a case for further consideration by this Court which does not, ordinarily, concern itself with deciding mere questions of fact unless such questions arise on a certificate granted under clauses (*a*) or (*b*) of Article 134(1) of the Constitution. In other words, this Court does not function, ordinarily, as a court of criminal appeal. Under the Constitution, it has the power, and it is its duty, to hear appeals, as a regular court of appeal, on facts involved in cases coming upto this Court on a certificate under Article 134(1)(*a*) or (*b*). To the same effect are the other decisions of this Court, referred to in the reported decision aforesaid, for example,

Narsingh v. *State of Uttar Pradesh*[2]

Baladin v. *State of Uttar Pradesh*[3]

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Sunder Singh v. *State of Uttar Pradesh*[4].

It is, therefore, incumbent upon the High Courts to be vigilant in cases coming up before them, by way of an application for a certificate of fitness under Article 134(1)(*c*) of the Constitution.

7. In view of these considerations, it has got to be held that the certificate of fitness granted by the High Court, does not satisfy the requirements of Article 134(1)(*c*) of the Constitution. The appeal on such a certificate has, therefore, to be dismissed in limine; but we have to satisfy ourselves whether there are such grounds as would justify this Court in granting special leave to appeal to this Court, if the appellant had approached this Court in that behalf. We have, therefore, examined the record of this case from that point of view. It appears from the judgments of the courts below that the prosecution case rests mainly upon the three dying declarations of Baboolal who died shortly after making those statements as to his assailants, in quick succession within about two and a half hours of the occurrence — indeed, the first one to the doctor, was made within half an hour; as also upon the evidence of two persons Inayatullah, PW 1 and Sadashiv, PW 3, who figure as eyewitnesses, and Trimbak, PW 2 and Ramgopal, PW 4, who claimed to have turned up in the nick of time, to witness the last stages of the occurrence. Though the trial Judge did not disbelieve the oral testimony of the witnesses aforesaid, and only insisted upon corroboration, the High Court was more pronounced in its view that the testimony of those four witnesses was not trustworthy. The High Court has discussed their evidence in great detail, and was not prepared to accept any part of their testimony on the ground that they were strongly partisan witnesses and that they did not come to the rescue of the victim of the murderous assault if they were really in the neighbourhood of the place of the occurrence, as claimed by them. If we had to assess the value of that body of oral evidence, we may not have come to the same conclusion, but we proceed on the assumption that the High Court is right in its estimate of the oral testimony adduced on behalf of the prosecution. After discussing all that evidence, the High Court took the view that it could not place any reliance on the oral testimony of what Baboolal had spoken to PWs 2 and 19 when they deposed that Baboolal had named two of his assailants, namely, the appellant and Tukaram. The High Court relied upon the three dying declarations recorded at the hospital — first, by the attending doctor, second, by the Sub-Inspector of Police and the third, by the Magistrate, First Class, between 9.25 and 11.35 p.m. As regards authenticity of the record of those three statements of the deceased, the High Court had no doubt, nor has any doubt been cast upon them by counsel for the appellant. The High Court then considered the question whether the conviction of the accused could be based on those dying declarations alone. It pointed out that in that High Court as also in other High Courts, convictions on dying declarations alone, had been rested if the Court was satisfied that the dying declaration was true and, therefore, could be acted upon. But the decision of this Court in *Ram Nath Madhoprasad* v. *State of Madhya Pradesh*[5] was brought to their notice, and in view of that decision, the High Court looked for corroboration of the dying declarations aforesaid. It found that corroboration in the subsequent conduct of the appellant in that, as deposed to by prosecution witness 31 — the Sub-Inspector in charge of Ganeshpeth Police Station — the appellant could not be traced till February 16, 1956, on which day, the police obtained information to the effect that the accused had been concealing himself in the premises of Ganesh *dhobi* at Hazari Pahar. He went there and found the appellant sitting in a room which had been locked from the front side. He arrested the accused. The High Court did not believe the defence suggestion that the appellant had been concealing himself for fear of the police in connection with an excise case in which he had been suspected. The records in connection with that case have been placed before us, and after examining those records, we do not find any good reasons for differing from the High Court in its appreciation of the

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circumstances connected with the absconding of the accused. The High Court took the view that the circumstances of the appellant's conduct in concealing himself and evading the police for a number of days, was consistent with the prosecution case that he was concerned in the crime which was the subject-matter of the charge against him. Thus, in effect, the High Court found corroboration which according to the ruling of this Court referred to above, was necessary in order to base the conviction upon the dying declarations of Baboolal.

8. The question whether the circumstances of the appellant's alleged keeping out of the way of the police, for a number of days after the occurrence, can be used as corroboration of the dying declarations, is not free from doubt and difficulty. The argument on behalf of the accused that he had been keeping out of the way of the police because he was suspected in the excise case, is not entirely unfounded. He had not left the city of Nagpur and gone out of the jurisdiction of the local police. In those circumstances we are not prepared to say that the alleged absconding of — the accused could afford sufficient corroboration, if corroboration of the dying declarations was needed.

9. In this Court, a good deal of argument was addressed to us, to the effect that the ruling of this Court lays down a sound proposition of law which should have been followed by the High Court, and that the alleged fact of the accused absconding and keeping out of the way of the police, could not be used as corroboration of the dying declaration. The decision of this Court in *Ram Nath Madhoprasad* v. *State of Madhya Pradesh*[5] contains the following observations at p. 423, which have been very strongly relied upon, on behalf of the appellant, as having a great bearing upon the value to be placed upon the dying declarations:

> "It is settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration. It is in this light that the different dying declarations made by the deceased and sought to be proved in the case have to be considered...."

10. We have, therefore, to examine the legal position whether it is settled law that a dying declaration by itself, can, in no circumstances, be the basis of a conviction. In the first place, we have to examine the decision aforesaid, of this Court from this point of view. This Court examined the evidence in detail with a view to satisfying itself that the dying declarations relied upon in that case, were true. In that case, apart from the dying declarations, there was the evidence of the approver. This Court found that the evidence of the approver and other oral testimony had been rightly rejected by the High Court. In that case also, the Court had mainly relied upon the dying declarations for basing the conviction under Section 302, read with Section 34 of the Indian Penal Code. This Court examined for itself, the dying declarations and the other evidence bearing upon the truth and reliability of the dying declarations, and after an elaborate discussion of all that evidence, came to the conclusion that the dying declarations did not contain "a truthful version of what actually happened". Thus, after a very careful and cautious examination of the facts of the case, connected with the recording of the dying declaration, and of the other evidence in the case and of the fact that it was a dark night without any lights available at the place of occurrence, this Court distinctly came to the conclusion that the dying declaration was not true and could not be relied upon to base, upon that alone, the conviction of the appellants. It is, thus, clear that the observations quoted above, of this Court, are in the nature of obiter dicta. But as it was insisted that those observations were binding upon the courts in India and upon us, we have to examine them with the care and caution they rightly deserve.

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11. The legislature in its wisdom has enacted in Section 32(1) of the Evidence Act that "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question", such a statement written or verbal made by a person who is dead (omitting the unnecessary words) is itself a relevant fact. This provision has been made by the legislature, advisedly, as a matter of sheer necessity by way of an exception to the general rule that hearsay is no evidence and that evidence which has not been tested by cross-examination, is not admissible. The purpose of cross-examination is to test the veracity of the statements made by a witness. In the view of the legislature, that test is supplied by the solemn occasion when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such a serious and solemn moment, that person is not expected to tell lies; and secondly, the test of cross-examination would not be available. In such a case, the necessity of oath also has been dispensed with for the same reasons. Thus, a statement made by a dying person as to the cause of death, has been accorded by the legislature, a special sanctity which should, on first principles, be respected unless there are clear circumstances brought out in the evidence to show that the person making the statement was not in expectation of death, not that that circumstance would affect the admissibility of the statement, but only its weight. It may also be shown by evidence that a dying declaration is not reliable because it was not made at the earliest opportunity, and, thus, there was a reasonable ground to believe its having been put into the mouth of the dying man, when his power of resistance against telling a falsehood, was ebbing away; or because the statement has not been properly recorded, for example, the statement had been recorded as a result of prompting by some interested parties or was in answer to leading questions put by the recording officer, or, by the person purporting to reproduce that statement. These may be some of the circumstances which can be said to detract from the value of a dying declaration. But in our opinion, there is no absolute role of law, or even a rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other independent evidence, is not fit to be acted upon, and made the basis of a conviction. No decision of this Court, apart from the decision already noticed, has been pointed out to us as an authority for the proposition that a dying declaration, in order to be acted upon by a court, must be corroborated by independent evidence. On the other hand, the different High Courts in India (including Burma) have taken conflicting views as to the value of a dying declaration in part or in its entirety, without any independent corroboration. For example, a Division Bench of the Bombay High Court, presided over by Sir John Beaumont, C.J., has laid down in the case of *Emperor* v. *Akbarali Karimbhai*[6] that a statement which is covered by Section 32(1) of the Evidence Act, is relevant evidence and has to be judged on the same principles as other evidence, bearing in mind that such a declaration was not made on oath and was not subject to cross-examination, and is, therefore, a weaker type of evidence than that given by a witness on oath. Therefore, if a part of a dying declaration is deliberately false, it will not be safe to act upon the other part of the declaration without very definite corroboration. That Bench also ruled that it is not correct to postulate that because some part of the dying declaration is false, the whole declaration must necessarily be disregarded. The Bombay High Court, thus, did not agree with the observations of the Calcutta High Court in the case of *Emperor* v. *Premananda Dutt*[7] to the effect that it is not permissible to accept a dying declaration in part and to reject the other part and that a dying declaration stood on a widely different footing from the testimony of a witness given in court. On the other hand, we have the decision of the Rangoon High Court, reported in the case of the *King* v. *Maung Po Thi*[8]. In that case, the positive evidence led on behalf of the prosecution, was found to have been tampered with and

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unreliable. The Court set aside the order of acquittal passed by the trial Judge, and recorded an order of conviction for murder, practically on the dying declaration of the victim of the crime. The Court observed that there was no such rule of prudence as had been invoked in aid of the accused by the trial Judge who had observed that an accusation by a dying man without corroboration from an independent source, could not be the sole basis for conviction. The learned Judges of the High Court further observed that in order to found on a dying declaration alone, a judgment of conviction of an accused person, the Court must be fully satisfied that the dying declaration has the impress of truth on it, after examining all the circumstances in which the dying person made his statement ex parte and without the accused having the opportunity of cross-examining him. If, on such an examination, the Court was satisfied that the dying declaration was the true version of the occurrence, conviction could be based solely upon it.

12. In the High Court of Madras, there was a difference of judicial opinion, as expressed in certain unreported cases, which resulted in a reference to a Full Bench. Sir Lionel Leach, C.J., presiding over the Full Bench (*In re Guruswami Tevar*[9]), delivered the unanimous opinion of the Court after examining the decisions of that High Court and of other High Courts in India. His conclusions are expressed in the penultimate paragraph of his judgment, thus:

> "In my judgment it is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and, naturally, it could not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility."

To the same effect are the decisions of the Patna High Court in the case of *Mohamad Arif* v. *Emperor*[10] and of the Nagpur High Court in *Gulabrao Krishnajee Maratha* v. *King-Emperor*[11].

13. The Judicial Committee of the Privy Council had to consider, in the case of *Chandrasekera alias Alisandiri* v. *King*[12] the question whether mere signs made by the victim of a murderous attack which had resulted in the cutting of the throat, thus, disabling her from speaking out, could come within the meaning of Section 32 of the Ceylon Evidence Ordinance, which was analogous to Section 32(1) of the Indian Evidence Act. The Privy Council affirmed the decision of the Supreme Court of Ceylon, and made the following observations in the course of their judgment, which would suggest that a dying declaration, if found reliable by a jury, may, by itself, sustain a conviction:

> "...Apart from the evidence proceeding from the deceased woman, the other evidence was not sufficient to warrant a conviction, but at the same time that other evidence was not merely consistent with the deceased's statement but pointed in the same direction. It was a case in which, if the deceased's statement was received, and was believed, as it evidently was by the jury, to be clear and unmistakable in its effect, then a conviction was abundantly justified and, indeed, inevitable."

14. In *Phipson on Evidence* — 9th Edn., p. 335, the author has discussed the question whether a dying declaration without other evidence in corroboration, could be sufficient for a conviction, and has made the following observations which are pertinent to this case:

> "...The deceased then signed a statement implicating the prisoner, but which was

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not elicited by question and answer, and died on March 20. It was objected that being begun in that form, it was inadmissible: Held (*1*) the questions and answers as to his state of mind were no part of the dying declaration; (*2*) that even if they were, they only affected its weight, not its admissibility; and (*3*) that the declaration was sufficient, without other evidence, for conviction (*R.* v. *Fitzpatrick*, (1910) 46 Ir. LTR 173, CCR)."

15. Sometimes, attempts have been made to equate a dying declaration with the evidence of an accomplice or the evidence furnished by a confession as against the maker, if it is retracted, and as against others, even though not retracted. But in our opinion, it is not right in principle to do so. Though under Section 133 of the Evidence Act, it is not illegal to convict a person on the uncorroborated testimony of an accomplice, Illustration (*b*) to Section 114 of the Act, lays down as a rule of prudence based on experience, that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars and this has now been accepted as a rule of law. The same cannot be said of a dying declaration because a dying declaration may not, unlike a confession, or the testimony of an approver, come from a tainted source. If a dying declaration has been made by a person whose antecedents are as doubtful as in the other cases, that may be a ground for looking upon it with suspicion, but generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver.

16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (*1*) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (*2*) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (*3*) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (*4*) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (*5*) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (*6*) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it

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cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case.

18. Having made the general observations bearing on the question of the legality of basing a conviction on a dying declaration alone, and keeping in view the tests set out above, let us examine the dying declarations now in question before us. The most remarkable fact which emerges from an examination of the three successive dying declarations made in the course of about two hours, by the deceased, is that he consistently named the appellant and Tukaram as the persons who had assaulted him with sword and spear. The injuries found on his person, namely, the punctured wounds and the incised wounds on different parts of his body, are entirely consistent with his statement that he was attacked by a number of persons with cutting and piercing weapons. No part of his dying declarations has been shown to be false. Of the two assailants named by him, Tukaram was convicted by the learned trial Judge, but acquitted by the High Court which very reluctantly gave him the benefit of the doubt created by the similarity of names in that locality, as already stated. There was no such confusion in the case of the appellant. The deceased indicated that there were two more persons concerned in the crime, but he could not name them. The other two accused persons who were acquitted by the courts below had not been named in the dying declarations and, therefore, their acquittal did not, in any way militate against the truth of the dying declarations. The courts below also agreed in holding that Baboolal was in a position to see his assailants and to identify them in the light of the electric lamp nearby. They have also pointed out that there was no “coaching”. There is no doubt, therefore, that Baboolal had been consistent throughout in naming the appellant as one of his assailants, and he named him within less than half an hour of the occurrence and as soon as he reached the Mayo Hospital. There was, thus, no opportunity or time to tutor the dying man to tell a lie. At all material times, he was in a proper state of mind in spite of multiple injuries on his person, to remember the names of his assailants. Hence, we have no reasons to doubt the truth of the dying declarations and their reliability. We have also no doubt that from the legal and from the practical points of view, the dying declarations of the deceased Baboolal are sufficient to sustain the appellant's conviction for murder. The only other question that remains to be considered is whether there are any extenuating circumstances in favour of the accused justifying the lesser of the two sentences prescribed by law. In our opinion, there are none. It was a case of a deliberate cold-blooded murder.

19. For the reasons given above, we uphold the judgment and order of the High Court convicting the appellant of murder and sentencing him to death. The appeal is, accordingly, dismissed.

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* Appeal from the Judgment and Order dated 15th October, 1956, of the former Nagpur High Court in Criminal Appeal No. 205 of 1956 and Criminal Reference No. 15 of 1956, arising out of the Judgment and Order dated 10th July, 1956, of the First Additional District Judge, Nagpur in Sessions Trial No. 34 of 1956.

[1] (1956) SCR 639

[2] (1955) 1 SCR 238

[3] (1956) AIR SC 181

[4] (1956) AIR SC 411

[5] AIR (1953) SC 420

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[6] ILR (1932) 58 Bom 31

[7] ILR (1925) 52 Cal 987

[8] AIR (1938) Rang 282

[9] ILR (1940) Mad 158, 170

[10] AIR (1941) Patna 409

[11] ILR (1945) Nag 613 : AIR (1945) Nag 153

[12] LR (1937) AC 220, 229

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(1964) 3 SCR 397 : AIR 1965 SC 328 : (1965) 1 Cri LJ 350

In the Supreme Court of India

(BEFORE P.B. GAJENDRAGADKAR, K.N. WANCHOO AND K.C. DAS GUPTA, JJ.)

DARYA SINGH AND OTHER ... Appellants;

Versus

STATE OF PUNJAB ... Respondent.

Criminal Appeal No. 27 of 1962*, decided on April 25, 1963

Advocates who appeared in this case :

T.R. Bhasin, Advocate, for the Appellants;

M/s Gopal Singh and P.D. Menon, Advocates, for the Respondent.

The Judgment of the Court was delivered by

P.B. GAJENDRAGADKAR, J.— The three appellants, Darya Singh, Rasala and Pehlada, along with their brother Ratti Ram were tried by the learned Sessions Judge, Patiala, under Section 302 read with Section 34 of the Indian Penal Code for having committed the murder of Inder Singh in the village of Petwar in the early hours of the morning of 2nd June, 1960. The learned Sessions Judge acquitted Ratti Ram, because he held that the case against him had not been proved beyond a reasonable doubt. He, however, convicted the three appellants and sentenced them to imprisonment for life. This order of conviction and sentence was challenged by the appellants by preferring an appeal before the Punjab High Court. The High Court agreed with the conclusion of the learned trial Judge and dismissed the appeal. The acquittal of Ratti Ram was challenged by the State but the State's appeal was dismissed and Ratti Ram's acquittal was confirmed. The appellants have come to this Court by special leave and on their behalf, Mr Bhasin has contended that the High Court was in error in confirming the order of conviction and sentence passed against the 3 appellants by the trial Judge.

2. The facts leading to the prosecution of the appellants lie within a very narrow compass. It appears that on June 2, 1960, before sunrise the victim Inder Singh was returning towards his house after relieving himself of the call of nature. When he came near the Baithak of Kishan Lal Jat, he was suddenly attacked by the three appellants. Darya Singh had a lathi and Rasala and Pehlada had a gandasa each. The prosecution had alleged that Ratti Ram had also joined in that act. All the assailants inflicted serious injuries on Inder Singh as a result of which he died. While he was being assaulted, Inder Singh raised an alarm in consequence of which his brother Dalip Singh, his wife Dharam Devi and his son Shamsher Singh rushed to the scene of the offence. They, however, had not the courage to go to the rescue of the victim, because they were afraid that they would themselves be assaulted. At the time of the assault, Darya Singh fired shots in the air to frighten people. After the assailants left the scene of the offence, Dalip Singh, Dharam Devi and Shamsher Singh went near the victim, but found that he was dead. First Information Report about this occurrence was then sent and that set the investigation into motion, as a result of which the three appellants and their brother Ratti Ram were arrested and put up for trial for offence under Section 302/34 IPC.

3. The case of the prosecution rests on the evidence of three eye-witnesses. Dalip Singh (PW 2), Shamsher Singh (PW 3) who is a student of the Engineering College, Ludhiana, and Dharam Devi (PW 4). These three witnesses gave a consistent account of the attack on Inder Singh which they witnessed in front of their house and stated

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how each one of the three appellants took part in the assault. Hira Singh (PW 5) who is Lambardar of the village, reached the scene of the offence, after the victim had been murdered. When he reached the scene of the offence, he was told by Shamsher Singh about the assault and was also given the names of the assailants. The learned trial Judge believed the three eye-witnesses, but was not inclined to act upon the evidence of Hira Singh. The High Court has believed the three eye witnesses as well as the evidence of Hira Singh. The High Court thought that the failure of Dalip Singh to refer to the arrival of Hira Singh in the first information report did not introduce any infirmity in the evidence of Hira Singh himself, and it has observed that Hira Singh's presence on the scene soon after the occurrence is established by the fact that he has signed the inquest report which was prepared by the Assistant Sub-Inspector Gurbux Singh on reaching the scene of the offence at about 9 a.m. In considering the evidence of these witnesses, the High Court took into account the fact that some inconsistencies were brought to its notice, but it held that they did not constitute any serious infirmity in the evidence at all. It is true that the prosecution had also relied upon the evidence of certain recoveries made by the investigating officer, but neither the Sessions Judge nor the High Court has attached any importance to the said recoveries or the disclosure statements preceding them. Since the High Court took the view that the oral evidence adduced by the prosecution established the guilt of the appellants beyond a reasonable doubt, it has confirmed their conviction under Section 302-34 and the sentence of life imprisonment imposed on them by the trial court.

4. It appears that the murder of Inder Singh was an act of reprisal on the part of the appellants, because it is not denied that Dewan Singh, another brother of the appellants, had been killed in April, 1957, and Dhup Singh, the step-brother of Inder Singh had been found guilty of the said murder. The sentence of life imprisonment imposed on him by the trial court had been confirmed by the High Court on January 14, 1959, but on the recommendation made by the High Court, the said sentence had been commuted to five years by the State Government. There is evidence to show that Inder Sing moved the State Government of Punjab for the release of Dhup Singh on two months' parole, and this he did by an application on April 5, 1960. It appears that this application had been subsequently rejected by the State Government on July 15, 1960; but on June 2, 1960 when Inder Singh was assaulted, the said application was pending and the appellants were indignant that Inder Singh should have moved the State Government for the release of his step-brother Dhup Singh. That, according to the prosecution, is the motive for the commission of the offence. Both the Courts below have agreed that this motive must have led to the commission of the offence.

5. Mr Bhasin contends that the High Court was in error in accepting the evidence of the three eye witnesses, because the said evidence has been given by witnesses who are near relatives of Inder Singh and who shared Inder Singh's enmity against the appellants. In such a case the High Court, could not have acted upon the said interested and hostile evidence without corroboration: Mr Bhasin realised that if he were to contend that the High Court should not have accepted the said evidence on the merits, that would be a matter of appreciation of oral evidence and the conclusion of the High Court based on the appreciation of oral evidence cannot ordinarily be challenged in an appeal under Article 136. He, therefore, put his case higher and contended that in law the evidence of interested and hostile witnesses cannot be accepted without corroboration, and he suggests that some of the decisions of this Court lend support to his argument.

6. There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be

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hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence. Courts naturally begin with the enquiry as to whether the said witnesses were chance-witnesses or whether they were really present on the scene of the offence. If the offence has taken place, as in the present case, in front of the house of the victim, the fact that on hearing his shouts, his relations rushed out of the house cannot be ruled out as being improbable, and so, the presence of the three eyewitnesses cannot be properly characterised as unlikely. If the criminal court is satisfied that the witness who is related to the victim was not a chance-witness, then his evidence has to the examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised. In doing so, it may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the real assailant and would not think of substituting in his place the enemy of the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested witnesses. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars. We do not think it would be possible to hold that such witnesses are no better than accomplices and that their evidence, as a matter of law, must receive corroboration before it is accepted. That is not to say that the evidence of such witnesses should be accepted light-heartedly without very close and careful examination; and so, we cannot accept Mr Bhasin's argument that the High Court committed an error of law in accepting the evidence of the three eye witnesses without corroboration.

7. It now remains to consider Mr Bhasin's contention that some of the decisions of this Court support the proposition that as a matter of law, corroboration must be available before interested evidence of the relatives of the victim can be accepted. The first decision on which Mr Bhasin has relied is the case of *Rameshwar* v. *State of Rajasthan*[1]. In that case, the accused was charged with having committed an offence under Section 376 IPC, and the point which was raised for the decision of this Court was in regard to the appreciation of the evidence of a prosecutrix in a sex offence. In that connection, this Court held that though a woman who has been raped is not an accomplice, her evidence has been treated by the Courts on somewhat similar lines, and the rule which requires corroboration of such evidence save in exceptional circumstances, has now hardened into law. It is obvious that this decision can have no application to the facts in the present case. It is well settled that in cases of rape, prudence requires that evidence given by the prosecutrix should be corroborated, though even in these cases, it would be open to a court of law to act upon the evidence of the prosecutrix if her evidence appears to the Court to be completely satisfactory and there are attending circumstances which make it safe for the Court to act upon that evidence without corroboration. But case of rape cannot, in the context, be compared to cases of murder, and so, no assistance can be legitimately drawn by Mr Bhasin from this decision in contending that in a murder case, if a relative of the victim gives evidence, his evidence cannot, in law, be acted upon unless it is

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corroborated.

8. The next decision to which Mr Bhasin has referred is the decision of this Court in *Lachman Singh* v. *State*[2]. It appears that in that case, the High Court had taken the view that "in all the circumstances it would be proper not to rely upon the oral evidence implicating particular accused unless there is some circumstantial evidence to support it", and the High Court proceeded to examine the evidence from this point of view, and upheld the conviction of three persons who had come to this Court in appeal under Article 136. The contention of the appellants that their conviction was not justified, however, failed and their appeal was dismissed. Mr Bhasin suggests that in dealing with the evidence, this Court had impliedly approved of the approach adopted by the High Court in appreciating the evidence of interested testimony in a murder trial. It cannot be disputed that if the evidence given by interested witnesses in a murder trial seems to suffer from some infirmities, the Court would be justified in looking for some corroboration before accepting the said evidence. Cases may arise where such interested evidence may be shown to have implicated some persons without any justification, or cases may arise where the evidence given by eye witnesses, who are interested, conflicts in material particulars, or may appear to be improbable; in all these cases, the Court would naturally be justified in refusing to act upon such evidence without corroboration. That is a precaution which is invariably adopted by criminal courts in dealing with all direct evidence, and so, the fact that in the circumstances of any particular case, the High Court required some corroboration before acting upon direct evidence and this Court approved of the said approach, does not lend support to the general proposition of law for which Mr Bhasin contends that in all cases where interested witnesses give evidence in a murder trial, their evidence cannot be accepted as a matter of law without corroboration.

9. In *Karnail Singh* v. *State of Punjab*[3] the High Court from whose decision an appeal was brought to this Court, had adopted a similar approach. Having regard to the circumstances of the case, the High Court had taken the view that the evidence given by the sole witness Karnail Singh could not be safely acted upon unless there was some corroboration, and in dealing with this approach, this Court took the precaution of repeating what it had already stated in the case of *Lachman Singh*[2] that the corroboration that is required in such cases is not what would be necessary to support the evidence of an approver, but what would be sufficient to lend assurance to the evidence before them, and satisfy them that the particular persons were really concerned in the murder of the deceased.

10. The same view has been expressed by this Court in the case of *Vaikuntam Chandrappa* v. *State of Andhra Pradesh*[4]. Therefore, the broad and unqualified proposition for which Mr Bhasin contends is not supported by any of the decisions on which he relied. We have no doubt that the rule of caution which requires corroboration to evidence of interested witnesses cannot be treated as an inflexible principle which can be mechanically applied to all cases, because in that event if a murder is committed in the house of the victim, it would be difficult to convict the assailant, for in such a case all the witnesses would be relatives of the victim. That is why in appreciating evidence of this kind, Courts have, no doubt, to be careful, but they cannot be bound by any inflexible rule like the one suggested by Mr Bhasin.

11. Mr Bhasin further argued that the murder having taken place in a locality where a large number of citizens resided, it was the duty of the prosecution to have examined independent persons staying in the locality to support its case against the appellants and he suggested that if the prosecution failed to examine such witnesses, it was the duty of the Court to have exercised its powers under Section 540 of the Criminal Procedure Code and to call such witnesses to give evidence. Mr Bhasin argues that under Section 172 of the Code, it is competent to a criminal court to send for the police diaries of a case under trial in such Court, and if the Court had seen the police

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diaries, it would have easily found whether the statements of any independent eye-witnesses had been recorded or not. If it found that some statements of independent eye-witnesses had been recorded, it should have called them in exercise of its powers under Section 540 of the Code; since this has not been done, it has introduced an infirmity in the trial, and this Court should set aside the conviction of the appellants and send the case back with a direction, that the Magistrate should exercise his powers under Section 540 as suggested by Mr Bhasin. In our opinion, this argument is entirely misconceived. It is well settled that in a murder case, it is primarily for the prosecutor to decide which witnesses he should examine in order to unfold his story. It is obvious that a prosecutor must act fairly and honestly and must never adopt the device of keeping back from the Court eye-witnesses only because their evidence is likely to go against the prosecution case. The duty of the prosecutor is to assist the Court in reaching a proper conclusion in regard to the case which is brought before it for trial. It is no doubt open to the prosecutor not to examine witnesses who, in his opinion, have not witnessed the incident, but, normally he ought to examine all the eye-witness's in support of his case. It may be that if a large number of persons have witnessed the incident, it would be open to the prosecutor to make a selection of those witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the witness-box. If at the trial it is shown that persons who had witnessed the incident have been deliberately kept back to the Court may draw an inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case. In such a case, if the ends of justice require, the Court may even examine such witnesses by exercising its powers under Section 540; but to say that in every murder case, the Court must scrutinise the police diary and make a list of witnesses whom the prosecutor must examine, is virtually to suggest that the Court should itself take the role of a prosecutor. The powers of the Court under Section 540 can and ought to be exercised in the interests of justice whenever the Court feels that the interests of justice so require, but that does not justify Mr Bhasin's contention that the failure of the Court to have exercised its powers under Section 540 has introduced a serious infirmity in the trial itself.

12. In this connection, it is necessary to bear in mind that there is nothing on the record to show that any person in the locality who actually witnessed the incident had been kept back. No such suggestion has been made to the investigating officer and no other evidence has been brought by the defence in support of such a plea. It is well-known that in villages where murders are committed as a result of factions existing in the village or in consequence of family feuds, independent villagers are generally reluctant to give evidence because they are afraid that giving evidence might invite the wrath of the assailants and might expose them to very serious risks. It is quite true that it is the duty of a citizen to assist the prosecution by giving evidence and helping the administration of criminal law to bring the offender to book, but it would be wholly unrealistic to suggest that if the prosecution is not able to bring independent witnesses to the Court because they are afraid to give evidence, that itself should be treated as an infirmity in the prosecution case so as to justify the defence contention that the evidence actually adduced should be disbelieved on that ground alone without examining its merits. In the present case, we see no justification for the assumption that any eye-witness has been kept back from the Court, and so, we feel no hesitation in rejecting the argument that the case should be sent back on the hypothetical ground that the scrutiny of the police diary may disclose the presence of an independent eye-witness; such an argument is wholly misconceived and can be characterised as fantastic.

13. As we have already indicated, both the courts below have examined the evidence given by the eye-witnesses and have believed the said evidence. The High

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Court has also believed the evidence of Hira Singh, the Lambardar. The story deposed to by these witnesses appears to be very probable and has been treated by the courts below as consistent and cogent. In such circumstances it is not open to the appellants to contend that this Court should re-appreciate the said evidence and decide whether the view taken by the High Court is right or not. In our opinion, the conviction of the appellants rests on the appreciation of oral evidence and no case has been made out for our interference under Article 136 of the Constitution.

14. The result is, the appeal fails and is dismissed.

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* Appeal by Special Leave from the Judgment and Order dated 24th August 1961 of the Punjab High Court in Criminal Appeal No. 146 of 1961.

[1] (1952) SCR 377

[2] (1952) SCR 839 at p 844

[3] (1954) SCR 904

[4] AIR 1960 SC 1340

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(1964) 8 SCR 133 : AIR 1965 SC 202 : (1965) 1 Cri LJ 226

In the Supreme Court of India

(BEFORE P.B. GAJENDRAGADKAR, C.J. AND K.N. WANCHOO AND K.C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.)

1. MASALTI (IN CR.A. NO 30 OF 1964)
2. MUNGA RAM AND OTHERS (IN CR.A. NO 31 OF 1964)
3. BHAGWATI AND ORS (IN CR.A. NO. 32 OF 1964)
4 CHANDAN SINGH AND OTHERS (IN CR.A. NO. 33 OF 1964)
5 LAXMI PRASAD (IN CR.A. NO 34 OF 1964) ... Appellants;

Versus

STATE OF UTTAR PRADESH (IN ALL THE APPEALS) ... Respondent.

Criminal Appeals Nos. 30 to 34 of 1964*, decided on May 4, 1964

Advocates who appeared in this case :

M.S.K. Sastri, Advocate, (at State Expense), for the Appellant (In Cr.A. No. 30 of 1964);

I.M. Lall and Ganpat Rai, Advocates, for the Appellants (In Cr.A. No. 31 of 1964);

V.S. Sawhney, Advocate, for the Appellants (In Cr.A. Nos. 32 to 34 of 1964);

O.P. Rana, Atiqur Rehman and C.P. Lal, Advocates, for the Respondent (In all the Appeals).

The Judgment of the Court was delivered by

P.B. GAJENDRAGADKAR, C.J.— Forty persons were charged with having committed several offences the principal one of which was under Section 302 read with Section 149 of the Indian Penal Code. The case against these persons was tried by the First Additional Sessions Judge at Jhansi. The other charges framed against them were under Section 307/149, 201/149 and 511, 395, 396, 149 and 449 IPC. The learned trial Judge held that none of the charges had been proved against five of the accused persons. He also found that the charges under Sections 395 and 396 were not proved against any of them. In regard to the remaining charges, he found that 35 out of 40 accused persons were guilty. For the major offence charged under Section 302/149, he sentenced 10 accused persons to death and 25 others to imprisonment for life. He also directed that the said accused persons should undergo different terms of imprisonment for the remaining offences; but for the purpose of the present appeals, it is unnecessary to refer to them.

2. After the learned trial Judge pronounced his judgment on 31st December, 1962, the 35 accused persons who had been convicted by him preferred three appeals between them before the Allahabad High Court, whereas the sentences of death imposed on 10 accused persons by learned trial Judge were submitted to the said High Court for confirmation. The High Court has held that 7 out of the 35 appellants before it were not proved to have committed any of the offences, and so, they were ordered to be acquitted. In regard to the remaining 28 appellants, the High Court has confirmed the orders of conviction and sentence imposed on them by the trial court. In the result, the reference made to the High Court for confirmation of the sentences of death imposed on the 10 accused persons by the trial court was allowed. It is against this decision of the High Court that the present five appeals have been brought to this Court by special leave, and the number of accused persons who have brought these appeals before us is 16.

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3. Before dealing with the points raised in these appeals, it is necessary to set out very briefly the relevant facts on which the prosecution case against the appellants and their co-accused substantially rests. The incident which has given rise to the present criminal proceedings took place on 29th November, 1961 in village Bilati Khet in the district of Jhansi at about 8 a.m. It is clear that this village is cursed with keen rivalry and enmity between two factions. One group was led by Gayadin who and four other members of his family were murdered on the said date. All these murders were committed according to the prosecution, by the members of the rival faction amongst whom are included the present appellants before us. Criminal proceedings have continued between the parties for several years almost without interruption. The rival group was led by Laxmi Prasad alias Laxmi Narain who is one of the appellants in this Court. In the last election of the village panchayat Laxmi Prasad succeeded as Pradhan of the village and defeated the candidate set up by Gayadin. On 28th November, 1961, a boundary dispute led to an incident between the members of the two groups. This dispute related to two fields one of which belonged to Gayadin and the other to Laxmi Prasad. Attempts were made to settle this dispute by arbitration, but they failed. It appears that Laxmi Prasad and the members of his group did not agree to submit to any arbitration and they left the meeting called for the purpose threatening that they would see that the matter in dispute between them was settled the next day. It is on this grim note that the incident of the 28th November ended.

4. On the 29th November in the early morning, Bahoran, one of the sons of Gayadin, had gone out to ease himself. He was then carrying a pharasa. In the field he met Laxmi Prasad who attacked him with a *lathi*. Bahoran retaliated this attack with his own pharasa and in the scuffle the nose of Laxmi Prasad was injured and it began to bleed, in fact, a part of the nose was actually cut. Infuriated by this injury, Laxmi Prasad went to his house and collected the whole crowd belonging to his faction. Bahoran eased himself and returned to his house. Soon thereafter he washed his hands and went to the north where his father, brothers and other relations were warming themselves by fire. At that stage, Ram Prasad and Dayaram rushed to the scene and informed them that Laxmi Prasad and his companions were all armed with guns, spears, swords, *gandasas* and *lathis* and were proceeding to the house of Gayadin determined to kill all the members of Gayadin's family. On receiving this alarming information, Gayadin and his friends and relatives thought of proceeding towards the house of Gayadin. About that time, Laxmi Prasad and his companions reached near the house of Gayadin whereon Laxmi Prasad fired a gun. Bhagwati was carrying a large quantity of cartridges in the folds of his *dhoti* and was instigating Laxmi Prasad to fire at everyone sitting near the fire to the north of the house and to exterminate the family of Gayadin. On hearing this, everyone of the group sitting near the fire rushed into the house and closed the door. The assailants then broke open the doors of the house and entered the sehan of Gayadin. Inside the house the assailants pursued Gayadin on the upper storey and killed him there. Brindaban, Radha Saran and Dayaram were hiding in different rooms of the house the door of these rooms were broken open and all the three of them were shot dead. Bahoran and Shiroman Singh, both sons of Gayadin, escaped through the tiled roof into the cattleshed of Harbans which is situated towards the south-east of Gayadin's house. Shrimon concealed himself in the godown while Bahoran concealed himself in the room in the upper storey where chaff had been stored. After killing Gayadin, Brindaban, Radha Saran and Dayaram, the assailants mercilessly dragged the bodies of the victims out of the house of Gayadin and began their search for Bahoran and other male inmates of the house. When the dead bodies were thus being dragged, Gori Dulaiya wife of Gayadin rushed after the assailants and implored them not to take the dead bodies away. One of the assailants, however, struck her with a stick and she was forced to re-trace her steps. The dead bodies were then dragged towards the east of the house. On reaching the

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cattleshed of Harbans the assailants broke open the outer door of the house and entered into it. They then injured Harbans and managed to discover Shiroman Singh who was promptly killed. The fire dead bodies were then taken into the field of Bhagwati. In the field, two big piles of cowding cakes were prepared. On one of the piles the bodies of Gayadin, Brindaban, Radha Saran and Dayaram were placed and on the other Shiroman Singh's body was put. Kerosene oil was sprinkled on the bodies and fire was set to them. That in brief, is the story of the gruesome murder, which have given rise to the present proceedings.

5. When the assailants had left the house of Gayadin dragging the dead bodies with them, Bahoran came out of his hiding place and rushed to the Police Station Erichh and lodged the first information report at about 11 o'clock. In this report, he gave all the material details in regard to the commission of the offence and named the 35 persons as the assailants. In fact, the first committal order passed on 31st March, 1962, in the present proceedings referred to 35 assailants. Later, five more persons were added to the list of assailants by the committal order made on 14th May, 1962. On receiving the first information report, the police party rushed to the scene of occurrence on cycles and they put off the burning fire and took out the half burnt bodies of the five murdered persons. These bodies were identified and were sent for post-mortem examination. The injured persons Harbans, Ram Prasad, Mansa Ram and Smt Gori Dulaiya were sent for medical examination. Post-mortem examination was then held on the dead bodies and statements of witnesses were recorded in the course of investigation. That led to the several charges framed against 40 persons and ultimately their trial in the Court of the First Additional Sessions Judge at Jhansi.

6. The case for the prosecution is sought to be established by the testimony of 12 eyewitnesses. All the accused persons denied that they had anything to do with the offences charged. Their main contention was that a false case had been made against them and it was attempted to be supported by evidence of witnesses who were hostile to them and who had no regard for truth. The trial Judge, in substance, rejected the defence plea and accepted the prosecution evidence, except in the case of five accused persons. In appeal, several contentions were raised on behalf of the appellants, but they were rejected and in the result, the findings of the trial court against the appellants were confirmed. The High Court, however, reversed the conclusion of the trial court in respect of 7 accused persons with whose cases we are not concerned in the present appeals. The 12 persons who gave direct evidence against the appellants and their co-accused persons are: Bahoran PW 1; Basanti Lal PW 2; Rameshwar Dayal PW 3; Prabhu Dayal PW 5; Fanchem PW 6; Swarup Singh PW 14; Kasturi PW 15; Thakur Das PW 16; Shyamlal PW 17; Harbans PW 18; Dropadi PW 19; and Kishori Lal PW 20. The High Court has critically examined the evidence given by these witnesses and has held that the evidence of Bahoran and Prabhu Dayal may be left out of account as it appeared to the High Court that the said evidence suffered from material infirmities. The evidence given by the remaining 10 witnesses has, however, been accepted by the High Court as substantially true and correct.

7. In dealing with this oral evidence, the High Court took into account the fact that most of these witnesses belonged to the faction of Gayadin and must therefore, be regarded as partisan. It also considered another feature which characterised the evidence of all the witnesses and that was that they gave their account of the incident substantially in similar terms and did not assign particular parts in respect of overt acts to any of the assailants except Laxmi Prasad Accused 1. The approach adopted by the High Court shows that it decided to confirm the conviction of the accused persons against whom four or more witnesses gave a consistent account, and it is by the application of this test that 7 accused persons have been acquitted. As to the sentence, the High Court realised that 10 persons had been ordered to be hanged and that it could not be said about all of them except Laxmi Prasad, that they had actually

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fired a gun and caused the death of any of the five victims. Even so, the High Court held that since they all formed members of the unlawful assembly the common object of which was to exterminate the male members of the family of Gayadin, they were all equally guilty of murder under Section 302/149 IPC and it would not, therefore, be unreasonable to impose the penalty of death on such of the assailants as were shown to have carried guns in their hands on that occasion. That is how the High Court upheld the orders of conviction passed against 28 persons who had brought their cases before it in appeal and confirmed the sentences of death imposed on 10 of them.

8. In these appeals, Mr Sawhney who has addressed the principal argument before us on behalf of the appellants, has urged that the High Court has failed in discharging its duty properly when it dealt with the appeals brought before it by the appellants and decided to confirm the sentences of death imposed on 10 of the accused persons. In support of this argument, Mr Sawhney has relied upon the decision of this Court in the case of *Jumman* v. *State of Punjab*[1]. In that case, this Court has emphasised the fact that the mandatory requirement prescribed by Section 374 of the Code of Criminal Procedure shows that in dealing with reference for confirmation of death sentence imposed by the Sessions Judge, the High Court has to consider the entire case for itself before deciding whether the sentence of death should be confirmed or not. Section 374 provides that the sentence of death shall not be executed unless it is confirmed by the High Court. In other words, the sentence of death imposed by the Court of Sessions is not effective until and unless it is confirmed by the High Court. It is only when the High Court confirms the sentence of death that it is capable of execution. That is why this Court emphasised the solemnity of the proceedings brought before the High Court under Section 374, and it pointed out that under Section 375, the High Court is given the power to admit additional evidence if it thinks necessary to do so. Proceedings brought before the High Court for confirmation of a death sentence give a right to the condemned prisoner to be heard on the merits and to require the High Court to consider the matter for itself without being influenced by the conclusions recorded by the Court of Session. The conclusions of the High Court on the merits in such proceedings must be independent, and so, the High Court inevitably has to go into the whole of the evidence, consider all the pros and cons of the case and satisfy itself that the offence charged under Section 302 IPC is established beyond reasonable doubt and the sentence of death submitted to it for its confirmation is fully justified. Mr Sawhney contends that this essential requirement of Section 374 has not been complied with by the High Court when it dealt with the appeals brought before it in the present proceedings. He also adds that since 10 persons have been ordered to be hanged, that itself is a reason this Court should examine the evidence for itself and not hold that the appellants are concluded by concurrent findings of fact recorded by the courts below.

9. We are not impressed by this argument. It is perfectly true that in a murder trial when an accused person stands charged with the commission of an offence punishable under Section 302, he stands the risk of being subjected to the highest penalty prescribed by the Indian Penal Code; and naturally judicial approach in dealing with such cases has to be cautious, circumspect and careful. In dealing with such appeals or reference proceedings where the question of confirming a death sentences is involved, the High Court has also to deal with the matter carefully and to examine all relevant and material circumstances before upholding the conviction and confirming the sentence of death. All arguments urged by the appellants and all material infirmities pressed before the High Court on their behalf must be scrupulously examined and considered before a final decision is reached. The fact that 10 persons had been ordered to be hanged by the trial Judge necessarily imposed a more serious and onerous responsibility on the High Court in dealing with the present appeals. We

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have carefully considered the judgment delivered by the High Court in these appeals and we are satisfied that the criticism made by Mr Sawhney that the High Court did not bestow due care and attention on the points involved in the case cannot be regarded as well-founded. The judgment shows that the arguments which were urged on behalf of the appellants, have been carefully examined, the evidence given by the respective witnesses has been accurately summarised and the infirmities in the said evidence closely scrutinised. The relevance of the argument of the admitted enmity between the two factions of the village has been taken into account and the common features of the evidence tendered by the witnesses have not been overlooked. After taking into account all the points which were urged before the High Court the High Court adopted what it thought to be a safe test before acting on direct evidence. It has held that unless at least four witnesses are shown to have given a consistent account against any of the appellants, the case against them cannot be said to have been proved beyond reasonable doubt. Having regard to the manner in which the High Court has dealt with the appeals brought before it, we are not prepared to hold that the general criticism made by Mr Sawheny against the judgment of the High Court can be accepted.

10. In this connection, Mr Sawhney strongly relied on the fact that the High Court has not considered one important point in favour of the defence, and that is in relation to the failure of the prosecution to tender three material witnesses whose names had been shown in the witnesslist in the calendar sent by the committing Magistrate to the trial Judge. These witnesses are: Ram Prasad, Mansa Ram and Rani Dulhan. It appears that this contention was raised by the defence before the trial court and had been rejected by it. The Government Counsel appearing for the prosecution had made an application to the trial court expressing his inability to examine the three witnesses for the reason that Ram Prasad and Mansa Ram had been won over by the defence and Rani Dulhan, the widow of one of the victims, was suffering from such mental shock that she was unable to depose coherently. After this application was made and granted, the learned trial Judge did not insist upon the prosecution examining the three said witnesses. Then followed three other applications by the defence (Nos. 247-B; 248-B and 249-B) in which it was urged that the said three witnesses should be examined under Section 540 CrPC. The learned trial Judge rejected these applications, and so, the case concluded without the said three witnesses giving evidence before the trial court. In rejecting the applications made by the defence, the learned Judge has carefully examined the validity of the defence contention that the evidence given by the said witnesses and the committing Magistrate showed that they were material witnesses before the plea raised by them that the absence of their evidence would cause prejudice to the defence, and has held that the evidence which the said three witnesses may give was not essential for a just decision of the case and that it was unreasonable to suggest that the prosecution had an oblique motive in suppressing their evidence. This part of the judgment clearly shows that all relevant aspects of the matter were examined by the trial Judge before he refused to exercise his powers under Section 540 CrPC. It is obvious that this contention was not urged before the High Court, and so, we find no discussion of the point in the judgment of the High Court.

11. We are not prepared to accept Mr Sawhney's argument that even if this point was not raised by the appellants before the High Court, they are entitled to ask us to consider that point having regard to the fact that 10 persons have been ordered to be hanged. It may be conceded that if a point of fact which plainly arises on the record, or a point of law which is relevant and material and can be argued without any further evidence being taken, was urged before the trial court and after it was rejected by it was not repeated before the High Court, it may, in a proper case, be permissible to the appellants to ask this Court to consider that point in an appeal under Article 136 of the

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Constitution; after all in criminal proceedings of this character where sentences of death are imposed on the appellants, it may not be appropriate to refuse to consider relevant and material pleas of fact and law only on the ground that they were not urged before the High Court. If it is shown that the pleas were actually urged before the High Court and had not been considered by it, then, of course, the party is entitled as a matter of right to obtain a decision on those pleas from this Court. But even otherwise no hard and fast rule can be laid down prohibiting such pleas being raised in appeals under Article 136.

12. In the present case, however, we are satisfied that there is no substance in the contention which Mr Sawhney seeks to raise before us. It is not unknown that where serious offences like the present are committed and a large number of accused persons are tried, attempts are made either to terrorise or win over prosecution witnesses, and if the prosecutor honestly and bona fide believes that some of his witnesses have been won over, it would be unreasonable to insist that he must tender such witnesses before the court. It is undoubtedly the duty of the prosecution to lay before the court all material evidence available to it which is necessary for unfolding its case; but it would be unsound to lay down as a general rule that every witness must be examined even though his evidence may not be very material or even if it is known that he has been won over or terrorised. In such a case, it is always open to the defence to examine such witnesses as their witnesses and the court can also call such witnesses in the box in the interest of justice under Section 540 CrPC. As we have already seen, the defence did not examine these witnesses and the Court, after due deliberation, refused to exercise its power under Section 540 CrPC. That is one aspect of the matter which we have to take into account.

13. The other aspect of the matter is that the trial court has found that the evidence which these witnesses would have given was not essential for a just decision of the case. What these witnesses might have said in the Sessions Court was judged by the trial court in the light of their previous statements already recorded, and that is a finding which is purely one of fact. If this finding was not challenged by the appellants before the High Court, we do not see how they can claim to argue before us now that the said finding is erroneous. Besides, so far as Rani Dulhan is concerned, it seems to us utterly unreasonable to insist that before permitting the prosecutor not to examine her, evidence should have been led to show that she was suffering from such mental shock that she was unable to give a coherent account of the tragic events that happened on that fateful morning. One has merely to recall the fact that five male members of her family were butchered to death by the assailants to realise that the prosecutor's statement that she was mentally unbalanced must be true. Then, as to Ram Prasad and Mansa Ram having been won over by the defence, that again is a matter on which the trial court appears to have been satisfied, otherwise it would have readily acceded to the request of the defence to exercise its powers under Section 540 CrPC. We are inclined to think that it is because this part of the defence contension was felt to be inarguable that the advocate for the appellants did not raise this point before the Court. Therefore, we are not prepared to allow Mr Sawhney to take us through the evidence in the case on the ground that one important contention raised by the defence has not been examined by the High Court.

14. Mr Sawhney has then argued that where witnesses giving evidence in a murder trial like the present are shown to belong to the faction of victims, their evidence should not be accepted, because they are prove to involve falsely members of the rival faction out of enmity and partisan feeling. There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the court as genuine whether or not the story disclosed by the evidence is probable, are all matters which must be taken into

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account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautions in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

15. Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well-founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not. In the present case, the High Court has in fact refused to act upon the evidence of Bahoran and Prabhu Dayal, because it appeared to the High Court that the evidence of these two witnesses suffered from serious infirmities.

16. Mr Sawhney also urged that the test applied by the High Court in convicting the appellants is mechanical. He argues that under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. That, no doubt is true; but where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. Therefore, we do not think any grievance can be made by the appellants against the adoption of this test. If at all the prosecution may be entitled to say that the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses, and if the said test had not been applied, they might as well have been convicted. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case.

17. Mr Sawhney then attempted to argue that the High Court failed to give effect to the principles enunciated by this Court in the case of *Baladin* v. *State of Uttar Pradesh*[2]. In that case, it was observed by Sinha, J., who spoke for the Court that it is well-settled that mere presence in an assembly does not make a person, who is present, a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under Section 142 IPC. The argument is

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that evidence adduced used by the prosecution in the present case does not assign any specific part to most of the accused persons in relation to any overt act, and so, the High Court was in error in holding that the appellants were members of an unlawful assembly. The observation of which Mr Sawhney relies, prima facie, does seem to support his contention; but, with respect, we ought to add that the said observation cannot be read as laying down a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of such an unlawful assembly. In appreciating the effect of the relevant observation on which Mr Sawhney has built his argument, we must bear in mind the facts which were found in that case. It appears that in the case of *Baladin*[2] the members of the family of the appellants and other residents of the village had assembled together; some of them shared the common object of the unlawful assembly, while others were merely passive witnesses. Dealing with such an assembly, this Court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained long with the other members of the assembly the common object as defined by Section 141 IPC Section 142 provides that however, being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common object specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of *Baladin*[2] assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in the case of *Baladin*[2] must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition or law such as Mr Sawhney suggests.

18. In this case, the High Court has carefully examined the evidence and has made a finding that the whole group of persons who constituted the assembly were members of the faction of Laxmi Prasad and they assembled together, armed with several weapons, because they entertained a common object in pursuance of which the five murders were committed on that day. Therefore, there is no substance in the argument that the conclusion of the High Court that the appellants are guilty of the offences charged is not supported by the principles of law enunciated by this Court in the case of *Baladin*[2].

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19. It is thus clear that the general grounds of attack urged before us by Mr Sawhney in challenging the validity of the conclusions recorded by the High Court fail, and so, there would be no occasion or justification for this Court to consider the evidence for itself.

20. That leaves one question still to be considered and that has relation to the sentence of death imposed on 10 persons. Mr Sawhney argues that in confirming the sentences of death imposed by the trial court on 10 accused persons in this case, the High Court has adopted a mechanical rule. The High Court has held that the 10 persons who carried firearms should be ordered to be hanged, whereas others who have also been convicted under Section 302/149, should be sentenced to imprisonment for life. It is true that except for Laxmi Prasad, the charge under Section 302/149 rests against the other accused persons on the ground that five murders have been committed by some members of the unlawful assembly of which they were members, and the argument is that unless it is shown that a particular accused person has himself admitted the murder of one or the other of the victims, the sentence of death should not be imposed on him. In other words, the contention is that if a person is found guilty of murder under Section 302/149 and it is not shown that he himself committed the murder in question, he is not liable to be sentenced to death. In support of this argument, Mr Sawhney has relied on certain observations made by Bose, J., who spoke for the Court in *Dalip Singh* v. *State of Punjab*[3]. In that case, what this Court observed was that the power to enhance a sentence from transportation to death should very rarely be exercised and only for the strongest reasons; and it was added that it is not enough for the appellate court to say or think that if left to itself it would have awarded the greater penalty because the discretion does not belong to the appellate court but to the trial Judge, and the only ground on which the appellate court can interfere is that the discretion has been improperly exercised. These observations have no relevance in the present case, because we are not dealing with a case where the High Court has enhanced the sentence imposed by the trial Judge at all. In fact, both the trial court and the High Court are agreed that the sentences of death imposed on 10 persons are justified by the circumstances of the case and by the requirements of justice. As a mere proposition of law, it would be difficult to accept the argument that the sentence of death can be legitimately imposed only where an accused person is found to have committed the murder himself. Whether or not sentences of death should be imposed on persons who are found to be guilty not because they themselves committed the murder, but because they were members of an unlawful assembly and the offence of murder was committed by one or more of the members of such an assembly in pursuance of the common object of that assembly, is a matter which has to be decided on the facts and circumstances of each case. In the present case, it is clear that whole group of persons belonged to Laxmi Prasad's faction, joined together armed with deadly weapons and they were inspired by the common object of exterminating the male member in the family of Gayadin. 10 of these persons were armed with firearms and the others with several other deadly weapons, and evidence shows that five murders by shooting were committed by the members of this unlawful assembly. The conduct of the members of the unlawful assembly both before and after the commission of the offence has been considered by the courts below and it has been held that in order to suppress such fantastic criminal conduct on the part of villages it is necessary to impose the sentences of death on 10 members of the unlawful assembly who were armed with firearms. It cannot be said that discretion in the matter has been improperly exercised either by the trial court or by the High Court. Therefore, we see no reason to accept the argument urged by Mr Sawhney that the test adopted by the High Court in dealing with the question of contence is mechanical and unreasonable.

21. There are, however, three cases in which we think we ought to interfere. These

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are the case of Accused 9 Ram Saran who is aged 18; Accused 11 Asha Ram who is aged 23, and Accused 16 Deo Prasad who is aged 24. Ram Saran and Asha Ram are the sons of Bhagwati who is Accused II. Both of them have been sentenced to death. Similarly, Deo Prasad has also been sentenced to death. Having regard to the circumstances under which the unlawful assembly came to be formed, we are satisfied that these young men must have joined the unlawful assembly under pressure and influence of the elders of their respective families. The list of accused persons shows that the unlawful assembly was constituted by members of different families and having regard to the manner in which these factions ordinarily conduct themselves in villages, it would not be unreasonable to hold that these three young men must have been compelled to join the unlawful assembly that morning by their elders, and so, we think that the ends of justice would be met if the sentences of death imposed on them are modified into sentences of life imprisonment. Accordingly, we confirm the orders of conviction and sentence passed against all the appellants, except Accused 9, 11 and 16 in whose cases the sentences are altered to those of imprisonment for life. In the result, appeals are dismissed, subject to the said modification.

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* Appeals by Special Leave from the Judgment and Order dated 22nd October, 1963 of the Allahabad High Court in Criminal Appeals Nos. 77 and 78 of 1963.

[1] AIR 1957 SC 469

[2] AIR 1956 SC 181

[3] 1954 SCR 145

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AIR 1956 SC 643 : 1956 Cri LJ 1254

In the Supreme Court of India
(BEFORE B.K. MUKHERJEA, VIVIAN BOSE AND B. JAGANNADHADAS, JJ.)

RAMJANAM SINGH ... Appellant;

Versus

STATE OF BIHAR ... Respondent.

Criminal Appeal No. 81 of 1953*, decided on November 2, 1954

Advocates who appeared in this case :

H.J. Umrigar, and P.K. Chatterjee, Advocates, for the Appellant;

C.K. Daphtary, Solicitor-General for India (A.K. Datta, B.P. Sinha and M.M. Sinha, Advocates, with him), for the Respondent.

The Judgment of the Court was delivered by

VIVIAN BOSE, J.— The appellant Ramjanam Singh was prosecuted under Section 161 of the Indian Penal Code, read with Section 5 of the Prevention of Corruption Act, 1947, for having accepted a bribe. He was acquitted by the trying Magistrate but was convicted by the High Court on an appeal against the acquittal and was sentenced to one year's rigorous imprisonment. He was given special leave to appeal by this Court.

2. The appellant was a Sub-Inspector of Police at all material times. He was in charge of the Dinapore Police Station and was investigating dacoity charges against the complainant Sitaram Dusadh (PW 2) under Sections 395 and 399/402 IPC on the relevant dates. The prosecution story in that during the course of the investigation the appellant demanded Rs 100 for himself and Rs 25 for his Assistant Sub-Inspector as a bribe for dropping the proceedings against the complainant whom we shall hereafter call PW 2. On 17-10-1951 he is said to have been offered and to have accepted the Rs 100.

3. It will be necessary to examine the facts in detail and first we will consider those which are said to have preceded and led up to the actual taking of the bribe.

4. There are three police investigations to bear in mind; Dinapore Case No. 21(8) 51 Dinapore Case No. 19(8) 51 and Khagaul Case No. 9(7) 51. It will be enough to call them Cases Nos. 21 and 19 respectively and Case No. 9. The following facts are admitted:

5. The police received information in the first half of August, 1951 about the commission of a dacoity within the jurisdiction of the Dinapore Police Station and Cases Nos. 19 and 21 were registered, the former for dacoity under Section 395 IPC and the latter under Section 399/402 for making preparation for the commission of a dacoity and assembly for that purpose. Sitaram Dusadh (PW 2) a resident of Khagaul, was named by one of the suspects and accordingly he was arrested by the Assistant Sub-Inspectors of Khagaul and Dinapore on 17-8-1951 and was sent in custody to the Dinapore Police Station in connection with both cases. He was handed over to the appellant (the Dinapore Sub-Inspector) and was kept in the police lock-up there.

6. Next day (18-8-1951) he was forwarded to the Sub-Divisional Officer, Dinapore, by another Dinapore Sub-Inspector R. Nath with a recommendation that he be not released on bail, but two days later (20-8-1951) he was released on bail. This was in Case No. 21.

7. A few days later, the police wanted him for an identification parade and so obtained orders for his re-arrest and detention by the Sub-Divisional Officer in charge of these cases on 29-8-1951. It seems that despite that he was not arrested till 17-9-

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1951 because an order sheet of that date in Case No. 19 reads as follows:

> "As ordered the following two accused are taken into custody *today* (1) Sitaram Dusadh (PW 2) .... They were not taken into custody as prayed by the S.I. Dinapore since they were on bail in the other case and today they appeared in Court."

8. The following day (18-9-1951) he was again released on bail. In his evidence Sitaram Dusadh (PW 2) indicates that this was on 21-9-1951 but the correct date as ascertained from the order sheet is 18-9-1951.

9. Next we turn to matter which is controversial. According to Sitaram Dusadh (PW 2), when he was arrested on 17-9-1951, the appellant said to him that he had not seen him after he was released on bail and that he should do so. The suggestion is that this was a hint that he should pay the appellant some money to secure his release. But the curious part of this portion of the story is that Sitaram Dusadh was under arrest when this was said and was under the control of the appellant. He was not a free agent and the appellant could have sent for him or interviewed him at any time he "the appellant" pleased. It is also to be observed that in cross-examination Sitaram Dusadh, speaking of the incident of 3-10-1951, to which we shall presently refer, said:

> "Except on that day I had no talk with the SI of Police accused or with any other police officer about the bribe."

10. Reading the two statements together we do not think that this was an invitation for a bribe or that it was so understood by Sitaram Dusadh and in fact we do not think the appellant said anything of the sort.

11. Next follows a significant fact which is admitted by both sides. The Dy. S.P. of Dinapore (PW 7) tells us that on or about this very date the appellant

> "reported to me that he had received information from his spy that one intrigue was going on in Khagaul against him and other police officers".

12. Apparently because of these two Dinapore dacoity cases which he was investigating. It is evident that police officers who try to break up a large gang of dacoits are bound to be unpopular with the gang and their friends and with those who back them. Their unpopularity will not be any the less if the persons they suspect are in fact innocent. So the appellant's fears that trouble against him was brewing cannot be brushed aside as groundless. In any case, he told his superior officer that this was what he had heard, and what he feared, just about the time he was making arrangements for rounding up the suspects, including Sitaram Dusadh (PW 2), for an identification parade.

13. Turning back to Sitaram Dusadh (PW 2), he tells us that two days after the date of his release (that would be 20-9-1951) he went to the Dinapore Police Station and met the Assistant Sub-Inspector of Police and asked him why he was being arrested again and again when he was innocent. The appellant was in the Police Station at the time but neither asked to see the other and there was no hint or suggestion of a bribe by anyone. If what Sitaram Dusadh says the appellant told him on 17-9-1951 was actually said and was intended to be a hint, no attempt was made to follow it up by any one of the parties concerned.

14. This differs from the statement made in the letter which Sitaram Dusadh sent to the Anti-Corruption Department on 17-10-1951. There he said that the Assistant Sub-Inspector said to him on this occasion that the appellant had asked the Assistant Sub-Inspector why Sitaram Dusadh came to him "empty handed". This was not repeated in evidence and we again stress the fact that Sitaram Dusadh was emphatic in his cross-examination that except on 3-10-1951.

> "I had no talk with the S.I. of Police *or any other police officer about the bribe*."

15. We can only proceed on the evidence given on oath in the witness box and not

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on the statement made in the letter.

16. Sitaram Dusadh (PW 2) next tells us that after he had protested his innocence to the Assistant Sub-Inspector on 20-9-1951 he went to see his friend Hiralal Parnat (PW 5) and told him what he had told the Assistant Sub-Inspector. Hiralal Parnat advised him

> "to see the S.I. of Police personally and to request him to do the needful as I was being immensely harassed by the Police and he also told me to settle up if any money was demanded by him from me".

17. Now it will be seen from this sequence of events that the first real hint or suggestion about a bribe emanated from Hiralal Parnat (PW 5) and not from the police officers. This is significant when taken in conjunction with the appellant's complaint to his superior officer, the Dy.S.P. (PW 7), that there were people in Dinapore who were conspiring to get him into trouble.

18. It will be relevant at this stage to pause for a moment and investigate Hiralal Parnat (PW 5). He calls himself a businessman but it turns out that he is a journalist. He also boasts about his local influence and says that he has

> "got access and familiarity with big Congressmen and also with the Hon'ble Ministers of his province."

19. He has taken an unusually keen interest in this case and in the dacoity charges against Sitaram Dusadh, PW 2. He says that Rs 200 to Rs 250 were collected locally to defend Sitaram Dusadh but says that he had no hand in those collections. He admits that he attended some of the court hearings and on one occassion came with Rs 5 as his contribution towards the defence. He also admits that he spent his own money for attending these hearings in the dacoity cases and that on another occasion he paid not only his own railway fare but also that of Sitaram Dusadh. He admitted that—

> "I was very much aggrieved at the arrest of PW Sitaram Dusadh. I was also very much annoyed with the actions and acts of the police because PW Sitaram was innocent in the cases".

20. We have seen the shape that one phase of his annoyance took: to advice Sitaram Dusadh to go to the appellant and offer him a bribe when up to that time no one else had made any such suggestion.

21. We now proceed from the 20th, when Hiralal Parnat (PW 5) advised Sitaram Dusadh to bribe the appellant, to the 22nd when Sitaram Dusadh says he followed up his friend's suggestion. He says that two days later he went to the Police Station and met the Assistant Sub-Inspector and the appellant. The appellant then openly asked for a bribe and said that in cases of that kind people paid Rs 1000 to Rs 2000 to the police.

22. On hearing this, Sitaram Dusadh went back to his friend Hiralal Parnat for further advice and told him what had happened but neither Sitaram Dusadh nor Hiralal Parnat tells us what Hiralal then advised.

23. From here we proceed to narrate some further facts which both sides accept. On 27-9-1951 the investigating officer in Khagaul Case No. 9 asked that certain accused, including Sitaram Dusadh (PW 2) who was on bail, in Dinapore Case No. 21 be detained. The Magistrate ordered them to be taken into custody on 29-9-1951 and that was done. Sitaram Dusadh was again arrested on that date, this time in the Khagaul case. The appellant had no hand in this.

24. On the same day the senior Superintendent of Police made a report in Dinapore Case No. 21 that only four accused could reasonably be charge-sheeted though most of them would be required in Case No. 19. Sitaram Dusadh was not among the four. This report was initialled by the appellant on 15-10-1951. This meant that on 27-9-1951 the police recommended that Sitaram Dusadh be discharged in Case No. 21.

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25. An identification parade was held on 30-9-1951 in Case No. 19. This was the day following the arrest in Case No. 9. No witness identified Sitaram Dusadh and so, on the same day, the appellant sent a report to the Sub-Divisional Officer and recommended his release in this case as there was no evidence against him though he added that he might be wanted in the *Khagaul case*. But that has no significance because Khagaul was outside the appellant's jurisdiction and was in charge of another official. So far as his two cases in Dinapore were concerned, the police, including the appellant, made a recommendation to the Magistrate in both cases that Sitaram Dusadh (PW 2) be discharged. This is hardly the conduct of a man who has demanded, and presumably hoped to receive, at least Rs 1000 as a bribe, for that is the sum he is said to have demanded on 22-9-1951.

26. This recommendation was put up before the Sub-Divisional Officer on 1-10-1951 and he said it would be considered on the date fixed (18-10-1951). But on the same day (1-10-1951) he released Sitaram Dusadh on bail in the Khagaul Case (No. 9) and either on that or the following day in the two Dinapore Cases (Nos. 19 and 21). Anyway, Sitaram Dusadh was free on 2-10-1951. We think it unlikely that Sitaram Dusadh, who must have been present in Court, as he was under arrest, did not know on the 1st and 2nd why he was being granted bail and did not know of the recommendation for release made by the appellant, especially as it was made in open court.

27. We now go back to Sitaram Dusadh's story. According to him, after he was released (either on the 1st or the 2nd), he went to the Dinapore Police Station on 3-10-1951 with Hiralal Parnat (PW 5) and saw the appellant who demanded Rs 1000 to Rs 2000 but ultimately settled for Rs 100 for himself and Rs 25 for the Assistant Sub-Inspector. The witness says—

> "and it was agreed between me and him that I would be let off if I paid the same amounts to him".

28. Sitaram Dusadh still protested, but he says that the appellant told him that if he did not pay he would have to go to jail. Hiralal Parnat (PW 5) accompanied him and Hiralal says that

> "I told him that we would make arrangement for the same."

29. This is the examination-in-chief. But in cross-examination both witnesses go back on their stories and both are emphatic that there was never any agreement to pay anything and that on the contrary they point blank refused to pay. Thus, Sitaram Dusadh (PW 2) says that first he talked with the Assistant Sub-Inspector.

> "I had talked with him ... for about two minutes only about the bribe when he demanded and to which I refused. PW Hiralal Parnat was also present."

30. Then they went in and saw the appellant, and PW 2 says—

> "I also told him that I will not pay the bribe to him.... I never agreed to pay any bribe nor was there any idea in my mind to pay it to the accused or to any police officer."

31. Hiralal Parnat (PW 5) is equally emphatic. First of all, he contradicts what he had said in his examination-in-chief and said—

> "I did not take any part in the said talk or in the said transaction", and then said—
>
> "PW 2 Sitaram Dusadh had told in my presence during the course of the talk that he would not pay the amount as bribe under any circumstances".

32. Having made this decided and emphatic refusal Sitaram Dusadh (PW 2) says the two of them returned home and, naturally, no further details were discussed. Therefore, no assignation was arranged and no date, time, place and mode of payment for payment of the bribe was fixed.

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33. Now, standing by itself it would have been difficult for any court to accept this evidence. Consider the facts. The appellant was directed by his superior officer to make the investigation. He acted in the ordinary course of his duties and not only is there no evidence of harassment but we know that the moment the witnesses failed to identify PW 2 at the parade the appellant at once recommended their discharge from the only two cases he was investigating. From 17-8-1951 down to 20-9-1951 there was no hint or suggestion of a bribe from any of the police officers. The idea originated with Hiralal Parnat (PW 5) and, strangely enough, just about this time the appellant reported to his superior officer that there was an intrigue on foot against him by persons who were trying to get him into trouble because of the investigation in these very cases. Then, on 22-9-1951, Sitaram Dusadh and his friend Hiralal Parnat go to the police station *of their own accord* and without any invitation from the police, and without any thought of offering a bribe despite the advice of Hiralal Parnat on the 20th, but suddenly a bribe is demanded as if in telephathic answer to the thoughts of Hiralal Parnat; but the demand is firmly rejected and the two friends at once walk away and go home. The learned trying Magistrate has examined their evidence in greater detail and has given strong reasons for showing how untrustworthy they are.

34. Now to proceed with the evidence. Sitaram Dusadh (PW 2) says that on or about 11-10-1951 the appellant sent a head constable to him and asked him to come and see him. But as this information is not included in the first information report given by Sitaram Dusadh on 17-10-1951 and as neither Court has relied on it we can ignore it.

35. On 15-10-1951 the appellant initialled the recommendation of the senior Superintendent of Police that Sitaram Dusadh could not be reasonably charge-sheeted in Case No. 21.

36. Two days latter, 17-10-1951, Sitaram Dusadh accompanied by Hiralal Parnat (PW 5) went to K.N. Chatterjee (PW 1) of the Anti-Corruption Department and then things moved swiftly. Whether it was the fear of Hiralal Parnat with his boasted backing of big Congressmen and Ministers, or whether it was just the inherent efficiency of the local officials, they certainly "hustled". To start with, Chatterjee (PW 1) says that Hiralal Parnat came to him *early in October* and complained that the appellant was harassing his friend Sitaram Dusadh and implicating him in several dacoity cases with a view to extort money from him. Chatterjee told him to bring Sitaram Dusadh to him in person. It is curious that despite this Hiralal Parnat should not have taken Sitaram Dusadh to see Chatterjee before 17-10-1951 or even suggested that he should make a complaint. Sitaram Dusadh is clear about this and says that

> "prior to 17-10-1951 I had never gone to any officer of the Anti-Corruption Department at any place and prior to this date none had asked me to file report about it".

37. Sitaram Dusadh (PW 2) and Hiralal Parnat (PW 5) went to Chatterjee at 8 a.m. on the 17th. He examined Sitaram Dusadh and at once took them both to Mukherjee (PW 3), the Deputy Secretary of the Anti-Corruption Department, in his jeep. Mukherjee thereupon examined Sitaram Dusadh and got him to write down his statement and he then deputed Chatterjee to "do the needful in the matter" and also to contact the District Magistrate of Patna for the deputation of a Magistrate. This was done and I.K. Saran (PW 4) was deputed.

38. Next the usual formalities about noting the numbers of the notes to be used in the trap were gone through and at 5 or 6 p.m. the party set out for the Dinapore Police Station in a car and a jeep. Sitaram Dusadh and Hiralal Parnat went with the Magistrate Saran in his car and Mukherjee and Chatterjee followed in a jeep. Mukherjee (PW 3) says that the deputed Hiralal Parnat to find out where the appellant

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was "and ascertain from him when he would take the money". Hiralal discovered that the appellant was at a meeting of the Socialist Party in the D.A.V. School in plain clothes. So, after the officials had changed into mufti, all proceeded to the school. Sitaram Dusadh and Hiralal Parnat sat close to the appellant and the three officers mingled with the crowd, Chatterjee and Saran keeping together with Mukherjee a little behind them.

39. Shortly after Sitaram Dusadh and Hiralal Parnat took their seats *and while the meeting was still in progress*, Sitaram Dusadh says that

> "I went to the S.I. Police and *saluted him* and told him I had come, on which he asked me to wait. After this *we* again went and sat at the same place."

40. Chatterjee (PW 1) improves on this and says he saw Sitaram Dusadh *tender* something to the appellant.

41. When the meeting was over and the crowd began to disperse — there is only one exit so they all made for that — Sitaram Dusadh and Hiralal Parnat went close up to the appellant: Hiralal says "in close contact", Sitaram says "one span"; and the three officials closed in on them too. Chatterjee (PW 1) says that they were "just behind" and that there was no one between them. Mukherjee (PW 3) says he was "immediately behind" Chatterjee. Saran says he followed "one step" behind the appellant and that Mukherjee was "two steps" behind.

42. There was considerable argument before us about the state of the light. Hiralal Parnat (PW 5) says—

> "There was no bulb light *or any light* at the place where the money was paid nor was there also near about it. The lights were only near the gate or at the place where the President of the meeting was sitting".

43. But he says that there was enough light for all the faces to be visible. Saran (PW 4) says—

> "I swear that there was sufficient light for me to see that they were notes as I was immediately behind the accused at that time."

44. If this was so, there was obviously light enough for people to recognise one another. The point of this is that Saran tells us that

> "The SI of Police looked backwards for a while and then I saw Sitaram Dusadh passing on G.C. Notes in the left hand of the accused who quickly put them in the left bottom pocket of his Kurta."

45. Now the appellant knew at least two of these officers and it is evident that he was exercising caution before taking the bribe and looked behind him for that purpose. We find it very difficult to believe that he would not have recognised those officials when they were only one and two paces behind him. Their disguises did not extend to their faces and when a person is only one or two paces away in a crowd it is his face that attracts attention and not his clothes.

46. As regards the actual handing over of the money, Sitaram Dusadh says that when they were leaving, the appellant asked him whether he had brought the money and on his saying 'yes' he asked him to go over to his left side and put the money into his left hand. This also is a curious question from a man who could hardly have been expecting a bribe after the emphatic refusal of them both to pay him one and when he knew that he could no longer do anything to them because he had already recommended their discharge on the ground that there was no evidence against them and when, so far as he knew, they must have known that fact also because Sitaram Dusadh was released on bail on the strength of the police recommendations made in open Court on 1-10-1951.

47. Another curious feature is that Hiralal Parnat (PW 5) gave the prearranged signal of lighting a bidi when the money was handed over. This seems strange if the

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three officials were only one and two paces behind. And another point is that Sitaram Dusadh and Hiralal Parnat bolted from the scene as soon as the notes changed hands. Sitaram says he cannot give any reason why they did that and Hiralal says they left "without any rhyme or reason".

48. We need not travel further than this, for we have said enough to indicate that the whole affair was most unusual. There is however one more comment which we wish to make. It will be seen that Sitaram Dusadh did nothing between 3-10-1951, when the bribe is said to have been demanded, and 17-10-1951 when it is said to have been paid, but on the 17th events moved at almost breakneck speed. It is perhaps significant that when the appellant recommended their discharge in open court on 1-10-1951 the Magistrate fixed the next date for 18-10-1951. It is evident that if the matter had been delayed for another day it might have been too late.

49. Now, whatever the truth of this tale may be, it is evident from the prosecution case that this was not a case of laying a trap, in the usual way, for a man who was demanding a bribe but of deliberately tempting a man to his own undoing after his suggestion about breaking the law had been finally and conclusively rejected with considerable emphasis and decision. Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; and more particularly by those who are the guardians and keepers of the law. However regrettable the necessity of employing *agents provocateurs* may be (and we realise to the full that this is unfortunately often inevitable if corruption is to be detected and bribery stamped out), it is one thing to tempt a suspected offender to overt action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which it has been finally and firmly decided shall not be done. The very best of men have moments of weakness and temptation, and even the worst, times when they repent of an evil thought and are given an inner strength to set Satan behind them; and if they do, whether it is because of caution, or because of their better instincts, or because some other has shown them either the futility or the wickedness of wrongdoing, it behoves society and the State to protect them and help them in their good resolve: not to place further temptation in their way and start afresh a train of criminal thought which had been finally set aside. This is the type of case to which the strictures of this Court in *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*[1] apply.

50. The learned trying Magistrate disbelieved the story about the demand on the 3rd October and reached the conclusion that the notes were planted on the appellant in pursuance of a well planned conspiracy, and he suggests that the officials were duped by Hiralal Parnat (PW 5) and that in their zeal to catch the appellant they have not been too careful either in what they did or what they said. There can be no doubt that there were many irregularities in the investigation which followed and even the High Court has been constrained to remark that at least one part of their conduct was "unfortunate".

51. Now we are dealing here with a case in which the High Court has interfered with an acquittal. The law about this has been laid down repeatedly and it is needless to say that no modification of what was said in *C.M. Narayan* v. *State of Travancore-Cochin*[2], *Wilayat Khan* v. *U.P. State*[3], *Surajpal Singh* v. *State*[4] and *Sheo Swarup* v. *King-Emperor*[5] is intended here. But the presumption of innocence still remains and the fact that one Court has doubted or disbelieved the evidence strengthens the hands of the accused. It behoves the High Court in such cases to furnish strong reasons why the benefit of the doubt should not go where it has already been placed in the lower court.

52. In considering the story about the demand for Rs 1000 and ultimate

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acceptance of Rs 100, the learned trying Magistrate twice stressed the fact that both Sitaram Dusadh (PW 2) and Hiralal Parnat (PW 5) are definite in their cross-examination that the demand was firmly and flatly rejected. The High Court do not get to grips with this at all and merely say that even though Sitaram Dusadh might have been unwilling to pay, the appellant could still hope that he might at some future time be able to compel it. But that is hardly the point. The fact is that the witnesses, after saying that there was a definite settlement, go back on it and are emphatic in the end that there was never any agreement. The High Court think, in connection with two other contradictions of a like nature regarding the same incident, that there must have been either a slip on the part of the witnesses or a mistake in the recording of the statement because, in the case of *Hiralal Parnat* (PW 5),

> "it cannot seriously be urged that he meant to go back in this fashion on the very story which he had come into the witness box to support";

53. and in the case of *Sitaram Dusadh* (PW 2)—

> "As I have observed in the case of *Hiralal* there is nothing to suggest that Sitaram was going back on the case that he had made out from the very beginning."

54. But it *was* seriously urged, and what is more, the Magistrate who recorded the evidence and heard the witnesses did not think there was any slip. He relied on this very strongly and we also are unable to regard it as lightly as the learned High Court Judges; nor are we able to dismiss as trivial the circumstance that the appellant had already recommended the discharge of Sitaram Dusadh from the two dacoity cases, a fact which the High Court accepts.

55. What really seems to have weighted the scales in the High Court against the appellant is the fact that the learned Judges felt that they could not disbelieve the three official witnesses. But they have not weighed the fact that there is such a thing as over zealousness even in responsible officials. Take Chatterjee (PW 1) for example. When telling us what occurred during the meeting he says—

> "After a while I noticed that Sitaram Dusadh went and approached the said SI of Police *and tendered to him something*."

56. This is nobody's case, and Sitaram Dusadh and Hiralal Parnat who were directly concerned do not support anything of the kind. All that Sitaram Dusadh says they did was that

> "I went to the SI of Police and *saluted* him and told him that I had come on which he asked me to wait."

57. If this witness can draw on his imagination to see a wholly imaginary tender which never took place he can just as easily do so when he says that he saw the handing over of the notes.

58. Then take Saran (PW 4). He says—

> "At the time PW Sitaram gave the notes to the accused they looked folded up... I swear that there was sufficient light for me to see *that they were notes* as I was immediately behind the accused at that time."

59. That is an evident exaggeration because the notes could hardly have been flourished in a large crowd as flagrantly as that without arousing the appellant's suspicion.

60. There is another important point on which the High Court have slipped up. They say—

> "There is, besides, another consideration, namely, that if we are to believe these witnesses they were immediately behind Ramjanam Singh and close to him. He would, therefore, be unlikely to see them *unless he turned round and looked directly behind him*. In the circumstances of the case before us it is extremely

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unlikely that he would do so. He would not want to make himself conspicuous."

61. With all due respect to the learned High Court Judges, we think that that is just what a man would be likely to do in a case like that. He would want to make sure that he would not be caught. But apart from that, Saran (PW 4) says that *that is exactly what the appellant* did do. He says that before taking the notes the appellant "looked backwards", with, not merely a passing glance, but "*for a while*".

62. In our opinion, the High Court has not displaced the conclusion of the learned trying Magistrate that this is a case of careful conspiracy against the appellant in which the notes were planted on him and in which the three Government officials have been misled and duped by Sitaram Dusadh and Hiralal Parnat and that their zeal outrunning their discretion led them to draw on their imagination for facts which they believed must have occurred and thus induced them to touch up their stories just enough to make what they honestly believed to have been the fact foolproof in the witness box. This is not to say that we hold this to be the fact because that is not our function. We are only deciding whether the High Court has given true effect to the principles which must guide a court in an appeal against an acquittal. In our opinion, the reasons given by the High Court are not enough to justify the setting aside of the acquittal. The strong presumption of innocence and the doubts which the numerous circumstances to which we have adverted and which are given in greater detail in the first Court, raise have not been displaced.

63. We allow the appeal and set aside the conviction and sentence.

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[*] Appeal by Special Leave granted by the Supreme Court by its Order dated 21st April, 1953 from the Judgment and Order dated 10th April, 1953 of the High Court of Judicature at Patna in Govt. Appeal No. 5 of 1952 arising out of the Judgment and Order dated 18th February, 1952 of the Court of Magistrate First Class at Dinapore in Case No. 926 GR/261 TR. of 1951.

[1] AIR 1954 SC 322 at 334

[2] AIR 1953 SC 478 at 484

[3] AIR 1953 SC 122

[4] AIR 1952 SC 52

[5] AIR 1934 PC 227

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8. As a last resort it was contended that if the motive alleged by the prosecution is accepted then the sentence imposed would appear to be excessive. In our view, the manner in which the five shots were fired at the deceased clearly shows that the offence committed was deliberate and pre-planned. We are unable to find any cogent ground for interference with the sentence. The appeal accordingly fails and is dismissed.

1970(2) Supreme Court Cases 122

(*From Bombay*)

[BEFORE A. N. RAY AND I. D. DUA, JJ.]

SHESHANNA BHUMANNA YADAV .. Appellant ;

Versus

STATE OF MAHARASHTRA† .. Respondent.

Criminal Appeal No. 225 of 1969, decided on 8th May, 1970

Evidence Act, 1872—Sections 114(b), 133—Approver's evidence—Scope of—Test of reliability—Corroboration—Nature of—Rule as to corroboration.

The appellant, accused 1 and 2 were charged with having entered into criminal conspiracy with the approver Dinkar for the purpose of committing offences under Sections 302, 454, 414 and 201, I. P. C. The approver made a full-fledged confession. All the accused were convicted for the various offences. The High Court confirmed the conviction on the ground that there was corroboration of the evidence of Dinkar in material particulars in regard to the connection of the accused with the crime. On appeal to the Supreme Court,

Held, that the law with regard to appreciation of approver's evidence is based on the effect of Sections 133 and 114(*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 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 or 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. The first test of reliability of approver and accomplice evidence was for the Court to be satisfied that there was nothing inherently impossible in evidence. After that conclusion is reached as to reliability corroboration is required. The rule as to corroboration is based on the reasoning that there must be sufficient corroborative evidence in material particulars to connect the accused with the crime.

Cases referred to :

Sarwan Singh v. *State of Punjab*, 1957 SCR 953 ; *Lachi Ram* v. *State of Punjab*, (1967) 1 SCR 243.

Appeal *dismissed*.

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†Appeal by Special Leave from the Judgment and Order, dated 18-12-1969, of the Bombay High Court in Criminal Appeal No. 1426 of 1968 and confirmation Case No. 21 of 1968.

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The Judgment of the Court was delivered by

RAY, J.—This appeal by special leave is against the judgment, dated December 18, 1968 of the High Court at Bombay dismissing the appeal and confirming the conviction of Moti alias Narayan Sheshanna Yadav and Sheshanna Bhumanna Yadav accused Nos. 2 and 3 respectively except that the conviction of accused No. 2 of the substantive offence of the murder under Section 302 was altered and accused No. 2 was convicted of an offence under Section 302, read with Section 120-B as well as of offence under Section 302, read with Section 34 of the Indian Penal Code. The High Court confirmed the sentence of death passed against accused No. 3 Sheshanna Bhumanna Yadav. Accused No. 2 son of accused No. 3 was at the time of the judgment of High Court of 17 years of age. The High Court reduced the punishment of accused No. 2 to rigorous imprisonment for life. Accused No. 1 Hiralal was the domestic servant of Dr. Nanavati grandfather of the deceased Narendra. Accused No. 2 is the son of accused No. 3.

2. Accused No. 1 Hiralal Jamadas Joshi, accused No. 2 Moti alias Narayan Sheshanna Yadav and accused No. 3 Sheshanna Bhumanna Yadav were charged with having entered into criminal conspiracy with approver Dinkar Sakharam between December 19, 1967 and January 4, 1968 at Deolali Camp for the purpose of committing the murder of Narendrakumar and committed house breaking and thefts in the house of his grandfather Dr. Nanavati and disposed of the property so obtained and caused the evidence of murder to disappear with the intention of screening the offenders from lawful punishment and that these acts were done in pursuance of the said criminal conspiracy, an offence punishable under Section 120-B, read with Sections 302, 454, 380, 414 and 201 of the Indian Penal Code. Accused Nos. 1 to 3 were further charged with having committed the murder of Narendrakumar in complicity with approver Dinkar Sakharam and the said murder came to be committed in furtherance of common intention of all the accused an offence punishable under Section 302, read with Section 34 of the Indian Penal Code. They were further charged under Sections 201, 454, 380 and 411 of the Indian Penal Code.

3. Dr. Dalichand Nanavati the grandfather of deceased Narendrakumar who met unnatural and unfortunate end at the hands of accused No. 2 and one Dinkar Sakharam, subsequently turned approver, resided at Deolali Camp at Dhondi Road in bungalow No. 17 for about 11 years. He was a registered medical practitioner. At the relevant time he was in pharamaceutical business for the manufacture of medicines. The head-office was at Bombay. The branch was at Deolali. The owner of bungalow No. 17 was Narsanna Bhumanna Yadav brother of accused No. 3. Narsanna was a person of unsound mind and accused No. 3 was the holder of power of attorney. Accused No. 3 resided at the rear portion of bungalow No. 17. The bungalow was agreed to be sold to Dr. Nanavati. There were civil and criminal proceedings out of that transaction. Bungalow No. 17 was eventually sold to a third party on May 11, 1964. In the sale deed it was said that possession of the portion in the occupation of Dr. Nanavati would be handed over to the vendee when the proceedings pending against Dr. Nanavati concluded. Dr. Nanavati succeeded in those proceedings. Therefore, possession could not be given by the vendor to the vendee.

4. In the month of November, 1967, Dr. Nanavati's wife left Deolali for Jodhpur. Dr. Nanavati also left Deolali and went to his native place leaving his grandson Narendra, who was about 15 years of age in the care of his domestic servant accused No. 1.

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5. The prosecution case was as follows. Accused No. 3 thought that Dr. Nanavati's departure from Deolali leaving his grandson Narendra at the bungalow in charge of the domestic servant was a good opportunity to commit theft of articles in the house of Dr. Nanavati and to murder his grandson Narendra with a view to frightening Dr. Nanavati to vacate the bungalow. Accused No. 3 called Dinkar on December 19, 1967 and suggested to Dinkar that the latter should commit the murder of Narendra after December 21, 1967, when Dr. Nanavati would leave the bungalow and his grandson Narendra would be there with the domestic servant. Accused No. 3 proposed a reward to Dinkar, namely, a motor cycle and a further sum of Rs. 100/-. Accused No. 3 told Dinkar that the said accused had committed two murders prior to that date but nothing happened to him. Dinkar at first expressed his inability to undertake the job. Accused No. 3 then said that Dinkar should take accused No. 2 who was the son of accused No. 3 for the job.

6. Accused No. 2 and Dinkar started getting familiar and friendly with Narendra. They visited his house regularly. They moved about with Narendra. On December 25, 1967 accused No. 1 the domestic servant of Dr. Nanavati left Deolali and went to Bombay. Accused No. 2 and the approver Dinkar took Narendra out with the intention of murdering him but because of certain interruptions they could not muster courage to achieve that object. On December 27, 1967 accused No. 3 called Dinkar and told him and accused No. 2 that he was going to Nasik in connection with some court work and they should murder Narendra and that he would look to everything after his return from Nasik. Nasik is about 5 or 7 miles from Deolali.

7. Accused No. 2 and Dinkar took Narendra to a lonely area beyond Barne's High School on the pretext of collecting clothes from a washerman and went to the house of the latter and collected a couple of garments. Thereafter they went to a garden where they drank water and then went to a open field. There they plucked fresh groundnuts and started eating them. Accused No. 2 and Dinkar took Narendra to a jowar field. Dinkar gave a blow with his hand on the neck of Narendra as a result of which Narendra fell down. Accused No. 2 and Dinkar held Narendra tightly. Dinkar sat upon his abdomen and started chocking his throat with both his hands and accused No. 2 gagged his mouth and nose. Dinkar gave blows on Narendra's abdomen. After Narendra was chocked for about 10/15 minutes, he breathed his last.

8. Accused No. 2 then asked Dinkar to take out the key of the bungalow which he had seen Narendra putting in his pocket and Dinkar removed the key and gave it to accused No. 2. Accused No. 2 scrapted some earth and dug a small pit and placed Narendra in it, face down-words, and covered it with some loose earth. Accused No. 2 and Dinkar then returned to the house of accused No. 3 on being told that accused No. 2 and Dinkar had accomplished the murdar of Narendra accused No. 3 was happy and gave them Rs. 10/- to celebrate the occasion by seeing a picture. Accused No. 3 told accused No. 2 and Dinkar that the following day they must take out all the goods from the house of Dr. Nanavati and hand them over to him.

9. When Dinkar went to the house of accused No. 3 the following morning, Dinkar heard accused No. 2 and 3 saying that Dr. Nanavati would not be able to live in that bungalow any longer. Accused No. 2 and Dinkar then went to the bungalow of Dr. Nanavati and opened the lock with the key which had been removed from Narendra's pocket. Accused No. 2 and Dinkar locked the front door from outside and kept the back door ajar and removed a large number of articles which were in cupboards which they opened with the help of a bunch of keys which they found in the house. Accused No. 2

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and Dinkar again went to the bungalow of Dr. Nanavati on the subsequent day. They removed two cycles and several other articles and handed them over to accused No. 3. Accused No. 3 gave to the approver Dinkar a cycle and some of the property which had been recovered from the house of Dr. Nanavati.

10. Dr. Nanavati returned to Deolali along with his wife on January 4, 1968. They found the front door of the house locked. They made enquiries. Ultimately, they entered the house by breaking open the lock and found that Narendra was not in the house, that the whole house had been ransacked and the back door was ajar. Dr. Nanavati reported the matter to the police. Clue was furnished by a piece of cloth which had been stolen from the house of Dr. Nanavati. That piece of cloth had been given by accused No. 3 to the approver Dinkar who gave it to a tailor named Thakur for stitching a pair of trousers for him. Dr. Nanavati happened to go to the shop of Thakur and made enquiries about the piece of cloth which was found in the tailor's shop. Accused No. 2 and Dinkar took away the cloth from the tailor's shop when they heard of the enquiries about the piece of cloth. Dinkar gave some money to the tailor. Dinkar and accused No. 2 raised some money by pledging a cycle which they had with them. The police came to the tailor's shop, made enquiries and ultimately accused No. 2 and Dinkar were arrested on January 23, 1968. Dinkar pointed out the place of the occurrence to the police on that day. On January 24, 1968 some human bones were found at that place. On January 25, 1968 accused No. 3 was arrested. Dinkar and accused No. 2 made various statements and led the police to various places. Several articles stolen from the house of Dr. Nanavati were recovered. On February 12, 1968, Dinkar made a full-fledged detailed confession.

11. In the High Court three questions were canvassed. First whether there was corroboration in regard to the crime. Secondly, whether there was corroboration in regard to accused Nos. 2 and 3 being guilty of the offence. Thirdly, whether there was corroboration in regard to the approver's story about the conspiracy and the common intention by way of a pre-conceived plan to murder Narendra. The High Court found that there was corroboration of the evidence which connected accused Nos. 2 and 3 not only with the offence of theft but also with murder. The High Court also came to the conclusion that there was corroboration of the evidence of Dinkar in material particulars in regard to the connection of the accused with the crime and in regard to the conspiracy as well as the common intention.

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 some one 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

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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.

13. This Court stated the law of corroboration of accomplice evidence in several decisions. One of the earlier decision is *Sarwan Singh* v. *State of Punjab*, 1957 SCR 953 and the recent decision is *Lachi Ram* v. *State of Punjab*, (1967) 1 SCR 243. In *Sarwan Singhs case* (supra) this Court laid down that before the court would look into the corroborative evidence it was necessary to find out whether the approver or accomplice was a reliable witness. This Court in *Lachi Ram's case* (supra) said that the first test of reliability of approver and accomplice evidence was for the court to be satisfied that there was nothing inherently impossible in evidence. After that conclusion is reached as to reliability corroboration is required. The rule as to corroboration is based on the reasoning that there must be sufficient corroborative evidence in material particulars to connect the accused with the crime.

14. In the present appeal, counsel on behalf of the appellant contended that there was no corroboration of the actual participation in the murder and secondly that accused No. 3 could be guilty of theft but not of murder. The washerman said that Dinkar was his classmate and through Dinkar he came to know accused No. 2. The washerman further said that he used to wash the clothes of accused No. 2 and on December 27, 1967 Dinkar and accused No. 2 came to the washerman's house to take out a few clothes which he had washed for them. The washerman also said that Dinkar and accused No. 2 had with them a boy who was of fair skin and wore khaki shorts and a white shirt.

15. Mohan Lal Boob, an agriculturist gave evidence that on December 27, 1967 he was watering the crops. Three persons turned up one of whom was accused No. 2 and the other was known to him by face and the third was a boy of 14 or 15 years of age wearing khaki shorts and a shirt. Mohan Lal Boob said that he saw all of them sitting down in the field, drank water and purchase radishes from a woman who was sitting nearby.

16. It may be difficult to find corroborative evidence of the actual killing. Dinkar showed the place of occurrence. Eventually, a few things were discovered there, namely, a shirt, a chain, a skull having the upper jaw with 13 teeth, a bone, bunch of hair. These things were found on January 28, 1968, the shirt and the chain were identified by Dr. Nanavati and his wife to belong to Narendra. A girl of 14 years named Garadin Bride who was classmate of Narendra said that Narendra wore a chain similar to the one that was shown. The medical evidence was that the bones were those of a human being probably a male. Beyond that the medical evidence does not assist the prosecution. The High Court found that the death of Narendra was not disputed because it was put to Dinkar in cross-examination that it was Dinkar alone who killed Narendra. Therefore, the medical evidence as to the skull and the bone is not of importance in view of the death of Narendra. Dr. Nanavati entered the house by breaking open the lock. He found the back door left ajar. The key which was produced by Dr. Nanavati was found to fit the lock though the lock could not be operated with the key in view of the fact that Dr. Nanavati had broken it open for gaining entry into the house.

17. There is also evidence of Kisan Prasad that after Christmas day in 1967 he saw a dead body which had on it khaki shorts and white shirt. If the murder of Narendra and the theft were not parts of the same transaction, Narendra would not have been taken out to the field to be murdered there to

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eliminate the possibility of detection. The close proximity between murder and theft points to the inescapable conclusion that they formed part of the same transaction. Narendra was seen alive by Kewal Ram, owner of the betel shop on December 26, 1967. Hira Lal, the domestic servant of Dr. Nanavati left Deolali on December 25, 1967. The theft could not have been committed before the murder because in that case there would be complaint by Narendra and the house in that case would also have been broken open for committing the murder. All these features prove that the murder and the theft formed the same transaction and were committed by the same persons. Narendra was seen alive in the company of accused No. 2 and Dinkar. That was the evidence of the washerman as also of the agriculturist Mohan Lal Boob. These witnesses further identified the shorts and shirt of Narendra.

18. Accused No.2 produced the piece of cloth which was identical with the cloth of the matteress cover produced by Dr. Nanavati. Both the pieces of the cloth were of the identical design. The pledging of the cycle by accused No. 2 is of significance. The cycle was identified both by Dr. Nanavati and his wife. The next piece of evidence is that accused No. 2 sold some utensils to Gadekar. One of the utensils was found to have a name thereon scraped off. There was also a piece of handwriting with the signature of accused No. 2 at the foot of it and that was the list of the articles sold to Gadekar. There were some articles found from the tailor's shop. The evidence of the tailor was that those articles were given by accused No. 2. The discovery of the chain which Narendra wore was identified by Dr. Nanavati. Accused No. 2 sold a cycle carrier to Rupvate on January 16, 1968. The sale of that article was discovered on January 23, 1968. Dr. Nanavati identified the cycle carrier. That identification was not challenged. All these pieces of evidence prove the connection of accused No. 2 with the crime.

19. With regard to accused No. 3 it is found that there were civil and criminal proceedings between him and Dr. Nanavati. Accused No. 3 had the notice not only to make it impossible for Dr. Nanavati to stay in the bungalow but also to commit theft in his house. Accused No. 3 gave several articles to a person called Takalkar. Takalkar had dealings with accused No. 3 in the past. Takalkar said that accused No. 3 gave him some pieces from silver idols and other silver articles and wanted money by disposing of the same. Takalkar purchased the entire silver material from accused No. 3 for Rs. 175/-. Takalkar also said that at the request of accused No. 3 he kept that bag of utensils in his godown and gave the key of the godown to accused No. 3 who afterwards returned the key. The police came to the shop of Takalkar and he was asked to produce the gunny bag which he did. The articles in the gunny bag were taken and the articles excepting the lump of silver were identified by Dr. Nanavati and by his wife. The identification was not challenged in cross-examination it is obvious that silver lump could not be identified. At this stage it is to be noticed as to whether there is evidence to connect accused No. 3 with murder. The transaction was one composite unit of murdering Narendra and committing theft.

20. The discovery of articles in the godown of Takalkar was as a result of a statement by accused No. 2. The name of accused No. 3 was found in the note-book of Takalkar. The relationship of father and son between accused No. 3 and accused No. 2 is not to be lost sight of. Accused Nos. 2 and 3 went together for the sale of cycle carrier to Rupvate. The High Court rightly came to the conclusion that there was sufficient corroboration of the evidence of Dinkar in material particulars and that Dinkar was a reliable witness and it was proved that accused Nos. 2 and 3 were guilty of the offence. In view of the

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fact that there was capital sentence of accused No. 3 we went through the evidence to find out as to whether there was any infirmity in evidence. We have found none.

21. The appeal therefore fails. The accused will surrender to his bail, if any.

1970(2) Supreme Court Case 128

(From Allahabad)

[BEFORE A. N. RAY AND I. D. DUA, JJ.]

BUDHSEN AND ANOTHER .. Appellant ;

Versus

STATE OF U. P. .. Respondent.

Criminal Appeal No. 199 of 1969 and 200 of 1969, decided on 6th May, 1970

Criminal trial—Test identification parade—Evidentiary value—Conviction based solely on identification of witnesses by test identification parade—Legality.

Constitution of India—Article 136—Practice—Finding of fact—When open for interference.

The appellants and co-accused Jagdish and Sugriv were convicted by the Trial Court in a joint trial. The appellants were sentenced to death under Section 302 read with Section 34, I. P. C. and Jagdish and Sugriv to life imprisonment under Section 302, read with Section 109, I.P.C. On separate appeals preferred by all the accused the High Court by a common judgment dismissed the appeal of the appellants basing its judgment mainly on the test identification parade and allowed the appeal of the co-accused. In the appeals preferred by the appellants to the Supreme Court with special leave the appellants contended that the evidence in regard to identification parade was of an extremely weak character and their conviction based on such evidence should be set aside.

Held, that the entire case depends on the identification of the appellants and this identification is founded solely on test identification parades. The High Court does not seem to have correctly appreciated the evidentiary value of these parades though they were considered to be the primary evidence in support of the prosecution case. It seems to have proceeded on the erroneous legal assumption that it is a substantive piece of evidence and that on the basis of that evidence alone the conviction can be sustained. And then that Court also ignored important evidence on the record in regard to the manner in which the test identification parades were held suggesting that they were held more or less in a mechanical way without the necessary precautions being taken to eliminate unfairness. This is clearly an erroneous way of dealing with the test identification parades, and has caused failure of justice. The evidence in regard to identification having been discarded as legally infirm and which does not connect the appellants with the alleged offence it cannot by itself sustain the conviction of the appellants.

Held, further that it is undoubtedly true that under Article 136 this Court does not ordinarily interfere with conclusions of fact properly arrived at by the High Court on appreciation of evidence on the

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(1984) 4 Supreme Court Cases 116

(BEFORE S. MURTAZA FAZAL ALI, A. VARADARAJAN AND SABYASACHI MUKHARJI, JJ.)

SHARAD BIRDHICHAND SARDA .. Appellant;

Versus

STATE OF MAHARASHTRA .. Respondent.

Criminal Appeal No. 745 of 1983†, decided on July 19, 1984

Penal Code, 1860 — Section 302 — Death by poisoning — Murder or suicide — Psychological state, background and circumstances of the deceased relevant in showing possibility of suicide — Rule for admissibility and weight of statements and letters of deceased as 'circumstances of the transaction' resulting in death under Section 32(1), Evidence Act explained — For proving murder the standard tests for murder by poisoning must be satisfied — Circumstantial evidence should be conclusive — Effect of falsity of defence plea — Accused when entitled to benefit of doubt — Interference by Supreme Court with concurrent findings of fact when justified — Reappreciation of evidence — Criminal Trial — Evidence Act, 1872, Section 32(1) — CrPC, 1973, Section 313 — Constitution of India, Article 136 — Penal Code, 1860, Section 498-A read with Section 113-A of Evidence Act, 1872

SCHEME OF HEADNOTE

I. Murder by poisoning or a suicide
II. Circumstantial evidence
III. Evidence Act, 1872, Sections 32(1), 60 & 3 and 113-A
IV. Benefit of doubt
V. Supreme Court's interference under Article 136
VI. Miscellaneous

The appellant, a chemical engineer owning a factory, was married in February 1982 to the deceased who was a science graduate with chemistry. The deceased's mother, her maternal uncle and others had a plastic factory in partnership. According to the evidence of the deceased's parents, her maternal uncle, her sister and her friend, when she came back to her parental home for the first time after her marriage she looked quite happy. But in her two subsequent trips to her parents' place she appeared uneasy, disturbed, frightened and depressed. In both of her subsequent visits, according to the witnesses, she was profusely weeping and in the last trip she was reluctant to go back to her husband's home. The witnesses deposed that the deceased was complaining against the appellant and also that the appellant had a girl friend with whom she had been introduced. The deceased had also written some letters to her friend and sister in which she inter alia stated that

†From the Judgment and Order dated September 20, 21, 22 and 23, 1983 of the Bombay High Court in Criminal Appeal No. 265 of 1983 with confirmation case No. 3 of 1983

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she was feeling lonely though everyone in her new home was very good and loving, that due to many elderly persons in the house she could not dare to do any work independently and the fear in her mind every time was leading to confusion, that her husband was neglecting her and not caring to talk to her, that one day when self-pride in the appellant would be reduced she would be the most fortunate person but it was not certain whether she would be alive till that day, that she was undergoing a very difficult test and was unable to achieve her object, that it would be well and good only if she could control herself and that she would be compelled to evolve some other way when that would become impossible and that though she was happy she could not understand why there was so dirty or foul atmosphere in the bouse and every momen. she was feeling that something would happen.

According to the prosecution case, on the fateful night of June 11/12, 1982 the deceased along with other members of the family came to her husband's apartment from her father-in-law's residential house in the same city by an auto-rickshaw at about 11 p.m. The appellant reached the flat 15 minutes later after attending a meeting. At about 2 p.m. the appellant called his brother from the adjacent room and then he went to inform his father about deceased's death and his brother went to call their family doctor, though a doctor couple was residing in the same building. The family doctor reached the place around 2.30 p.m. and advised them to inform the police as it was an unnatural death. Thereupon another doctor was called who too advised the same. Another person 'M' also came there at 4.30 a.m. and after giving the same advice went back. Later the appellant's brother asked 'M' on phone to inform police that the deceased died at 5.30 a.m. 'M' reported accordingly at 7 a.m. The medical report opined that the deceased died due to potassium cyanide poisoning and simultaneous mechanical suffocation. Both the trial court and the High Court convicted the appellant under Section 302 and sentenced him to death. On appeal the Supreme Court set aside the judgment of the High Court and acquitted the accused-husband of the charge of murdering his wife.

Each of the three Judges constituting the Bench delivered a separate judgment, the leading judgment being that of Fazal Ali, J. with whom both Varadarajan, J. and Mukharji, J. concurred, but for certain reservations expressed by them in their respective judgments both on questions of law and on facts.

Varadarajan, J. while concurring with Fazal Ali, J.'s formulation of the rule for admissibility of statements, oral and written, as 'circumstances of the transaction which resulted in the death' under Section 32(1) of the Evidence Act, disagrees with him regarding its application to certain statements and letters in the present case. (Paras 199 to 204)

Mukharji, J., however adds a note of caution that its application be restricted to exceptional situations only. Also the rule should not be applied for proving a positive fact but as an indication of a negative fact, such as raising doubt about the existence of another fact or possibility. Mukharji, J. also expressed strong reservations regarding the many inferences drawn by Fazal Ali, J. from the evidence admitted under Section 32(1).

Arising out of his disagreement regarding the application of the rule under Section 32(1), Evidence Act, Varadarajan, J. disagrees with Fazal Ali, J., with whom Mukharji, J. concurred, regarding appreciation of evidence and

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conclusions on two issues: (1) ill-treatment of the deceased by the appellant and (2) intimacy of the appellant with another girl. He also differs in judging the conduct of the doctor who carried out the autopsy and in condemning him for the interpolations made in his report.

All the three Judges agreed that the accused was entitled to benefit of doubt.

I. MURDER BY POISONING OR A SUICIDE

A. Penal Code, 1860 — Section 302 — Murder by poisoning — Proof of — Four important circumstances to be established restated — Failure to prove possession of the poison by the accused fatal to the prosecution case — Such possession could not be presumed — Clear motive also not established

Held:

Per Fazal Ali, J.

In cases of death by poisoning the Court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:

(1) there is a clear motive for the accused to administer poison to the deceased,

(2) that the deceased died of poison said to have been administered,

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased.

Ramgopal v. *State of Maharashtra*, (1972) 4 SCC 625: AIR 1972 SC 656: 1972 Cri LJ 473; *Chandrakant Nyalchand Seth* v. *State of Bombay*, Criminal Appeal No. 120 of 1957 (SC), decided on February 19, 1958 and *Dharambir Singh* v. *State of Punjab*, Criminal Appeal No. 98 of 1958, decided on November 4, 1958 (SC), *followed*

Merely because the accused had the opportunity to administer poison and the same was found in the body of the deceased, it cannot be presumed that the accused was in possession of the poison. The prosecution in the present case has miserably failed to prove one of the most essential ingredients of a case of death caused by administration of poison, i.e., possession of poison with the accused (either by direct or circumstantial evidence) and on this ground alone the prosecution must fail. In the instant case, while two ingredients have been proved, two have not. (Paras 165, 166 and 176)

Anant Chintaman Lagu v. *State of Bombay*, (1960) 2 SCR 460: AIR 1960 SC 500: 1960 Cri LJ 682; *Pershadi* v. *State of U.P.*, AIR 1957 SC 211: 1957 Cri LJ 328 and *Ram Das* v. *State of Maharashtra*, (1977) 2 SCC 124: 1977 SCC (Cri) 254: 1977 Cri LJ 955, *distinguished*

Per Varadarajan, J.

Unless the prosecution excludes the possibility of the deceased having committed suicide by consuming the poison, no adverse inference of guilt can be drawn against the appellant from the fact that he was last seen together with his deceased wife on the fateful night, a situation which is otherwise natural (Para 197)

Per Mukharji, J. (concurring)

There is no direct evidence of administering poison. There is no

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evidence either way that either the deceased or the accused had in her or his possession any potassium cyanide. The guilt of the accused has not been proved beyond reasonable doubt. (Paras 212 and 218)

B. Penal Code, 1860 — Section 302 — Murder or suicide — Psychological aspect of deceased's personality examined on the basis of evidence to find tendency to commit suicide — Kinds of persons who are prone to commit suicide — Factors responsible for development of suicidal tendency — Finding of tendency and circumstances to commit suicide would raise a doubt regarding commission of murder

Held :

Per Fazal Ali, J

The psychological aspect of suicide is an important factor to be taken into account while reappreciating the evidence. The melancholy marriage may create so much of emotional disorder resulting from frustration and pessimism that one may become psychotic and develop a tendency to end his life. Persons with such psychotic philosophy or bent of mind always dream of an ideal ; they possess a peculiar psychology which instils extreme love and devotion but when their ideal fails or when they are faced with disappointment or find their environment so unhealthy or unhappy, they seem to lose all the charms of life and they are driven to end their life. Ruptured personal relationship plays a major part in the clinical picture. Further, the psychologically oriented theories view that suicide is a means of handling aggressive impulses engendered by frustration. Revenge fantasies are associated with suicide. In cases of women of sensitive and sentimental nature it has usually been observed that if they are tired of their life due to the action of their kith and kin, they become so desperate that they develop a spirit of revenge and try to destroy those who had made their lives worthless and under this strong spell of revenge sometimes they can go to the extreme limit of committing suicide with a feeling that the subject who is the root cause of their malady is also destroyed. Moreover, the constant fact of wailing and weeping, feeling miserable, feelings of hopelessness about the future, suicidal thoughts etc. which show depressed mood as also factors such as fear, anxiety and worry are some of the important symptoms of an intention to commit suicide. (Paras 40 to 45 and 91 to 95)

Death, Society and Human Experience by Robert J. Kastenbaum pp. 242 to 252 ; *The Melancholy Marriage* by K. Hinchliffe, Douglas Hooper and F. John Roberts ; *Social Origins of Depression* by George W. Brown and Terril Harris ; *Encyclopaedia of Crime and Justice* (Vol. 4) by Sanford H. Kadish, *relied on*

Most of the above psychological factors and symptoms appear to have been proved as existing in the deceased both from her letters and from the evidence deposed. It appears from the evidence that she was a highly emotional, sensitive and impressionate sort of woman. She used to keep all her worries and troubles to herself. She neither made any serious allegation of cruelty against her husband personally, nor she expected any danger from him, nor things had reached to such a pass that catastrophe might have resulted. But due to ill-treatment by her in-laws and neglect by her husband her dreams of a happy marriage were shattered and in reality turned into a melancholy marriage as a result of which she became lonely, dejected, depressed and disappointed. A constant conflict between her mind and body was going on. She exhibited feelings of optimism and pessimism at the same time. There was thus a possibility that her emotional disorder and

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aggressive impulse engendered by frustration and a feeling to take revenge on her husband by killing herself overpowered her to such an extent that she became psychotic and developed a tendency to end her life. She had even given hint in her letters that she might not remain alive. Thus a reasonable possibility of suicide cannot be excluded.
(Paras 40, 41, 85, 91, 92, 94, 96 and 181)

Per Varadarajan, J.

The testimony of PWs 2, 3, 5, 6 and 20 (relative and friend of the deceased) as to what the deceased allegedly told them and the deceased's letters Exs. 30, 32 and 33 written to her sister and friend are inadmissible under Section 32(1), Evidence Act. (Paras 199 to 204)

Per Mukharji, J.

Though I do not agree with the several inferences drawn by Fazal Ali, J. from the several exhibits, I agree with the inference that the deceased was extremely depressed and that there was a clear tendency resulting from her psychotic nature to end her life or commit suicide. (Para 216)

However, from English rendering of one of the letters of the deceased it appears that the deceased was sensing some 'foul' (and not 'dirty') atmosphere in the appellant's house. Read in that light and in the context of other factors, this letter causes some anxiety. If the deceased was sensing foul atmosphere, why was it? But this again is only a doubt. It does not prove the guilt of the accused. (Para 217)

II. CIRCUMSTANTIAL EVIDENCE

Criminal Trial — Circumstantial evidence — Cardinal principles for conviction on the basis of, restated — Falsity of defence plea if a circumstance against the accused — Held on facts, circumstances not sufficient to conclusively establish the guilt of the accused — Circumstance of last seen together and other circumstances examined in the light of the facts of the case — Circumstances not put to the accused under Section 313, CrPC, 1973 cannot be held against him

Criminal Trial — Circumstantial evidence — False plea or false defence taken by accused when can constitute an additional link in the chain of circumstances against the accused — Infirmities in the prosecution case cannot be cured by use of such additional link

Criminal Procedure Code, 1973 — Section 313 — Criminal Procedure Code, 1898 — Section 342 — Circumstances in respect of which accused not examined under, canuot be used against him

Circumstantial evidence — Last seen together — Where it was natural for the deceased to be with the accused at the material time, other possibilities must be excluded before an adverse inference can be drawn (Para 197)

Held :

Per Fazal Ali, J.

The following conditions must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence :

(1) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established,

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(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (Para 153)

It is vital that any circumstance adverse to the accused must be put to him under Section 313, CrPC, 1973; otherwise it must be completely excluded from consideration because the appellant did not have any chance to explain them. (Paras 143 to 145)

Hate Singh Bhagat Singh v. *State of M. P.*, AIR 1953 SC 468 : 1953 Cri LJ 1933; *Shamu Balu Chaugule* v. *State of Maharashtra*, (1976) 1 SCC 438 : 1976 SCC (Cri) 56 : 1976 Cri LJ 492 and *Harijan Megha Jesha* v. *State of Gujarat*, 1979 SCC (Cri) 652 : AIR 1979 SC 1566 : 1979 Cri LJ 1137, *relied on*

Moreover the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court. (Paras 151 and 161)

Before a false explanation or false plea taken by the accused can be used as an additional link to the chain of circumstantial evidence, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been *satisfactorily proved*,

(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation. (Paras 159 and 160)

Deonandan Misra v. *State of Bihar*, (1955) 2 SCR 570, 582 : AIR 1955 SC 801 : 1955 Cri LJ 1617 and *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra*, (1981) 2 SCC 35, 39 : 1981 SCC (Cri) 315, 318, harmonised with *Hanumant* v. *State of M. P.*, AIR 1957 SC 343 : 1953 Cri LJ 129 on this aspect.

In the present case the High Court has taken a completely wrong view of law in holding that even though the prosecution may suffer from serious infirmities it could be reinforced by additional link in the nature of false defence in order to supply the lacuna and has thus committed a fundamental error of law. Since two views are clearly possible in the present case, the question of defence being false does not arise and the argument of the High Court that the defence was false does not survive. (Paras 160 and 176)

The circumstance that the appellant was last seen with the deceased before her death, if proved, would be a conclusive evidence against the appellant. But for examining this circumstance a computerised and

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mathematical approach to the problem in fixing the exact time of the various events cannot be correct when from the evidence such precision in time does not appear to be possible. One should always give some room for a difference of a few minutes in the time that a layman would say.
(Paras 99, 102 and 103)

From the evidence the only reasonable possibility appears to be that the deceased in a combined spirit of revenge and hostility herself took potassium cyanide after entering the flat and lay lifeless. When the appellant entered the room he must have thought that as she was sleeping she need not be disturbed but when he found that there was no movement in the body after an hour or so, his suspicion was roused and therefore he called his brother from the adjacent flat to send for the doctor. Thus the circumstance of the appellant having been last seen with the deceased has not been proved conclusively so as to raise an irresistible inference that the deceased's death was a case of blatant homicide. (Paras 101, 125 and 127)

The circumstance that the accused's brother on being suspicious of the health of the deceased went about 1 1/2 km to call the family doctor instead of calling for immediate help of the doctors (a skin specialist and a child specialist) residing in the same building is not of much relevance on the facts of the case. The accused's father being a respectable person of the town, preferred to send for his family doctor rather than those who were not known to him. Moreover, in a matter of this magnitude it would be quite natural for the members of the appellant's family to send for their own family doctor who was fully conversant with the ailment of every member of the family. Indifferent conduct of the accused when the doctors came to examine his wife is a purely conjectural circumstance. Absence of an anklet from the ankle of the deceased and whether the anklet was in the *chadar* or elsewhere do not affect the question of suicide at all. The circumstance that the bedroom wherein the deceased was found dead was not found bolted from inside would itself not show that the deceased could not have committed suicide. Various persons may react to circumstances in different ways. The deceased's family having a plastic factory, potassium cyanide could have been available to her because cyanide is also used for making basic chemicals for plastics. The contention that the fact that the deceased was 4 to 6 weeks pregnant would dissuade her from committing suicide is also purely speculative. That the accused was so desperate as to kill his wife a day before his sister's betrothal is also conjectural. The other circumstances pointed out by the prosecution are not substantiated on facts.
(Paras 135 to 142 and 147)

As many as 10 out of the 17 circumstances held against the accused were not put to him under Section 313, CrPC, 1973 and must therefore be excluded from consideration. (Para 145)

Also one does not find any evidence of a clear motive on the part of the appellant to kill his wife. (Para 138)

The facts and circumstances of the present case therefore do not fully satisfy the five conditions of the rule of circumstantial evidence. It cannot be held that the act of the accused cannot be explained on any other hypothesis except the guilt of the appellant, nor can it be said that in all human probability, the accused had committed the murder of his wife.
(Paras 160 and 176)

Hanumant v. *State of M. P.*, 1952 SCR 1091 : AIR 1952 SC 343 : 1953 Cri LJ 129, *explained* and *followed*

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Tufail (Alias) Simmi v. *State of U. P.*, (1969) 3 SCC 198 : 1970 SCC (Cri) 55 ; *Ramgopal* v. *State of Maharashtra*, (1972) 4 SCC 625 : AIR 1972 SC 656 ; *Shivaji Sahabrao Bobade* v. *State of Maharashtra*, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783 ; *King* v. *Horry*, 1952 NZLR 111 ; *Anant Chintaman Lagu* v. *State of Bombay*, (1960) 2 SCR 460 : AIR 1960 SC 500 : 1960 Cri LJ 682 ; *Naseem Ahmed* v *Delhi Administration*, (1974) 3 SCC 668, 670 : 1974 SCC (Cri) 198, 200 : (1974) 2 SCR 694 : 1974 Cri LJ 617 ; *Mohan Lal Pangasa* v. *State of U. P.*, (1974) 4 SCC 607, 609 : 1974 SCC (Cri) 643, 645 : AIR 1974 SC 1144 ; *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra*, (1981) 2 SCC 35, 39 : 1981 SCC (Cri) 315, 318-19 : (1981) 2 SCR 384 : 1981 Cri LJ 325 ; *M. G. Agarwal* v. *State of Maharashtra*, (1963) 2 SCR 405, 419 : AIR 1963 SC 200 : (1963) 1 Cri LJ 235 ; *Chandrakant Nyalchand Seth* v. *State of Bombay*, Criminal Appeal No. 120 of 1957, decided on February 19, 1958 and *Dharambir Singh* v. *State of Punjab*, Criminal Appeal No. 98 of 1958, decided on November 4, 1958, *relied on*

Per Varadarajan, J.

Unless the prosecution excludes the possibility of the deceased having committed suicide by consuming the poison, no adverse inference of guilt can be drawn against the appellant from the fact that he was last seen together with his deceased wife on the fateful night, a situation which is otherwise natural. (Para 197)

At least 5 out of the 17 circumstances held by the High Court against the appellant cannot be said to point to nothing but the guilt of the accused. The rule for circumstantial evidence is not satisfied. (Para 197)

The letters written by the deceased as well as the oral testimony of the witnesses are inadmissible in evidence under Section 32(1) of the Evidence Act. Thus there is no acceptable evidence on record to show that either the appellant or his parents ill-treated the deceased or that the appellant had intimacy with any girl as alleged by the prosecution. (Paras 199 to 201)

Since the circumstances not put to the appellant in his examination under Section 313 CrPC have to be completely excluded from consideration and since no question has been put to the appellant in this regard in the course of his examination under Section 313 CrPC, even if there is any evidence about any ill-treatment of the deceased by the appellant or his parents it has to be completely excluded from consideration. (Para 199)

Per Mukharji, J.

Regarding ill-treatment of the deceased by the appellant and the latter's intimacy with another girl, I agree with Fazal Ali, J. (Para 214)

Hate Singh Bhagat Singh v. *State of M.P.*, AIR 1953 SC 468 : 1953 Cri LJ 1933 ; *Shamu Balu Chaugule* v. *State of Maharashtra*, (1976) 1 SCC 438 : 1976 SCC (Cri) 56 : and *Harijan Megha Jesha* v. *State of Gujarat*, 1979 SCC (Cri) 652 : AIR 1979 SC 1566 : 1979 Cri LJ 1137, *relied on*

The deceased died of potassium cyanide poisoning on the night of June 11 and 12. June 13 was the date fixed for the betrothal of the sister of the accused. There is no evidence that the accused was in any way hostile or inimical towards his sister. The deceased had a very sensitive mind and occasionally had suffered from mental depression partly due to the fact of adjusting in a new family and partly due to her peculiar mental make up but mainly perhaps due to the family set up of the accused husband. There is no direct evidence of administering poison. There is no evidence either way that either the deceased or the accused had in her or his possession any potassium cyanide. In these circumstances and in view of the entire evidence and the letters written by the deceased as also other circumstance, it can be concluded that the guilt of the accused has not been proved beyond all reasonable doubt. (Para 212)

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III. EVIDENCE ACT, 1872, SECTIONS 32(1), 60 & 3 AND 113-A

Evidence Act, 1872 — Section 32(1) — "Circumstances of the transaction which resulted in his death" — Meaning and scope of the expression — Nature of circumstances admissible under — Circumstances must have some proximate relation to the actual occurrence — Proximity of time and of circumstances explained — Departure from English law pointed out — Letters written by deceased and oral testimony of witnesses regarding statements and conduct of the deceased would be admissible when the same are connected with or related to the death of the deceased — Written statements of the deceased can be used to judge the probative value of the testimony regarding oral statements said to have been made by such deceased (Varadarajan, J. contra on some aspects)

Evidence Act, 1872 — Section 32(1) — Nature — 'Death' referred to in, held, includes suicidal besides homicidal death

Held :

Per Fazal Ali, J.

Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. Indian law has made a distinct departure from the English law where only the statements which directly relate to the cause of death are admissible. The second part of Section 32(1) viz. "the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question", is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused is not admitted; unless there is strong evidence to show that the statement being admitted was secured either by prompting or tutoring. (Para 21)

Section 32(1) is not confined to homicide alone but includes suicide also. Hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide. (Para 21)

Rajindra Kumar v. *State*, AIR 1960 Punj 310 : 1960 Cri LJ 851 and *State* v. *Kanchan Singh*, AIR 1954 All 153 : 1953 All LJ 615 : 1953 All WR (HC) 640 : 1954 Cri LJ 264, *approved*

The phrase "circumstances of the transaction" in Section 32(1) is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae". If the statement of the deceased is to be admissible under this section it must be a statement relating to the circumstances of the transaction resulting in his death. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. But the necessary condition of admissibility under the section is that the circumstances must have some proximate relation to the actual occurrence. However, the test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. Where death is a logical culmination of a long and continuous process, the statement regarding each step directly connected with the death would be admissible because the entire statement would have to be read as an organic whole not torn from the context. Sometimes statements relevant

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to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. Manifestly, all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32. (Paras 11 and 21)

Consequently statements which do not bear any proximity with the death or if at all are very remotely and indirectly connected with the death would not be admissible. Sometimes, the two kinds of statements may be inextricably mixed up that it would require great effort in locating the admissible from that which is not. (Para 47)

Ratan Gond v. *State of Bihar*, 1959 SCR 1336 : AIR 1959 SC 18 : 1959 Cri LJ 108 ; *Pakala Narayana Swami* v. *Emperor*, AIR 1939 PC 47 : 66 IA 66 : 180 IC 1 and *Shiv Kumar* v. *State of U.P.*, Cri. Appeal No. 55 of 1966, decided on July 29, 1966 (SC), *relied on*

Manohar Lal v. *State of Punjab*, 1981 Cri LJ 1373 (P & H) ; *Protima Dutta* v. *State*, (1977) 81 Cal WN 713 ; *Onkar* v. *State of M.P.*, 1974 Cri LJ 1200 : 1974 MPLJ 429 : 1974 Jab LJ 377 ; *Allijan Munshi* v. *State*, AIR 1960 Bom 290 : 61 Bom LR 1620 : 1960 Cri LJ 894 ; *Chinnavalayan* v. *State of Madras*, 1959 Mad LJ 246, *approved*

Gokul Chandra Chatterjee v. *State*, AIR 1950 Cal 306 : 51 Cri LJ 1201, *overruled*

Law of Evidence by Woodroffe & Ameer Ali (Vol. II), *referred to*

[**Ed** : The way the rule has been stated, in respect of what is admissible and what is not judges are bound to differ. In the present case Varadarajan, J. has disagreed with Fazal Ali, J. with regard to admissibility of oral evidence of PWs 2, 3, 5, 6 and 20 about what the deceased told them about the appellant or his family and of the letters Exs. 30, 32 and 33 written by the deceased to her sister and friend. (Paras 199 and 200)

Though Mukharji, J. has concurred with Fazal Ali, J. regarding the formulation of the test and the items found admissible by him under Section 32(1), he has, as detailed below, cautioned its use but as an exception and that too to prove the negative. (Para 215)

The caution of Mukharji, J. is all the more relevant in view of extension of Section 32(1) to suicidal deaths which cover cases of dowry deaths and of cruelty by husband or relatives of husband under Section 498-A, IPC read with new Section 113-A of the Evidence Act, 1872 which have been recently inserted by Criminal Law (Second Amendment) Act, 1983 (Act 46 of 1983).]

Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, they would fall within the four corners of Section 32(1), and, therefore, be admissible. The distance of time alone in such cases would not make the statement irrelevant. (Para 21)

In the present case the letters written by the deceased to her sister and friend during the period of four months of her marriage till her death depicting her state of mind, psychological attitude and personal traits, the amount of tension and frustration in her mind and the nature of her attitude towards her husband and in-laws, are admissible under Section 32. These would help to determine if she was ever capable of or prone to committing suicide. (Para 22)

Some of the statements said to have been made by the deceased to her parents, relatives and friends, which have a causal connection with the death

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or the circumstances leading to the death would fall in the second part of Section 32(1) relating directly to the transaction resulting in her death, and would be admissible. Thus the oral testimony of the deceased's father regarding what the deceased had told him or what he had seen about the deceased's mental condition, if directly or proximately related to the death of the deceased, would be admissible. But statements regarding usual domestic quarrels between the husband and the wife and other small incidents of married life and the cool, curt, negligent, displeased attitude of the husband towards the wife are inadmissible under Section 32. The father's statement that he saw the deceased in a disturbed, frightened and completely break-down condition who was profusely weeping, would be primary evidence of what he saw and felt and cannot be connected with Section 32. Further his statements which are inconsistent with the nature and personality of the deceased as depicted in her letters cannot be relied upon.
(Paras 47, 50 to 63 and 66)

Per Varadarajan, J.

The oral evidence of the witnesses PWs 2, 3, 5, 6 and 20 to whom the deceased allegedly spoke and the letters written by the deceased were not as to the cause of the deceased's death or as to any of the circumstances of the transaction which resulted in her death. The alleged oral statements of the deceased and her letters may relate to matters perhaps having a very remote bearing on the cause or the circumstances of her death. Those circumstances do not have any proximate relation to the actual occurrence resulting in her death due to potassium cyanide poison, though, as for instance in the case of prolonged poisoning they may relate to dates considerably distant from the date of the actual fatal dose. They are general impressions of the deceased indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of her death. It is not the case of the prosecution that the present case was one of prolonged poisoning. In view of the Privy Council's decision in *Pakala Narayana Swami case*, it is clear that the oral evidence as well as the letters were inadmissible in evidence under Section 32(1) of the Evidence Act and cannot be looked into for any purpose. (Paras 199 to 204)

Pakala Narayana Swami v. *Emperor*, AIR 1939 PC 47 : 66 IA 66 : 180 IC 1, *approved* and *followed*
Law of Evidence by Woodroffe and Ameer Ali, 14th Ed., pp 937, 941, 945 to 949 and *Law of Evidence* by Ratanlal and Dhirajlal, (1982 Reprint), pp. 94-95, *relied on*

Per Mukharji, J.

Whenever the test of proximity of the circumstances with the actual occurrence under Section 32(1) is extended beyond the immediate, it should be the exception and must be done with very great caution and care. As a general proposition, it cannot be laid down for all purposes that for instance where a death takes place within a short time of marriage and the distance of time is not spread over three or four months, the statement would be admissible under Section 32. This is always not so and cannot be so. In very exceptional circumstances like the circumstances in the present case such statements may be admissible and that too not for proving the positive fact but as an indication of a negative fact, namely raising some doubt about the guilt of the accused as in this case. (Para 215)

Evidence Act, 1872 — Sections 60 and 3 — Oral testimony about mental state of a person (deceased) as the witnesses had themselves seen and felt, admissible as primary evidence — Probative value of

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such testimony would depend upon context and would be judged against the other evidence in the case — Mere opinion evidence of a witness not admissible as evidence

Held :

The statements made by the witnesses of what they saw with their own eyes and felt the mental agony and the distress through which the deceased was passing would undoubtedly be admissible as revealing the state of mind of the deceased. This would be primary evidence in the case. (Paras 50 to 65)

As to what probative value the court should attach to such testimony would depend on the context and the other evidence in the case. Hence, if the character, conduct and temperament of the deceased, as disclosed or evinced by the admitted letters written by the deceased, demonstrates that it is most unlikely, if not impossible, for the deceased to have related in detail the facts which the witnesses deposed, then no reliance can be placed on this part of the statement of the witnesses. It is extremely difficult for a person to change a particular bent of mind or a trait of human nature unless there are substantial and compelling circumstances to do so. (Paras 59 and 66)

So also the testimony regarding behaviour and incidents relating to the deceased must be judged against the nature, temperament, habits and frame of mind of the deceased. (Paras 76 and 97)

But other evidence of the witnesses which merely in the nature of opinion evidence is not admissible. (Para 52)

Evidence Act, 1872 — Section 60 — Testimony of person who was merely informed of a fact, not admissible

Testimony of a person who was never referred to by the deceased in her letters etc. and who was not told anything directly by the deceased but was merely informed about the incident by others cannot be relied upon. (Para 49)

Evidence Act, 1872 — Section 3 — 'Proved' — Morally and conscientiously an accused may appear to be guilty on the basis of suspicion, but that cannot amount to legal proof — Graver the crime, greater should be the standard of proof — In case of capital sentence awarded by a court to the accused, the appellate court must adopt a very cautious approach to the case — Criminal Procedure Code, 1973, Section 368 — Constitution of India, Articles 21 and 136 — Criminal Trial — Appreciation of evidence

Even though the case, superficially viewed, may bear an ugly look so as to prima facie shock the conscience of any court yet suspicion, however great it may be, cannot take the place of legal proof. A moral conviction, however strong or genuine, cannot amount to a legal conviction supportable in law. The well established rule of criminal justice is that "fouler the crime higher the proof". Where the accused has been given a capital sentence and his life and liberty is thus at stake, a very careful, cautious and meticulous approach of the court is necessary. (Paras 179 and 180)

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IV. BENEFIT OF DOUBT

Criminal Trial — Benefit of doubt — When can be given — Where two possibilities, one of commission of crime and the other of innocence are reasonably possible, accused entitled to benefit of doubt

Held :

Per Fazal Ali, J. (*Varadarajan, J.* concurring)

Where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. This principle has special relevance where the guilt of the accused is sought to be established by circumstantial evidence. (Paras 162 and 163)

Shankarlal Gyarasilal Dixit v. *State of Maharashtra*, (1981) 2 SCC 35, 39 : 1981 SCC (Cri) 315, 318-19 : (1981) 2 SCR 384, 390 : 1981 Cri LJ 325 and *M. G. Agarwal* v. *State of Maharashtra*, (1963) 2 SCR 405, 419 : AIR 1963 SC 200 : (1963) 1 Cri LJ 235; *Kali Ram* v. *State of H. P.*, (1973) 2 SCC 808 : 1973 SCC (Cri) 1048 : 1974 Cri LJ 1 and *Hanumant* v. *State of M. P.*, AIR 1952 SC 343 : 1953 Cri LJ 129, *relied on*

On the evidence in this case two possibilities are clearly open viz. (1) that it may be a case of suicide, or (2) that it may be a case of murder, and both are equally probable; hence the prosecution case stands disproved. On this ground alone therefore, the appellant is entitled to the benefit of doubt resulting in his acquittal. (Paras 169, 176 and 177)

Per Mukharji, J.

In view of the fact that this is a case of circumstantial evidence and further in view of the fact that two views are possible on the evidence on record, one pointing to the guilt of the accused and the other to his innocence, the accused is entitled to have the benefit of one which is favourable to him. (Para 218)

Criminal Trial — Benefit of doubt — When any fact asserted by the prosecution turns doubtful, the benefit should go to the accused, not the prosecution (Paras 121 and 142)

V. SUPREME COURT'S INTERFERENCE UNDER ARTICLE 136

Constitution of India — Article 136 — Appeal against conviction — Supreme Court's interference with concurrent findings of fact when justified — Conviction and death sentence under Section 302 IPC affirmed by High Court — Reasonable possibility of accused's innocence not excludible on facts — High Court's approach erroneous resulting in substantial miscarriage of justice — Held, Supreme Court's interference called for — Accused acquitted on benefit of doubt — Penal Code, 1860, Section 302

Held :

Per Fazal Ali, J. (*Varadarajan, J.* concurring)

Supreme Court normally does not interfere with the concurrent findings of fact of the courts below, in the absence of very special circumstances or gross errors of law committed by the High Court. But where the High Court ignores or overlooks the crying circumstances and proved facts, violates and misapplies the well established principles of criminal jurisprudence or decisions rendered by Supreme Court on appreciation of circumstantial

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evidence and refuses to give benefit of doubt to the accused despite facts apparent on the face of the record or on its own findings or tries to gloss over them without giving any reasonable explanation or commits errors of law apparent on the face of the record which results in serious and substantial miscarriage of justice to the accused, it is the duty of the Supreme Court to step in and correct the legally erroneous decision of the High Court. In the present case the prosecution has failed to prove its case against the appellant beyond reasonable doubt. Therefore, the High Court's judgment must be set aside and the appellant acquitted of the charges framed against him. (Paras 178 and 182)

Per Mukharji, J.

With some hesitation and good deal of anxiety, it is agreed that the appellant must be acquitted of the charges against him and he should be released forthwith, though that would be interfering with the concurrent findings by two courts below on a pure appreciation of facts. (Para 211)

VI. MISCELLANEOUS

Criminal Trial — Appreciation of evidence — Testimony of a fact militating against norms and culture of Indian society, ought to be rejected (Paras 62 and 87)

Criminal Trial — Witnesses — Related witness — Testimony of, should be scanned with great caution and care

In view of the close relationship and affection any person related to the deceased would have, such a witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. (Para 48)

Evidence Act, 1872 — Section 45 — Expert — Doctor conducting post-mortem found to have interpolated and altered the report must be prevented in public interest from conducting autopsy in future (Per Varadarajan, J.) (Para 207)

Criminal Procedure Code, 1973 — Sections 313, 242 and 243 — Trial judge must exercise control over the evidence being tendered in his court and the questions put to the accused (Per Varadarajan, J.) (Para 209)

R-M/6631/CR

Advocates who appeared in this case:

Ram Jethmalani, Senior Advocate, (*M. S. Ganesh, F. N. Ranka, Ms Rani Jethmalani*, Advocates, with him), for the Appellant;

K. G. Bhagat, A.S.G. (*M. N. Shroff, U. A. Jadhavrao*, Advocates, with him), for the Respondent.

The Judgments of the Court were delivered by

FAZAL ALI, J.—This is rather an unfortunate case where a marriage arranged and brought about through the intervention of common friends of the families of the bride and bridegroom though made a good start

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but ran into rough weather soon thereafter. The bride, Manju, entertained high hopes and aspirations and was not only hoping but was anxiously looking forward to a life full of mirth and merriment, mutual love and devotion between the two spouses. She appears to be an extremely emotional and sensitive girl and at the very behest cherished ideal dreams to be achieved after her marriage, which was solemnised on February 11, 1982 between her and the appellant, Sharad Birdhichand Sarda. Soon after the marriage, Manju left for her new marital home and started residing with the appellant in Takshila Apartments at Pune. Unfortunately, however, to her utter dismay and disappointment she found that the treatment of her husband and his parents towards her was cruel and harsh and her cherished dreams seem to have been shattered to pieces. Despite this shocking state of affairs she did not give in and kept hoping against hope and being of a very noble and magnanimous nature she was always willing to forgive and forget. As days passed by, despite her most laudable attitude she found that "things were not what they seem" and to quote her own words "she was treated in her husband's house as a labourer or as an unpaid maidservant". She was made to do all sorts of odd jobs and despite her protests to her husband nothing seems to have happened. Even so, Manju had such a soft and gentle frame of mind as never to complain to her parents-in-law, not even to her husband except sometimes. On finding things unbearable, she did protest, and expressed her feelings in clearest possible terms, in a fit of utter desperation and frustration, that he hated her. Not only this, when she narrated her woeful tale to her sister Anju in the letters written to her (which would be dealt with in a later part of the judgment), she took the abundant care and caution of requesting Anju not to reveal her sad plight to her parents lest they may get extremely upset, worried and distressed.

2. Ultimately, things came to such a pass that Manju was utterly disgusted and disheartened and she thought that a point of no return had reached. At last, on the fateful morning of June 12, 1982, i.e., nearly four months after her marriage, she was found dead in her bed.

3. As to the cause of death, there appears to be a very serious divergence between the prosecution version and the defence case. The positive case of the prosecution was that as the appellant was not at all interested in her and had illicit intimacy with another girl, Ujvala, he practically discarded his wife and when he found things to be unbearable he murdered her between the night of June 11 and 12, 1982, and made a futile attempt to cremate the dead body. Ultimately, the matter was reported to the police. On the other hand, the plea of the defence was that while there was a strong

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possibility of Manju having been ill-treated and uncared for by her husband or her in-laws, being a highly sensitive and impressionate (*sic*) woman she committed suicide out of sheer depression and frustration arising from an emotional upsurge. This is the dominant issue which falls for decision by this Court.

4. Both the High Court and the trial court rejected the theory of suicide and found that Manju was murdered by her husband by administering her a strong dose of potassium cyanide and relied on the medical evidence as also that of the chemical examiner to show that it was a case of pure and simple homicide rather than that of suicide as alleged by the defence. The High Court while conforming the judgment of the trial court affirmed the death sentence and hence this appeal by special leave.

5. Before discussing the facts of the case, it may be mentioned that although the High Court and the trial court have gone into meticulous and minutest matters pertaining to the circumstances leading to the alleged murder of Manju, yet after going through the judgments we feel that the facts of the case lie within a very narrow compass.

6. The story of this unfortunate girl starts on February 11, 1982 when her marriage was solemnised with the appellant preceded by a formal betrothal ceremony on August 2, 1981. After the marriage, Manju, for the first time, went to her parents' house on February 22, 1982 for a very short period and returned to Pune on February 26, 1982. It is the prosécution case that on March 17, 1982 the appellant had called Manju at Pearl Hotel where he introduced her to Ujvala and told her that she must act according to the dictates and orders of Ujvala, if she wanted to lead a comfortable life with her husband. In other words, the suggestion was that the appellant made it clear to his wife that Ujvala was the real mistress of the house and Manju was there only to obey her orders. After this incident, Manju went to her parents' house on April 2, 1982 and returned to Pune on April 12, 1982. This was her second visit. The third and perhaps the last visit of Manju to her parents' house was on May 25, 1982 from where she returned to Pune on June 3, 1982, never to return again. The reason for her return to Pune was that her father-in-law insisted that she should return to Pune because the betrothal ceremony of Shobha (sister of the appellant) was going to be held on June 13, 1982.

7. The last step in this unfortunate drama was that Manju, accompanied by Anuradha (wife of A-2) and her children returned to the flat on June 11, 1982 near about 11 p.m. Her husband was not in the apartment at that time but it is alleged by the prosecution

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that he returned soon after and administered potassium cyanide to Manju. Thereafter, the appellant went to his brother, Rameshwar who was also living in the same flat and brought Dr Lodha (PW 24) who was living at a distance of 1½ kms. from Takshila Apartments. At the suggestion of Dr Lodha, Dr Gandhi (PW 25) was also called and both of them found that Manju was dead and her death was an unnatural one and advised the body to be sent for post-mortem in order to determine the cause of death. Ultimately, Mohan Asava (PW 30) was approached on telephone and was informed that Manju had died at 5.30 a.m. Subsequently, the usual investigation and the post-mortem followed which are not very germane for our purpose at present and would be considered at the appropriate stage.

8. The plea of the appellant was that Manju was not administered potassium cyanide by him but she appears to have committed suicide out of sheer frustration. In order to prove his bona fides the accused relied on the circumstances that as soon as he came to know about the death of his wife he called two doctors (PWs 24 and 25) and when they declared that Manju had died an unnatural death, as the cause of death was not known, and therefore the body had to be sent for post-mortem, he immediately took steps to inform the police. He flatly denied the allegation of the prosecution that there was any attempt on his part to persuade Mohan Asava (PW 30) to allow the body of the deceased to be cremated.

9. We might state that the High Court has mentioned as many as 17 circumstances in order to prove that the circumstantial evidence produced by the prosecution was complete and conclusive. Some of these circumstances overlap, some are irrelevant and some cannot be taken into consideration because they were not put to the appellant in his statement under Section 313 of the Code of Criminal Procedure in order to explain the effect of the same as we shall presently show.

10. The law regarding the nature and character of proof of circumstantial evidence has been settled by several authorities of this Court as also of the High Courts. The locus classicus of the decision of this Court is the one rendered in the case of *Hanumant* v. *State of Madhya Pradesh*[1] where Mahajan, J. clearly expounded the various concomitants of the proof of a case based purely on circumstantial evidence, and pointed out thus :

> ...the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved... it must be such as to show

1. 1952 SCR 1091 : AIR 1952 SC 343 : 1953 Cri LJ 129

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> that within all human probability the act must have been done by the accused.

This decision was followed and endorsed by this Court in the case of *Dharambir Singh* v. *State of Punjab*[2]. We shall however discuss *Hanumant case*[1] fully in a later part of our judgment. Coming now to the question of interpretation of Section 32(1) of The Evidence Act, this Court in the case of *Ratan Gond* v. *State of Bihar*[3], S. K. Das, J. made the following observations :

> The only relevant clause of Section 32 which may be said to have any bearing is clause (1) which relates to statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. In the case before us, the statements made by Aghani do not relate to the cause of her death or to any of the circumstances relating to her death ; on the contrary, the statements relate to the death of her sister.

In the *Law of Evidence* by Woodroffe and Ameer Ali, (Vol. II) the authors have collected all the cases at one place and indicated their conclusions thus :

> To sum up, the test of the relevancy of a statement under Section 32(1), is not what the final finding in the case is but whether the cause of the death of the person making the statement comes into question in the case. The expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death" ; in other words, clause (1) of Section 32 refers to two kinds of statements : (1) statement made by a person as to the cause of his death, and (2) the statement made by a person as to any of the circumstances of the transaction which resulted in his death.
>
> The words 'resulted in his death' do not mean 'caused his death'. Thus, it is well settled that declarations are admissible only insofar as they point directly to the fact constituting the res gestae of the homicide ; that is to say, to the act of killing and to the circumstances immediately attendant thereon, like threats and difficulties, acts, declarations and incidents, which constitute or accompany and explain the fact or transaction in issue. They are admissible for or against either party, as forming parts of the res gestae. (p. 952)

It would appear that the solid foundation and the pivotal pillar on which rests the edifice of the prosecution may be indicated as follows :

2. Criminal Appeal No. 98 of 1958, decided on November 4, 1958 printed on green papers in bound volumes
3. 1959 SCR 1336 : AIR 1959 SC 18 : 1959 Cri LJ 108

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(1) Written dying declaration by the deceased in her letters, two of which were addressed to her sister Anju and one to her friend Vahini,

(2) The oral statements made by the deceased to her father (PW 2), mother (PW 20), sister (PW 6) and her friend (PW 3) and also to PWs 4 and 5 showing her state of mind shortly before her death and the complaints which she made regarding the ill-treatment by her husband,

(3) Evidence showing that the appellant was last seen with the deceased in the room until the matter was reported to the police.

(4) The unnatural and incriminating conduct of the appellant,

(5) The medical evidence taken along with the report of the chemical examiner which demonstrably proves that it was a case of homicide, completely rules out the theory of suicide as alleged by the appellant.

Mr Jethmalani, learned counsel for the appellant, has vehemently argued that there was a very strong possibility of the deceased having committed suicide due to the circumstances mentioned in her own letters. He has also questioned the legal admissibility of the statements contained in the written and oral dying declarations. He has submitted that the so-called dying declarations are admissible neither under Section 32 nor under Section 8 of the Evidence Act. It was submitted by the appellant that the present case is not at all covered by clause (1) of Section 32 of the Evidence Act.

11. The leading decision on this question, which has been endorsed by this Court, is the case of *Pakala Narayana Swami* v. *Emperor*[4] where Lord Atkin has laid down the following tests :

> It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the 'circumstances' can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction : general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. . . . "Circumstances

4. AIR 1939 PC 47 : 66 IA 66 : 180 IC 1

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> of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae". *Circumstances must have some proximate relation to the actual occurrence* : . . . .
>
> It will be observed that "the circumstances" are of the transaction which resulted in the death of the declarant.

These principles were followed and fully endorsed by a decision of this Court in *Shiv Kumar* v. *State of Uttar Pradesh*[5] where the following observations were made :

> It is clear that if the statement of the deceased is to be admissible under this section it must be a statement relating to the circumstances of the transaction resulting in his death. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed,. . . . A necessary condition of admissibility under the section is that the circumstance must have some proximate relation to the actual occurrence. . . . The phrase "circumstances of the transaction" is a phrase that no doubt conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae". (See *Pakala Narayana Swami* v. *Emperor*[4].)

The aforesaid principles have been followed by a long catena of authorities of almost all the courts which have been noticed in this case. To mention only a few important ones, in *Manohar Lal* v. *State of Punjab*[6], the Division Bench of the Punjab and Haryana High Court observed thus :

> The torture administered sometimes manifests itself in various forms. To begin with, it might be mental torture and then it may assume the form of physical torture. The physical harm done to the victim might be increased from stage to stage to have the desired effect. The fatal assault might be made after a considerable interval of time, but if the circumstances of the torture appearing in the writings of the deceased come into existence after the initiation of the torture the same would be held to be relevant as laid down in Section 32(1) of the Evidence Act.

12. We fully agree with the above observations made by the learned Judges. In *Protima Dutta* v. *State*[7] while relying on *Hanumant case*[1]

5. Cri. Appeal No. 55 of 1966, decided on July 29, 1966 and printed in blue prints of Supreme Court Judgments
6. 1981 Cri LJ 1373 (P & H)
7. (1977) 81 Cal WN 713

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the Calcutta High Court has clearly pointed out the nature and limits of the doctrine of proximity and has observed that in some cases where there is a sustained cruelty, the proximity may extend even to a period of three years. In this connection, the High Court observed thus :

> The 'transaction' in this case is systematic ill-treatment for years since the marriage of Sumana with incitement to end her life. Circumstances of the transaction include evidence of cruelty which produces a state of mind favourable to suicide. Although that would not by itself be sufficient unless there was evidence of incitement to end her life it would be relevant as evidence.
>
> * * *
>
> This observation taken as a whole would, in my view, imply that the time factor is not always a criterion in determining whether the piece of evidence is properly included within "circumstances of transaction". . . . "In that case the allegation was that there was sustained cruelty extending over a period of three years interspersed with exhortation to the victim to end her life." His Lordship further observed and held that the evidence of cruelty was one continuous chain, several links of which were touched up by the exhortations to die. "Thus evidence of cruelty, ill-treatment and exhortation to end her life adduced in the case must be held admissible, together with the statement of Nilima (who committed suicide) in that regard which related to the circumstances terminating in suicide."

13. Similarly, in *Onkar* v. *State of Madhya Pradesh*[8] while following the decision of the Privy Council in *Pakala Narayana Swami case*[4], the Madhya Pradesh High Court has explained the nature of the circumstances contemplated by Section 32 of the Evidence Act thus :

> The circumstances must have some proximate relation to the actual occurrence and they can only include the acts done when and where the death was caused.... Thus a statement merely suggesting motive for a crime cannot be admitted in evidence unless it is so intimately connected with the transaction itself as to be a circumstance of the transaction. In the instant case evidence has been led about statements made by the deceased long before this incident which may suggest motive for the crime.

14. In *Allijan Munshi* v. *State*[9], the Bombay High Court has taken a similar view.

8. 1974 Cri LJ 1200 : 1974 MPLJ 429 : 1974 Jab LJ 377
9. AIR 1960 Bom 290 : 61 Bom LR 1620 : 1960 Cri LJ 894

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15. In *Chinnavalayan* v. *State of Madras*[10] two eminent Judges of the Madras High Court while dealing with the connotation of the word 'circumstances' observed thus :

> The special circumstance permitted to transgress the time factor is, for example, a case of prolonged poisoning, while the special circumstance permitted to transgress the distance factor is, for example, a case of decoying with intent to murder. This is because the natural meaning of the words, according to their Lordships, do not convey any of the limitations such as (1) that the statement must be made after the transaction has taken place, (2) that the person making it must be at any rate near death, (3) that the circumstances can only include acts done when and where the death was caused. But the circumstances must be circumstances of the transaction and they must have some proximate relation to the actual occurrence.

16. In *Gokul Chandra Chatterjee* v. *State*[11] the Calcutta High Court has somewhat diluted the real concept of proximity and observed thus :

> In the present case, it cannot be said that statements in the letters have no relation to the cause of death. What drove her to kill herself was undoubtedly her unhappy state of mind, but the statements in my view have not that proximate relation to the actual occurrence as to make them admissible under Section 32(1), Evidence Act. They cannot be said to be circumstances of the transaction which resulted in death.

17. We, however, do not approve of the observations made by the High Court in view of the clear decision of this Court and that of the Privy Council. With due respect, the High Court has not properly interpreted the tenor and the spirit of the ratio laid down by the Privy Council. We are, therefore, of the opinion that this case does not lay down the correct law on the subject.

18. Before closing this chapter we might state that the Indian law on the question of the nature and scope of dying declaration has made a distinct departure from the English Law where only the statements which directly relate to the cause of death are admissible. The second part of clause (1) of Section 32, viz., "the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question" is not to be found in the English Law. This distinction has been clearly pointed out

10. 1959 Mad LJ 246
11. AIR 1950 Cal 306 : 51 Cri LJ 1201

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in the case of *Rajindra Kumar* v. *State*[12] where the following observations were made :

> Clause (1) of Section 32 of the Indian Evidence Act provides that statements, written or verbal, of relevant facts made by a person who is dead,...are themselves relevant facts when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.... It is well settled by now that there is difference between the Indian Rule and the English Rule with regard to the necessity of the declaration having been made under expectation of death.
>
> In the English Law the declaration should have been made under the sense of impending death whereas under the Indian Law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under the expectation of death.

19. And in the case of *State* v. *Kanchan Singh*[13] it was observed thus :

> The law in India does not make the admissibility of a dying declaration dependent upon the person's having a consciousness of the approach of death. Even if the person did not apprehend that he would die, a statement made by him about the circumstances of his death would be admissible under Section 32, Evidence Act.

20. In these circumstances, therefore, it is futile to refer to English cases on the subject.

21. Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge :

(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

12. AIR 1960 Punj 310 : 1960 Cri LJ 851
13. AIR 1954 All 153 : 1953 All LJ 615 : 1954 Cri LJ 264

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(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.

22. This now brings us to a close consideration of the contents of the letters (Exs. 30, 32 and 33) written by Manju to her sister and friend. We propose to examine the contents of the letters for four purposes :

(1) in order to find out the state of mind and psychological attitude of Manju,

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(2) the nature of Manju's attitude towards her husband and in-laws,

(3) the amount of tension and frustration which seems to be clearly expressed in the letters, and

(4) to determine Manju's personal traits and psychological approach to life to determine if she was ever capable of or prone to committing suicide.

23. We start with the letter dated May 8, 1982 (Ex. 30) which was addressed to her sister Anju and is printed at page 191 of Part I of the printed Paperbook. The learned counsel for the appellant in order to make our task easy has supplied the English translation as also the Roman script of the original letter. On a comparison of the two versions, we are of the opinion that by and large the English translation printed in the Paperbook is a true and faithful rendering of the contents of the original letter. It is not necessary for us to extract the entire letter but we propose to extract only the relevant portions which seek to explain and illustrate the four purposes mentioned above :

> All read the letter with curiosity, or it may go to anybody's hand. I do not want to take any such risk. So I have taken up today for writing, the second letter to you. (p. 191)

The Roman script runs thus :

> Khat to sabhi utsukta se padte hain. Kahin kisi ke hath pad saktahai. Aisi risk leni nahin hai. Isliye maine tumhe aaj doosra khat likhneko liya. (p. 17)

24. An analysis of the above clearly shows that Manju was a highly secretive woman and wanted to keep her personal matters or secrets to herself except giving a rough idea or a passing glimpse of her feelings only to those who were very close to her as friends or near relations. The extract shows that perhaps in a spell of heavy emotions she had written a very long letter to her sister whom she regarded as her best friend but on second thought she tore it off lest it may fall in anybody's hands and she was not prepared to take such a risk. This mentality and noble nature would be of great assistance to us in assessing the probative value of the statements made by her to her parents, sister and friend during her last visit to Beed. The second paragraph, which is extracted below, reflects her state of mind and the tension and torture which she was undergoing :

> *Now in this letter, when (out of) the things coming to my mind which cannot be written, I do not understand what is to be written. The state of mind now is very much the same.*

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> *Enough.* You understand (me). *I am undergoing a very difficult test.* I am unable to achieve it. *Till I could control (myself), well and good. When it becomes impossible, some other way will have to be evolved. Let us see what happens. All right.* (p. 191)

25. She has hinted that she was passing through difficult times but was trying to control herself as much as she could. She has further indicated that if things did not improve then *she may have to evolve some other method.* The exact words used in the Roman script runs thus :

> Jab tak sambhal sakti hoon theek hai jab aasambhab ho jayega to phir rasta nikalna padega, dekhenge kya kya hota hai, (p. 17)

26. The words "some other way will have to be evolved" clearly gives a clue to her phychotic state of mind and seem to suggest that the other method to get rid of all her troubles was to commit suicide. It is pertinent to note that in the first two paragraphs of her letter extracted above there is no indication nor any hint about the conduct of her husband.

27. In the third para of her letter she states her feelings thus :

> I thought much that since the house of my husband's parents is at Pune, I would do this and that or the people from the house of my husband's parents are free. However, I have gradually come to know that in that house, the worth of a daughter-in-law is no more than that of a labourer. (p. 191)

The relevant portion in the Roman script reads thus :

> Is ghar mein bahu ki keemut majdoor se jyada nahin hai. (p. 18)

28. At the end of the third paragraph she repeats her sad plight thus :

> My state here however is like an unclaimed person. Let it be gone. I do not like to weep (over it). When we will meet, we will talk all the things.

29. In the middle of the fourth paragraph she comes out with an emotional outburst by indicating that all her hopes had been shattered and because of being neglected by her husband her health was adversely affected. In the Roman script she used the following words :

> Sachmuch kya kya sapne rahte hain kuarepanmein, magar toote huye dekhkar dilpar kya gujarti hai. Vaise tu maine

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kuch bhi sapne nahin dekhe the, bas ek hi sapna tha ki mera pati mujhse bahut pyar kare, magar abhi wo bhi na pakar dilki halat per kaboo nahin pa sak rahi. Tabiyat par uska asar dikh raha hai. (pp. 19-20)

30. In the latter part of the eighth paragraph while giving vent to her feelings she states thus :

> Now Manju is moving, it is necessary to tell that she is alive. You don't tell anybody about this letter. I felt like telling all this to Bhausab. What, however, is the use of making him sorry. One should test one's fate, whatever may be the result. I want to tell you all. But I cannot tell.

31. The words used by her show her affectionate and secretive nature and the precaution taken by her not to tell anything to her father, who is addressed as 'Bhausab'. The Roman script of the relevant portion runs thus :

> Dil tu karta tha Bai Bhau Sahab ko sab bataon, magar unko dukh dekar kye phaida. Apne apne naseeb dekhenge, natija kya nikalta hai. Mujhe tumhein sab kuch batana hai, magar bata nahin sakti. (p. 22)

32. These extracts throw a flood of light on the nature, character, mental attitude, suffering and shock of the deceased. One thing which may be conspicuously noticed is that she was prepared to take all the blame on her rather than incriminate her husband or her in-laws. The other portions of the letter (Ex. 30) are not at all germane for the purpose of this case. Summarising the main contents of the letter, the following conclusions or inferences follow :

(*a*) Manju was a highly emotional and sensitive woman,

(*b*) she got the shock of her life when due to ill-treatment by her husband and in-laws she found that all her dreams had been shattered to pieces after marriage leaving her a dejected, depressed and disappointed woman,

(*c*) she had been constantly ill-treated by her in-laws and her position in the house was nothing but that of an unpaid maidservant or a labourer,

(*d*) she wanted to keep all her worries and troubles to herself and on no account was she prepared to disclose them to her parents or even to her sister, lest they also get depressed and distressed,

(*e*) no serious allegation of cruelty had been made against the husband personally by her and she thought that she herself should suffer out of sheer frustration.

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33. Now we shall examine Ex. 32 which is a letter dated June 8, 1982 written by Manju to her sister Anju. This was perhaps her last letter to Anju and is very important and relevant for decision of the case. The letter begins with the words "*I am happy here*". In the second paragraph she expresses her feelings as follows :

> Shobhabai's *'Sadi' programme is fixed on thirteenth.* I do not know why there is such a dirty atmosphere in the house ? *It is felt every moment that something will happen.* Everybody is in tension. *No work has been started in the house. Let it go. I am out of mind. Still I am used not to pay heed to it. Ala what about your law.* (p. 195)

34. So far as the first part is concerned, the 'dirty atmosphere' about which she speaks is totally unrelated to anything done by the husband or of any cruel treatment by him ; it merely refers to the tension prevailing in the family as the 'Sadi' (Kohl) was fixed on June 13, 1982. Her anger is not so much towards her husband or herself as for the manner in which things were being done. She complained that no work had been started and being the eldest daughter-in-law of the family she felt it her duty to see that all arrangements were complete. It was conceded by the Additional Solicitor-General that this portion of the letter does not refer to any ill-treatment by the husband or his parents but relates only to the defective and unsatisfactory arrangements for such an important function. The relevant portion of the third paragraph is also more or less innocuous but in between the lines it contains a tale of woe, a spirit of desperation and frustration and a wave of pessimism. The actual vernacular words are—

> Mera to aane ka kya hota hai dekna hai. Buaji ke yahan se khat aur aaya to shahid chance mil sakta hai. Magar meri mangal ke dulhan ke roop mein dekhne ki bahut ichha hai. Dekhenge.

35. She was naturally apprehending something and was not very hopeful of going to her father's place. This being her last letter, and that too a short one, it gives a clear inkling of the manner of how her mind was working. She did not lay any blame on her husband or anybody else but still she was afraid that something was going to happen and that she may not be able to go to her father and see the marriage of her sister-in-law for which preparations were being made. In our opinion, these words are extremely prophetic and seem to indicate that by that time she had almost made up her mind to end her life instead of carrying on her miserable existence. As brevity is the soul of wit, she directly hinted that she may not be able to meet her father or anybody naturally because when a life comes to

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an end there can be no such question. Ex. 32, though a short letter, depicts her real feeling and perhaps a tentative decision which she may have already taken but did not want to disclose for obvious reasons.

36. Then we come to Ex. 33 which is a letter dated April 23, 1982 written by the deceased to her close friend, Vahini and which shows her exact feelings, changing mood and emotions. This is the only letter where she had made clear complaints against her husband and the relevant portions may be extracted thus :

> Really, Vahini, I remember you very much. *Even if I am little uneasy*, I feel that you should have been near with me.
>
> All persons here are very good. Everybody is loving. Still I feel lonely. One reason is that, in the house there are many persons and they are elder to me and as such I do not dare to do any work independently. Every time some fear is in mind which leads to confusion.
>
> God knows when I can come there ? *The point on which we had discussion is as it was. Vahini, I swear you if you talk to anyone. I am much in pains* But what else can I do ? No other go than that, and the same mistake is done again and again by me. It is that I go ahead and talk for ten times, then I become angry if he does not speak. Vahini, there is nothing in my hands except to weep profusely. At least till now this man has no time to mind his wife, let it be, but Vahini, what shall I do ? (p. 196)
>
> Who knows what hardships befall on me, so long I am alive. Why the god has become (unkind) towards me. (p. 197)
>
> Since yesterday I have up my mind not to speak a word even, till he speaks (to me). Let me see to what extent I control my feelings. Vahini, you also pray to God for me whether a girl like me should be put to such a difficult test. Vahini, I am so much afraid of him that the romantic enchantment during first 10-15 days after marriage has become like a dream.
>
> I cannot dare to ask him whether his clothes be taken for wash. At present my status is only that of a maidservant without pay as of right.
>
> Why so much indifference towards me only ? Vahini, I feel to weep in your arms. Vahini, come to Pune early.
>
> On getting up every morning I feel he will speak today but every day I am hoping against hope. Vahini, what will happen ? Now there is no ray of hope.

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Day before yesterday I became excited and uttered in rage, "You hate me, was I unable to get food in my parents' house ?" He was irritated due to word 'hate'. He said, "if you talk more like this, I will be very bad man".

If this goes on, I will not come to sleep. That means not permitted (to cry) also. *How he says to me, are you tired of me so early ? What shall I say to such a man. Once I feel that he does not count me. On second thought, I feel he cares me much.* But due to moody nature, it will take time to pacify the same. On the day on which *self-pride is lessened, no other person will be more fortunate than me. But till that day it is not certain that I will be alive.* (p. 197)

37-38. In the second paragraph she starts by giving an indication that she was feeling uneasy and would have very much liked to have Vahini with her. In the third paragraph she clearly states that all persons in her father-in-law's place were very good and loving but due to a number of persons in the house she did not get a chance to work independently. The last line "every time some fear is in mind which leads to confusion" is the starting point of the first symptom of her invisible fear which she was unable to locate. The fourth paragraph is rather important which shows that whatever her feelings may have been she sought an oath from Vahini not to talk to anyone regarding the matters which she proposed to write in the said letter. She says that she was much in pains and hints that she weeps profusely and the reason given by her for this is that she went on committing mistakes and talked to her husband many times but his silence was extremely painful which made her angry. In the last portion, for the first time, she makes a direct complaint against her husband to the effect that he had no time to look after her (Manju). In the same paragraph she describes her hardships and complains why God was unkind to her. She further expresses her sentiments that the romantic enchantment which she experienced during the first few days of her marriage had completely disappeared and looks like a lost dream or a "Paradise lost". Then she describes her plight as being a maidservant without pay. She again complains of indifference towards her. Ultimately, she hopes against hope that some day he will speak to her and discuss the problems but there is no response. Later, she refers to a particular incident and goes to the extent of telling him that he hates her. This seems to have irritated the husband who resented this remark very much. Again in the same breath towards the end of the paragraph, while she says that her husband does not care for her yet she at once changes her mind and says that he cares for her much but due to his moody nature it will take time to pacify him. Her feelings again take a sudden turn when

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she says that when her husband's self-pride is lessened none would be more fortunate than her. The next line is rather important because she hints that till the said heyday comes perhaps she might not be alive.

39. A careful perusal of this letter reveals the following features—

(1) After going to her marital home she felt completely lost and took even minor things to her heart and on the slightest provocation she became extremely sentimental and sensitive.

(2) She exhibited mixed feelings of optimism and pessimism at the same time.

(3) It can easily be inferred that she did not have any serious complaint against her husband but she became sad and morose because she was not getting the proper attention which she thought she would get.

(4) There is no indication that she expected any danger from her husband nor is there anything to show that things had come to such a pass that a catastrophe may have resulted. There may be certain concealed and hidden hints which she was not prepared to reveal in writing ; what they were is not clear.

(5) A close reading and analysis of the letter clearly shows at least two things—

(*a*) that she felt extremely depressed,

(*b*) that there was a clear tendency resulting from her psychotic nature to end her life or commit suicide.

This possibility is spelt out from the various letters which we have extracted. Indeed, if this was not so how could it be possible that while not complaining against her husband she gives a hint not only to Vahini but also to Anju that she might not live. She mentions of no such threat having been given to her by her husband at any time or anywhere.

(6) The contents of the letter lead us to the irresistible conclusion that Manju felt herself lonely and desolate and was treated as nothing but a chattel or a necessary evil ever since she entered her marital home.

40. Thus. from the recitals in the letters we can safely hold that there was a clear possibility and a tendency on her part to commit suicide due to desperation and frustration. She seems to be tired of her married life, but she still hoped against hope that things might improve. At any rate, the fact that she may have committed suicide cannot be safely excluded or eliminated. It may be that her husband

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may have murdered her but when two views are reasonably possible the benefit must go to the accused. In order to buttress our opinion, we would like to cite some passages of an eminent psychiatrist, Robert J. Kastenbaum where in his book *Death, Society and Human Experience* he analyses the causes, the circumstances, the moods and emotions which may drive a person to commit suicide. The learned author has written that a person who is psychotic in nature and suffers from depression and frustration is more prone to commit suicide than any other person. In support of our view, we extract certain passages from his book :

> The fact is that some people who commit suicide can be classified as psychotic or severely disturbed. (p. 242)
>
> If we are concerned with the probability of suicide in very large populations, then mental and emotional disorder is a relevant variable to consider. (p. 243)
>
> And it is only through a gross distortion of the actual circumstances that one could claim all suicides are enacted in a spell of madness. (p. 243)
>
> Seen in these terms, suicide is simply one of the ways in which a relatively weak member of society loses out in the jungle-like struggle. (p. 243)
>
> The individual does not destroy himself in hope of thereby achieving a noble post-mortem reputation or a place among the eternally blessed. Instead he wishes to subtract himself from a life whose quality seems a worse evil than death. (p. 245)
>
> The newly awakened spirit of hope and progress soon became shadowed by a sense of disappointment and resignation that, it sometimes seemed, only death could swallow. (p. 245)
>
> Revenge fantasies and their association with suicide are well known to people who give ear to those in emotional distress. (p. 251)
>
> People who attempt suicide for reasons other than revenge may also act on the assumption that, in a sense, they will survive the death to benefit by its effect.
>
> * * *
>
> The victim of suicide may also be the victim of self-expectations that have not been fulfilled. The sense of disappointment and frustration may have much in common with that experienced by the person who seeks revenge through suicide. . . . However, for some people a critical moment arrives when the discrepancy is experienced as too glaring and painful to be tolerated.

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> If something has to go it may be the person himself, not the perhaps excessively high standards by which the judgment has been made.... Warren Breed and his colleagues found that a sense of failure is prominent among many people who take their own lives. (p. 252)

41. The above observations are fully applicable to the case of Manju. She solemnly believed that her holy union with her husband would bring health and happiness to her but unfortunately it seems to have ended in a melancholy marriage which in view of the circumstances detailed above, left her so lonely and created so much of emotional disorder resulting from frustration and pessimism that she was forced to end her life. There can be no doubt that Manju was not only a sensitive and sentimental woman but was extremely impressionate (*sic*) and the letters show that a constant conflict between her mind and body was going on and unfortunately the circumstances which came into existence hastened her end. People with such a psychotic philosophy or bent of mind always dream of an ideal and if the said ideal fails, the failure drives them to end their life, for they feel that no charm is left in their life.

42. Mary K. Hinchliffe, Douglas Hooper and F. John Roberts in their book *The Melancholy Marriage* observe that—

> Studies of attempted suicide cases have also revealed the high incidence of marital problems which lie behind the act. In our own study of 100 consecutive cases (Roberts and Hooper 1969), we found that most of them could be understood if the patients' interactions with others in their environment were considered. (p. 5)

43. Such persons possess a peculiar psychology which instils extreme love and devotion but when they are faced with disappointment or find their environment so unhealthy or unhappy, they seem to lose all the charms of life. The authors while describing these sentiments observe thus :

> 'Hopelessness', 'despair', 'lousy' and 'miserable' draw attention to the relationship of the depressed person to his environment. The articulate depressed person will often also struggle to put into words the fact that not only does there appear to be no way forward and thus no point to life — but that the world actually looks different. (p. 7)

44. Coleridge in *Ode to Dejection* in his usual ironical manner has very beautifully explained the sentiments of such persons thus :

> I see them all so excellently fair —
> I see, not feel, how beautiful they are ;

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45. At another place the authors (Hinchliffe, Hooper, and John) come to the final conclusion that ruptured personal relationships play a major part in the clinical picture and in this connection observed thus :

> Initially we applied these ideas to study of cases of attempted suicide (Roberts and Hooper 1969) and although we did not assume that they were all necessarily depressed, we looked for distal and proximal causes for their behaviour and found that *ruptured personal relationships played a major part in the clinical picture.* (p. 50)

The observations of the authors aptly and directly apply to the nature, mood and the circumstances of the unfortunate life of Manju which came to an end within four months of her marriage.

46. We have pointed out these circumstances because the High Court has laid very great stress on the fact that the evidence led by the prosecution wholly and completely excludes the possibility of suicide and the death of Manju was nothing but a dastardly murder.

47. We shall now deal with the next limb of the oral dying declaration said to have been made by the deceased to her parents and friends. Some of the statements which have a causal connection with the death of Manju or the circumstances leading to her death are undoubtedly admissible under Section 32 of the Evidence Act as held by us but other statements which do not bear any proximity with the death or if at all are very remotely and indirectly connected with the death would not be admissible. Unfortunately, however, the two kinds of statements are so inextricably mixed up that it would take a great effort in locating the part which is admissible and the one which is not.

48. Before discussing the evidence of the witnesses we might mention a few preliminary remarks against the background of which the oral statements are to be considered. All persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously

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by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it.

49. This now takes us to a consideration of the evidence of the witnesses concerned which read together with the letters form a composite chain of evidence regarding the causes or the circumstances relating to the death of the deceased. According to the prosecution, the last visit of Manju to Beed was on May 25, 1982 where she stayed till June 3, 1982 when she was brought back by the father of the appellant. In other words, the narration of the troubles and tribulations of Manju was made only during her last visit and not earlier. These statements are alleged to have been made to Rameshwar Chitlange (PW 2), Manju's father, Rekha (PW 3), who was Manju's friend and referred to as 'Vahini' in the letter Ex. 33, Anju (PW 6), Manju's sister to whom letters (Exs. 30 and 32) were written, and PW 20, Bai, the mother of Manju. Meena Mahajan (PW 5) was also examined but we are not in a position to rely on the evidence of this witness for two reasons — (1) she does not figure anywhere in any of the letters written by Manju, and (2) nothing was told to her by Manju directly but she was merely informed regarding the incidents mentioned by PW 2. This sort of indirect evidence is not worthy of any credence.

50. We would first deal with the evidence of PW 2, Rameshwar Chitlange (Manju's father). We shall give a summary of the relevant part of his evidence because the other parts relate to how the marriage was performed and the spouses had gone for honeymoon which are not germane for our purpose. The witness states that when Manju came to Beed with her maternal uncle he found her somewhat uneasy and on making enquiries whether she was happy at her husband's house she told him that she was not *very happy* with her husband since she noticed that her husband was not very much pleased with her and in fact hated her. These facts are the result of the usual domestic quarrels between a husband and a wife, hence this statement cannot be said to be so directly or proximately related to the death of Manju so as to be admissible under Section 32 of the Evidence Act.

51. It appears from his evidence that even after hearing the narration from his daughter he advised her to get herself adjusted to the situation and to the atmosphere of her new marital home. Apart from being inadmissible this does not appear to be of any assistance to the prosecution in proving the case of murder alleged against the appellant. The witness goes on to state that as the grandfather of the accused had died he visited Pune, accompanied by his wife and Manju. Since this was more or less a formal visit for expressing

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his condolences to the bereaved family, he left Manju at the house of the accused. The only part of his evidence on which reliance was placed by the prosecution is that he had noticed Manju very much disturbed and uneasy and requested Birdichand (father of the accused) to allow him to take Manju to the house of Dhanraj, which he did. On reaching the house of Dhanraj, the witness states that Manju completely broke down and started weeping and fell in the grip of her mother. This state of Manju, which the witness saw with his own eyes, would undoubtedly be primary evidence of what he saw and felt though not in any way connected with Section 32 of the Evidence Act. But from this circumstance alone it cannot be safely inferred that Manju apprehended any serious danger to her life from her husband.

52. The witness further states that he informed Birdichand about the grievances made to him by Manju. The appellant, Sharad, was sent for and he quietly listened to his father but the witness felt that whatever Birdhichand may have told to his son that does not appear to have made any serious impact on him (appellant) and he left the room. This is purely an opinion evidence and therefore not admissible. Even so, the accused perhaps did not think it necessary to enter into arguments with his father-in-law in the presence of his father and that is why he may have kept quiet. From this no inference can be drawn that he was in any way inimically disposed towards Manju or was animated by a desire to take her life.

53. The witness further stated that he found that Manju was weeping every now and then during the night at Dhanraj's place. Later, in the morning the witness took Manju back to her in-laws' house but his grievance was that Sharad did not care to meet or talk to them. These are however small circumstances which are incidents of any married life and from this no adverse inference can be drawn against the appellant.

54. Another complaint made in the statement was that when he made a voluntary offer to solve the difficulties of Sharad, the appellant curtly told him that he did not want to get his difficulties solved by other persons and at this attitude of Sharad the witness was naturally very much disappointed. This conduct of the accused also is not of such an importance as to lead to any adverse inference. Some persons who have a keen sense of pride and self-respect do not like anyone else not even their father or father-in-law to interfere in their personal matters. Perhaps this may be the reason for the somewhat cool and curt attitude of Sharad but that proves nothing. In fact, experience shows that where elders try to intermeddle in the affairs of a husband and his wife, this creates a serious obstruction in the relations of the married couple. Nothing therefore, turns upon this statement of PW 2.

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55. Again, the witness repeats that when Manju came down to see him off he noticed her weeping all the time. To cut a long story short, the witness came back to Beed and sent his son Pradeep to bring Manju from Pune to Beed. On reaching there he was informed that Manju and Sharad had gone on a holiday trip to Mysore, Tirupati, etc. After the return of Pradeep to Beed, Dhanraj informed the witness that Sharad and Manju had returned to Pune and therefore, he sent his son, Deepak to Pune to bring back Manju. When Manju arrived at Beed, the witness found her totally disturbed and frightened. This statement would be admissible as primary evidence. What probative value should be attached to this small matter is a different issue.

56. Thereafter, the witness was told the incidents by his wife (PW 20) which had been narrated to her by Manju but that is of no value so far as this witness is concerned as the main evidence would be that of PW 20. However, in order to save the marriage from a total breakdown the witness was extremely worried and therefore, he called one Hira Sarda, a close acquaintance of the family of accused, who told him (witness) that he was going to Hyderabad and after June 4-5 some solution would be found out. At the same time, he advised the witness not to make any haste in sending back Manju to Pune.

57. On June 2, 1982, Birdhichand arrived at Beed and requested the witness to send Manju to Pune because the marriage of Birdhichand's daughter was fixed for June 30, 1982 and the Kohl (betrothal) ceremony was to be held on June 13 so that Manju may be present at the ceremony and look after the arrangements. The witness says that after hearing this he apprised Birdhichand that Manju was extremely frightened and that she was not ready to go back to her husband's house nor was he (witness) willing to send her back so soon. He suggested to Birdhichand that as the marriage of his nephew was to be celebrated at Beed on June 25, Sharad would come to attend the marriage and at that time he can take Manju with him. Birdhichand, however, persuaded the witness to send back Manju and assured him that no harm of any kind would come to her and he also promised that Manju would be sent back to Beed. The most important statement in the evidence of this witness may be extracted thus :

> I was having this talk with Birdhichand on the first floor of my house. *Manju heard this from the staircase,* called me out in the ground portion of the house and told me that she was not in a position to go to the house of the accused. *Since she was in a state of fear or extreme fear in her mind and she also told me that she was not prepared to go to the house of the accused.*

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* * *

Thereafter, after the meals I sent Manju with Birdhichand. Birdhichand, Manju and Kavita then left Beed by about 12.30 p.m. by bus on June 3, 1982. At that time Manju was constantly weeping right from inside my house till the bus left. She was also in a state of extreme fear. (p. 197)

58. The witness has said many times in his statement that Manju was always weeping and crying and the final crisis came when on hearing the talks between him and Birdhichand she called him from the staircase and told him that she was not prepared to go to her husband's house as she was in a state of extreme fear. It is difficult to believe this part of the evidence of the witness for two reasons—

(1) When the talks were going on between two elders would Manju be sitting near the staircase to listen their talks and call her father and give vent to her feelings and her decision not to go back to Pune at any cost. This conduct appears to be directly opposed not only to the tenor and spirit of the letters (Exs. 30, 32 and 33) which we have discussed but also against her mental attitude and noble nature.

(2) As indicated by us while discussing the letters — could a woman who was so affectionate and reserved in nature and who would not like the contents of her letters to Anju and Vahini to be disclosed to her parents lest they feel worried, disturbed and distressed — suddenly turn turtle, forgetting her sentiments not to worry them and come out in the open to declare before all by weeping and crying that she was in a state of extreme fear, seem to us to be inherently improbable. Once a mature woman develops a particular nature or habit or a special bent of mind she is not likely to forgo her entire nature — in this case, her affection and love for her parents and the feeling of not doing anything which may cause distress or worry to them, and start telling her woeful story to everyone whom she met.

59. Manju must have known fully that her husband's sister's betrothal ceremony was to be held on June 13 and if her father-in-law was making request after request to take her to Pune to attend the said ceremony, and had given all sorts of assurances that no harm would come to her, would she still call her father and express her state of fear and go on repeating what she had already said. This seems to us to be an afterthought or an embellishment introduced in the evidence of the witness so as to add credence to the prosecution story and provide an imaginary motive for the murder of the deceased. Indeed, if she was bent on resisting all attempts of her father-in-law

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.o take her to Pune she would not have gone at all. On the other ıand, her subsequent conduct of ultimately going to Pune and making arrangements for the Kohl ceremony belies the story put forward ɔy the witness. It is extremely difficult for a person to change a particular bent of mind or a trait of human nature unless there are substant al and compelling circumstances to do so. In the instant case, we find no such compelling circumstance even taking the statement of the witness at its face value.

60. To take the other side of the picture, the witness says that when he reached Pune on June 12, 1982 and visited the place where Manju had died, he found Sharad sleeping or lying on the cot and on seeing him he immediately started crying vigorously and making a show of the grief and shock they had received. The exact statement of the witness may be extracted thus :

> I could notice that Sharad who was sleeping or lying on the cot in the said room on seeing me entering the room immediately started crying vigorously giving jerks to his body and making show of the grief and the shock he had received. Ultimately I asked him as to what had happened to Manju when he told me that since eleventh it was the day of his marriage with Manju, he and Manju were in joyest mood. According to him they went to bed by about 12 midnight and he had a sexual act with Manju in such a manner which they never had enjoyed before. Ultimately according to him when they completely felt tired and exhausted both of them fell asleep. According to him by about 5.30 a.m. when he got up and after visiting the urinal, when returned to the room he found that Manju had not got up as usual since according to him, she used to wake up at the same time he used to wake up and so he went near Manju and called her out when he found her dead.

61. It is rather strange that while the witness took whatever his daughter told him at its face value without making any further enquiry, he immediately jumped to the conclusion that the grief and tears in the eyes of his son-in-law were fake and that he was merely shedding crocodile tears. There is nothing on the record nor in the evidence to show any circumstance which may have led the witness to arrive at this conclusion. On the other hand, if the conduct of the appellant, as described by the witness, is seen from a dispassionate angle, it was quite spontaneous and natural because by the time the witness reached Pune the post-mortem had been done and the death of Manju had come to light long before his arrival. There was no reason for the witness to have presumed at that time that Sharad must have committed the murder of the deceased. There were no materials or data

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before him which could have led him to this inference. This clearly shows one important fact, viz., that the witness was extremely prejudiced against Sharad and if one sees anything — even the truth — with a pale glass everything would appear to him to be pale.

62. The second part of the statement made by the witness regarding having sexual intercourse nearabout midnight seems to us to be inherently improbable. However educated or advanced one may be, it is against our precious cultural heritage for a person to utter such things in a most frank and rudimentary fashion to his father-in-law. We are clearly of the opinion that the story of having a sexual act, etc., was a pure figment of the imagination of the witness and this, therefore, goes a long way off to detract from the truth of the testimony of this witness.

63. Furthermore, at page 175 the witness admits that during the lifetime of Manju, Anju and Rekha told him about the receipt of the letters from Manju but they never referred to the nature or the contents of the letters. This is a correct statement because both Anju and Vahini had been requested by Manju not to disclose to her parents the state of affairs or the tortures which she was suffering and perhaps they kept the sanctity of oath given to them by the deceased. This is an additional circumstance to show that even when Manju visited Beed for the last time she might tell something to her own sister Anju or to Vahini but she would never dare to disclose all the details and put all the cards on the table before her parents — a step which she deliberately desisted from coming into existence. We can understand the evidence of the witness that Manju was worried, distressed and depressed. Sometimes out of natural love and affection parents make a mountain of a mole hill and this is what seems to have happened in this case.

64. Great reliance was placed by the Additional Solicitor-General, on behalf of the respondent, on the relevance of the statements of PWs 2, 3, 6 and 20. He attempted to use their statements for twin purposes — firstly, as primary evidence of what the witnesses saw with their own eyes and felt the mental agony and the distress through which the deceased was passing. Secondly, he relied on the statements made by the deceased (Manju) to these witnesses about the treatment meted out to her by her husband during her stay at Pune and furnishes a clear motive for the accused to murder her.

65. As regards the first circumstance, there can be no doubt that the said evidence of the witnesses would undoubtedly be admissible as revealing the state of mind of the deceased. This would be primary evidence in the case and, therefore, there cannot be any doubt about the relevancy of the statement of the witnesses in regard to this aspect

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of the matter. As to what probative value we should attach to such statements would depend on a proper application of the context and evidence of each of the witnesses.

66. As regards the second aspect — which is in respect of what the deceased told the witnesses — it would only be admissible under Section 32 of the Evidence Act as relating to the circumstances that led to the death of the deceased. In view of the law discussed above and the propositions and the conclusions we have reached, there cannot be any doubt that these statements would fall in the second part of Section 32 of the Evidence Act relating directly to the transaction resulting in the death of Manju, and would be admissible. Before, however, examining this aspect of the question we might at the outset state that the character, conduct and the temperament of Manju, as disclosed or evinced by the admitted letters (Exs. 30, 32 and 33), demonstrate that it is most unlikely, if not impossible, for Manju to have related in detail the facts which the aforesaid witnesses deposed. If this conclusion is correct, then no reliance can be placed on this part of the statement of the aforesaid witnesses.

67. We now proceed to discuss the evidence of PWs 3, 4, 5, 6 and 20. As we have discussed the evidence of PW 2, father of Manju, it will be more appropriate to discuss now the evidence of PW 20 (Manju's mother) from whom most of the matters spoken to by PW 2 were derived. Her evidence appears at page 305 of Part I of the Paperbook. It is not necessary for us to go into those details which have already been deposed to by PW 2. The most relevant part of her evidence is about the visit of Manju to Beed on April 2, 1982. She states that during this visit she found Manju cheerful and happy and she did not complain of anything during her stay for 8-10 days. In answer to a question — whether she enquired from Manju or had any talk with her during that period — she stated that Manju told her that her husband was not taking any interest in her and used to leave the house early in the morning and return late at night on the excuse that he was busy with his factory work. It may be stated here that the accused had a chemical factory where he used to work from morning till late at night. The witness further deposed that Manju informed her that there was no charm left for her at the house of her husband. These facts however run counter to her first statement where she stated that Manju was quite happy and cheerful as was expected of a newly married girl. Even so, whatever Manju had said does not appear to be of any consequence because she (the witness) herself admits that she did not take it seriously and told Manju that since she had entered a new family it might take some time for her to acclimatise herself with the new surround-

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ings. She also warned Manju against attaching much importance to such matters.

68. Thereafter she goes on to state that near about April 11 or 12, 1982 she (PW 20) along with her husband left for Pune to offer condolences on the death of the grandfather of the appellant. She then proceeds to state that during their second visit to Pune on May 11 or 12, 1982 she stayed with her brother, Dhanraj and that while she was there Manju hugged at her neck and having lost her control, started weeping profusely. She further states that Manju requested her to take her to Beed as it was not possible for her to stay in her marital house where she was not only bored but was extremely afraid and scared.

69. On the next day she (PW 20) met the mother of the appellant and told her plainly that she found Manju extremely perturbed, uneasy and scared and that she was experiencing tremendous pressure and restrictions from her husband. But the mother of the appellant convinced her that there was nothing to worry about and everything will be alright. The witness then narrated the facts to her husband and requested him to take Manju with them to Beed. PW 2 then sought the permission of Birdhichand to take Manju to Beed but he told him that as some guests were to visit him, he (PW 2) can send somebody after 4-5 days to take Manju to Beed. It may be mentioned here that the details about the sufferings and the mental condition of Manju were not mentioned by this witness even to her husband (PW 2) as he does not say anything about this matter. Further, her statement is frightfully vague.

70. As already indicated that the letters (Exs. 30, 32, 33) clearly show that Manju never wanted to worry or bother her parents about her disturbed condition, it appears to be most unlikely that on the occasion of the death of her grandfather-in-law she would choose that opportunity to narrate her tale of woe to her mother. This appears to us to be a clear embellishment introduced by the prosecution to give a sentimental colour to the evidence of this witness. Ultimately, on May 25, 1982 Deepak brought Manju to Beed and this time she was accompanied by her cousin, Kavita. Here again, she states that on her arrival she found Manju extremely disturbed and under tension or fear and Manju was prepared to make a clean breast of all her troubles. However, as Kavita was there and did not give any opportunity to Manju to meet her mother alone, she (Kavita) was sent out on some pretext or the other. Thereafter, Manju told her mother that she was receiving a very shabby treatment from her husband and while narrating her miserable plight she told her about two important incidents which had greatly upset her — (1) that she

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happened to come across a love letter written by PW 37, Ujvala Kothari. to her husband which showed that the appellant was carrying on illicit relations with PW 37, and (2) that on one occasion the appellant told Manju that he was tired of his life and did not want to live any more and, therefore, wanted to commit suicide. Despite Manju's enquiries as to why he wanted to commit suicide, he did not give any reason. She then informed her mother that when this talk was going on, she (Manju) herself volunteered to commit suicide. Thereafter, Sharad put forth a proposal under which both of them were to commit suicide and they decided to write notes showing that they were committing suicide. On hearing this plan from Sharad, Manju told him that she was not inclined to commit suicide as she had not lost all hope of life and that she had expressed her desire to commit suicide only because he had said that he would do so. PW 20 would have us believe that while in one breath she agreed to the suicide pact yet the next moment she made a complete volte-face. This is hard to believe having regard to the nature of the temperament of Manju.

71. The two statements said to have been made by Manju to her mother appear to be contradictory and irreconciliable and smack of concoction. According to Manju, Sharad then prepared two notes one addressed to his father and another to his father-in-law and asked Manju to do the same but she refused to do anything of the sort. The witness admitted that she was not told as to what had happened to the notes written by the appellant.

72. All this story of a suicidal pact seems to us nothing but a fairy tale. There is no mention nor even a hint in the letters (Exs. 30, 32, 33) written by Manju about the aforesaid suicidal pact and the story narrated by the witness before the trial court, nor was the note produced in the court. This appears to us to be a make-believe story and was introduced to castigate the appellant for his shabby treatment towards Manju.

73. Another intrinsic circumstance to show the untruth of this statement is that although PW 2 was apprised of these facts yet he never mentioned them to Birdhichand particularly when he was insisting tht Manju should be sent back to Pune for attending the betrothal ceremony of his daughter, Shoba. Indeed, if this fact, which is of very great importance so far as the lives of both the husband and the wife are concerned, would have been there, the first thing which PW 2 would have done is to tell Birdhichand that matters had reached such a stage as to leave no doubt that her daughter was in an instant fear of death and it was impossible for him to allow his daughter to go to Pune where Sharad was bent on forcing her to commit suicide or even murder her, more particularly because PW 20 admits in her

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evidence that as all the things she had learnt from Manju were serious, she had informed her husband about the same who agreed with her.

74. Apart from this grave incident, the witness deposed to another equally important matter, viz., that on the Shitla Saptami day, the appellant rang up his mother to send Manju along with Shobha to a hotel (Pearl Hotel, as has been deposed to by other witnesses) because he wanted to give a party to his friends. As Shobha was not present in the house, Manju's mother-in-law sent her alone in a rickshaw to the hotel. On reaching the hotel she did not find any other person except a girl who was introduced by her husband as Ujvala Kothari. The most critical part of the incident is that the appellant is alleged to have informed Manju that she should take lessons from Ujvala as to how she should behave with him and also told her that Ujvala knew everything about him and he was completely in her hands. Subsequently, the appellant went away and Ujvala told her that the appellant was a short-tempered man and she should talk to him only if and when he wanted to talk to her. She (Ujvala) also told Manju that the appellant was completely under her command and she was getting every bit of information about the incidents happening between the husband and the wife. Finally, she was apprised of the fact by Ujvala that she and Sharad were in love with each other. Manju is said to have retorted and protested to Ujvala by saying that she was not prepared to take any lessons from her regarding her behaviour towards her husband as she (Manju) was his wedded wife while Ujvala was only a friend. Manju also told her mother that these facts were narrated by her to the appellant and accused 2. As a result of this incident, Manju became a little erratic which attracted double cruelty towards her by her husband and made her extremely scared of her life and in view of this development she requested her mother not to send her back to the house of the accused.

75. One point of importance which might be noticed here and which shows that whatever be the relations with her husband and Ujvala, the picture presented by the witness is not totally correct because if such a point of no return had already been reached, there was absolutely no question of Birdhichand sending for the appellant and arranging a trip to Ooty, Mysore and other places nor would have Manju agreed to go to these places. The witness further stated that as soon as Manju came to know that Birdhichand had come to take her away she was shocked and continuously kept saying that she was extremely afraid of going to her husband's house and that she should not be sent back.

76. The behavioural attitude of Manju depicted by the witness

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seems to us to be absolutely contradictory to and not at all in consonance with her temperament, frame of mind, psychological approach to things and innate habits. That is why no reference had been made even directly or indirectly in any of the letters written by Manju, and she had expressly requested both Anju and Vahini not to disclose anything to her parents lest they may get worried and distressed on her account. In other words, Manju was a woman who despite her troubles and tribulations, sufferings and travails, anxiety and anguish would never have thought of narrating her woeful story to her parents and thereby give an unexpected shock to them. This feeling is mentioned in the clearest possible terms in the letters (Exs. 30, 32, 33) which we have already discussed. There is no reference at all in any of the letters regarding suicidal pact or the illicit relationship of her husband with Ujvala.

77. Another important fact which the High Court has missed is that even according to the statement of this witness, the appellant had asked his mother to send Shobha along with Manju to the hotel and at that time he could not have been aware that Shobha would not be available. Indeed, if he had an evil intention of insulting or injuring the feelings of Manju by keeping Ujvala there he would never have asked his mother to send Shobha also because then the matter was likely to be made public. This is another inherent improbability which makes the whole story difficult to believe.

78. Despite these serious developments both PWs 2 and 20 tried to convince Manju to accept the assurances given by Birdhichand that no harm would come to her and if anything might happen they will take proper care. We find it impossible to believe that the parents who had so much love and affection for their daughter would, after knowing the circumstances, still try to take the side of Birdhichand and persuade her daughter to go to Pune. Rameshwar (PW 2) should have told Birdhichand point-blank that he would not send Manju in view of the serious incidents that had happened, viz., the suicidal pact, the cruel treatment of the appellant towards Manju, the constant fear of death which Manju was apprehending, the illicit relationship between the appellant and Ujvala, and the strong resistance of his daughter who was not prepared to go to Pune at any cost and was weeping and wailing all the time. On the other hand, knowingly and deliberately they seem to have thrown their beloved daughter into a well of death. The fact that Manju's parents tried to console her and believed the assurance of Birdhichand knowing full well the history of the case shows that any statement made by Manju to her parents was not of such great consequence as to harden their attitude. This is yet another intrinsic circumstance which negatives the story of suicidal pact and the invitation to Manju to come to the Pearl

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Hotel and the manner in which she was insulted in the presence of Ujvala. There is no doubt that relations between the appellant and Manju were extremely strained, maybe due to his friendship with Ujvala, she may not have felt happy in her marital home as she has clearly expressed in her letters but she did not disclose anything of such great consequence which would have shocked the parents and led them to resist her going to Pune at any cost. This makes the version given by PWs 2 and 20 unworthy of credence.

79. We now proceed to take up the evidence of PW 6, Anju, the sister of Manju. The statement of this witness is more or less a carbon copy of the evidence of PW 20 which has been discussed above and, therefore, it is not necessary to consider her evidence in all its details. So far as the first visit is concerned, she fully supports her mother that Manju was very happy as was expected of a newly married girl. When Manju came to Beed around April 2, 1982 she stayed there for 8-10 days and during that period the witness noticed that she was somewhat dissatisfied and complained that her husband used to return late at night. She also complained against the callous attitude of the other members of her husband's family. She also introduced the story of Ujvala Kothari and corroborated what PW 20 had said which we have discussed above. She also refers to the said suicidal pact and then to the fact that Birdhichand had come to take away Manju to Pune so that she may be able to attend the betrothal ceremony of Shobha. Then she deposes to an incident which appears to be wholly improbable. According to her, on June 3, 1982, PW 2 invited his two friends, Raju and Rath, for lunch at which Birdhichand was also present, and told them that Manju was not prepared to go to Pune as she was afraid to go there but Birdhichand, along with his two friends, assured him that nothing would happen. We do not think that in the course of things PW 2 would be so foolish as to let the secret matters of the house known to others than the parties concerned. Thereafter the witness proves the letters (Exs. 30 and 32).

80. She stated one important statement to the effect that on some occasions Manju had a talk with her mother in her presence. Although Manju had requested Anju not to disclose anything to her parents yet everything was made known to them. During cross-examination the witness was asked — how was it that Manju was narrating these talks when the witness had been asked not to disclose the same to her parents, which she explained away by saying that she did not ask Manju why she was disclosing these things to her mother. No satisfactory answer to this question seems to have been given by her. At another place, the witness states thus :

> I did not tell all these informations I received from Manju

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to anybody. Nor anybody enquired from me till my statement was recorded by the police.

81. Her evidence, therefore, taken as a whole is subject to the same infirmity as that of PW 20 and must suffer the same fate.

82. PW 3, Rekha [who was addressed as 'Vahini' in Manju's letter (Ex. 33)], states that on the first occasion when Manju came home she was quite happy but during her second visit to Beed in the month of April, 1982 she did not find her so and Manju complained that her husband was avoiding her to have a talk with her on one excuse or another. Manju also informed the witness that the appellant had a girl-friend by name Ujvala and the witness says that she tried to console Manju by saying that since her husband was a chemical engineer he may have lot of friends. While referring to Ex. 33 (letter written to her by Manju) she stated that the only complaint made in that letter was that her husband was not talking to her properly. She then deposed to an incident which happened when on her way to Bombay when the witness stayed at Pune for some time. She states that she had a talk with Manju for about half-an-hour when she narrated the story of the suicidal pact. She also stated that she was extremely afraid of the situation and almost broke down in tears and wept.

83. The most important fact which may be noted in her evidence is a clear pointer to the frame of mind and the psychotic nature of Manju. At page 212 of Part I of the Paperbook while narrating the relationship of her husband with Ujvala she says that the appellant lost his temper and thereupon she spoke the following words to him :

> I am not going to spare this, I will not allow this, his bad relations even though a blot may come to our family and I have decided likewise.

84. These significant and pregnant words clearly show that Manju was so much bored and disgusted with her life that she entertained a spirit of revenge and told the witness that she was not going to tolerate this even though a blot may come to the family and that she had decided likewise. This statement undoubtedly contains a clear hint that she had almost made up her mind to end her life, come what may and thereby put to trouble her husband and his family members as being suspect after her death. This appears to be a culmination of a feeling which she had expressed in one of her letters to Anju in the following words :

> Till I could control (myself), well and good. When it becomes impossible, *some other way will have to be evolved*. Let us see what happens. All right.

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Similarly, in her letter (Ex. 33) to this witness she gives a concealed hint "But till that day it is not certain that I will be alive".

85. Thus the feelings of death and despair which she orally expressed to the witness at Pune seems to have been fulfilled when on the morning of June 12, 1982 she was found dead.

86. The evidence of PW 4, Hiralal Ramlal Sarda, is not that important. He merely states that in the last week of May 1982, PW 2 had called him and told him that Manju was being ill-treated by her husband and therefore she was not prepared to go to her marital home. PW 2 also informed him about the suicidal pact affair. As the witness was in a hurry to go to Hyderabad he counselled PW 2 not to take any final decision in a hurry and that Manju should not be sent to Pune with Birdhichand until his return when a decision may be taken. On return from Hyderabad he learnt that Birdhichand had already taken Manju to Pune and thereafter he left for Pune. Indeed, if the matter was so grave and serious that a person like PW 4, who was a relation of the appellant rather than that of PW 2, had advised him not to make haste and take a final decision but wait until his return yet PW 2 seems to have spurned his advice and sent Manju to Pune. This shows that the matter was not really of such great importance or urgency as to take the drastic step of making a blunt refusal to Birdhichand about Manju's not going to Pune. This also shows that the story of suicidal pact and other things had been introduced in order to give a colour or orientation to the prosecution story.

87. Another fact to which this witness deposes is the narration by the appellant about his having sexual act with his wife. We have already disbelieved this story as being hopelessly improbable and against the cultural heritage of our country or of our nature and habits. This is the only purpose for which this witness was examined and his evidence does not advance the matter any further.

88. PW 5, Meena Mahajan, has also been examined to boost up the story narrated by PW 2 and other witnesses. She was not at all connected with the family of PW 2 but is alleged to be a friend of Manju and she says that she found Manju completely disheartened and morose and she started weeping and crying while narrating her said (*sic* sad) story. The witness goes on to state that Manju was so much terrified of the appellant that she was afraid of her life at his hands. No witness has gone to the extent of saying that there was any immediate danger to Manju's life nor did Manju say so to PWs 2, 6 and 20. This witness appears to us to be more loyal than the king. Even assuming that Manju was a friend of PW 6 but she never wrote

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to her any letter indicating anything of the sort. For these reasons, we are not satisfied that this witness is worthy of credence.

89. A close and careful scrutiny of the evidence of the aforesaid witnesses clearly and conspicuously reveals a story which is quite different from the one spelt out from the letters (Exs. 30, 32 and 33). In fact, the letters have a different tale to tell particularly in respect of the following matters :

(1) There is absolutely no reference to suicidal pact or the circumstances leading to the same,

(2) There is no reference even to Ujvala and her illicit relations with the appellant,

(3) There is no mention of the fact that the deceased was not at all willing to go to Pune and that she was sent by force,

(4) The complaints made in the letters are confined to ill-treatment, loneliness, neglect and anger of the husband but no apprehension has been expressed in any of the letters that the deceased expected imminent danger to her life from her husband,

(5) In fact, in the letters she had asked her sister and friend not to disclose her sad plight to her parents but while narrating the facts to her parents she herself violated the said emotional promise which appears to us to be too good to be true and an afterthought added to strengthen the prosecution case,

(6) If there is anything inherent in the letters it is that because of her miserable existence and gross ill-treatment by her husband, Manju might have herself decided to end her life rather than bother her parents.

90. We are therefore unable to agree with the High Court and the trial court that the witnesses discussed above are totally dependable so as to exclude the possibility of suicide and that the only irresistible inference that can be drawn from their evidence is that it was the appellant who had murdered the deceased.

91. Putting all these pieces together a general picture of the whole episode that emerges is that there is a reasonable possibility of Manju having made up her mind to end her life either due to frustration or desperation or to take a revenge on her husband for shattering her dream and ill-treating her day-to-day.

92. Apart from the spirit of revenge which may have been working in the mind of Manju, it seems to us that what may have happened is that the sum total and the cumulative effect of the circumstances may have instilled in her an aggressive impulse engendered by

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frustration of which there is ample evidence both in her letters and her subsequent conduct. In *Encyclopedia of Crime and Justice* (Vol. 4) by Sanford H. Kadish the author mentions thus :

> Other psychologically oriented theories have viewed suicide as a means of handling aggressive impulses engendered by frustration.

93. Another inference that follows from the evidence of the witness discussed is that the constant fact of wailing and weeping is one of the important symptoms of an intention to commit suicide as mentioned by George W. Brown and Tirril Harris in their book *Social Origins of Depression* thus :

1. *Symptom data* :

Depressed mood—

1. crying
2. feeling miserable/looking miserable, unable to smile or laugh
3. feelings of hopelessness about the future
4. suicidal thoughts
5. suicidal attempts

Fears/anxiety/worry—

15. psychosomatic accompaniments
16. tenseness/anxiety
17. specific worry
18. panic attacks
19. phobias

Thinking—

20. feelings of self-depreciation/nihilistic delusions
21. delusions or ideas of reference
22. delusions of persecution/jealousy
23. delusions of grandeur
24. delusions of control/influence
25. other delusions e.g. hypochondriacal worry
26. auditory hallucinations
27. visual hallucinations.

94. Most of these symptoms appear to have been proved as existing in Manju both from her letters (Exs. 30, 32 and 33) and from the evidence discussed.

95. We might hasten to observe here that in cases of women

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of a sensitive and sentimental nature it has usually been observed that if they are tired of their life due to the action of their kith and kin, they become so desperate that they develop a spirit of revenge and try to destroy those who had made their lives worthless and under this strong spell of revenge sometimes they can go to the extreme limit of committing suicide with a feeling that the subject who is the root cause of their malady is also destroyed. This is what may have happened in this case. Having found her dreams shattered to pieces Manju tried first to do her best for a compromise but the constant ill-treatment and callous attitude of her husband may have driven her to take revenge by killing herself so that she brings ruination and destruction to the family which was responsible for bringing about her death. We might extract what Robert J. Kastenbaum in his book *Death, Society, and Human Experience* has to say :

> Revenge fantasies and their association with suicide are well known to people who give ear to those in emotional distress.

96. After a careful consideration and discussion of the evidence we reach the following conclusions on point No. 1 :

(1) That soon after the marriage the relations between Manju and her husband became extremely strained and went to the extent that point of no return had been almost reached,

(2) That it has been proved to some extent that the appellant had some sort of intimacy with Ujvala which embittered the relationship between Manju and him,

(3) That the story given out by PW 2 and supported by PW 20 that when they reached Pune after the death of Manju they found appellant weeping and wailing out of grief as this was merely a pretext for shedding of crocodile tears, cannot be believed,

(4) That the story of suicidal pact and the allegation that appellant's illicit relations with Ujvala developed to such an extreme extent that he was so much infatuated with Ujvala as to form the bedrock of the motive of the murder of Manju, has not been clearly proved,

(5) The statement of PW 2 that the appellant had told him that during the night on June 11, 1982 he had sexual act with the deceased is too good to be true and is not believable as it is inherently improbable,

(6) That despite the evidence of PWs 2, 3, 6 and 20 it has not been proved to our satisfaction that the matter had assumed such extreme proportions that Manju refused to go to Pune with her father-in-law (Birdhichand) at any cost and yet she was driven by use of compulsion and persuasion to accompany him,

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(7) That the combined reading and effect of the letters (Exs. 30, 32 and 33) and the evidence of PWs 2, 3, 4, 6 and 20 clearly reveal that the signs and symptoms resulting from the dirty atmosphere and the hostile surroundings in which Manju was placed is a pointer to the fact that there was a reasonable possibility of her having committed suicide and the prosecution has not been able to exclude or eliminate this possibility beyond reasonable doubt.

We must hasten to add that we do not suggest that this was not a case of murder at all but would only go to the extent of holding that at least the possibility of suicide as alleged by the defence may be there and cannot be said to be illusory.

(8) That a good part of the evidence discussed above, is undoubtedly admissible as held by us but its probative value seems to be precious little in view of the several improbabilities pointed out by us while discussing the evidence.

97. We might mention here that we had to reappreciate the evidence of the witnesses and the circumstances taking into account the psychological aspect of suicide as found in the psychotic nature and character of Manju because these are important facts which the High Court completely overlooked. It seems to us that the High Court while appreciating the evidence was greatly influenced by the fact that the evidence furnished by the contents of the letters were not admissible in evidence which, as we have shown, is a wrong view of law.

98-99. We now come to the second limb — perhaps one of the most important limbs of the prosecution case viz., the circumstance that the appellant was last seen with the deceased before her death. Apparently, if proved, this appears to be a conclusive evidence against the appellant but here also the High Court has completely ignored certain essential details which cast considerable doubt on the evidence led by the prosecution on this point.

100. The question of the appellant having been last seen with the deceased may be divided into three different stages :

(1) The arrival of Anuradha and her children along with Manju at Takshila Apartments, followed by the arrival of the appellant and his entry into his bedroom where Anuradha was talking to Manju,

(2) The calling of PW 29 by A 2 followed by the appellant and his brother's going out on a scooter to get Dr Lodha and thereafter Dr Gandhi,

(3) Sending for Mohan Asava (PW 30) and the conversation between

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the appellant, Birdhichand and others as a result of which the matter was reported to the police.

101. Although the aforesaid three stages of this circumstance cannot technically be called to mean that the accused was last seen with the deceased but the three parts combined with the first circumstance might constitute a motive for the murder attributed to the appellant.

102. From a perusal of the judgment of the High Court on these points, it appears that the High Court has made a computerised and mathematical approach to the problem in fixing the exact time of the various events which cannot be correct as would appear from the evidence of the witnesses, including Dr Banerjee (PW 33).

103. The evidence of PW 7, the motor rickshaw driver shows that on the night of June 11 he had brought the deceased along with Anuradha and others and dropped them near the Takshila Apartments at about 11 p.m. The witness was cross-examined on several points but we shall accept the finding of the High Court on the fact that on June 11, 1982 the witness had dropped the persons, mentioned above, at about 11 p.m. The rest of the evidence is not germane for the purpose of this case. It may, however, be mentioned that one should always give some room for a difference of a few minutes in the time that a layman like PW 7 would say. We cannot assume that when the witness stated that he had dropped Manju and others at 11 p.m., it was exactly 11 p.m. — it would have been 10-15 minutes this way or that way. His evidence is only material to show the approximate time when Manju returned to the Apartments.

104. The next witness on this point is PW 28, K.N. Kadu. This witness corroborates PW 7 and stated that he had heard the sound of a rickshaw near the Apartments when the wife of A 2, Manju and 3 children entered the Apartments and went to their rooms. He further says that after about 15 minutes he saw the appellant coming on a scooter and while he was parking his scooter the witness asked him why did he come so late to which he replied that he was busy in some meeting. This would show that the appellant must have arrived at the Apartments near about 11.30 or 11.45 p.m. It is very difficult to fix the exact time because the witness himself says that he had given the timings approximately. The High Court was, therefore, not justified in fixing the time of the arrival of Manju and party or the appellant with almost mathematical precision for that would be a most unrealistic approach. The High Court seems to have speculated that Manju must have died at 12 p.m., that is to say, within 15-20 minutes of the arrival of the appellant. It is, however, impossible for

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us to determine the exact time as to when Manju died because even Dr Banerjee says in his evidence that the time of death of the deceased was between 18 to 36 hours which takes us to even beyond past 12 in the night. At any rate, this much is certain that Manju must have died round about 2 a.m. because when Dr Lodha arrived at 2.45 a.m. he found her dead and he had also stated that rigor mortis had started setting in. It is, therefore, difficult to fix the exact time as if every witness had a watch which gave correct and exact time. Such an inference is not at all called for.

105. The third stage of this matter is that while the witness was sleeping he heard the sound of the starting of a scooter and got up from his bed and saw appellant and A 2 going away. Thereafter, he found 7-8 persons coming and going on their scooters. The High Court seems to suggest that this must have happened by about 1.30 p.m. Even so, this does not prove that Manju must have died at midnight. As the witness had been sleeping and was only aroused by the sound of scooters, it would be difficult to fix the exact time when he saw the appellant and A 2 going out on their scooters. His evidence, therefore, was rightly relied upon by the High Court in proving the facts stated by him.

106. PW 29, B.K. Kadu, who was serving as a watchman at the Takshila Apartments says that near about the midnight he was called by Rameshwar, A 2 and on hearing the shouts he went to flat No. 5. He further says that A 2 directed him to unbolt or unchain the door but the door was not found closed from inside and hence A 2 went out and returned after some time. While the witness was standing at the door A 2 returned and after his return the witness also came back to his house and went to sleep. Perhaps the witness was referring to the incident when A 1 and A 2 had gone on scooter to fetch Dr Lodha. During cross-examination the witness admitted that he did not possess any watch and gave the timings only approximately. We shall accept his evidence in toto but that leads us nowhere.

107. This is all the evidence so far as the first stage of the case is concerned and, in all probability, it does not at all prove that A 1 had murdered the deceased. On the other hand, the circumstances proved by the three witnesses are not inconsistent with the defence plea that soon after entering the room Manju may have committed suicide.

108. Part II of this circumstance relates to the coming of Dr Lodha and then Dr Gandhi on the scene of occurrence and we accept their evidence in toto. Dr Lodha was a family doctor of the appellant's family and it was quite natural to send for him when

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the appellant suspected that his wife was dead. Although Dr Lodha (PW 24) was a family doctor of the appellant's family yet he did not try to support the defence case and was frank enough to tell the accused and those who were present there that it was not possible for him to ascertain the cause of death which could only be done by a post-mortem. In other words, he indirectly suggested that Manju's death was an unnatural one, and in order to get a second opinion he advised that Dr Gandhi (PW 25) may also be summoned. Accordingly, Dr Gandhi was called and he endorsed the opinion of Dr Lodha. Such a conduct on the part of the appellant or the persons belonging to his family is wholly inconsistent with the allegation of the prosecution that the appellant had murdered the deceased.

109. The High Court seems to have made one important comment — in that why Dr Lodha and Dr Gandhi were called from some distance when Dr Kelkar, who was a skin specialist and another doctor who was a child expert, were living in the same building. This comment is neither here nor there. It is manifest that Birdhichand was a respectable person of the town and when he found that his daughter-in-law had died he would naturally send for his family doctor rather than those who were not known to him.

110. It appears that PW 30 Mohan Asava was also summoned on telephone and when he came at the scene of occurrence he found A 2, Birdhichand sitting on the floor of the room and Birdhichand hugged him out of grief, and told him that Manju had died of shock and the doctors were not prepared to give a death certificate.

111. In order to understand the evidence of this witness it may be necessary to determine the sequence of events so far as PW 30 is concerned. The witness has stated that while he was sleeping he was aroused from his sleep by a knock at the door by Ram Vilas Sharda (brother of appellant) at about 4.00 or 4.15 a.m. Ram Vilas told him that Manju had died and the doctors were not prepared to give any death certificate. After having these talks the witness, along with Ram Vilas, proceeded to the Apartments and remained there till 5.15 a.m. Then he returned to his house, took bath and at about 6.30 a.m. he received a telephone call from Ram Vilas for lodging a report with the police with the request that the time of death should be given as 5.30 a.m. Consequently, he reached the police station near about 7.00 or 7.15 a.m. and lodged a report stating that Manju had died at 5.30 a.m.

112. This witness appears to be of doubtful antecedents and, therefore, his evidence has to be taken with a grain of salt. He admitted in his statement at p. 387 that some proceedings about evasion of

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octroi duty were pending against him in the court. He also admitted that he was convicted and sentenced to 9 months' R.I. under the Food Adulteration Act in the year 1973.

113. Apart from this it appears that most of the statements which he made in the Court against Birdhichand and the other accused, were not made by him before the police. These statements were put to him and he denied the same but they have been proved by the Investigation Officer, PW 40 whose evidence appears at p. 521 of Part II of the printed Paperbook. These belated statements made in the Court may be summarised thus :

114. While in his statement before the Court the witness at p. 386 (para 19) states that the death of Manju was suspicious yet he made no such statement before the police on being confronted by the statement of PW 40. Another important point on which his statement does not appear to be true is that the dominant fact mentioned to him by Birdhichand and others was that the doctors were not prepared to issue death certificate but he did not say so before the police. Similarly, he deposed in the Court about the statement made to him by Birdhichand that he would lose his prestige and therefore the body should be cremated before 7 a.m. but he advised him not to do so unless he has informed the police otherwise his whole family would be in trouble. Almost the entire part of his evidence in para 5 at p. 381 appears to be an afterthought, as PW 40 stated thus :

> I recorded the statement of PW 30 Mohan Asava. He did not state before me that death of Manju was suspicious. He did not state before me that accused 3 informed him that the doctors were not prepared to issue the death certificate. He did not state before me that the demand was made of the death certificate from the doctors or the doctors refused to give the same. During his statement this witness did not make the statements as per para 5 excluding the portions from A to F of his examination-in-chief.

115. The portions referred to as 'A to F' in para 5 of examination-in-chief of PW 30 may be extracted thus:

> Birdhichand then started telling me that Manju had died on account of shock and that...he said that she died of heart attack...under any circumstance he wanted to cremate Manju before 7 o'clock. . . when he said that he would spend any amount but wanted to cremate her before 7.00 a.m.

116. This statement does not appear to be true for the following reasons :

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(*a*) Birdhichand knew full well that PW 30 was a police contact constable and as he was not prepared to persuade the doctors to give a death certificate, his attitude was hardly friendly as he was insisting that the matter should be reported to the police.

It is, therefore, difficult to believe that Birdhichand would take such a great risk in laying all his cards on the table knowing full well that the witness was not so friendly as he thought and therefore he might inform the police ; thereby he would be in a way digging his own grave.

(*b*) On a parity of reasoning it would have been most improbable on the part of the appellant, after having decided to report the matter to the police, to ask PW 30 to report the time of death as 5.30 a.m. knowing full well his attitude when he came to the Apartments.

117. It is not at all understandable how the witness could have mentioned the time of Manju's death as 5.30 a.m. or, at any rate, when her death was known to her husband and when he himself having gone to the Apartments near about 4.15 a.m. knew full well that Manju had died earlier and that Dr Lodha and Dr Gandhi had certified the same and advised Birdhichand to report the matter to the police. In the original Ex. 120 (in Marathi language), it appears that the time of death given by the witness is 'Pahate' which, according to Molesworth's *Marathi-English Dictionary* at p. 497, means "The period of six ghatikas before sunrise, the dawn" i.e., about 2 hours 24 minutes before sunrise (one ghatika is equal to 24 minutes). This would take us to near about 3 a.m. Either there is some confusion in the translation of the word 'Pahate' or in the words '5.30 a.m.', as mentioned in the original Ex. 120. However, nothing much turns on this except that according to the witness Manju must have died around 3 a.m. which is consistent with the evidence of Dr Lodha that when he examined Manju at about 2.30 a.m. he found her dead and rigor mortis had already started setting in.

118. We are not concerned here with the controversy whether the report was admissible under Section 154 or Section 174 of the Code of Criminal Procedure but the fact remains that the police did receive the information that the death took place at 5.30 a.m. The High Court seems to have made a capital out of this small incident and has not made a realistic approach to the problem faced by Birdhichand and his family. Being a respectable man of the town, Birdhichand did not want to act in a hurry lest his reputation may suffer and naturally required some time to reflect and consult his friends before taking any action. The allegation that A 3 told him

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to report the time of death as 5.30 a.m. is not at all proved but is based on the statement of PW 30, before the police. Thus, the approach made by the High Court to this aspect of the matter appears to be artificial and unrealistic as it failed to realise that the question of the time of death of the deceased as 5.30 a.m. could never have been given by the appellant or any other accused because they knew full well that the two doctors had examined the whole matter and given the time of death as being round about 1.30 a.m. Having known all these facts how could anyone ask PW 30 to give the time of death at the police station as 5.30 a.m.

119. Thus, it will be difficult for us to rely on the evidence of such a witness who had gone to the extent of making wrong statements and trying to appease both Birdhichand and the prosecution, and, therefore, his evidence does not inspire any confidence.

120. The last part of the case on this point is the evidence of PWs 2 and 4, where the appellant is said to have told them that he had sexual intercourse with his wife near about 5 a.m. on June 12, 1982. Apart from the inherent improbability in the statement of the appellant, there is one other circumstance which almost clinches the issue. It appears that Kalghatgi (PW 20), Inspector in-charge of the police station made a query from Dr Banerjee which is extracted below :

> Whether it can be said definitely or not as to whether sexual intercourse might have taken just prior to death ?

The above query was made in Ex. 129 and the answer of the doctor appears in Ex. 187 which is extracted below :

> From clinical examination there was no positive evidence of having any recent sexual intercourse just prior to death.

121. This positive finding of the doctor therefore knocks the bottom out of the case made out by the prosecution that the appellant had told PWs 2 and 4 about having sexual intercourse with his wife. Unfortunately, however, the High Court instead of giving the benefit of this important circumstance to the accused has given the benefit to the prosecution which is yet another error in the approach made by the High Court while assessing the prosecution evidence. Having regard to the very short margin of time between the arrival of the appellant in his bedroom and the death of Manju, it seems to be well-nigh impossible to believe that he would try to have sexual intercourse with her. This circumstance, therefore, falsifies the evidence of PWs 2 and 4 on this point and shows the extent to which the witnesses could go to implicate the appellant.

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122. Finally, in view of the disturbed nature of the state of mind of Birdhichand and the catastrophe faced by him and his family, it is difficult to believe that the grief expressed and the tears shed by the appellant when PW 2 met him could be characterised as fake. If it is assumed that the accused did not commit the murder of the deceased then the weeping and wailing and expressing his grief to PW 2 would be quite natural and not fake.

123. There are other minor details which have been considered by the High Court but they do not appear to us to be very material.

124. Taking an overall picture on this part of the prosecution case the position seems to be as follows :

(1) If the accused wanted to give poison while Manju was wide awake, she would have put up stiffest possible resistance as any other person in her position would have done. Dr Banerjee in his post-mortem report has not found any mark of violence or resistance. Even if she was overpowered by the appellant she would have shouted and cried and attracted persons from the neighbouring flats which would have been a great risk having regard to the fact that some of the inmates of the house had come only a short while before the appellant.

(2) Another possibility which cannot be ruled out is that potassium cyanide may have been given to Manju in a glass of water, if she happened to ask for it. But if this was so, she being a chemist herself would have at once suspected some foul play and once her suspicion would have arisen it would be very difficult for the appellant to murder her.

(3) The third possibility is that as Manju had returned pretty late to the flat she went to sleep even before the arrival of the appellant and then he must have tried to forcibly administer the poison by the process of mechanical suffocation, in which case alone the deceased could not have been in a position to offer any resistance. But this opinion of the doctor has not been accepted by the High Court which, after a very elaborate consideration and discussion of the evidence, the circumstances and the medical authorities, found that the opinion of the doctor that Manju died by mechanical suffocation has not been proved or, at any rate, it is not safe to rely on such evidence. In this connection, we might refer to the finding of fact arrived at by the High Court on this point :

> In view of the above position as is available from the evidence of Dr Banerjee and from the observations made by the medical authorities it will not be possible to say that the existence

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of the dark red blood in the right ventricle exclusively points out the mechanical suffocation particularly when such phenomenon is available in cases of poisoning by potassium cyanide. (PB p. 147-48)

In view of this answer it will not be possible to say conclusively that this particular symptom of observation is exclusively available in case of mechanical suffocation.

Thus we have discussed all the seven items on which Dr Banerjee has relied for the purpose of giving an opinion that there was mechanical suffocation. In our view, therefore, those 7 findings would not constitute conclusive date for the purpose of holding that there was mechanical suffocation. As the 7 findings mentioned above can be available even in the case of cyanide poisoning we think that it would not be safe to rely upon these circumstances for recording an affirmative finding that there was mechanical suffocation. As the 7 findings mentioned above can be available even in the case of cyanide poisoning we think that it would not be safe to rely upon these circumstances for recording an affirmative finding that there was mechanical suffocation. (p. 150-151)

125. It is not necessary for us to repeat the circumstances relied upon by the High Court because the finding of fact speaks for itself. This being the position, the possibility of mechanical suffocation is completely excluded.

(4) The other possibility that may be thought of is that Manju died a natural death. This also is eliminated in view of the report of the Chemical Examiner as confirmed by the post-mortem that the deceased had died as a result of administration of potassium cyanide.

(5) The only other reasonable possibility that remains is that as the deceased was fed up with the maltreatment by her husband, in a combined spirit of revenge and hostility after entering the flat she herself took potassium cyanide and lay limp and lifeless. When the appellant entered the room he must have thought that as she was sleeping she need not be disturbed but when he found that there was no movement in the body after an hour or so, his suspicion was roused and therefore he called his brother from the adjacent flat to send for Dr Lodha.

126. In these circumstances, it cannot be said that a reasonable possibility of the deceased having committed suicide, as alleged by the defence, can be safely ruled out or eliminated.

127. From a review of the circumstances mentioned above, we

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are of the opinion that the circumstance of the appellant having been last seen with the deceased has not been proved conclusively so as to raise an irresistible inference that Manju's death was a case of blatant homicide.

128. This now brings us to an important chapter of the case on which great reliance appears to have been placed by Mr Jethmalani on behalf of the appellant. Unfortunately, however, the aspect relating to interpolations in the post-mortem report has been completely glossed over by the High Court which has not attached any importance to the infirmity appearing in the medical evidence in support of the said interpolations. Although the learned counsel for the appellant drew our attention to a number of interpolations in the post-mortem report as also the report sent to the chemical examiner, we are impressed only with two infirmities which merit serious consideration. To begin with, it has been pointed out that in the original post-mortem notes which were sent to Dr Banerjee (PW 33) for his opinion, there is a clear interpolation by which the words "can be a case of suicidal death" appear to have been scored out and Dr Banerjee explained that since he had written the words 'time since death' twice, therefore, the subsequent writing had been scored out by him. In other words, the doctor clearly admitted the scoring out of the subsequent portion and we have to examine whether the explanation given by him is correct. In order to decide this issue we have examined for ourselves the original post-mortem notes (Ex. 128) where the writing has been admittedly scored out by Dr Banerjee. The relevant column against which the scoring has been done is column No. 5 which runs thus :

> 5. Substance of accompanying report from police officer or Magistrate, together with the date of death, if known. Supposed cause of death, or reason for examination.

129. The last line indicates that the doctor was to note two things — (1) the date of death, if known, and (2) the supposed cause of death. This document appears to have been written by PW 33 on June 12, 1982 at 4.30 p.m. The relevant portion of the words written by the doctor are 'time since death' which were repeated as he states in his statement. After these words some other words have been admittedly scored out and his (PW 33) explanation was that since he had written 'time since death' twice, the second line being a repetition was scored out. A bare look at Ex. 128 does not show that the explanation given by the doctor is correct. We have ourselves examined the said words with the help of a magnifying glass and find that the scored words could not have been 'time since death'. The only word common between the line scored out and the line left intact is 'death'. To us, the scored out words seem to be "can be a case

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of suicidal death". Dr Banerjee however stuck to his original stand which is not supported by his own writing in the document itself. It seems to us that at the first flush when he wrote the post-mortem notes it appeared to him that no abnormality was detected and that it appears to be a case of suicide rather than that of homicide. This, therefore, is the strongest possible circumstance to make the defence highly probable, if not certain. Furthermore, the doctor's explanation is that the scored words were 'time since death', according to the said explanation, the scored words are only three whereas the portion scored out contains as many as seven words. Hence the explanation of the doctor is not borne out from the document.

130. It is true that the doctor reserved his opinion until the chemical examiner's report but that does not answer the question because in column No. 5 of the post-mortem notes Dr Banerjee has clearly written "can be a case of suicidal death" which indicates that in the absence of the report of the chemical examiner, he was of the opinion that it could have been a case of suicide. In his evidence, PW 33 stated that in Ex. 128 in column No. 5 the contents scored out read 'time since death' and since it was repeated in the next line, he scored the words in the second line. Despite persistent cross-examination the doctor appears to have stuck to his stand. It cannot, therefore, be gainsaid that this matter was of vital importance and we expected the High Court to have given serious attention to this aspect which goes in favour of the accused.

131. Another interpolation pointed out by the learned counsel is regarding position of tongue as mentioned in Ex. 134. In the original while filling up the said column the doctor appears to have scored out something : the filled up entry appears thus — "mouth is closed with tip (something scored out) seen caught between the teeth". But in the carbon copy of the report which was sent to the chemical examiner (Ex. 132) he has added "caught between the teeth" in ink but in the original there is something else. This is fortified by the fact that the copy of the report actually sent to the chemical examiner does not contain any interpolation against the said column where the filled up entry reads 'Inside mouth'.

132. The combined effect of these circumstances show that Dr Banerjee (PW 33) tried to introduce some additional facts regarding the position of the tongue. Perhaps this may be due to his final opinion that the deceased died due to mechanical suffocation which might lead to the tongue being pressed between the teeth. This, however, throws a cloud of doubt on the correctness or otherwise of the actual reports written by him and the one that was sent to the chemical examiner. It is obvious that in the carbon copy which

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was retained by the doctor, the entries must have been made after the copy was sent to the chemical examiner. However, this circumstance is not of much consequence because the opinion of the doctor that Manju died by forcible administration of potassium cyanide or by the process of mechanical suffocation has not been proved. This aspect need not detain us any further because the High Court has not accepted the case of mechanical suffocation.

133. So far as the other findings of Dr Banerjee are concerned we fully agree with the same. A number of comments were made on behalf of the appellant about Dr Banerjee's integrity and incorrect reports but subject to what we have said, we do not find any substance in those contentions.

134. In para 90 of its judgment the High Court has given a number of circumstances which according to it, go to prove the prosecution case showing that the appellant had administered the poison during the night of June 11, 1982. These circumstances may be extracted thus :

(1) In the bedroom Manju died of poisoning between 11.30 pm. and 1 a.m. in the night between June 11/12, 1982.

(2) Accused 1 was present in that bedroom since before the death of Manju i.e. since about 11.15 p.m.

(3) Accused 1 did not return to the flat at 1.30 a.m. or 1.45 a.m. as alleged.

(4) The conduct of accused 1 in not calling for the immediate help of Dr Shrikant Kelkar and/or Mrs Anjali Kelkar is inconsistent with his defence that he felt suspicious of the health of Manju when he allegedly returned to the flat at 1.30 a.m.

(5) Indifferent conduct of accused 1 when Dr Lodha and Dr Gandhi went to the flat in Takshila Apartment. Accused 1 did not show any anxiety which one normally finds when the doctor comes to examine the patient. Accused 1 should have accompanied the doctors when they examined Manju and should have expressly or by his behaviour disclosed his feelings about the well being of his wife. It was also necessary for him to disclose the alleged fact that he saw Manju in a suspicious condition when he returned at about 1.30 a.m. or so.

(6) An attempt of Birdhichand to get the cremation of Manju done before 7 a.m. on June 12, 1982 even by spending any amount for that purpose. This conduct though of

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Birdhichand shows the conduct of a person to whom accused 1 had gone and informed as to what had happened.

(7) Delay and false information to police at the hands of Mohan Asava. Though the information is given by Mohan as per the phone instructions of accused 3 it is presumed that accused 1 must have told accused 3 about the incident and on that basis accused 3 gave instructions to Mohan Asava.

(8) Accused 1 himself does not take any action either personally or through somebody else to give correct information to police.

(9) Arrangement of the dead body to make show that Manju died a peaceful and natural death.

(10) Accused 1 has a motive to kill Manju as he wanted to get rid of her to continue relations with Ujvala.

(11) Absence of an anklet on left ankle of Manju is inconsistent with the defence that Manju committed suicide.

(12) The conduct of the accused in concealing the anklet in the fold of the chaddar is a conduct of a guilty man.

(13) The door of the bedroom was not found bolted from inside. This would have been normally done by Manju if she had committed suicide.

(14) Potassium cyanide must not have been available to Manju.

(15) Manju was 4 to 6 weeks pregnant. This is a circumstance which would normally dissuade her from committing suicide.

(16) Denial of the part of accused 1 of admitted or proved facts.

(17) Raising a false plea of absence from the bedroom at the relevant time. (pp. 152-155)

135. We have already discussed most of the circumstances extracted above and given our opinion, and have also fully explained the effect of circumstances Nos. 1, 2, 3, 4, 5 and 6. We might again even at the risk of repetition say that too much reliance seems to have been placed by the High Court on circumstance No. 4 as the appellant did not immediately call for Dr Shrikant Kelkar (PW 26) and Dr (Mrs) Anjali Kelkar (PW 27). In a matter of this magnitude it would be quite natural for the members of the appellant's family to send for their own family doctor who was fully conversant with the ailment of every member of the family. In these circumstances there was nothing wrong if the appellant and his brother went to a distance of 1½ km. to get Dr Lodha. Secondly, Dr Shrikant Kelkar was a skin specialist whereas Dr (Mrs) Anjali Kelkar was a paediatrician and the

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appellant may have genuinely believed that as they belonged to different branche , they were not at all suitable to deal with such a serious case. The High Court was, therefore, wrong in treating this circumstance as an incriminating conduct of the appellant.

136. Circumstance No. 5 is purely conjectural because as soon as Dr Lodha came he examined Manju and advised that Dr Gandhi be called. We fail to understand what was the indifferent conduct of the appellant when he had sent for the two doctors who examined the deceased. The appellant was in the same room or rather in an adjacent room when the deceased was being examined. From this no inference can be drawn that the appellant was indifferent to the state in which Manju was found.

137. As regards circumstance No 6 we have already explained this while dealing with the evidence of Mohan Asava, PW 30. As regards circumstance No. 7, the High Court has presumed that there being no dependable evidence the information given to the police by PW 30 was false and that the appellant must have told A 3 about the incident on the basis of which he gave instructions to PW 30. This is also far from the truth as has been pointed out by us while dealing with the evidence of PW 30.

138. Circumstance No. 8 is that PW 30 was asked to report the matter to the police. When the dead body was lying in the flat what action could the appellant have taken except reporting the matter to the police through one of his known persons. So far as circumstances Nos. 9 and 10 are concerned, they do not appear to us to be of any consequence because, as shown by us, from a reading of the letters (Exs. 30, 32 and 33) and the conduct of the appellant, we do not find any evidence of a clear motive on the part of the appellant to kill Manju.

139. Circumstances Nos. 11 and 12 are also of no assistance to the prosecution because whether the anklet was in the chaddar or elsewhere is wholly insignificant and does not affect the issue in question at all. Circumstance No. 13 is also speculative because if the bedroom was not found bolted from inside that would itself not show that Manju could not have committed suicide. Various persons may react to circumstances in different ways. When Manju entered her bedroom her husband had not come and since she went to sleep she may not have bolted the door from inside to enable her husband to enter the room. As regards circumstance No. 14, the High Court has overlooked a very important part of the evidence of PW 2 who has stated at page 178 of part I of the printed Paperbook thus :

> The plastic factory at Beed is a partnership concern in which

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two sons of Dhanraj, my wife and sister-in-law, i.e., brother's wife are partners.

140. Dr Modi's *Medical Jurisprudence and Toxicology* (Nineteenth Edn.) at page 747 shows that "Cyanide is also used for making basic chemicals for plastics". Apart from the fact that the High Court in relying on this circumstance has committed a clear error of record, it is an additional factor to show that cyanide could have been available to Manju when she visited Beed for the last time and had stayed there for more than a week.

141. Circumstance No. 15 — the fact that Manju was 4 to 6 weeks pregnant would dissuade Manju from committing suicide is also purely speculative. A pregnancy of 4 to 6 weeks is not very serious and can easily be washed out. Moreover, when a person has decided to end one's life these are matters which do not count at all. On the other hand, this circumstance may have prompted her to commit suicide for if a child was born to her, in view of her ill-treatment by her husband and her in-laws, the child may not get proper upbringing. Anyway, we do not want to land ourselves in the field of surmises and conjectures as the High Court has done.

142. Circumstance No. 16 is wholly irrelevant because the prosecution cannot derive any strength from a false plea unless it has proved its case with absolute certainty. Circumstance No. 17 also is not relevant because there is no question of taking a false plea of absence from the bedroom at the relevant time as there is no clear evidence on this point.

143. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code, 1973 they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of *Hate Singh Bhagat Singh* v. *State of Madhya Pradesh*[14] this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 of the old Code (corresponding to Section 313 of the Criminal Procedure Code, 1973), the same cannot be used against

14. AIR 1953 SC 468 : 1953 Cri LJ 1933

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him. In *Shamu Balu Chaugule* v. *State of Maharashtra*[15] this Court held thus : [SCC para 5, p. 440 : SCC (Cri) p. 58]

> The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him.

144. To the same effect is another decision of this Court in *Harijan Megha Jesha* v. *State of Gujarat*[16] where the following observations were made : [SCC (Cri) p. 653, para 3]

> In the first place, he stated that on the personal search of the appellant a *chedi* was found which was blood stained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement under Section 342, the prosecution cannot be permitted to rely on this statement in order to convict the appellant. . . .

145. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code, 1973 have to be completely excluded from consideration.

146. We might mention here an important argument advanced by counsel for the appellant and countered by the Additional Solicitor-General. It was argued before the High Court that it was highly improbable that if the betrothal ceremony of appellant's sister, which was as important as the marriage itself, was going to be performed on June 13, would the appellant choose a day before that for murdering his wife and thereby bring disgrace and destruction not only to his family but also to his sister. We have already adverted to this aspect of the matter but it is rather interesting to note how the High Court has tried to rebut this inherent improbability, on the ground that in a case of administration of poison the culprit would just wait for an opportunity to administer the same and once he gets the opportunity he is not expected to think rationally but would commit the murder at once. With due respect to the Judges of the High Court, we are not able to agree with the somewhat complex line of reasoning which is not supported by the evidence on record. There is clear evidence, led by the prosecution, that except for a week or few days of intervals, Manju always used to live with her husband and she had herself complained that he used to come late at night. Hence, as both were

15 (1976) 1 SCC 438 : 1976 SCC (Cri) 56
16. AIR 1979 SC 1566 : 1979 SCC (Cri) 652 : 1979 Cri LJ 1137

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living alone in the same room for the last four months there could be no dearth of any opportunity on the part of the appellant to administer poison if he really wanted to do so. We are unable to follow the logic of the High Court's reasoning that once the appellant got an opportunity he must have clung to it. The evidence further shows that both Manju and appellant had gone for a honeymoon outside Pune and even at that time he could have murdered her and allowed the case to pass for a natural death. However, these are matters of conjectures.

147. The Additional Solicitor-General realising the hollowness of the High Court's argument put it in a different way. He submitted that as the deceased was 4-6 weeks pregnant the appellant realised that unless the deceased was murdered at the behest it would become very difficult for him to murder her, even if he had got an opportunity, if a child was born and then he would have to maintain the child also which would have affected his illicit connections with Ujvala. This appears to be an attractive argument but on close scrutiny it is untenable. If it was only a question of Manju's being 4-6 weeks pregnant before her death, the appellant could just as well have waited just for another fortnight till the marriage of his sister was over which was fixed for June 30, 1982 and then either have the pregnancy terminated or killed her. Moreover, it would appear from the evidence of PW 2 (p. 176) that in his community the Kohl ceremony is not merely a formal betrothal but a very important ceremony in which all the near relations are called and invited to attend the function and a dinner is hosted. We might extract what PW 2 says about this :

> At the time of Kohl celebration of Manju, on August 2, 1981 my relatives i.e. my sister from outside had attended this function and many people were invited for this function. A dinner was also hosted by me. In that function the father of the bridegroom is required to spend for the dinner, while the presentations made to the bride are required to be given or doned at the expenses of the side of bridegroom. This programme is not attended by the bridegroom. (p. 176)

148. As Birdhichand and others were made co-accused in the case they were unable to give evidence on this point but it is the admitted case of both the parties that the accused belonged to the same community as PW 2. In these circumstances, it is difficult to accept the argument that the appellant would commit the murder of his wife just on the eve of the Kohl ceremony, when he could have done the same long before that ceremony or after the marriage as there was no hurry nor any such impediment which would deny him any opportunity of murdering his wife.

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149. We now come to the nature and character of the circumstantial evidence. The law on the subject is well settled for the last 6-7 decades and there have been so many decisions on this point that the principles laid down by courts have become more or less axiomatic.

150. The High Court has referred to some decisions of this Court and tried to apply the ratio of those cases to the present case which, as we shall show, are clearly distinguishable. The High Court was greatly impressed by the view taken by some courts, including this Court, that a false defence or a false plea taken by an accused would be an additional link in the various chain of circumstantial evidence and seems to suggest that since the appellant had taken a false plea that would be conclusive, taken along with other circumstances, to prove the case. We might, however, mention at the outset that this is not what this Court has said. We shall elaborate this aspect of the matter a little later.

151. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this : where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.

152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant* v. *State of Madhya Pradesh*[1]. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail (Alias) Simmi* v. *State of Uttar Pradesh*[17] and *Ramgopal* v. *State of Maharashtra*[18]. It may be useful to extract what Mahajan, J. has laid down in *Hanumant case*[1] :

> It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance

17. (1969) 3 SCC 198 : 1970 SCC (Cri) 55
18. AIR 1972 SC 656 : (1972) 4 SCC 625

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be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra*[19] where the following observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

> Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

19. (1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783

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155. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in *King* v. *Horry*[20], thus :

> Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt : the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.

156. Lord Goddard slightly modified the expression 'morally certain' by "such circumstances as render the commission of the crime certain".

157. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. *Horry case*[20] was approved by this Court in *Anant Chintaman Lagu* v. *State of Bombay*[21]. *Lagu case*[21] as also the principles enunciated by this Court in *Hanumant case*[1] have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases — *Tufail case*[17], *Ramgopal case*[18], *Chandrakant Nyalchand Seth* v. *State of Bombay*[22], *Dharambir Singh* v. *State of Punjab*[2]. There are a number of other cases where although *Hanumant case*[1] has not been expressly noticed but the same principles have been expounded and reiterated, as in *Naseem Ahmed* v. *Delhi Administration*[23], *Mohan Lal Pangasa* v. *State of U.P.*[24], *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra*[25] and *M.G. Agarwal* v. *State of Maharashtra*[26] — a five-Judge Bench decision.

158. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in *Deonandan Mishra* v. *State of Bihar*[27], to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor-General we are unable to agree with

20. 1952 NZLR 111
21. (1960) 2 SCR 460 : AIR 1960 SC 500 : 1960 Cri LJ 682
22. Criminal Appeal No. 120 of 1957, decided on February 19, 1958
23. (1974) 2 SCR 694, 696 : (1974) 3 SCC 668, 670 : 1974 SCC (Cri) 198, 200
24. AIR 1974 SC 1144, 1146 : (1974) 4 SCC 607, 609 : 1974 SCC (Cri) 643, 645
25. (1981) 2 SCR 384, 390 : (1981) 2 SCC 35, 39 : 1981 SCC (Cri) 315, 318-19 : 1981 Cri LJ 325
26. (1963) 2 SCR 405, 419 : AIR 1963 SC 200 : (1963) 1 Cri LJ 235
27. (1955) 2 SCR 570, 582 : AIR 1955 SC 801 : 1955 Cri LJ 1647

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the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus :

> But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation,. . . such absence of explanation or false explanation would itself be an additional link which completes the chain.

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied :

(1) various links in the chain of evidence led by the prosecution have been *satisfactorily proved,*

(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in *Shankarlal case*[25] where this Court observed thus : [SCC para 30, p. 43 : SCC (Cri) p. 322]

> Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused.

161. This Court, therefore, has in no way departed from the five conditions laid down in *Hanumant case*[1]. Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court. Where the prosecution is unable to prove any of the essential principles laid down in *Hanumant case*[1], the High Court cannot supply the weakness or the lacuna by taking

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aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General.

162. Moreover, in *M.G. Agarwal case*[26] this Court while reiterating the principles enunciated in *Hanumant case*[1] observed thus :

> If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt.

In *Shankarlal*[25] this Court reiterated the same view thus : [SCC para 31, p. 44 : SCC (Cri) p. 322]

> Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment.

163. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. In *Kali Ram* v. *State of Himachal Pradesh*[28], this Court made the following observations : [SCC para 25, p. 820 : SCC (Cri) p. 1060]

> Another golden thread which runs through the web of the administration of justice in criminal cases, is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.

164. We now come to the mode and manner of proof of cases of murder by administration of poison. In *Ramgopal case*[18] this Court held thus : (SCC p. 629, para 15)

> Three questions arise in such cases, namely (firstly), did the deceased die of the poison in question ? (secondly), had the accused the poison in question in his possession ? and (thirdly), had the accused an opportunity to administer the poison in question to the deceased ? It is only when the motive is there and these facts are all proved that the court may be able to draw the inference, that the poison was administered by the accused to the deceased resulting in his death.

165. So far as this matter is concerned, in such cases the court must carefully scan the evidence and determine the four important

28. (1973) 2 SCC 808 : 1973 SCC (Cri) 1048. (1974) 1 SCR 722 : AIR 1973 SC 2773 : 1974 Cri LJ 1

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circumstances which alone can justify a conviction :

(1) there is a clear motive for an accused to administer poison to the deceased,

(2) that the deceased died of poison said to have been administered,

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased.

166. In the instant case, while two ingredients have been proved but two have not. In the first place, it has no doubt been proved that Manju died of potassium cyanide and secondly, it has also been proved that there was an opportunity to administer the poison. It has, however. not been proved by any evidence that the appellant had the poison in his possession. On the other hand, as indicated above, there is clear evidence of PW 2 that potassium cyanide could have been available to Manju from the plastic factory of her mother, but there is no evidence to show that the accused could have procured potassium cyanide from any available source. We might here extract a most unintelligible and extraordinary finding of the High Court—

> It is true that there is no direct evidence on these two points, because the prosecution is not able to lead evidence that the accused had secured potassium cyanide poison from a particular source. Similarly there is no direct evidence to prove that he had administered poison to Manju. However, it is not necessary to prove each and every fact by a direct evidence. Circumstantial evidence can be a basis for proving this fact. (p. 160)

167. The comment made by the High Court appears to be frightfully vague and absolutely unintelligible. While holding in the cleare t possible terms that there is no evidence in this case to show that the appellant was in possession of poison, the High Court observes that this fact may be proved either by direct or indirect (circumstantial) evidence. But it fails to indicate the nature of the circumstantial or indirect evidence to show that the appellant was in possession of poison. If the Court seems to suggest that merely because the appellant had the opportunity to administer poison and the same was found in the body of the deceased, it should be presumed that the appellant was in possession of poison, then it has committed a serious and gro s error of law and has blatantly violated the principles laid down by this Court. The High Court has not indicated as to what was the basis for coming to a finding that the accused could have procured the cyanide. On the other hand, in view of the decision in *Ramgopal case*[18] failure to prove possession of the cyanide poison

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with the accused by itself would result in failure of the prosecution to prove its case. We are constrained to observe that the High Court has completely misread and misconstrued the decision in *Ramgopal case*[18]. Even prior to *Ramgopal case*[18] there are two decisions of this Court which have taken the same view. In *Chandrakant Nyalchand Seth case*[22] this Court observed thus :

> Before a person can be convicted of murder by poisoning, it is necessary to prove that the death of the deceased was caused by poison, that the poison in question was in possession of the accused and that poison was administered by the accused to the deceased. There is no direct evidence in this case that the accused was in possession of potassium cyanide or that he administered the same to the deceased.

168. The facts of the case cited above were very much similar to the present appeal. Here also, the Court found that the circumstances afforded a greater motive to the deceased to commit suicide than for the accused to commit murder. This view was reiterated in *Dharambir Singh case*[2] where the Court observed as follows :

> Therefore, along with the motive, the prosecution has also to establish that the deceased died of a particular poison said to have been administered, that the accused was in possession of that poison and that he had the opportunity to administer the same to the deceased ; (see *Mt. Gajrani* v. *Emperor*[29]). It is only when the motive is there and these facts are all proved that the court may be able to draw the inference, in a case of circumstantial evidence, that the poison was administered by the accused to the deceased resulting his death.
>
> * * *
>
> We feel that it was not right for the High Court to say, when this link in the chain had failed, that it could not be very difficult for anybody to procure potassium cyanide and therefore the absence of proof of possession of potassium cyanide by the accused was practically of no effect. On the facts as found by the High Court it must be held that the second of the three facts which have to be proved in a case of poisoning based on circumstantial evidence has not been proved, namely, that the accused was in possession of the poison that had been found in the body. . . . Can it be said in these circumstances when the proof of a very vital fact, namely, that the accused was in possession of potassium cyanide, has failed that the chain of circumstantial evidence is so far complete as not to leave any

29. AIR 1933 All 394 : 1933 All LJ 1617 : 34 Cri LJ 754

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reasonable ground for a conclusion consistent with the innocence of the accused and that the evidence which remains after the rejection of this fact is such as to show that within all human probability the act must have been done by the accused ?

169. We are, therefore, clearly of the opinion that the facts of the present appeal are covered by the ratio of the aforesaid decisions. At any rate, taking the worst view of the matter on the evidence in this case two possibilities are clearly open—

(1) that it may be a case of suicide, or

(2) that it may be a case of murder

and both are equally probable, hence the prosecution case stands disproved.

170. We now proceed to deal with some of the judgments of this Court on which great reliance has been placed by the High Court. In the first place, the High Court relied on the case of *Pershadi* v. *State of Uttar Pradesh*[30]. This case appears to be clearly distinguishable because no point of law was involved therein and on the facts proved and the very extraordinary conduct of the accused, the Court held that the circumstantial evidence was consistent only with the guilt of the accused and inconsistent with any other rational explanation. Indeed, if this would have been our finding in this particular case, there could be no question that the conviction of the accused would have been upheld.

171. The next case on which the High Court placed great reliance is *Lagu case*[21]. This case also does not appear to be of any assistance to the prosecution. In the first place, the case was decided on the peculiar facts of that case. Secondly, even though the corpus delicti was not held to be proved yet the medical evidence and the conduct of the accused unerringly pointed to the inescapable conclusion that the death of the deceased was as a result of administration of poison and that the accused was the person who administered the same. This, however, is not the case here. On the other hand, we have held that the conduct of the appellant has not been proved to be inconsistent with his guilt (*sic* innocence) and on this ground alone the present case can be easily distinguished. If at all it is an authority, it is on the point that this Court is not required to enter into an elaborate examination of the evidence unless there are very special circumstances to justify the same. As this Court in that case was clearly of the view that the High Court had fully considered the facts and a multitude of circumstances against the accused remained unexplained, the pre-

30. AIR 1957 SC 211 : 1957 Cri LJ 328

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sumption of innocence was destroyed and the High Court was therefore right in affirming the conviction. Of course, Sarkar, J. gave a dissenting judgment. From a detailed scrutiny of the decision cited above (*Lagu case*[31]) we find that there is nothing in common between the peculiar facts of that case and the present one. Hence, this authority is also of no assistance to the prosecution.

172. Reliance was then placed on the case of *Ram Das* v. *State of Maharashtra*[31] but we are unable to see how this decision helps the prosecution. The High Court relied on the fact that as the accused had taken the deceased immediately to the Civil Hospital in order to stop the poison from spreading, this particular fact was eloquent enough to speak for the innocence of the accused. A careful perusal of that decision shows that this Court did not accept the prosecution case despite circumstances appearing in that case which are almost similar to those found in the present one. Moreover, here also the accused had immediately sent for their family doctor after they had detected that Manju was dead. The reason for a little delay in lodging the FIR has already been explained by us while dealing with the facts. In the decision cited above, it was clearly held that the case against the accused was not proved conclusively and unerringly and that two reasonable views were possible, the relevant portion of which may be extracted thus : [SCC para 16, p. 131 : SCC (Cri) p. 261]

> On a consideration of the evidence and the circumstances referred to above, we are satisfied that this is a case in which the circumstantial evidence did not prove the case against the accused conclusively and unerringly, and at any rate two reasonable views were possible.

173. We have already found in the instant case that taking the prosecution at the highest the utmost that can be said is that two views — one in favour of the accused and the other against him — were possible. *Ram Dass case*[31] also therefore supports the appellant rather than the prosecution.

174. The last case relied upon by the High Court is *Shankarlal case*[25] but we are unable to see how this case helps the prosecution. The observations on which the High Court has relied upon appears to have been torn from the context. On the other hand, this decision fully supports the case of the appellant that falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. This decision has already been dealt with by

31. AIR 1977 SC 1164 : (1977) 2 SCC 124 : 1977 SCC (Cri) 254 : 1977 Cri LJ 955

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us while considering the merits of the present case and it is not necessary to repeat the same.

175. These are the only important cases of this Court on which the High Court seeks to rely and which, on a close examination, do not appear to be either relevant or helpful to the prosecution case in any way. On the other hand, some of the observations made in these cases support the accused rather than the prosecution.

176. This now brings us to the fag end of our judgment. After a detailed discussion of the evidence, the circumstances of the case and interpretation of the decisions of this Court the legal and factual position may be summarised thus :

(1) That the five golden principles enunciated by this Court in *Hanumant*[1] decision have not been satisfied in the instant case. As a logical corollary, it follows that it cannot be held that the act of the accused cannot be explained on any other hypothesis except the guilt of the appellant nor can it be said that in all human probability, the accused had committed the murder of Manju. In other words, the prosecution has not fulfilled the essential requirements of a criminal case which rests purely on circumstantial evidence

(2) That, at any rate, the evidence clearly shows that two views are possible — one pointing to the guilt of the accused and the other leading to his innocence. It may be very likely that the appellant may have administered the poison (potassium cyanide) to Manju but at the same time a fair possibility that she herself committed suicide cannot be safely excluded or eliminated. Hence, on this ground alone the appellant is entitled to the benefit of doubt resulting in his acquittal.

(3) The prosecution has miserably failed to prove one of the most essential ingredients of a case of death caused by administration of poison, i.e., possession of poison with the accused (either by direct or circumstantial evidence) and on this ground alone the prosecution must fail.

(4) That in appreciating the evidence, the High Court has clearly misdirected itself on many points, as pointed out by us, and has thus committed a gross error of law.

(5) That the High Court has relied upon decisions of this Court which are either inapplicable or which, on closer examination, do not support the view of the High Court being clearly distinguishable.

(6) That the High Court has taken a completely wrong view of law in holding that even though the prosecution may suffer from

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serious infirmities it could be reinforced by additional link in the nature of false defence in order to supply the lacuna and has thus committed a fundamental error of law.

(7) That the High Court has not only misappreciated the evidence but has completely overlooked the well established principles of law and in view of our findings it is absolutely clear that the High Court has merely tried to accept the prosecution case based on tenterhooks and slender tits and bits.

(8) We entirely agree with the High Court that it is wholly unsafe to rely on that part of the evidence of Dr Banerjee (PW 33) which shows that poison was forcibly administered by the process of mechanical suffocation.

(9) We also agree with the High Court that there is no manifest defect in the investigation made by the police which appears to be honest and careful. A proof positive of this fact is that even though Rameshwar Birdhichand and other members of his family who had practically no role to play had been arrayed as accused but they had to be acquitted by the High Court for lack of legal evidence.

(10) That in view of our finding that two views are clearly possible in the present case, the question of defence being false does not arise and the argument of the High Court that the defence is false does not survive.

177. This was a fit case in which the High Court should have given at least the benefit of doubt to the appellant.

178. Normally, this Court does not interfere with the concurrent findings of fact of the courts below, in the absence of very special circumstances or gross errors of law committed by the High Court. But where the High Court ignores or overlooks the crying circumstances and proved facts, violates and misapplies the well established principles of criminal jurisprudence or decisions rendered by this Court on appreciation of circumstantial evidence and refuses to give benefit of doubt to the accused despite facts apparent on the face of the record or on its own findings or tries to gloss over them without giving any reasonable explanation or commits errors of law apparent on the face of the record which results in serious and substantial miscarriage of justice to the accused, it is the duty of this Court to step in and correct the legally erroneous decision of the High Court.

179. We can fully understand that though the case superficially viewed bears an ugly look so as to prima facie shock the conscience of any court yet suspicion, however great it may be, cannot take the

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place of legal proof. A moral conviction however strong or genuine cannot amount to a legal conviction supportable in law.

180. It must be recalled that the well established rule of criminal justice is that "fouler the crime higher the proof". In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautious and meticulous approach was necessary to be made.

181. Manju (from the evidence on the record) appears to be not only a highly sensitive woman who expected whole-hearted love and affection from her husband but having been thoroughly disappointed out of sheer disgust, frustration and depression she may have chosen to end her life — at least this possibility is clearly gleaned from her letters and mental attitude. She may have been fully justified in entertaining an expectation that after marriage her husband would look after her with affection and regard. This is clearly spelt out in the letters where she hinted that her husband was so busy that he found no time for her. A hard fact of life, which cannot be denied, is that some people in view of their occupation or profession find very little time to devote to their family. Speaking in a light vein, lawyers, professors, doctors and perhaps Judges fall within this category and to them Manju's case should be an eye-opener.

182. For the reasons given above we hold that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. We, therefore, allow the appeal, set aside the judgments of the courts below and acquit the appellant, Sharad Birdhichand Sarda, of the charges framed against him and direct him to be released and set at liberty forthwith.

VARADARAJAN, J. (*concurring*)—This appeal by special leave is directed against the judgment of a Division Bench of the Bombay High Court in Criminal Appeal No. 265 of 1983 and Confirmation Case No. 3 of 1983, dismissing the appeal and confirming the sentence of death awarded to the first accused Sharad Birdhichand Sarda (hereinafter referred to as the 'appellant') by the Additional Sessions Judge, Pune in Sessions Case No. 203 of 1982. The appellant, Rameshwar Birdhichand Sarda and Ramvilas Rambagas Sarda were accused 1, 2 and 3 respectively in the sessions case.

184. The appellant and the second accused are the sons of one Birdhichand of Pune whose family has a cloth business. In addition, the appellant who is said be a graduate in chemical engineering had started a chemical factory at Bhosari, a suburb of Pune. The third accused is uncle of the appellant and the second accused. The appellant is the husband of Manjushree alias Manju while the second accused

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is the husband of Anuradha (PW 35). Birdhichand's family has its residential house at Ravivar Peth in Pune and owns a flat in a building known as Takshila Apartments in Mukund Nagar area of Pune.

185. Manju, the alleged victim in this case, was the eldest amongst the five children of Rameshwar (PW 2) and Parwati (PW 20). Anju (PW 6) is the second daughter of PW 2 who is a Commercial Tax and Income Tax Consultant since 1960. PW 2 is living in his own house situate in Subash Road in Beed city since 1973, prior to which he was living in a rented house in Karimpura Peth in that city. Meena (PW 5) is a school and college mate and friend of Manju who passed the B.Sc. examination in chemistry in the first class in 1980 while PW 5 who had passed the tenth standard examination together with Manju was still studying in college. Rekha (PW 3) whom Manju used to call as Vahini is another friend of Manju. She is living with her husband Dr Dilip Dalvi in a portion of PW 2's house in Subash Road, Pune (*sic* Beed city) as his tenant. PW 20's elder brother Dhanraj Rathi (PW 22) is a resident of Pune where he is doing business in the sale of plastic bags for the manufacture of which he has a plastic factory called Deepak Plastics at Beed. It is a partnership concern of PW 20 and some others including PW 22's third son Shrigopal. Deepak is one of the two sons of PWs 2 and 20.

186. After Manju passed her B.Sc. degree examination in 1980 her marriage with the appellant was settled by a formal betrothal ceremony which took place in June 1981. The marriage of the appellant and Manju was performed at the expense of PW 2 at Beed on February 11, 1982. The appellant and Manju left for Pune on February 12, 1982 after the marriage. Subsequently, PW 2 sent his elder son Deepak for fetching Manju from the appellant's house at Pune and they accordingly came back to Beed on February 22, 1982. The appellant went to Beed four or five days later and took Manju back to Pune on the next day after pleading his inability to stay in PW 2's house for some more days. This was Manju's first visit to her parents' house after her marriage with the appellant. She is said to have been very happy during that visit. Thereafter Manju came to her parents' house along with her maternal uncle Dhanraj Rathi (PW 22) on or about April 2, 1982. It is the case of the prosecution that during that visit Manju was uneasy and had generally complained against the appellant to PWs 3 and 6. PW 2 planned to keep Manju in his house for about three weeks on that occasion. But news of the death of the appellants grandfather was received in PW 2's house in Beed and, therefore, PWs 2 and 20 and Manju went to Pune for condolences on April 11, 1982. After meeting the appellant's father and others at Pune, PWs 2 and 20 returned to Beed leaving Manju in the appellant's house in Pune. That was the

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second visit of Manju to her parents' house after marriage with the appellant. PWs 2 and 20 came to Pune again on or about May 13, 1982. After staying for some time as usual in the house of PW 22, PWs 2 and 20 visited the house of Birdhichand on that occasion. It is the case of the prosecution that PWs 2 and 20 found Manju disturbed and uneasy and that they, therefore, took her to the house of PW 22 with the permission of Birdhichand. It is also the case of the prosecution that on reaching PW 22's house Manju completely broke down and started weeping in the arms of PW 20. PWs 2 and 20 returned to Beed from Pune and sent their second son Pradeep four or five days later to fetch Manju, who had, however, by then gone with the appellant to Tirupati in Andhra Pradesh. After learning that the appellant and Manju had returned to Pune, PW 2 sent his son Deepak to fetch Manju to Beed. Accordingly Deepak brought Manju to Beed accompanied by the third accused's daughter Kavita on May 25, 1982. This was Manju's third and last visit to her parents' house after her marriage with the appellant. It is the case of the prosecution that Manju was totally disturbed and frightened during that visit and that she complained to her mother PW 20 against the appellant and she in turn conveyed to PW 2 what she heard from Manju. Birdhichand went to Beed on June 2, 1982 without any prior intimation for taking Manju to Pune on the ground that Manju's presence in his family house at Pune was necessary for the betrothal ceremony of his daughter Shobha fixed for June 13, 1982 as well as for her marriage fixed for June 30, 1982. It is the case of the prosecution that when Manju came to know that her father-in-law Birdhichand had come for taking her to Pune she wept and expressed her unwillingness to go to Pune and that, however, on the assurance of Birdhichand that he would see to it that nothing happened to the life of Manju, PW 2 permitted Manju to go to Pune along with Birdhichand and she accordingly went to Pune on June 3, 1982 along with Kavita and Birdhichand.

187. The family of Birdhichand and his sons including the appellant is joint. As stated earlier they have their family's residential house at Ravivar Peth, Pune besides the flat which they owned in the Takshila Apartment situate at some distance from their family house. Their flat has two bedrooms besides a hall and other portions. Birdhichand's two married sons, the appellant and the second accused used to go to the family's flat in the Takshila Apartments for sleeping during the nights. The appellant and Manju used to sleep in one of the two bedrooms while the second accused and his wife Anuradha (PW 35) and their children used to sleep in the other bedroom.

188. Manju had written amongst others, three letters, Ex. 33 dated April 25, 1982 to her friend Vahini (PW 3) and Exs. P-30

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dated May 8, 1982 and P-32 dated June 8, 1982 to her younger sister Anju (PW 6). In Ex. 33 Manju has stated inter alia that she was feeling lonely though all persons in Pune were very good and everybody was loving and that one reason is that there are many elderly persons in the house and, therefore, she does not dare to do any work independently and the fear which is in her mind every time leads to confusion. She has also stated in that letter that she becomes angry if he (appellant) does not speak to her when she goes and talks to him even ten times and that till now this man (appellant) had no time to mind his wife. She has stated in that letter that she dare not ask him (appellant) whether his clothes be taken for washing and that at present her status is only that of an unpaid maidservant. She has finally stated in that letter that on the day on which self-pride in the appellant is reduced no other person will be more fortunate than her but it is not certain whether she will be alive until that date. In Ex. 30 she has stated inter alia that she was undergoing a very difficult test and was unable to achieve her object, that it would be well and good only if she controls herself and that some other way will have to be evolved when that becomes impossible. In Ex. 32 she has stated that though she was happy at Pune she does not know why there is such a dirty atmosphere in the house and it is felt every moment that something will happen. She has also stated in that letter that no work had been started in the house though Shobha's 'sari' function is fixed for June 13, 1982 and, therefore, she is out of her mind.

189. The case of the prosecution as regards the alleged occurrence during the night of June 11/12, 1982 is this : On June 11, 1982 at about 10.30 p.m. Manju accompanied by Anuradha (PW 35) and three children of the latter came to the Takshila Apartments by an auto-rickshaw. The night-watchman of the Takshila Apartments, Kerba (PW 28) has deposed about this fact. Syed Mohideen, (PW 7), an auto-rickshaw driver residing in the border of Ganesh Peth and Ravivar Peth in Pune claims to have taken two ladies, three children and a baby by his auto-rickshaw at about 11 p.m. on that day to Mukund Nagar. He has identified the photo of Manju published in a newspaper two or three days later as that of one of the two ladies who travelled by his auto-rickshaw as aforesaid. The second accused had already gone to the flat in the Takshila Apartments. The appellant reached the flat about 15 minutes later by a scooter, when the night-watchman (PW 28) remarked that he was coming rather late he told PW 28 that it was because he had a meeting. After the appellant reached the flat he and Manju retired to their bedroom while the second accused and PW 35 retired to their's. Thereafter the appellant came out of his bedroom at about 2 a.m. on June 12, 1982 and went

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to the second accused and both of them went out of that flat by scooters soon afterwards. The appellant proceeded to Ravivar Peth and called his father while the second accused went to call Dr Uttamchand Lodha (PW 24), who lives about one and a half kilometres away from the Takshila Apartments without seeking the help of Dr Anjali Kelkar, (PW 26) and her husband Dr Shrikant Kelkar (PW 27) who lived close by in the same Takshila Apartments. PW 24 reached the appellant's flat at about 2.30 a.m. and found Manju dead, with rigor mortis having already set in and no external mark showing the cause of death. He, however, opined that it may be a case of unnatural death and suggested that the police may be informed. When Birdhichand who had arrived at the flat by then advised that some other doctor may be called as he was not satisfied with the opinion of PW 24, PW 24 suggested that Dr Anil Gandhi, PW 25 may be called if so desired. Thereafter, PW 24 and the third accused who had come with Birdhichand went to call PW 25 who lives about 7 kilometres away from the Takshila Apartments. On their way they contacted PW 25 over the phone and took him to the appellant's flat where he examined Manju at about 4 a.m. and pronounced that she was dead. He opined that she might have died three or four hours earlier and stated that there was no external evidence showing the cause of death. He too suggested that the police should be informed to avoid any trouble.

190. The third accused went to Mohan Asava (PW 30) at about 4.30 a.m. on June 12, 1982 and called him to the appellant's flat after informing him that Manju was dead. PW 30, who accompanied the third accused, saw the body of Manju in the flat and left the place after suggesting that the police should be informed. The third accused contacted PW 30 over the phone at about 6.30 a.m. and asked him to go and inform the police that Manju had died at 5.30 a.m. PW 30 accordingly went to Maharishi Nagar Police Station at about 7 or 7.15 a.m. and informed the head constable (PW 31) who thereupon made the entry Ex. 120 to the effect that Manju was found to be dead when the appellant tried to wake her up at 5.30 a.m. on June 12, 1982. PW 31 proceeded to the appellant's flat at about 8 a.m. after informing the Inspector of Police, PW 40 telephonically about the suspicious death of Manju.

191. On receipt of information from PW 22 by a lightning telephone call at about 6 a.m. on June 12, 1982 that Manju was extremely serious PW 2 went from Beed to Pune along with his wife PW 20 and his son Pradeep and Hiralal Sarda (PW 4) by jeep at about 1 p.m. on June 12, 1982 and learnt that Manju was dead. Thereafter PW 2 went along with Hiralal Sarda to the Sasson Hospital where Manju's body had been sent by the police for autopsy.

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192. Dr Kalikrishnan Banerji (PW 33) who conducted autopsy on the body of Manju did not find any external or internal injury. He preserved the viscera, small intestines etc. of Manju and reserved his opinion about the cause of her death. On receipt of the chemical examiner's report Ex. 130 to the effect that Manju's viscera contained potassium cyanide poison PW 33 finally opined that Manju had died due to potassium cyanide poisoning and simultaneous mechanical suffocation. After completing the investigation PW 40 filed the charge-sheet against the appellant and the other two accused on September 13, 1982.

193. The Additional Sessions Judge, Pune tried the appellant for the offence under Section 302, IPC of murder of Manju by administering potassium cyanide poison or by suffocating her or by both, all the three accused for the offence under Section 120-B, IPC of conspiring to destroy the evidence of the murder of Manju by giving a false report to the police about the time of her death and the third accused for the offence under Section 109 read with Section 201, IPC and Section 201, IPC for instigating PW 30 to give false information to the police and giving false information to PW 22 regarding the murder of Manju.

194. The appellant and the other two accused denied the charges framed against them. The appellant denied that he had anything to do with Ujvala (PW 37) with whom he is alleged to have been in love at the relevant time. He admitted that Manju and PW 35 accompanied by some children went to their flat in the Takshila Apartments at about 10.30 p.m. on June 11, 1982 but denied that they travelled by any auto-rickshaw and stated that they went there by their family's car driven by the second accused. He denied that he went to the flat about 15 minutes later and stated that he returned to the flat only at 1.30 or 1.45 a.m. on June 12, 1982 after attending a meeting in the Rajasthan Youth Club. He stated that after changing his clothes he looked at Manju and found something abnormal and became suspicious and then went to the second accused and that thereafter he went to call his father and uncle while the second accused went to call Dr Lodha, PW 24.

195. The trial court found all the three accused guilty as charged and convicted them accordingly and sentenced the appellant to death under Section 302, IPC and all the three accused to rigorous imprisonment for two years and a fine Rs 2000 each under Section 120-B, IPC but did not award any sentence under Section 201 read with Section 120-B.

196. The appellant and the other two accused filed appeals against their conviction and the sentences awarded to them. The State filed

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a criminal revision application for enhancement of the sentence awarded to accused 2 and 3. These appeals, confirmation case and criminal revision application were heard together by the Division Bench of the Bombay High Court, which in a lengthy judgment (195 pages of our Paperbook) allowed the appellant's appeal in part regarding his conviction and sentence under Section 120-B, IPC but confirmed his conviction and sentence of death awarded under Section 302, IPC and allowed the appeal of accused 2 and 3 in full and acquitted them and dismissed the criminal revision application. Hence, the appellant alone has come up before this Court on special leave against his conviction and the sentence of death.

197. I had the benefit of reading the judgment of my learned brother Fazal Ali, J. I agree with his final conclusion that the appeal should succeed. The learned Judges of the High Court have relied upon 17 circumstances for confirming the conviction and sentence of death awarded to the appellant. My learned brother Fazal Ali, J. has rightly rejected every one of those circumstances as not conclusively pointing to the guilt of the appellant, including the circumstance that the appellant was last seen with Manju before her death on the ground that the case of the prosecution based on the evidence of Dr Banerji (PW 33) that there was any mechanical suffocation of Manju has been disbelieved by the High Court itself and that some entries in the carbon copy Ex. 134 of PW 33's report sent to the chemical examiner had been scored out and interpolated after his report Ex. 132 to the chemical examiner had left his hands, that the original entry in the post-mortem certificate Ex. 134 contained the words "can be a case of suicidal death" and that the explanation of PW 33 that he wrote the words 'time of death' twice and not the words "can be a case of suicidal death" and, therefore, he scored off one of them is not acceptable at all. The doctors PW 24 and 25 did not find any external injury on the body of Manju which they saw at about 2.30 and 4.30 a.m. on June 12, 1982. Even PW 33 did not find any external or internal injury on the body of Manju. In these circumstances, unless the prosecution excludes the possibility of Manju having committed suicide by consuming potassium cyanide poison, as rightly pointed out by my learned brother Fazal Ali, J., no adverse inference of guilt can be drawn against the appellant from the fact that he was last seen with Manju, he being no other than her own husband who is naturally expected to be with her during nights. Some of these 17 circumstances cannot, by any stretch of imagination, be held to point to the guilt of the appellant. Circumstance No. 6 is an attempt of the appellant's father Birdhichand to get the body of Manju cremated before 7 a.m. on June 12, 1982 by expressing such a desire to PW 30. Circumstance No. 9 is arrange-

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ment of the dead body of Manju to make it appear that she died a peaceful and natural death. Circumstance No. 11 is absence of an anklet of Manju from her leg. Circumstance No. 12 is the conduct of the appellant in allegedly concealing the anklet in the fold of the chaddar. Circumstance No. 15 is the fact that according to the medical evidence Manju was pregnant by four to six weeks and it would normally dissuade her from committing suicide. With respect to the learned Judges of the High Court, in my view, by no stretch of imagination, can any of these circumstances be considered to point to nothing but the guilt of the appellant in a case resting purely on circumstantial evidence.

198. However, since I am unable to persuade myself to agree with my learned brother Fazal Ali, J. on four points, I am writing this separate but concurring judgment, giving my view on those points, namely, (1) ill-treatment of Manju by the appellant, (2) intimacy of the appellant with Ujvala (PW 37), (3) admissibility of Manju's letters Exs. 30, 32 and 33 and the oral evidence of PWs 2, 3, 5, 6 and 20 about the alleged complaints made by Manju against the appellant under Section 32(1) of the Evidence Act and (4) conduct of Dr Banerji (PW 33) who had conducted autopsy on the body of Manju.

199. My learned brother Fazal Ali, J. has observed as follows at pages 3 and 96 of his judgment : (paras 3, 141)

> Para 3 : On the other hand, the plea of the defence was that while there was a strong possibility of Manju having been ill-treated and uncared for by her husband or her in-laws, being a highly sensitive and impressionate woman she committed suicide out of sheer depression and frustration arising from an emotional upsurge.
>
> Para 141 : On the other hand, this circumstance may have prompted her to commit suicide for if a child was born to her, in view of her ill-treatment by her husband and her in-laws, the child may not get proper upbringing.

I do not recollect any admission by Mr Ram Jethmalani, learned counsel for the appellant in the course of his arguments about any cruelty or ill-treatment to Manju on the part of the appellant or his parents. The evidence of PW 3 is that during Manju's second visit to Beed after her marriage with the appellant she found Manju not quite happy and very much afraid of the appellant. The evidence of PW 5 is that during Manju's second visit to Beed, Manju complained to her about the appellant returning home late in the night and avoiding to have a talk with her and that Manju told her that

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she was afraid of the appellant and apprehended danger to her life at his hands. The further evidence of the PW 5 is that during her third visit to Beed she inferred from Manju's face a spell of fear. The evidence of PW 6 is that during Manju's second visit to Beed, Manju told her that the appellant used to leave the house early in the morning and return late at night under the pretext of work in his factory and that he was even reluctant to talk with her. PW 6 has stated that during Manju's third visit to Beed she was extremely uneasy, disturbed and under a spell of fear, that Manju told her that the appellant did not relish even her question as to why he was not prepared to have a simple talk with her, and that during her third visit to Beed, Manju expressed her unwillingness to go to Pune when Birdhichand went to Beed on June 2, 1982 for taking her to Pune. To the same effect is the evidence of PWs 2 and 20 about how Manju looked in spirit and what she stated during her last two visits. My learned brother Fazal Ali, J. has rightly rejected the oral evidence of PWs 2, 3, 5, 6 and 20. He has extracted the relevant portions of the letters Exs. 30, 32 and 33 in his judgment and has observed in para 32 that one thing which may be conspicuously noticed in Ex. 30 is that Manju was prepared to take all the blame on herself rather than incriminating her husband or his parents; in para 34 that it was conceded by the learned Additional Solicitor-General that the relevant portion of Ex. 32 does not refer to any ill-treatment of Manju by the appellant or his parents; and in para 39 that it can be easily inferred from Ex. 33 that Manju did not have any serious complaint against the appellant except that she was not getting proper attention which she deserved from him. These three letters do not establish that Manju made any complaint of any ill-treatment by the appellant or his parents. In my view, these three letters and the aforesaid oral evidence of PWs 2, 3, 5, 6 and 20 are inadmissible in evidence under Section 32(1) of the Evidence Act for reasons to be given elsewhere in my judgment. Thus there is no acceptable evidence on record to show that either the appellant or his parents ill-treated Manju. The High Court also has not found any such ill-treatment in its judgment. On the other hand, what has been found by the High Court in para 104 of its judgment is that the appellant treated Manju contemptuously. Even while setting out the case of the prosecution the High Court has stated in para 7 of its judgment that it is alleged that the appellant started giving contemptuous treatment to Manju and in para 20 that the appellant has denied in his statement recorded under Section 313 CrPC that Manju was being treated contemptuously. No question has been put to the appellant in the course of his examination under Section 313 CrPC about any ill-treatment of Manju by the appellant or his parents. My learned brother Fazal Ali, J. has referred in paras 143 and 144 of his judgment to this Court's decisions

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in *Hate Singh Bhagat Singh* v. *State of Madhya Pradesh*[14], *Shamu Balu Chaugule* v. *State of Maharashtra*[15] and *Harijan Megha Jesha* v. *State of Gujarat*[16] and has observed in para 145 of his judgment that circumstances not put to the appellant in his examination under Section 313 CrPC have to be completely excluded from consideration in view of those decisions. Therefore, since no question has been put to the appellant in this regard in the course of his examination under Section 313 CrPC, even if there is any evidence about any ill-treatment of Manju by the appellant or his parents it has to be completely excluded from consideration. I felt it necessary to say this in my judgment since I think that in fairness to the appellant it has to be done.

200. My learned brother Fazal Ali, J. has set out the case of the prosecution insofar as it connects PW 37 with the appellant in para 3 of his judgment where he has stated that the positive case of the prosecution is that the appellant was not at all interested in Manju and had illicit intimacy with PW 37. On this point there is the evidence of PWs 3, 5 and 6. The evidence of PW 3 is that during her second visit to Beed, Manju informed her that the appellant had a girl-friend by name Ujvala Kothari and that he introduced her (Ujvala Kothari) to her and told her that she should learn from Ujvala Kothari about how she should behave with him. The evidence of PW 5 is that during her second visit to Beed, Manju told her that the appellant had an affair with a girl by name Ujvala Kothari and that she had seen Ujvala's letter addressed to the appellant and an incomplete letter of the appellant addressed to that girl. No such letters have been produced in evidence. The evidence of PW 6 is that during her second visit to Beed, Manju told her that the appellant had an affair with a girl by name Ujvala Kothari and also introduced that girl to her in the Pearl Hotel saying that she has complete command over him and that she (Manju) should take lessons from her (Ujvala Kothari) about how she should behave with him. There is no other evidence regarding this alleged illicit intimacy between the appellant and PW 37. This alleged illicit intimacy is totally denied not only by the appellant but also by PW 37. The alleged incident in the Pearl Hotel, according to the case of the prosecution, took place on March 17, 1982. But there is no reference whatever to any such incident in any of the subsequent three letters of Manju, Exs. 30, 32 and 33, dated May 8, 1982, June 8, 1982 and April 23, 1982 respectively. My learned brother Fazal Ali, J. has rightly rejected the oral evidence not only of PWs 3, 5 and 6 but also of PWs 2 and 20 as untrustworthy in para 89 and 90 of his judgment. However, in para 96 he has stated that it has been proved to some extent that the appellant had some sort of intimacy with Ujvala Kothari and it

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had embittered the relationship between the appellant and Manju. In my view, as already stated, the oral evidence of PWs 2, 3, 5, 6 and 20 about what Manju is alleged to have told them against the appellant and or his family, and even her letters Exs. 30, 32 and 33 are inadmissible in evidence under Section 32(1) of the Evidence Act. Thus, there is absolutely no reliable or admissible evidence on record to show that the appellant had any intimacy with Ujvala (PW 37). I am, therefore, unable to share the view of my learned brother Fazal Ali, J. that the prosecution has proved to some extent that the appellant had some sort of intimacy with PW 37 and it had embittered the relationship between the appellant and Manju. I think that I am bound to say this in fairness to not only the appellant but also PW 37 who, on the date of her examination in the Court, was a 19 years old student and has stated in her evidence that she had known the appellant only as the President of the Rajasthan Youth Club in the year 1979 when she was a member of that Club for about 5 or 6 months in that year.

201. My learned brother Fazal Ali, J. has referred to the oral evidence of PWs 2, 3, 5, 6 and 20 about Manju's alleged complaint against the appellant and or his parents and also to the contents of Manju's letters, Exs. 30, 32 and 33. I have mentioned above the gist of that oral evidence and those three letters. My learned brother has held the said oral evidence and those three letters to be admissible under Section 32(1) of the Evidence Act while rejecting the oral evidence of those five witnesses as untrustworthy in para 89 and 90 of his judgment, mainly on the ground that the oral evidence is quite inconsistent with the spirit and contents of those letters. He appears to have relied upon those three letters for two purposes, namely, rejecting the oral evidence of those five witnesses as untrustworthy and supporting the defence version that it may be a case of suicidal death. In my opinion the oral evidence of those five witnesses about what Manju is alleged to have told them against the appellant and/or his parents and the three letters, are inadmissible under Section 32(1) of the Evidence Act, which reads thus :

> 32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases :
>
> (1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

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202. The alleged oral statements of Manju to PWs 2, 3, 5, 6 and 20 are said to have been made during her second and third visits to Beed in the end of February 1982 and end of May 1982 respectively before her death during the night of June 11/12, 1982. She had written the letters, Exs. 33, 30 and 32 on April 23, 1982, May 8, 1982 and June 8, 1982 as stated earlier. The oral evidence of these witnesses and these three letters are not as to the cause of Manju's death or as to any of the circumstances of the transaction which resulted in her death during that night. The position of law relating to the admissibility of evidence under Section 32(1) is well settled. It is, therefore, not necessary to refer in detail to the decisions of this Court or of the Privy Council or our High Courts. It would suffice to extract what the learned authors Woodroffe and Amir Ali have stated in their *Law of Evidence*, fourteenth edition and Ratanlal and Dhirajlal in their *Law of Evidence* (1982 Reprint). Those propositions are based mostly on decisions of courts for which reference has been given at the end. They are these :

Woodroffe and Amir Ali's Law of Evidence, fourteenth edition :

> Page 937 : Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the test applied to admissible evidence, namely, the oath and cross-examination. But where there are special circumstances which give a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source.
>
> Page 941 : What is relevant and admissible under clause (1) of this section (Section 32) is the statement actually made by the deceased as to the cause of his death or of the circumstances of the transaction which resulted in his death.
>
> Page 945-946 : A statement must be as to the cause of the declarant's death or as to any of the circumstances of the transaction which resulted in his death i.e. the cause and circumstances of the death and not previous or subsequent transaction, such independent transactions being excluded as not falling within the principle of necessity on which such evidence is received. When a person is not proved to have died as a result of injuries received in the incident in question, his statement cannot be said to be a statement as to the cause of his death or as to any of the circumstances which resulted in his death. (AIR 1964 SC 900.) Where there is nothing to show that the injury to which a statement in the dying declaration relates was the cause of the injured person's death or that the circumstances under which it was received resulted in his death, the statement is not admissible under this clause. (ILR 1901 25 Bom 45.)

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Page 947 : Circumstances of the transaction resulting in his death : This clause refers to two kinds of statements : (*i*) when the statement is made by a person as to the cause of his death, or (*ii*) when the statement is made by a person as to any of the circumstances of the transaction which resulted in his death. The words "resulted in his death" do not mean "caused his death". The expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death". The declarant need not actually have been apprehending death. (AIR 1964 MP 30.)

Page 947 : The expression "circumstances of the transaction" occurring in Section 32, clause (1) has been a source of perplexity to courts faced with the question as to what matters are admissible within the meaning of the expression. The decision of their Lordships of the Privy Council in *Pakala Narayana Swami* v. *Emperor*[4] sets the limits of the matters that could legitimately be brought within the purview of that expression. Lord Atkin, who delivered the judgment of the Board, has, however, made it abundantly clear that, except in special circumstances no circumstance could be a circumstance of the transaction if it is not confined to either the time actually occupied by the transaction resulting in death or the scene in which the actual transaction resulting in death took place. The special circumstance permitted to transgress the time factor is, for example, a case of prolonged poisoning, while the special circumstance permitted to transgress the distance factor is, for example, a case of decoying with intent to murder. . . . But the circumstances must be circumstances of the transaction and they must have some proximate relation to the actual occurrence.

Page 948 : "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes the evidence of all relevant factors. It is on the other hand narrower than 'res gestae'. Circumstances must have some proximate relation to the actual occurrence, though, as for instance, in the case of prolonged poisoning they may be related to dates at a considerable distance from the date of actual fatal dose.

Page 948 : The Supreme Court in the case of *Shiv Kumar v. State of U.P.*[32] has made similar observations that the circumstances must have some proximate relation to the actual occurrence, and that general expressions indicating fear or suspicion, whether

32. 1966 Cri App R (SC) 281

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of a particular individual or otherwise and not directly to the occasion of death will not be admissible.

Page 949 : The clause does not permit the reception in evidence of all such statements of a dead person as may relate to matters having a bearing howsoever remote on the cause or the circumstances of his death. It is confined to only such statements as relate to matters so closely connected with the events which resulted in his death that may be said to relate to circumstances of the transaction which resulted in his death. [(1939) 66 IA 66.] "Circumstances of the transaction which resulted in his death" means only such facts or series of facts which have a direct or organic relation to death. Hence statement made by the deceased long before the incident of murder is not admissible. [1974 Cri LJ 1200 (MP).]

Law of Evidence by Ratanlal and Dhirajlal (1982 Reprint)

Page 94 : Circumstances of the transaction : General expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death are not admissible. [(1939) 66 IA 66](18 Part 234.)

Page 95 : Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant. The condition of the admissibility of the evidence is that the cause of the declarant's death comes into question. It is not necessary that the statement must be made after the transaction has taken place or that the person making it must be near death or that the 'circumstance' can only include the acts done when and where the death was caused. . . . Dying declarations are admissible under this clause.

203. The alleged oral statements of Manju and what she has stated in her letters, Exs. 30, 32 and 33 may relate to matters perhaps having a very remote bearing on the cause or the circumstances of her death. Those circumstances do not have any proximate relation to the actual occurrence resulting in her death due to potassium cyanide poison, though, as for instance in the case of prolonged poisoning they may relate to dates considerably distant from the date of the actual fatal dose. They are general impressions of Manju indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of her death. It is not the case of the prosecution that the present case is one of prolonged poisoning. Since it is stated by the learned authors Woodroffe and Amir Ali in their treatise at page 947 that the decision of their Lordships of the Privy Council in *Pakala Narayana Swami* v. *Emperor*[4] sets the

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limit of the matters that could legitimately be brought within the purview of the expression "circumstances of the transaction" and that decision is referred to in several other decisions of our courts, it would be necessary to extract the relevant passage in this judgment. The learned Lords have observed at pages 75 and 76 thus :

> A variety of questions has been mooted in the Indian courts as to the effect of this section. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction : general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae". Circumstances must have some proximate relation to the actual occurrence : though, as for instance in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose.

204. I am, therefore of the opinion that the oral evidence of these witnesses, PWs 2, 3, 5, 6 and 20 about what Manju is alleged to have told them against the appellant and or his parents and what she has stated in her letters, Exs. 30, 32 and 33, are inadmissible in evidence under Section 32 (1) of the Evidence Act and cannot be looked into for any purpose. At this stage, it may be stated that Mr Ram Jethmalani, learned counsel for the appellant submitted that the said oral evidence of those five witnesses is inadmissible under Section 32(1) and that though at first he sought to rely upon the letters, Exs. 30, 32 and 33 which seem to lend support to the defence theory that it may be a case of suicide, he ultimately conceded that

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what applies to the relative oral evidence of PWs 2, 3, 5, 6 and 20 would equally apply to the letters, Exs. 30, 32 and 33 and that they too would be inadmissible in evidence. The Additional Solicitor-General who had strongly relied upon the said oral evidence of these five witnesses and the letters, Exs. 30, 32 and 33 at first proceeded in the end of his arguments on the basis that they are inadmissible in evidence. In these circumstances, I am firmly of the opinion that the oral evidence of PWs 2, 3, 5, 6 and 20 about what Manju is alleged to have told them against the appellant and or his parents as well as the letters, Exs. 30, 32 and 33 are inadmissible in evidence under Section 32(1) of the Evidence Act.

205. About Dr Banerji (PW 33) who conducted autopsy on the body of Manju what my learned brother Fazal Ali, J. has said in his judgment is this : (paras 130, 131 and 132)

> . . . in column No. 5 of post-mortem notes Dr Banerjee has clearly written "can be a case of suicidal death" which indicates that in the absence of the report of the chemical examiner, he was of the opinion that it could have been a case of suicide. In his evidence, PW 33 stated that in Ex. 128 in column No. 5 the contents scored out read 'time since the death' and since it was repeated in the next line, he scored the words in the second line. Despite persistent cross-examination the doctor appears to have stuck to his stand. It cannot, therefore, be gainsaid that this matter was of vital importance and we expected the High Court to have given serious attention to this aspect which goes in favour of the accused.
>
> In the original while filling up the said column the doctor appears to have scored out something ; the filled up entry appears thus — "mouth is closed with tip (something scored out) seen caught between the teeth". But in the carbon copy of the report which was sent to the chemical examiner (Ex. 132) he has added "caught between the teeth" in ink but in the original there is something else. This is fortified by the fact that the copy of the report actually sent to the chemical examiner does not contain any interpolation against the said column where the filled up entry reads 'Inside mouth'.
>
> . . . these circumstances show that Dr Banerjee (PW 33) tried to introduce some additional facts regarding the position of the tongue. . . . This, however, throws a cloud of doubt on the correctness or otherwise of the actual reports written by him and the one that was sent to the chemical examiner. It is obvious that in the carbon copy which was retained by the doctor, the entries must have been made after the copy was sent to the chemical examiner.

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206. I entirely agree with these findings of my learned brother Fazal Ali, J. But I am unable to share his view that these "circumstances are not of much consequence because the opinion of the doctor was that Manju died by forcible administration of potassium cyanide or by the process of mechanical suffocation and that this aspect need not detain the Court any further because the High Court has not accepted the case of mechanical suffocation" and that though a number of comments were made on behalf of the appellant about Dr Banerji's integrity and incorrect report he does not find any substance in those contentions subject to what he has stated about him.

207. The fact that the High Court has rejected the case of the prosecution based on Dr Banerji's report and evidence that it was also a case of mechanical suffocation is not one that could be taken into consideration as a mitigating circumstance in judging the conduct of the doctor who had conducted the autopsy in a case of suspicious death. The fact that he had reserved his opinion about the cause of death and had then noted in his report that the tongue was inside the mouth but has interpolated the words "mouth is closed with tip (something scored out) seen caught between the teeth" and "caught between the teeth" only after receipt of the chemical examiner's report to support the view that it was also a case of mechanical suffocation, is not a mitigating circumstance in favour of PW 33. The doctor had scored out the words "can be a case of suicidal death" and has persisted in his reply that he had scored out only the words "time since the death" which he claims to have written twice, which explanation has been rightly rejected by my learned brother Fazal Ali, J. The conduct of the doctor in making these later interpolations and alterations in the records of the post-mortem examination in the case of suspicious death in which the appellant has been sentenced to death by the two courts below, deserves serious condemnation. The doctor has tampered with material evidence in the case of alleged murder, may be at the instance of somebody else, ignoring the probable consequences of his act. In these circumstances, I am of the opinion that Dr Banerji (PW 33) is a person who should not be entrusted with any serious and responsible work such as conducting autopsy in the public interest. In this case the appellant would have gone to gallows on the basis of the evidence of PW 33 as he would have the Court to believe it, and the other evidence, if they had been accepted, but they have been rightly discarded by my learned brother Fazal Ali, J. as unworthy of acceptance against the appellant.

208. I agree with my learned brother Fazal Ali, J. that the High Court has clearly misdirected itself on many points in appreciating the evidence and has thus committed a gross error of law.

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209. I feel that something has to be stated in the judgment in this case about the way the Investigating Officer and the learned Additional Sessions Judge, Pune who had tried the case had gone about their business. Charge No. 3 is against the third accused for instigating Mohan Asava (PW 30) to give false information to the police regarding the offence of murder namely, that the appellant found Manju dead when he tried to wake her up at 5.30 a.m. on June 12, 1982. It is the case of the prosecution itself that PW 30 informed the police accordingly at 7 or 7.15 a.m. on that day after receipt of telephonic instructions from the third accused at 6.30 a.m. though he had himself seen the dead body of Manju earlier in the appellant's flat where he was taken by the third accused who had gone to his flat at about 4 or 4.15 a.m. and informed him that Manju was dead, and he (PW 30) left the appellant's flat a little later at about 5 or 5.15 a.m. after telling Dr Lodha (PW 34) that he was going to report to the police. Thus, it would appear that the case of the prosecution itself is that PW 30 is the principal offender as regards giving false information to the police about the death of Manju. Yet the Investigating Officer had not filed any charge-sheet against PW 30 but has conveniently treated him as a prosecution witness. The Additional Sessions Judge, Pune appears to have exercised no control over the evidence that was tendered in this case and to have been oblivious of the scope of the examination of the accused under Section 313 CrPC. This is reflected by some of the questions put to the appellant. Question No. 24 relates to PW 20 not maintaining good health and falling ill now and then. Question No. 25 relates to PW 22 being a patient of high blood pressure and having suffered a stroke of paralysis 7 years earlier. Question No. 30 relates to a reception held at Pune on February 13, 1982 in connection with the appellant's marriage with Manju. Question No. 32 relates to PW 6 asking the appellant's father Birdhichand for permission to take Manju to Beed with her when the party from PW 2's side started from Pune for Beed on February 14, 1982. Question No. 115 relates to PW 30 indulging in criminal acts of rowdyism, tax evasion etc. and being known as a contact-man of the police. Section 313, CrPC lays down that in every inquiry or trial for the purpose of enabling the accused personally to explain any circumstance appearing in the evidence against him the court may at any stage, without previously warning the accused, put such questions to him as the court considers necessary and shall, after the witnesses for the prosecution have been examined and before he is called for his defence, question him generally on the case. It is clear that the evidence on the basis of which the above questions have been put to the appellant is wholly irrelevant and that those questions do not relate to any circumstance appearing in the evidence against the appellant. The learned Additional Sessions

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Judge was bound to exercise control over the evidence being tendered in his court and to know the scope of the examination of the accused under Section 313, CrPC.

210. In the end, as I said earlier, I agree with my learned brother Fazal Ali, J. that the appeal has to be allowed. Accordingly I allow the appeal and set aside the conviction and sentence awarded to the appellant and direct him to be set at liberty forthwith.

SABYASACHI MUKHARJI, J. (*concurring*)—I have the advantage of having read the judgments prepared by my learned brothers Fazal Ali, J. and Varadarajan, J. I agree with the order proposed that the appeal should be allowed and the judgments of the courts below should be set aside and the appellant Sharad Birdhichand Sarda be acquitted of the charges framed against him and he should be released forthwith. I do so with some hesitation and good deal of anxiety, because that would be interfering with the concurrent findings by two courts below on a pure appreciation of facts. The facts and circumstances have been exhaustively and very minutely detailed in the judgment of my learned brother Fazal Ali, J. Those have also been set out to a certain extent by my brother Varadarajan, J. It will therefore serve no useful purpose to repeat these here. It is necessary, however, for me to make the following observations.

212. It is a case of circumstantial evidence. It is also undisputed that the deceased died of potassium cyanide on the night of June 11 and 12. June 13 was the date fixed for the betrothal of the sister of the accused. There is no evidence that the accused was in any way hostile or inimical towards his sister. The deceased had a very sensitive mind and occasionally had suffered from mental depression partly due to the fact of adjusting in a new family and partly due to her peculiar mental make up but mainly perhaps due to the family set up of the accused husband. There is no direct evidence of administering poison. There is no evidence either way that either the deceased or the accused had in her or his possession any potassium cyanide. In these circumstances my learned brothers, in view of the entire evidence and the letters and other circumstances, have come to the conclusion that the guilt of the accused has not been proved beyond all reasonable doubt.

213. As I have mentioned before, I have read the two judgments by my two learned brothers and on some points namely, four points mentioned in the judgment prepared by my brother Varadarajan, J., he has expressed views different from those expressed by Fazal Ali, J. and these are : (para 198)

(1) ill-treatment of Manju by the appellant ;

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(2) intimacy of the appellant with Ujvala (PW 37) ;

(3) admissibility of Manju's letters Exs. 30, 32 and 33 and the oral evidence of PWs 2, 3, 5, 6 and 20 about the alleged complaints made by Manju against the appellant under Section 32(1) of the Evidence Act ; and

(4) conduct of Dr Banerji (PW 33) who had conducted autopsy on the body of Manju.

214. On the three points, namely, ill-treatment of Manju by the appellant, intimacy of the appellant with Ujvala (PW 37) and the conduct of Dr Banerji (PW 33) who had conducted autopsy on the body of Manju, I would prefer the views expressed by my learned brother Fazal Ali, J. On the question of admissibility of Manju's letters Exs. 30, 32 and 33 and the oral evidence of PWs 2, 3, 5, 6 and 20 about the alleged complaints made by Manju against the accused under Section 32(1) of the Evidence Act, my learned brother Fazal Ali, J, has observed about Section 32(1) as follows : (para 21)

> The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. *For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than* 3-4 *months the statement may be admissible under Section* 32. (emphasis supplied)

215. I would, however, like to state here that this approach should be taken with a great deal of caution and care and though I respectfully agree with Fazal Ali, J. that the test of proximity cannot and should not be too literally construed and be reduced practically to a cut-and-dried formula of universal application, it must be emphasised that whenever it is extended beyond the immediate, it should be the exception and must be done with very great caution and care. As a general proposition, it cannot be laid down for all purposes that for instance where a death takes place within a short time of marriage and the distance of time is not spread over three or four months,

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the statement would be admissible under Section 32 of the Evidence Act. This is always not so and cannot be so. In very exceptional circumstances like the circumstances in the present case such statements may be admissible and that too not for proving the positive fact but as an indication of a negative fact, namely, raising some doubt about the guilt of the accused as in this case.

216. For the purpose of expressing my respectful concurrence with the views of Justice Fazal Ali, it is not necessary for me to agree and I do not do so, with all the detailed inferences that my learned brother has chosen to draw in respect of the several matters from the exhibits in this case. I am also with respect not prepared to draw all the inferences that my learned brother has chosen to draw in the paragraph beginning with the expression "the careful perusal of this letter revealed the following features" (Para 39). This my learned brother was speaking in respect of Ex. 33. I, however, respectfully agree with my learned brother when he says that a close analysis and reading of the letter namely, Ex. 33 clearly indicates :

(*a*) that the deceased was extremely depressed.

(*b*) that there was a clear tendency resulting from her psychotic nature to end her life or commit suicide.

217. Similarly I have some hesitation about the English rendering of Ex. 32 which is letter dated June 8, 1982 which has been set out by learned brother and which has been set out in his judgment which contains the expression "I do not know why there is such a dirty atmosphere in the house ?" As the original letter was read out in Court and we had the advantage of that, I am inclined to take the view that the correct and the more expressive expression would be "I do not know why there is such a foul atmosphere in the house ?" Read in that light and in the context of other factors, this letter causes some anxiety. If the deceased was sensing foul atmosphere, why was it ? But this again is only a doubt. It does not prove the guilt of the accused.

218. In view of the fact that this is a case of circumstantial evidence and further in view of the fact that two views are possible on the evidence on record, one pointing to the guilt of the accused and the other his innocence, the accused is entitled to have the benefit of one which is favourable to him. In that view of the matter I agree with my learned brothers that the guilt of the accused has not been proved beyond all reasonable doubt.

219. In the premises as indicated before, I agree with the order proposed.

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(2012) 7 Supreme Court Cases 646

(BEFORE A.K. PATNAIK AND SWATANTER KUMAR, JJ.)

SHYAMAL GHOSH .. Appellant;

Versus

STATE OF WEST BENGAL .. Respondent.

Criminal Appeals No. 507 of 2007† with Nos. 1369 of 2007 and 539-40 of 2011, decided on July 11, 2012

A. **Penal Code, 1860 — S. 302 r/w S. 34 and Ss. 201, 379 and 411 — Murder trial — Circumstantial evidence — Eyewitnesses to significant parts of chain of circumstances — Last seen together — Recovery of dismembered corpse and weapons of offence and other crime articles — Conviction confirmed**

— Accused persons visited house of deceased several times for demanding money and, on 27-9-2003 threatened him that if their demand for Rs 40,000 was not fulfilled within a day, they would murder him — Deceased refused to succumb to this illegal demand — On 29-9-2003, at about 9.00 p.m., victim started from his house on his bicycle to visit *C* — He started back at about 11.00 p.m. to return to his home but on his way back, he was restrained and assaulted by accused persons at about 11.30 p.m. — Accused persons strangulated deceased and subsequently severed head, legs and hands from body by a sharp-cutting weapon and left them near highway in gunny bags — There were eyewitnesses who had seen scuffling between deceased and accused and strangulation of deceased by accused persons and also loading of mutilated body parts of deceased contained in gunny bags into Maruti van

— Trial court relied on direct evidence in relation to altercation between accused and deceased and subsequent strangulation of deceased, dismembering of corpse and its disposal by accused persons, recoveries of weapon of offence, vehicle used by accused persons for carrying mutilated body parts of deceased person, cycle owned by deceased in furtherance of statement of accused, and found eight accused guilty — High Court sustained their conviction under S. 302 r/w S. 34 — Held, evidence completes chain of events and establishes case of prosecution beyond any reasonable doubt — Facts right from departure of deceased from his house to up to recovery of mutilated body of deceased, have been proved by different witnesses, including some eyewitnesses — All accused were identified by witnesses in court — Medical evidence corroborated prosecution evidence — No reason to interfere with judgment of High Court — Evidence Act, 1872, S. 27 (Paras 63 to 83)

B. **Criminal Trial — Circumstantial Evidence — Generally — Appreciation of — Principles reiterated — Presence of eyewitnesses at significant parts of chain of circumstances (Paras 63 and 64)**

Mousam Singha Roy v. *State of W.B.*, (2003) 12 SCC 377 : 2004 SCC (Cri) Supp 429, *relied on*

† From the Judgment and Order dated 5-2-2007 of the High Court of Calcutta in CRA No. 724 of 2005

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C. **Penal Code, 1860 — S. 34 and S. 34 r/w S. 302 — Circumstantial evidence — Common intention — Vicarious liability — Inference of — Appreciation of evidence — S. 34 carves out an exception from general law that a person is responsible for his own act — S. 34 applies where two or more accused are present, and common intention of those accused to commit crime in question is established — Furthermore, if common intention is proved but no overt act was committed, S. 34 can still be invoked — Common intention means a pre-oriented plan and acting in pursuance of the plan, thus, common intention must exist prior to commission of act in a point of time — Common intention to give effect to a particular act may even develop on spur of moment between a number of persons with reference to facts of a given case — In present case all ingredients of S. 34 were present — Hence, appellants rightly convicted under S. 34 r/w S. 302 even though it was a case of circumstantial evidence (Paras 84 to 88)**

Held :

The ingredients of more than two persons being present, existence of common intention and commission of an overt act stand established in the present case. The statements of the witnesses clearly show that all the eight accused were present at the scene of occurrence. They had demanded money and extended threat of dire consequences to the victim, if their demand was not satisfied. Thereafter, they had an altercation with the deceased and the deceased was strangulated by the accused persons and then his body was disposed of by cutting it into pieces and packing the same in gunny bags and abandoning the same at a deserted place near the Barrackpore-Dum Dum Highway. Thus, all these acts obviously were in furtherance of the common intention of doing away with the deceased, if he failed to give them Rs 40,000 as demanded. The offence was committed with common intention and collective participation. The various acts were performed by different accused in presence of each one of them. (Para 88)

Nand Kishore v. *State of M.P.*, (2011) 12 SCC 120 : (2012) 1 SCC (Cri) 378; *Lallan Rai* v. *State of Bihar*, (2003) 1 SCC 268 : 2003 SCC (Cri) 301; *Dharnidhar* v. *State of U.P.*, (2010) 7 SCC 759 : (2010) 3 SCC (Cri) 491, *applied*

Brathi v. *State of Punjab*, (1991) 1 SCC 519 : 1991 SCC (Cri) 203; *Shivalingappa Kallayanappa* v. *State of Karnataka*, 1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694; *Jai Bhagwan* v. *State of Haryana*, (1999) 3 SCC 102 : 1999 SCC (Cri) 388; *Suresh* v. *State of U.P.*, (2001) 3 SCC 673 : 2001 SCC (Cri) 601; *Barendra Kumar Ghosh* v. *King Emperor*, (1924-25) 52 IA 40; *Mahbub Shah* v. *King Emperor*, (1944-45) 72 IA 148; *Pandurang* v. *State of Hyderabad*, AIR 1955 SC 216 : 1955 Cri LJ 572; *Ramaswami Ayyangar* v. *State of T.N.*, (1976) 3 SCC 779 : 1976 SCC (Cri) 518, *cited*

John Milton: "On his blindness" (1655), *cited*

D. **Criminal Trial — Circumstantial Evidence — Last seen together — Theory of — Applicability — Time of death — Reversal of onus of proof after "last seen" established — Where prosecution is relying upon last seen theory, it must essentially establish time when accused and deceased were last seen together as well as time of death of deceased — Last seen theory requires a possible link between the time when the deceased was last seen alive and fact of death of deceased coming to light — Reasonable proximity of time between these two events is a necessary ingredient — Principle is to be applied depending upon facts and circumstances of a given case — As far**

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as death of deceased in present case is concerned, there was hardly any time gap between two incidents i.e. of victim being last seen alive with appellants and fact of death of deceased becoming known — All events occurred between 11.00 p.m. to 12.00 a.m. during night of 29-9-2003/30-9-2003 — Defence contention raised on this ground is entirely without any merit — Once last seen theory comes into play, onus was on accused to explain as to what happened to deceased after they were together seen alive — Accused persons have failed to render any reasonable/plausible explanation in this regard (Paras 63 and 72 to 77)

Held :

In the facts of the present case, the factor of time does not play such a significant role because it is a case where there were eyewitnesses to strangulation of deceased by the accused, and therefore, it may not be expected of the prosecution to show the time of last seen and death, by leading independent evidence. PW 17 is the witness to the altercation between the accused and the deceased. PW 8 is the witness to the strangulation of the deceased by the accused persons. Besides, PWs 7, 9 and 11 are witnesses to the loading of the gunny bags containing human body parts in the Maruti van by the accused. These facts have been established by independent witnesses. None of these witnesses is a relation or a witness inimical towards the accused. The occurrence had taken place on 29-9-2003 at midnight. There may be some variation (5 to 10 minutes) in the time stated by the different witnesses as to when the occurrence took place. From their statements, it is clear that by and large, they have given approximately same time with reasonable variation, which is primarily for the reason that the accused persons and the deceased were seen by the witnesses at different places. These discrepancies do not amount to any material contradiction. Time of death stands clearly established between 11.30 p.m. to 12.00 a.m. on 29-9-2003/30-9-2003. (Paras 75 and 76)

Sk. Yusuf v. *State of W.B.*, (2011) 11 SCC 754 : (2011) 3 SCC (Cri) 620; *Mohd. Azad* v. *State of W.B.*, (2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082; *State* v. *Mahender Singh Dahiya*, (2011) 3 SCC 109 : (2011) 1 SCC (Cri) 821, *relied on*

E. **Criminal Procedure Code, 1973 — Ss. 154, 161 and 162 — FIR — Omissions in FIR — Effect of — Relevance of use of word "may" in S. 162 Expln. — Every omission cannot be considered a contradiction in law — Discrepancies or omissions have to be material ones and then alone they may amount to contradiction of some serious consequence — Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect core of prosecution case should not be taken to be a ground to reject prosecution evidence in its entirety (Paras 66 to 71)**

F. **Criminal Trial — Appreciation of Evidence — Contradictions, inconsistencies, exaggerations or embellishments — Need for holistic appreciation of testimony of witness — Material contradictions alone are relevant and can affect case of party concerned — Every variation may not be enough to adversely affect case of prosecution — No statement of a witness can be read in part and/or in isolation — Court should examine statement of a witness in its entirety and read said statement along with statement of other witnesses in order to arrive at a rational conclusion — Court has to see whether variations are material and affect prosecution case substantially**

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— Variations pointed out as regards time of commission of crime are quite possible in facts of present case — Witnesses concerned were rickshaw pullers or illiterate or not highly educated persons — Their statements were recorded after more than two years from incident — It will be unreasonable to attach motive to witnesses or term variations of 15-20 minutes in timing of a particular event as a material contradiction — It probably may not even be expected of these witnesses to state these events with relevant timing with great exactitude, in view of attendant circumstances and manner in which incident took place — Statements of all these witnesses clearly show one motive i.e. illegal demand of money coupled with warning of dire consequences to deceased in case of default — Hence, conviction confirmed

(Paras 46 to 49 and 69)

Held :

Another settled rule of appreciation of evidence as already indicated is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on the part of a witness to bring correct facts by clarification on record, such statement must be seen in a different light to a situation where the contradiction is of such a nature that it impairs his evidence in its entirety. (Para 69)

In terms of the Explanation to Section 162 CrPC which deals with an omission to state a fact or circumstance in the statement referred to in Section 162(1) CrPC, such omission may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether there is any omission which amounts to contradiction in particular context shall be a question of fact. A bare reading of this Explanation reveals that if a significant omission is made in a statement of a witness under Section 161 CrPC, the same may amount to contradiction and the question whether it so amounts is a question of fact in each case. The basic element which is unambiguously clear from the Explanation to Section 162 CrPC is use of the expression "may". To put it aptly, it is not every omission or discrepancy that may amount to material contradiction so as to give the accused any advantage. If the legislative intent was to the contra, then the legislature would have used the expression "shall" in place of the word "may". The word "may" introduces an element of discretion which has to be exercised by the court of competent jurisdiction in accordance with law. Furthermore, whether such omission, variation or discrepancy is a material contradiction or not is again a question of fact which is to be determined with reference to the facts of a given case. The concept of contradiction in evidence under criminal jurisprudence, thus, cannot be stated in any absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is a contradiction or material contradiction which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially.

(Paras 70 and 71)

Tika Ram v. *State of M.P.*, (2007) 15 SCC 760 : (2010) 4 SCC (Cri) 667; *Sunil Kumar Sambhudayal Gupta* v. *State of Maharashtra*, (2010) 13 SCC 657 : (2011) 2 SCC (Cri) 375; *Subhash* v. *State of Haryana*, (2011) 2 SCC 715 : (2011) 2 SCC (Cri) 689, *relied on*

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G. **Criminal Trial — Witnesses — Hostile witness — Evidentiary value of hostile witness — Statement of a hostile witness, reiterated, can be relied upon by court to the extent it supports case of prosecution — Mere fact that two witnesses had turned hostile in present case would not affect prosecution case adversely — Moreover, even statements of these witnesses, who had turned hostile, partially supported case of prosecution (Para 45)**

Govindaraju v. *State*, (2012) 4 SCC 722 : (2012) 2 SCC (Cri) 533, *followed*

H. **Criminal Procedure Code, 1973 — S. 161 — Delay in examination of witnesses — Effect of — If explanation offered for delayed examination of a particular witness is plausible and acceptable, there is no reason to interfere with conclusion arrived at by courts below — Delay in examination of witnesses is a variable factor — It would depend upon a number of circumstances — Non-availability of witnesses, investigating officer being preoccupied in other serious matters, investigating officer spending his time in arresting accused who are absconding, being occupied in other spheres of investigation of same case which may require his attention urgently and importantly, etc. — Submission on behalf of State was that delay had been explained and though investigating officer was cross-examined at length, not even a suggestion was put to him as to the reason for such delay and, thus, held, accused cannot take any benefit thereof before Supreme Court (Paras 50 to 57)**

Held :

In the present case, it has come in evidence that the accused persons were absconding and the investigating officer had to make serious effort and even go to various places for arresting the accused, including coming from West Bengal to Delhi. The investigating officer has specifically stated, that too voluntarily, that he had attempted raiding the houses of the accused even after cornering the area, but of no avail. He had ensured that the mutilated body parts of the deceased reached the hospital and also effected recovery of various items at the behest of the arrested accused. Furthermore, the witnesses whose statements were recorded themselves belonged to the poor strata, who must be moving from one place to another to earn their livelihood. The statement of the available witnesses like PW 2, PW 4, PW 6, and the doctor, PW 16, another material witness, had been recorded at the earliest. The investigating officer recorded the statements of nearly 28 witnesses. Some delay was bound to occur in recording the statements of the witnesses whose names came to light after certain investigation had been carried out by the investigating officer. (Para 54)

Brathi v. *State of Punjab*, (1991) 1 SCC 519 : 1991 SCC (Cri) 203; *Banti* v. *State of M.P.*, (2004) 1 SCC 414 : 2004 SCC (Cri) 294; *State of U.P.* v. *Satish*, (2005) 3 SCC 114 : 2005 SCC (Cri) 642, *relied on*

State of Orissa v. *Brahmananda Nanda*, (1976) 4 SCC 288 : 1976 SCC (Cri) 596; *Maruti Rama Naik* v. *State of Maharashtra*, (2003) 10 SCC 670 : 2004 SCC (Cri) 958, *referred to*

I. **Penal Code, 1860 — S. 302 — Murder trial — Identification for first time in court — Failure to hold test identification parade does not by itself render evidence of identification in court inadmissible or unacceptable — Identification parade is a tool of investigation and is used primarily to strengthen case of prosecution and to make sure that persons named as accused in case are actually the culprits — Identification parade primarily belongs to stage of investigation by police — Fact that a particular witness**

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has been able to identify accused at an identification parade is only a circumstance corroborative of identification in court — Thus, it is only a relevant consideration which may be examined by court in view of other attendant circumstances and corroborative evidence with reference to facts of a given case — Mere fact that accused *S* was not identified by *M* is not of great relevance in present case — Firstly, for reason that *M* was never examined as a witness in court and even his statement under S. 164 CrPC was not relied upon by prosecution — Secondly, not only one, but all other witnesses i.e. PWs 7, 8, 9, 11, 17 and 19 had duly identified accused *S* in court — Evidence Act, 1872, S. 9 (Paras 80 to 82)

Sheo Shankar Singh v. *State of Jharkhand*, (2011) 3 SCC 654 : (2011) 2 SCC (Cri) 25; *Munshi Singh Gautam* v. *State of M.P.*, (2005) 9 SCC 631 : 2005 SCC (Cri) 1269, *followed*

J. **Criminal Trial — Witnesses — Related witness — Testimony of — Credibility — Reiterated, court has to be very careful in evaluating evidence given by witnesses who are closely related to deceased — Mechanical rejection of evidence on sole ground that it is that of an interested witness would inevitably relate to failure of justice — In present case there was no reason to disbelieve testimony of family members implicating accused — Conviction confirmed (Paras 52 to 57)**

Held :

In the present case, the examination of the interested witnesses was inevitable. They were the persons who had knowledge of the threat that was being extended to the deceased by the accused persons. Unless their statements were recorded, the investigating officer could not have proceeded with the investigation any further, particularly keeping the facts of the present case in mind. Merely because three witnesses were related to the deceased, the other witnesses, not similarly placed, would not attract any suspicion of the court on the credibility and worthiness of their statements. (Para 55)

The question of disbelieving the interested witnesses (family members of the deceased) does not arise. Their statements are reliable and trustworthy. The fact that they did not inform the police while lodging the missing diary report about the illegal demand for money by the accused persons and that the accused had also threatened the deceased with dire consequences, is not a material omission. All the family members must have been under great mental stress as their husband/brother had not returned home. It is also not factually correct to say that nothing of this kind was mentioned by these related witnesses to the police at any stage. (Para 57)

K. **Criminal Trial — Investigation — Defective or illegal investigation — Discrepancies in investigation — Every discrepancy in investigation does not weigh with court to an extent that it necessarily results in acquittal of accused — There are certain discrepancies in investigation in present case, but they are not fatal — Investigating officer failed to send bloodstained gunny bags containing parts of body of victim and other recovered weapons to FSL, to take photographs of shops in question, prepare site plan thereof, etc. — Of course, it would certainly have been better for prosecution case if such steps were taken by IO — However, these are discrepancies/lapses of immaterial consequence — Criminal Procedure Code, 1973, Ss. 157 and 179 (Para 58)**

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C. Muniappan v. *State of T.N.*, (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402; *Sheo Shankar Singh* v. *State of Jharkhand*, (2011) 3 SCC 654 : (2011) 2 SCC (Cri) 25, *followed*

L. **Criminal Trial — Abscondence — Reasonable excuse — Whether necessary — It is true that merely being away from residence having an apprehension of being apprehended by police is not very unnatural conduct of an accused — Even innocent persons may run away for fear of being falsely involved in criminal cases — Accused were absconding immediately after date of occurrence — Accused had no reasonable excuse for being away from their normal place of residence — In fact, they had left village and were not available for days together — Absconding in such a manner and for such a long period is a relevant consideration — In present case, in view of circumstances of present case which have been established by prosecution, it is clear that absconding of accused not only goes with hypothesis of guilt of accused but also points a definite finger towards them (Paras 60, 61 and 65)**

Dara Singh v. *Republic of India*, (2011) 2 SCC 490 : (2011) 1 SCC (Cri) 706, *relied on*

Paramjeet Singh v. *State of Uttarakhand*, (2010) 10 SCC 439 : (2011) 1 SCC (Cri) 98, *distinguished on facts*

Appeals dismissed J-D/50174/CR

Advocates who appeared in this case :

Pradip Ghosh and J.K. Das, Senior Advocates (Yadunandan Bansal, Rauf Rahim, Subhasish Bhowmick, Tanmay K. Ghosh, Ms Swati Yadav, P.P. Nayak, Sudarshan Rajan, Md. Qamar Ali, Ms Jayashree Narasimhan, Abhijit Sengupta, B.P. Yadav, Prakash Kumar, Chanchal Kr. Ganguli, Ms R. Bhuyan, Raja Chatterjee, Ms Sampa Sengupta and H.K. Puri, Advocates) for the appearing parties.

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15. (2005) 3 SCC 114 : 2005 SCC (Cri) 642, *State of U.P.* v. *Satish* 668*c-d*, 668*e*
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28. (1924-25) 52 IA 40, *Barendra Kumar Ghosh* v. *King Emperor* 680*c*, 681*e*

The Judgment of the Court was delivered by

SWATANTER KUMAR, J.— Eight accused, namely, Panchanan Tarafdar alias Chotka, Uttam Das, Dipak Das alias Mou, Manoranjan Debnath alias Behari, Bishu Saha alias Chor Bishu, Satyajit Das alias Sadhu, Ganesh Das and Shyamal Ghosh, were charged with offences under Sections 302, 201, 379, 411 read with Section 34 of the Penal Code, 1860 (for short "IPC"). All these accused were found to be guilty of the offences with which they were charged by the trial court vide its judgment dated 13-9-2005.

2. After hearing them on the quantum of sentence, vide order dated 14-9-2005, finding the offence to be that in the category of the rarest of rare cases, the trial court awarded sentence of death to all the accused persons for the offence under Section 302 IPC and directed that they be hanged by neck till they are dead, subject to confirmation by the Calcutta High Court. For the offence under Section 201 IPC, they were sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs 5000 each, in default to further undergo simple imprisonment for one year and for the offence under Section 379 IPC to undergo imprisonment of three years and a fine of Rs 1000 each, in default to undergo six months' simple imprisonment.

3. Aggrieved by the judgment of conviction and order of sentence passed by the trial court, all the accused preferred five different appeals before the High Court and prayed for setting aside the judgment of the trial court and their consequential acquittal. The High Court, vide its judgment dated 5-2-2007, while answering the death reference in the negative, acquitted all the accused persons of the offence under Section 379 read with Section 34 IPC. However, while sustaining their conviction under Section 302 read with Section 34 IPC, the Court awarded them rigorous imprisonment for life and to pay a fine of Rs 5000 each, in default to undergo rigorous imprisonment

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for two years each. The High Court maintained the sentence imposed upon the accused by the trial court under Section 201 read with Section 34 IPC.

4. The legality and correctness of the judgment of the High Court dated 5-2-2007 has been challenged before this Court by accused Shyamal Ghosh in Criminal Appeal No. 507 of 2007, Manoranjan Debnath alias Behari in Criminal Appeal No. 1369 of 2007 and Panchanan Tarafdar alias Chotka and Uttam Das in Criminal Appeals Nos. 539-40 of 2011. Since all these appeals arise from a common judgment of the High Court, it will be proper for this Court to deal with all these appeals in a common judgment. At the very outset, we may notice that even the contentions raised on behalf of the different accused in their respective appeals are by and large the same. Therefore, it will be proper for this Court to deal with all the appeals collectively, more so, when they are based upon common questions of facts and law.

5. Now, we may refer to the case of the prosecution which has resulted in filing of the present appeals. In the present case, the first information report (FIR), Exhibit 12, was lodged at PS Khardah on 1-10-2003 by one Apu alias Sukalyan Mukherjee, PW 15, wherein he stated that on 30-9-2003 at around 10.00 p.m., he had seen two gunny bags containing severed head and other mutilated body parts of a human body opposite Tapan Santra's garden near Dangadingla electric tower at Patulia Barabagan by the side of Barrackpore-Dum Dum Highway. Since he suspected some foul play, he reported the matter and requested for investigation thereof in accordance with law. On the basis of this information, a case being Case No. 332 of 2003 under Sections 302/201/34 IPC was registered against unknown miscreants and the Investigating Officer, SI Bholanath Dey, PW 28 started the investigation and rushed to the spot where the said gunny bags had been noticed. He completed the inquest over the mutilated dead body in the presence of the witnesses. On 1-10-2003 itself, wife of the deceased Smt Lily Bhattarcharjee, PW 4 and elder brother of the deceased, Arindam Bhattacharjee, PW 6, came to the police station and identified the mutilated dead body to be that of Archideb Bhattacharjee who was stated to have been missing since 29-9-2003.

6. Further, the case of the prosecution reveals that on 29-9-2003, at about 9.00 p.m., the victim Archideb Bhattacharjee had started from his house on his Avon bicycle to visit one Chandan Dey of Ghola Gouranganagar for making tagada in connection with his business and he started back therefrom at about 11.00 p.m. for returning to his home but on his way back, he was restrained by the accused persons near the goshala field at about 11.30 p.m. and was assaulted by them. The accused persons strangulated him and ultimately he was murdered by them on the midnight of 29-9-2003/ 30-9-2003.

7. With the intention to cause disappearance of evidence of the said murder, the accused persons subsequently severed the head, legs, hands and body of the corpse by a sharp-cutting weapon and after putting the same in gunny bags, carried it in a Maruti van at about 9.00 p.m. on the following day

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i.e. 30-9-2003 and left the same at Dangadingla Patulia, by the side of Barrackpore-Dum Dum Highway near the electric tower and in front of the garden of Tapan Santra. Subsequently, as already noticed, at about 10.00 p.m. on that day these two sacks containing the dismembered and beheaded corpse were noticed by PW 15 who then reported the matter to the police.

8. Since Archideb Bhattacharjee did not return to his home after visiting Chandan Dey on the night of 29-9-2003, his wife and elder brother had gone to the house of Chandan Dey at Ghola where they came to know that at about 11.00 p.m. he had left for his own home after collecting the money from him. Having come to know of that fact, the wife and brother of the deceased went to the police station and lodged a missing diary report being GD No. 1163 dated 30-9-2003 whereafter, as already noticed, they were called to the police station for identifying the dead body of Archideb Bhattarcharjee on 1-10-2003.

9. During the course of investigation, it was also revealed that before the date of occurrence, the eight accused persons led by Uttam Das, Panchanan and Mou alias Dipak had demanded Rs 40,000 from Archideb Bhattarcharjee towards "tola mastani salami" in relation to construction of six shop rooms on his own land for letting the same. Archideb had refused to succumb to this illegal demand. The accused persons had then threatened him with dire consequences. Archideb Bhattarcharjee was once called to the premises of the local East Bengal Bayam Samiti Club also where he was threatened. The accused persons had also visited the house of Archideb several times for demanding money and, lastly, they had come to the house of Archideb on 27-9-2003 and threatened that if their demand of Rs 40,000 was not fulfilled within one day, they would murder him.

10. On 1-10-2003, the driver of the Maruti van, namely, Manik Das was arrested by the police on the basis of a telephonic information that the dead body of the deceased was carried in the said Maruti van. Manik Das then made a statement to the police and the Maruti van was recovered on 13-10-2003 from the car parking place of Sushil Chakraborty at Kalitala Ghosh Para. The said Manik Das also made a statement under Section 164 of the Code of Criminal Procedure, 1973 (for short "CrPC") before the court of competent jurisdiction.

11. Accused Uttam Das, Dipak Das alias Mou and Manoranjan Debnath alias Behari, who were absconding were apprehended at Delhi with the help of the police at Tilak Marg Police Station. These three accused persons were brought to Calcutta by the investigating officer and upon being produced before the court on 16-10-2003, they were remanded to police custody by the court. During their custody and at their statement, the Avon cycle which was driven by the deceased, was recovered from an abandoned place near Agarpara Railway Station.

12. On 4-11-2003, accused Bishu Saha was arrested by the police from Highland, Sodhpur and produced before the court. He was taken into custody. Later on, even the other accused, namely, Shyamal Ghosh and Satyajit Das

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were arrested from Sodhpur. However, despite its best efforts, the police was not able to arrest accused Ganesh Das and Panchanan Tarafdar alias Chotka and declared them absconders. Charge-sheet against all other six accused was filed. However, at a subsequent stage, even the said two absconding accused were arrested by the police and produced before the court and they also were charged with the same offences.

13. Thus, all the accused were charged with the aforestated offences and subjected to face trial before the court of competent jurisdiction. After evidence of the prosecution was closed, the incriminating material was put to the accused and their statements under Section 313 CrPC were recorded. As already noticed, thereafter, the accused were convicted by the trial court and upon appeal before the High Court, they were acquitted of the offence under Section 379 IPC but sentenced to life imprisonment for the offence under Section 302 read with Section 34 IPC and were also sentenced for other offences, as indicated supra.

14. It will be appropriate to refer to the contentions raised before this Court by the learned counsel appearing for the respective accused persons. The contentions are:

(*i*) The crucial witnesses of the prosecution, particularly PW 8, Binode Mallick; PW 17, Amal Ray; and PW 19, Kali Das have not named accused Shyamal Ghosh. Besides, these witnesses are not reliable and their statements could not form the basis of conviction of the accused persons. In fact, PW 17 Amal Ray is a tutored witness as he was in police custody for three days before his statement was recorded.

(*ii*) The present case being a case of circumstantial evidence does not establish the complete chain of events so as to substantiate the conviction of the accused.

(*iii*) PW 9, Haru Das, has not named any of the accused and the disposal of the dead body which is a material circumstance has not been proved in accordance with law and, therefore, the conviction of the accused persons is ill-founded.

(*iv*) Accused Shyamal Ghosh was not identified in the test identification parade and only accused Satyajit Das alias Sadhu's identity could be established. As such, Shyamal Ghosh is not even proved to be connected with the commission of the crime.

(*v*) The driver of the Maruti van, Manik Das was never produced before the court for cross-examination and, therefore, statement under Section 164 CrPC of the said witness is inconsequential.

(*vi*) The evidence against the accused is very weak and nothing has been recovered from the accused Shyamal Ghosh. Since no specific role is attributable to Shyamal and even to other accused persons, the conviction under Section 302 read with Section 34 IPC is not sustainable, particularly against accused Shyamal.

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(*vii*) There has been considerable delay, varying from 3 days to 20 days, in recording the statement of the prosecution witnesses and, as such, the possibility of the witnesses not speaking the truth cannot be ruled out. These witnesses were informed about what statement to make prior to recording of their respective statements.

(*viii*) PW 8 Binode Mallick and PW 19 Kali Das cannot be believed as they are chance witnesses. Statement of PW 8 was recorded after a delay of 21 days. He did not disclose the name of anyone.

(*ix*) Conduct of the prosecution witnesses including the family members of the deceased is abnormal. No police report was lodged despite a specific case of the prosecution that the accused persons had come to the house of the deceased on a number of occasions for demanding money and had even threatened to murder the deceased.

(*x*) The fact that the prosecution has failed to establish the time of death of the deceased would lead to one irresistible conclusion that the prosecution has not been able to establish its case beyond reasonable doubt.

(*xi*) The statement of the accused under Section 313 CrPC cannot be used against the accused. Reliance by the courts below upon such statement is, therefore, improper and illegal.

(*xii*) The recoveries effected from the accused persons, if any, including even that from Manoranjan Debnath alias Behari, are contrary to law and are, therefore, inadmissible. In fact, the seizure memos were got signed on blank papers.

(*xiii*) There is no common intention and participation by all the accused persons. Resultantly, the ingredients of Section 34 IPC are not satisfied.

15. While collectively responding to the above arguments raised on behalf of the different accused persons, the learned counsel appearing for the State contended that there existed a clear motive for committing the crime i.e. demand of money.

16. The present case is not a case of circumstantial evidence simpliciter. According to the case of the prosecution, there are eyewitnesses to different events that had taken place. These witnesses are reliable and trustworthy. They are neither tutored nor stalked or interested witnesses. The background of the accused persons, their conduct in absconding immediately after the occurrence and the statement of the accused under Section 313 CrPC fully support the case of the prosecution. Even if some witnesses had turned hostile or there existed certain minor defects in the investigation, the accused persons cannot derive any advantage therefrom. According to the learned counsel, defective investigation normally would not prove fatal to the case of the prosecution and even delay in examination of witnesses per se would not render the statement of a witness unreliable. Once the entire prosecution evidence is cumulatively examined, the ingredients of Section 34 IPC are fully satisfied.

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Prosecution evidence

17. Before we proceed to dwell upon the merits or otherwise of the contentions raised before us, it will be necessary for the Court to examine the entire prosecution evidence at a glance.

18. In the present case, the investigative machinery was set into motion by two different facts. Firstly, Exhibit 15, which is the missing diary report lodged by the wife of the deceased, Lily Bhattacharjee, PW 4 and brother of the deceased, Arindam Bhattacharjee, PW 6 on 30-9-2003 and secondly, the FIR, Ext. 12, lodged by PW 15 Apu alias Sukalyan Mukherjee on 1-10-2003. No action appears to have been taken on the former while the investigating officer commenced his investigation on the basis of the latter.

19. According to PW 15, on 30-9-2003 at about 10.00 p.m. when he went to the electric tower situated at Dangadingla by the side of Barrackpore-Dum Dum Expressway, Patulia Barabagan in front of the garden of Tapan Santra he noticed two bags containing different parts of a human dead body upon which he informed the police and lodged a complaint at Khardah Police Station. One Indrajit Sen had written the complaint, Exhibit 10, which bore the signatures of PW 15 at Exhibit 10/1. If one looks at the contents of Ext. 10, per se, it is not evident as to by whom and how the offence was committed. It is a settled principle of law that FIR is not a substantive piece of evidence. However, during the course of investigation, the story leading to the commission of the crime got unfolded and pointed towards the guilt of the accused with certainty.

20. According to PW 4 and PW 6, the deceased used to earn his livelihood through private tuitions and also used to deal in clothing. The elder brother of the deceased was employed in a private firm and both of them had built six shop rooms on their own land in front of the house where they were residing, for the purpose of letting out. Particularly according to PW 4, Uttam Das, Mou alias Dipak Das and Chotka alias Panchanan Tarafdar had demanded Rs 40,000 from her husband towards "mastani salami". The deceased had expressed his inability to pay the said amount. Thereafter, Uttam Das, Mou and Chotka had called the deceased to the club premises of East Bengal Bayan Samiti. The deceased went there and agreed to pay a sum of Rs 2000 which was not accepted by the accused and they threatened the deceased with dire consequences, if their demand of Rs 40,000 was not satisfied. Uttam Das, Panchanan alias Chotka, Ganesh, Sadhu, Shyamal Ghosh, Dipak Das, Chor Bishu and Manoranjan came to the house of the deceased two or three times and threatened even her mother-in-law, the deceased and his brother with dire consequences if the demand was not fulfilled.

21. According to this witness, PW 4 on 27-9-2003, Uttam Das along with his associates had come to their house and extended a similar threat. They informed about this incident to political leaders, party officers and to the people and were assured of proper help by them. On 29-9-2003 at about 9 p.m., the deceased went to the house of Chandan Dey at Ghola

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Gouranganagar by an Avon cycle to collect money in connection with his business. He did not return at night. Therefore, they went to Chandan's house on the next morning and came to know that the deceased had come there in the night and after collecting money, he had returned therefrom on that very day. This resulted in lodging of the aforenoted missing diary report at Ghola Police Station by PW 6. On 1-10-2003, PW 4 and PW 6 both were called to the police station to identify the dead body which, as noted above, had been recovered as per the statement of PW 15.

22. It may be noticed that according to PW 4 the deceased was wearing four rings, HMT watch and was carrying cash and other papers with him on the night of 29-9-2003. After identifying the body at the police station, it was clear that the accused persons had, after murdering the deceased, cut the body of the deceased into pieces and packed the same in gunny bags with an intention to destroy the evidence. PW 4 and PW 6 both identified the apparels of the deceased as well as the accused persons in the court. PW 4 also stated that she had identified the accused persons even at the police station.

23. Now, we have to examine the prosecution evidence as to the manner in which the occurrence took place and the statements of the witnesses that are relevant for that purpose. PW 8 Binode Mallick, is stated to be an eyewitness to the assault caused by the accused upon the deceased. This witness stated that at the relevant time he was running a tea stall near Sandhya Cinema Hall at Khardah and also supplied biscuits to the shops at Panchanantala market and Bhanur More. On 29-9-2003 at about 12.00 a.m. in the night, he was returning to his home from Panchanantala, after making tagada. When he reached near the goshala field he saw that Uttam, Chotka, Mou, Chor Bishu, Sadhu and Ganesh were assaulting a fat person, whom he knew as Archideb Bhattacharjee, by strangulating him with a gumcha and were taking the deceased towards the goshala field. He asked them the reason for the same and they told him to leave the place as it was their internal matter. The deceased was saying "save me save me". PW 8 then left that place. After two days he came to know that the said person had been murdered and his body had been cut into pieces and was left near the Kalyani Road Highway.

24. PW 8 identified the accused persons as the ones who were doing the mischief on that night. In his cross-examination, PW 8 clearly denied the suggestion that he was deposing falsely or that he had any friendship or intimacy with the accused persons. The witness also stated that he did not know the name of the deceased prior to the date of occurrence and, in fact, he came to know of the same from the television after two days of the incident. In his cross-examination he also stated that about 10.45 p.m. he had reached Bhanur More and within 5-10 minutes, he reached Panchanantala market and had spent nearly an hour at Panchanantala market for collecting money from the said shop owners and after getting payment he started for his home.

25. PW 17 Amal Ray is another witness to the altercation that took place between the deceased and Uttam Das and his associates including Shyamal, Sadhu, Behari, Ganesh, Manoranjan and Mou. According to this witness, he

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had seen the altercation between them. When he was watching the incident, he was asked to leave the place by the accused persons, which he did and thereafter on the next day, he heard about the death of Archideb Bhattacharjee. His statement was recorded by the police three days after the incident. This witness also identified the accused in the court. In his cross-examination, he specifically denied the suggestion that he had not witnessed the incident in question.

26. The next witness whose statement has a direct bearing on this aspect is PW 19 Kali Das, who is a resident of Nandan Kanan. This witness stated before the court that on 29-9-2003 at about 11.30 p.m. while he was returning from Rashmoni More, he found that a jhamela was going on near Battalla of Nandan Kanan in between Archideb and Uttam, Panchanan, Bishu, Behari, Chotka and Mou and scuffling was going on between them. Uttam and Bishu threatened him, therefore, he left the place. Two days after the incident, he learnt about the recovery of body parts of Archideb Bhattacharjee. He also identified all the accused in the court. It needs to be noticed that according to this witness, all the persons whom he had seen on that night were present in the court and he identified them.

27. In his statement, PW 19 had not specifically given the name of Shyamal Ghosh and Ganesh. In his cross-examination, he admitted that he was taken into police custody at about 10 a.m. on the next date and was released by the police after four days. He admitted that he did not give the names of the accused persons' father to the police. He further stated that he had not gone to the police station on 29-9-2003 to report about the jhamela. Moreover, the investigating officer in his statement as PW 28 had stated that on 1-10-2003, he had examined Arindam Bhattacharjee at the police station and he had also examined various relations of the deceased. He denied that Amal Ray, PW 17 was in custody. In fact, according to him when he was going on his way to meet Amal Ray, he had the occasion to meet him and had examined him but did not bring him to the police station.

28. This is the direct evidence in relation to the altercation (jhamela) between the accused and the deceased and the subsequent strangulation of the deceased. The necessary inference that follows is that on the day of the incident, the deceased was killed and his body was disposed of, as stated by the prosecution witness noted above, by cutting the same into pieces, putting it in gunny bags and abandoning these bags at a deserted place.

29. The next circumstance in the chain of events is the evidence relating to dismembering of the corpse and its disposal by the accused persons. Let us examine that evidence now.

30. PW 7, Prakash Chowdhury, is a witness to this incident. According to him, on 30-9-2003, at about 9.00 p.m. he was returning along goshala field, Bhanur More after making tagada in connection with his business. While returning, he found Uttam and Mou standing by the side of a Maruti van and then Sadhu, Chotka, Chor Bishu, Shyamal and Manoranjan were taking inside the said steel-coloured Maruti van, parts of human dead body

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contained in gunny bags. He identified the accused persons in the court. He further stated that his statement was recorded by the police 20 to 22 days after the date of the incident. In his cross-examination certain doubts were created about the manner in which he was conducting his business i.e. sale and distribution of electric bulbs.

31. PW 9, Haru Das, is a rickshaw puller and he parks his rickshaw at the rickshaw stand at Bhanuthakur More. According to him, two days prior to the day of Durga Pooja nearly two years back, when he was sitting at the rickshaw stand, he saw that a steel-coloured Maruti van stopped near the goshala field and four-five bags containing parts of a human body were being loaded in the Maruti van from the side of goshala field by accused Uttam, Mou, Chotka, Bishu, Ganesh and Behari. All the accused persons who were present in the court were identified by this witness. According to this witness, the accused persons used to travel in his rickshaw and paid the exact fair. After putting the body into the van, the van went away towards Rashmoni More. The witness specifically stated that subsequently, he was threatened by Uttam Das and his associates by saying that if he disclosed anything to anybody, his family would be destroyed. This witness was subjected to a lengthy cross-examination but nothing material came out in the cross-examination.

32. PW 11, Someraw Orang is another rickshaw puller. He stated that he along with Tarapada Sahadeb and Haru was at the rickshaw stand of Bhanuthakur More. According to him, a Maruti car had stopped there and Uttam and Mou were standing by the side of the car and Chotka, Bishu, Manoranjan and Ganesh, were loading the bags containing the bloody parts of human body into the said car from the goshala field. Thereafter, the car went towards Rashmoni More with the accused persons. He identified all the accused persons present in the court. He stated that he knew the accused persons for long. He came to know of the murder 20-22 days after the date of incident. In his cross-examination, he stated that he could not tell the number of the Maruti car and he had not seen that car again. He denied that he had been tutored by the police and he was making the statement under the influence of the police. He admitted that he carried liquor in his rickshaw, as a government liquor shop was situated at Sodhpur and he went there, and sometimes he also drank liquor.

33. According to the prosecution, the statements of these witnesses completely establish that the deceased was last seen with the accused and they were responsible for assaulting and strangulating him and they were also witnessed loading the parts of the human dead body into the Maruti van. Resultantly, as per the prosecution, both the vital circumstances i.e. commission of murder as well as disposal of the body of the deceased have been proved.

34. PW 2, Jhantu Dey, the brother-in-law of the deceased also appeared as a witness and stated that his brother-in-law had built six shop rooms on their land which was near to his house. On 15-8-2003 Uttam, Manoranjan,

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Ganesh, Dipak Das, Shyamal, Chotka, Bishu and Sadhu demanded Rs 40,000 from the deceased but the deceased refused. Then Uttam threatened that if the said money was not paid he would not allow Archideb to enjoy and use the said property. PW 2 is also a witness to the recovery of the chopper which was recovered on the statement of accused Bishu who brought out the chopper from the bush in the field and admitted that they had cut the body of the deceased with the chopper. PW 2 proved his signatures on the seizure list, Ext. 1/1 and also identified in the court the persons who had threatened the deceased.

35. PW 1, Sunil Chakraborty and PW 3, Mritunjoy Chanda were also witnesses to the recovery of the chopper and the corresponding seizure memo, Exhibit 1/3. PW 1 had signed the seizure memo and admitted his signatures as Exhibit 1. The signatures of PW 3 were admitted by him at Exhibit 1/2. Both these witnesses identified the accused persons present in the court.

36. The Maruti van, Exhibit 13/2 was recovered in presence of PW 23, PW 24, PW 25 and PW 26. Further, the Avon cycle was recovered in presence of PW 21 and PW 22. PW 21 stated that a cycle was seized from a place near Agarpara Railway Station under the seizure list and it was recovered at the instance of three persons who led the police to the place of recovery. He admitted his signatures as Exhibit 4/1. The cycle was exhibited as Material Exhibit II. The signatures on the seizure memo attached to the cycle were exhibited as Exhibit 5/1.

37. These are the recoveries of the weapon of offence as well as the vehicle which was used by the accused persons for carrying the mutilated body parts of the deceased person. Further, the recovery of the cycle that was owned by the deceased provides a definite link as it was recovered in furtherance of the statement of the accused, namely, Uttam Das, Dipak Das and Manoranjan Debnath. The recoveries affected by the investigating officer, PW 28 can hardly be questioned in fact and in law.

38. Now, let us examine the evidence of the doctor who conducted the post-mortem on the body of the deceased. Dr Jnanprokash Bandhopadhyay was examined as PW 16. According to this witness, he was the medical officer attached to R.G. Kar Medical College and Hospital. On 1-10-2003 he was posted at Barrackpore Police Base Hospital. He performed post-mortem on the dead body of one Archideb Bhattacharjee, as identified by the constable who had brought the body of the deceased. In fact, some parts of the human body had been sent for post-mortem. He examined the injuries inflicted upon the deceased's body and connected each injury to the organ that had been severed from the body. He opined that all the body parts were of a single person. The injuries showed evidence of ante-mortem vital reaction. The cause of death was due to effect of strangulation by ligature. He prepared the post-mortem report as Exhibit 11 with his signature as Exhibit 11/1.

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39. It will be useful to refer to certain part of the statement of this witness, PW 16 that reads as under:

"On that date I held post-mortem on the dead body of one Archideb Bhattacharjee identified by Constable No. 4260, Brojogopal Ghosh in connection with Khardah PS UD Case No. 89 dated 1-1-2003 and Khardah PS Case No. 332 under Sections 302/201/34 of the Penal Code dated 1-10-2003. Actually the following parts of the dead body were sent for post-mortem:

1. One decapitated head.

2. One beheaded body with PM amputation of both arms, left leg from hip and right leg from knee.

3. One left arm.

4. One right arm.

5. One left leg from knee.

6. One right leg from knee.

7. One left thigh, all parts were arranged in anatomical order.

The body parts were in state of moderate decomposition with bloating body feature.

On examination I found the following post-mortem injuries:

1. Incised chop wound (ICW) placed transversely over neck adjacent to head. Winch below symphysis menti and along with nape of the neck at the level between C-2 and C-3 vertebrae measuring 6.8" × 6.3" × through and through all the structure of the neck.

2. ICW placed over neck adjacent to 4.4" above sterna notch placed transversely at the (torn) between C-2 and C-3 vertebrae measuring 6.8" × 6.3" × through and through all the structure of the neck.

Injuries 1 and 2 fitted anatomically and snugly.

3. ICW 6.2" × 4.3" × 2.2" all the structures and shoulder joint cavity over right shoulder.

4. ICW 6.2" × 4.7" × through and through all the structures and shoulder joint cavity over upper end of right arm.

Injuries 3 and 4 fitted anatomically and snugly.

5. ICW 5.9" × 4.7" × through and through all the structures and the shoulder joint cavity over left shoulder.

6. ICW 5.8" × 4.6" × through and through all the structures and shoulder joint cavity over upper end of left arm.

Injuries 5 and 6 fitted anatomically and snugly.

7. ICW over left hip 8.5" × 8" × through and through all the structure and left hip joint cavity.

8. ICW 8.4" × 8" × through and through all the structure and left hip joint cavity over upper end of left thigh.

Injuries 7 and 8 fitted anatomically and snugly.

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9. ICW left knee joint towards thigh 5.8" × 5.5" × through and through all the structure and left knee joint cavity.

10. ICW left knee joint towards leg 5.8" × 5.5" × through and through all the structure and left knee joint cavity.

Injuries 9 and 10 fitted anatomically and snugly.

11. ICW right knee towards thigh 5.6" × 5.5" × through and through all the structure and right knee joint cavity.

12. ICW right knee towards leg 5.6" × 5.5" × through and through all the structure and right knee joint cavity.

Injuries 11 and 12 fitted anatomically and snugly.

13. Incised wound 3" × 0.8" × muscle over right side of cheek and lower lip.

14. ICW 3.5" × 0.7" × muscle placed transversely over right side of back of knee at the level of tip of right mastoid process.

15. Lacerated wound 3" × 1.2" × muscle over left 4 and 5 intercostal space 5.6" from interior midland.

All the injuries mentioned showed no evidence of ante-mortem vital reaction. All the body parts were of a single person.

Ante-mortem injuries

1. One continuous ligature (LM) 12" × 1.4" completely encircling the neck was placed transversely low down around the neck adjacent to the body 1.6" above sterna notch and 1.8" above tip of C-7 spinal process. The area over the LM was less decomposed than the rest of the body and skin over the LM was brownish. On dissection extensive extravasation of blood is noted in the SC tissue and muscle of neck. Bruising was also noted in and around the tracheal cartilages with fracture and displacement of thyroid cartilages and tracheal rings.

2. An abrasion 1.5" × 0.8" over left malar prominent.

3. * * *

4. An abrasion over right anterior superior iliac spine measuring 0.8" × 0.6".

5. Bruise 4.8" × 2.5" over back of left arm 2.5" above left elbow joint.

6. Bruise 2.6" × 2" over ulnar aspect of right wrist.

7. Haematoma on scalp 3.5" × 2" × approximately 0.2" over left frontoparietal region, 1.6" from midline.

The injures showed evidence of ante-mortem vital reaction.

In my opinion death was due to the effects of strangulation by ligature, as noted above—ante-mortem and homicidal in nature.

This is the report of post-mortem prepared by me with my handwriting. It bears my signature and seal. This report of post-mortem is marked as Ext. 11, the signature is marked as Ext. 11/1.

The post-mortem injuries mentioned above may be caused by this type of moderately heavy sharp-cutting weapon."

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40. The investigating officer was examined as PW 28. Upon receiving the information from PW 15, he was entrusted with the investigation of the case. According to this witness, when he reached the spot, he found that a beheaded dead body whose hands and legs were separated, was lying by the left side of the Barrackpore-Dum Dum Highway. He conducted the inquest at the spot and prepared the inquest report, Exhibit 3/4. He seized the gunny bags containing mutilated parts of the body of the deceased. He also recovered an empty bloodstained gumcha and other articles vide Exhibit 16. On 1-10-2003 he conducted a raid in the area of Nandan Kanan in search of accused Uttam Das, Mou and Manoranjan Debnath but could not apprehend them. He recorded the statements of various witnesses. The mutilated body parts were sent to the police hospital. On 11-10-2003 he along with the force started for Delhi with production warrant and thereupon he arrested three accused. He recovered the Avon bicycle, while the Maruti van was recovered by SI Anjan De, PW 26, who had taken up investigation of the case under instructions of I.C. Khardah, during temporary absence of PW 28. Thereafter, according to this witness, he held raids in search of the associate accused but they could not be traced.

41. The IO, PW 28 prayed for issuance of WA and WPA against Chotka alias Panchanan Tarafdar, Chor Bishu alias Bishu Saha, Dipak Das alias Mou, Sadhu alias Satyajit Das, Shyamal Ghosh and Ganesh Das. The same were allowed. On 9-11-2003 he held raid at Nandan Kanan and surrounding area but could not trace the absconding accused. On 21-11-2003 he apprehended accused Shyamal Ghosh and Sadhu alias Satyajit Das from Sodhpur. He also took into custody photographs along with negatives thereof from photographer Ashok Sen on 7-10-2003 and prepared seizure list marked as Exhibit 7/1. Thereafter he filed the charge-sheet.

42. Another witness of some significance is PW 10 Chota Orang who stated that about one-and-a-half years back, a part of a dead body severed from its head, hands and legs was left in front of his house near Kalyani Highway Road by someone. The police had come to the place and prepared a report. He had put his signatures on the said report which he duly accepted in court as Exhibit 3/1.

43. This is the evidence that completes the chain of events and establishes the case of the prosecution beyond any reasonable doubt. The facts, right from the departure of the deceased from his house to the place of Chandan Dey to recover money up to the recovery of mutilated body of the deceased, have been proved by different witnesses, including some eyewitnesses.

44. It was contended that some of the witnesses had turned hostile and have not supported the case of the prosecution. In this regard, reference has been made to PW 13 and PW 23. PW 13 admitted that he was a rickshaw puller of Rickshaw 4. He also stated that he was not examined by the police. It was at that stage that the learned prosecutor sought permission of the court to declare him hostile, which leave was granted by the court. This witness

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stated that there were 10 rickshaw pullers at Nandan Kanan and he used to park his rickshaw from 7.00 a.m. to 10.00 a.m. at that stand, while in the afternoon, he used to park his rickshaw at Sodhpur Railway Station. He denied having seen the accused persons loading the gunny bags into the Maruti van and also receded completely from his statement made under Section 161 CrPC. The other witness is PW 23 who was a witness to the recovery of the Maruti van. According to this witness, the Maruti van was parked in his parking lot. However, on 30-11-2003 Manik Das had taken out the vehicle from the parking and again returned at midnight. With regard to his signature on the seizure memo which he accepted as Exhibit 13, he took up the plea that he was made to sign blank papers.

45. The mere fact that these two witnesses had turned hostile would not affect the case of the prosecution adversely.

45.1. *Firstly*, it is for the reason that the facts that these witnesses were to prove already stand fully proved by other prosecution witnesses and those witnesses have not turned hostile, instead they have fully supported the case of the prosecution. As per the version of the prosecution, PW 23 was witness to the recovery of the Maruti van along with PW 24, PW 25 and PW 26. All those witnesses have proved the said recovery in accordance with law. They have clearly stated that it was upon the statement of Manik Das that the vehicle had been recovered. Other witnesses have proved that the said vehicle was used for carrying the gunny bags containing the mutilated parts of the dead body of the deceased.

45.2. *Secondly*, PW 13 is a witness who was at the railway station rickshaw stand along with the other two witnesses, namely, PW 9 and PW 11 who have fully proved the fact as eyewitnesses to the loading of the gunny bags into the Maruti van.

45.3. *Thirdly*, even the version given by PW 13 and PW 23 partially supports the case of the prosecution, though in bits and pieces. For example, PW 23 has stated that the driver of the Maruti van was Manik Das and also that he had taken out the vehicle from the parking lot at about 9.30 p.m. on the day of the incident and had brought it back after midnight. He also stated that this car was being driven by Manik Das. Similarly, PW 13 also admitted that other rickshaws were standing at the stand. This was the place where PW 9 and PW 11 had seen the loading of the gunny bags into the Maruti van. In other words, even the statements of witnesses PW 13 and PW 23, who had turned hostile, have partially supported the case of the prosecution. It is a settled principle of law that statement of a hostile witness can also be relied upon by the court to the extent it supports the case of the prosecution. Reference in this regard can be made to *Govindaraju* v. *State*[1].

46. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses inasmuch as these witnesses have given different timing as to when they had seen the

1 (2012) 4 SCC 722 : (2012) 2 SCC (Cri) 533

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scuffling and strangulation of the deceased by the accused. It is true that there is some variation in the timing given by PW 8, PW 17 and PW 19. Similarly, there is some variation in the statement of PW 7, PW 9 and PW 11. Certain variations are also pointed out in the statements of PW 2, PW 4 and PW 6 as to the motive of the accused for commission of the crime. Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution.

47. The variations pointed out as regards the time of commission of the crime are quite possible in the facts of the present case. Firstly, these witnesses are rickshaw pullers or illiterate or not highly educated persons whose statements had been recorded by the police. Their statements in the court were recorded after more than two years from the date of the incident. It will be unreasonable to attach motive to the witnesses or term the variations of 15-20 minutes in the timing of a particular event as a material contradiction. It probably may not even be expected of these witnesses to state these events with the relevant timing with great exactitude, in view of the attendant circumstances and the manner in which the incident took place.

48. To illustrate the irrelevancy of these so-called variations or contradictions, one can deal with the statements of PW 2, PW 4 and PW 6. PW 4 and PW 6 have stated that the deceased had constructed shops along with his brother for the purpose of letting out and it was thereupon that the accused persons started demanding a sum of Rs 40,000 from the deceased and had threatened him of dire consequences, if their demand was not satisfied. PW 2 has made a similar statement. However, he has stated that Uttam Das and the accused persons had threatened the deceased that if the said money was not paid, they would not allow the deceased to enjoy and use the said shops built by him. This can hardly be stated to be a contradiction much less a material contradiction. According to the witnesses, two kinds of dire consequences were stated to follow if the demand for payment of money made by the accused was not satisfied. According to PW 4 and PW 6, they had threatened to kill the deceased while according to PW 2, the accused had threatened that they would not permit the accused to enjoy the said property. Statements of all these witnesses clearly show one motive i.e. illegal demand of money coupled with the warning of dire consequences to the deceased in case of default. In our view, this is not a contradiction but are statements made bona fide with reference to the conduct of the accused in relation to the property built by the deceased and his brother.

49. It is a settled principle of law that the court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/or in isolation. We are unable to see any material or serious contradiction in the statement of these witnesses which may give any advantage to the accused.

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50. The learned counsel appearing for the appellants contended that PW 2, PW 4 and PW 6 are interested witnesses as they are close relations of the deceased person. Further, it is contended that the statements of PW 8, PW 17 and PW 19 had been recorded after considerable delay, varying from 3 to 22 days and for these reasons the case of the prosecution suffers from patent lacuna and defects. This evidence, therefore, could not be taken into consideration by the Court to convict the accused. On the contrary, the accused are entitled to acquittal for these reasons. Reliance has been placed upon *State of Orissa* v. *Brahmananda Nanda*[2] and *Maruti Rama Naik* v. *State of Maharashtra*[3].

51. On the contra, the submission on behalf of the State is that the delay has been explained and though the investigating officer was cross-examined at length, not even a suggestion was put to him as to the reason for such delay and, thus, the accused cannot take any benefit thereof at this stage. Reliance in this regard on behalf of the State is placed on *Brathi* v. *State of Punjab*[4], *Banti* v. *State of M.P.*[5] and *State of U.P.* v. *Satish*[6].

52. These are the issues which are no more res integra. The consistent view of this Court has been that if the explanation offered for the delayed examination of a particular witness is plausible and acceptable and the Court accepts the same as plausible, there is no reason to interfere with the conclusion arrived at by the courts. This is the view expressed in *Banti*[5]. Furthermore, this Court has also taken the view that no doubt when the Court has to appreciate the evidence given by the witnesses who are closely related to the deceased, it has to be very careful in evaluating such evidence but the mechanical rejection of the evidence on the sole ground that it is that of an interested witness would inevitably relate to failure of justice (*Brathi*[4]). In *Satish*[6], this Court further held that the explanation offered by the investigating officer on being questioned on the aspect of delayed examination by the accused has to be tested by the Court on the touchstone of credibility. It may not have any effect on the credibility of the prosecution evidence tendered by other witnesses.

53. The delay in examination of witnesses is a variable factor. It would depend upon a number of circumstances. For example, non-availability of witnesses, the investigating officer being preoccupied in serious matters, the investigating officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc.

54. In the present case, it has come in evidence that the accused persons were absconding and the investigating officer had to make serious effort and even go to various places for arresting the accused, including coming from

2 (1976) 4 SCC 288 : 1976 SCC (Cri) 596
3 (2003) 10 SCC 670 : 2004 SCC (Cri) 958
4 (1991) 1 SCC 519 : 1991 SCC (Cri) 203
5 (2004) 1 SCC 414 : 2004 SCC (Cri) 294
6 (2005) 3 SCC 114 : 2005 SCC (Cri) 642

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West Bengal to Delhi. The investigating officer has specifically stated, that too voluntarily, that he had attempted raiding the houses of the accused even after cornering the area, but of no avail. He had ensured that the mutilated body parts of the deceased reached the hospital and also effected recovery of various items at the behest of the arrested accused. Furthermore, the witnesses whose statements were recorded themselves belonged to the poor strata, who must be moving from one place to another to earn their livelihood. The statement of the available witnesses like PW 2, PW 4, PW 6, and the doctor, PW 16, another material witness, had been recorded at the earliest. The investigating officer recorded the statements of nearly 28 witnesses. Some delay was bound to occur in recording the statements of the witnesses whose names came to light after certain investigation had been carried out by the investigating officer.

55. In the present case, the examination of the interested witnesses was inevitable. They were the persons who had knowledge of the threat that was being extended to the deceased by the accused persons. Unless their statements were recorded, the investigating officer could not have proceeded with the investigation any further, particularly keeping the facts of the present case in mind. Merely because three witnesses were related to the deceased, the other witnesses, not similarly placed, would not attract any suspicion of the court on the credibility and worthiness of their statements.

56. Some emphasis has been placed by the learned counsel appearing for the appellants upon some patent defects in the prosecution case and the abnormal conduct of the prosecution witnesses. According to the counsel, it is very unnatural that related witnesses like PW 2, PW 4 and PW 6 had not informed the police when they lodged the missing diary report with the police station that there was demand for money by the accused and that they had threatened the deceased with dire consequences if that demand was not satisfied. Furthermore, it is pointed out that nothing was sent by the investigating officer to the forensic science laboratory (FSL) to provide any scientific link to the commission of the offence or corroboration of the case of the prosecution. The contention is that these are material defects and should normally result in acquittal of the accused.

57. We are not impressed by this contention of the learned counsel appearing for the appellants. We have already noticed above that the question of disbelieving the interested witnesses (family members of the deceased) does not arise. Their statements are reliable and trustworthy. The fact that they did not inform the police while lodging the missing diary report about the illegal demand for money by the accused persons and that the accused had also threatened the deceased with dire consequences, is not a material omission. All the family members must have been under great mental stress as their husband/brother had not returned home. It is also not factually correct to say that nothing of this kind was mentioned by these related witnesses to the police at any stage. The investigating officer, PW 28, had specifically stated in his statement that "Jhantu Dey stated to me that on 15-8-2003 Uttam Das, Dipak Das, Manoranjan Debnath, Ganesh, Chotka,

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Chor Bishu, Shyamal and Sadhu demanded Rs 40,000 from Archideb Bhattacharjee in his presence".

58. Of course, there are certain discrepancies in the investigation inasmuch as the investigating officer failed to send the bloodstained gunny bags and other recovered weapons to the FSL, to take photographs of the shops in question, prepare the site plan thereof, etc. Every discrepancy in investigation does not weigh with the court to an extent that it necessarily results in acquittal of the accused. These are the discrepancies/lapses of immaterial consequence. In fact, there is no serious dispute in the present case to the fact that the deceased had constructed shops on his own land. These shops were not the site of occurrence, but merely constituted a relatable fact. Non-preparation of the site plan or not sending the gunny bags to the FSL cannot be said to be fatal to the case of the prosecution in the circumstances of the present case. Of course, it would certainly have been better for the prosecution case if such steps were taken by the investigating officer.

59. In *C. Muniappan* v. *State of T.N.*[7] this Court has clearly stated the principle that: (SCC p. 589, para 55)

> "*55.* ... The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded."

Similar view was taken by this Court in *Sheo Shankar Singh* v. *State of Jharkhand*[8] wherein the Court held that: (SCC p. 671, para 47)

> "*47.* ... The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the court. As to what should be the weight attached to such an identification is a matter which the court [would] determine in the peculiar facts and circumstances of each case."

Similarly, failure to make reference to the FSL in the circumstances of the case is no more than a deficiency in the investigation of the case and such deficiency does not necessarily lead to a conclusion that the prosecution case is totally unworthy of credit.

60. As we are discussing the conduct of the prosecution witnesses, it is important for the Court to notice the conduct of the accused also. The accused persons were absconding immediately after the date of the occurrence and could not be arrested despite various raids by the police authorities. The investigating officer had to go to different places i.e. Sodhpur and Delhi to arrest the accused persons. It is true that merely being away from his residence having an apprehension of being apprehended by the police is not a very unnatural conduct of an accused, so as to be looked upon as absconding per se where the court would draw an adverse inference.

7 (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402
8 (2011) 3 SCC 654 : (2011) 2 SCC (Cri) 25

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Paramjeet Singh v. *State of Uttarakhand*[9] is the judgment relied upon by the learned counsel appearing for the appellant. But we cannot overlook the fact that the present case is not a case where the accused were innocent and had a reasonable excuse for being away from their normal place of residence. In fact, they had left the village and were not available for days together. Absconding in such a manner and for such a long period is a relevant consideration.

61. Even if we assume that absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused because it is not unknown that even innocent persons may run away for fear of being falsely involved in criminal cases, but in the present case, in view of the circumstances which we have discussed in this judgment and which have been established by the prosecution, it is clear that absconding of the accused not only goes with the hypothesis of guilt of the accused but also points a definite finger towards them.

62. This Court in *Dara Singh* v. *Republic of India*[10] held as under: (SCC p. 529, para 88)

> "*88.* The other circumstance urged by the prosecution was that A-3 absconded soon after the incident and avoided arrest and this abscondence being a conduct under Section 8 of the Evidence Act, 1872 should be taken into consideration along with other evidence to prove his guilt. The fact remains that he was not available for quite some time till he was arrested which fact has not been disputed by the defence counsel. We are satisfied that before accepting the contents of the two letters and the evidence of PW 23, the trial Judge afforded him the required opportunity and followed the procedure which was rightly accepted by the High Court."

63. Then it was also contended that circumstantial evidence is a very weak evidence and in the present case, the complete chain having not been established, the accused are entitled to acquittal. This argument again does not impress us. Firstly, we have discussed in some details that this is not purely a case of circumstantial evidence. There are eyewitnesses who had seen the scuffling between the deceased and the accused and the strangulation of the deceased by the accused persons and also the loading of the mutilated body parts of the deceased contained in gunny bags into Maruti van. Evidence establishing the "last seen together" theory and the fact that after altercation and strangulation of the deceased which was witnessed by PW 8, PW 17 and PW 19, the body of the deceased was recovered in pieces in presence of the witnesses, have been fully established. To a very limited extent, it is a case of circumstantial evidence and the prosecution has proved the complete chain of events. The gap between the time when the accused persons were last seen with the deceased and the discovery of his mutilated body is quite small and the possible inference would be that the accused are responsible for commission of the murder of the deceased. Once the last seen

9 (2010) 10 SCC 439 : (2011) 1 SCC (Cri) 98
10 (2011) 2 SCC 490 : (2011) 1 SCC (Cri) 706

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theory comes into play, the onus was on the accused to explain as to what happened to the deceased after they were together seen alive. The accused persons have failed to render any reasonable/plausible explanation in this regard.

64. Even in the cases of circumstantial evidence, the court has to take caution that it does not rely upon conjectures or suspicion and the same should not be permitted to take the place of legal proof. The circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of guilt of the accused. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. (Ref. *Mousam Singha Roy* v. *State of W.B.*[11])

65. Accused Ganesh, in his statement under Section 313 CrPC, admitted the fact that he was absconding even till the charge-sheet was filed in the court declaring him absconding and thereafter, he surrendered at the police station after charges were framed. On a specific question as to what he had to say in this regard, except saying that it was correct, he gave no further explanation. This piece of evidence points towards lack of bona fides on the part of this accused. It may also be noticed that all the accused only stated that they did not know anything. However, they did not dispute the period during which they were stated to be absconding. This again is a circumstance which, seen in the light of the prosecution evidence, points towards the guilt of the accused.

66. Another argument advanced on behalf of accused Shyamal Ghosh is that he was not named in the FIR, was not identified in police custody and was also not named by PW 8 in his statement. As far as naming Shyamal Ghosh in the FIR is concerned, none of the accused was named in the FIR, which was recorded on the statement of PW 15. PW 15 had only informed about the recovery of the gunny bags containing the human body parts. Thus, it was a case of blind murder at that stage and was so registered by the police. Coming to the fact that this accused was not specifically named by PW 8 in his statement before the court, we may notice that it is true that Shyamal Ghosh was not named by the said witness. PW 8 had only named six accused persons but it is also to be noted that when he identified the accused persons present in the court, he specifically stated "the persons who were doing the mischief in that night are present in court today (identified)". PW 17 had seen the altercation immediately preceding the strangulation of the deceased and he has clearly named Shyamal Ghosh in his statement. Of course, this witness also had named six persons and according to this witness, the accused persons had asked him to leave the place which he then did. PW 19 had also similarly named six persons while not specifically naming the accused Shyamal but he also stated in his examination, "The persons whom I saw in that night all are present in court today (identified)."

11 (2003) 12 SCC 377 : 2004 SCC (Cri) Supp 429

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67. This clearly shows that all the three eyewitnesses to altercation and strangulation named some of the accused persons while did not name others specifically. However, they identified all the accused persons in the court as the persons who were present at the time of the mischief, altercation and strangulation of the deceased. This Court in *Tika Ram* v. *State of M.P.*[12], while rejecting the argument that the name of the accused is not mentioned in the FIR held that this would not by itself be sufficient to reject the prosecution case as against this accused. The Court further held that where the prosecution is able to establish its case, such omission by itself would not be sufficient to give benefit of doubt to the accused. In the present case, as already discussed, the prosecution has been able to establish its case beyond reasonable doubt.

68. From the above discussion, it precipitates that the discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contradistinction to mere marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution.

69. Another settled rule of appreciation of evidence as already indicated is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on the part of a witness to bring correct facts by clarification on record, such statement must be seen in a different light to a situation where the contradiction is of such a nature that it impairs his evidence in its entirety.

70. In terms of the Explanation to Section 162 CrPC which deals with an omission to state a fact or circumstance in the statement referred to in sub-section (1), such omission may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether there is any omission which

12 (2007) 15 SCC 760 : (2010) 4 SCC (Cri) 667

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amounts to contradiction in particular context shall be a question of fact. A bare reading of this Explanation reveals that if a significant omission is made in a statement of a witness under Section 161 CrPC, the same may amount to contradiction and the question whether it so amounts is a question of fact in each case. (*Sunil Kumar Sambhudayal Gupta* v. *State of Maharashtra*[13] and *Subhash* v. *State of Haryana*[14].)

71. The basic element which is unambiguously clear from the Explanation to Section 162 CrPC is use of the expression "may". To put it aptly, it is not every omission or discrepancy that may amount to material contradiction so as to give the accused any advantage. If the legislative intent was to the contra, then the legislature would have used the expression "shall" in place of the word "may". The word "may" introduces an element of discretion which has to be exercised by the court of competent jurisdiction in accordance with law. Furthermore, whether such omission, variation or discrepancy is a material contradiction or not is again a question of fact which is to be determined with reference to the facts of a given case. The concept of contradiction in evidence under criminal jurisprudence, thus, cannot be stated in any absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is a contradiction or material contradiction which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially.

72. Then, it is also contended and of course with some vehemence that where the prosecution is relying upon the last seen theory, it must essentially establish the time when the accused and deceased were last seen together as well as the time of the death of the deceased. If these two aspects are not established, the very application of the "last seen theory" would be impermissible and would create a major dent in the case of the prosecution. In support of this contention, reliance is placed upon the judgment of this Court in *Sk. Yusuf* v. *State of W.B.*[15]

73. Application of the "last seen theory" requires a possible link between the time when the person was last seen alive and the fact of the death of the deceased coming to light. There should be a reasonable proximity of time between these two events. This proposition of law does not admit of much excuse but what has to be seen is that this principle is to be applied depending upon the facts and circumstances of a given case. This Court in para 21 of *Yusuf case*[15] while referring to *Mohd. Azad* v. *State of W.B.*[16] and *State* v. *Mahender Singh Dahiya*[17], held as under: (*Yusuf case*[15], SCC pp. 760-61)

> "*21.* The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last

13 (2010) 13 SCC 657 : (2011) 2 SCC (Cri) 375
14 (2011) 2 SCC 715 : (2011) 2 SCC (Cri) 689
15 (2011) 11 SCC 754 : (2011) 3 SCC (Cri) 620
16 (2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082
17 (2011) 3 SCC 109 : (2011) 1 SCC (Cri) 821

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seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. (Vide *Mohd. Azad* v. *State of W.B.*[16] and *State* v. *Mahender Singh Dahiya*[17].)"

74. The reasonableness of the time gap is, therefore, of some significance. If the time gap is very large, then it is not only difficult but may even not be proper for the court to infer that the accused had been last seen alive with the deceased and the former, thus, was responsible for commission of the offence. The purpose of applying these principles, while keeping the time factor in mind, is to enable the court to examine that where the time of last seen together and the time when the deceased was found dead is short, it inevitably leads to the inference that the accused person was responsible for commission of the crime and the onus was on him to explain how the death occurred.

75. In the facts of the present case, the factor of time does not play such a significant role because it is a case where there were eyewitnesses to the strangulation of the deceased by the accused, and therefore, it may not be expected of the prosecution to show the time of last seen and death, by leading independent evidence. PW 17 is the witness to the altercation between the accused and the deceased. PW 8 is the witness to the strangulation of the deceased by the accused persons. Besides, PW 7, PW 9 and PW 11 are witnesses to the loading of the gunny bags containing human body parts in the Maruti van by the accused. Thus, these facts have been established by independent witnesses. None of these witnesses is a relation or a witness inimical towards the accused.

76. It has come on record that the occurrence had taken place on 29-9-2003 at midnight. There may be some variation (5 to 10 minutes) in the time stated by different witnesses as to when the occurrence took place. From their statements, it is clear that by and large, they have given approximately the same time with reasonable variation, which is primarily for the reason that the accused persons and the deceased were seen by the witnesses at different places. We have already held that these discrepancies do not amount to any material contradiction. Thus, the time of death stands clearly established between 11.30 p.m. to 12.00 a.m. on 29-9-2003/30-9-2003. Thereafter, it was the act of disposal of the body of the deceased which attracts the offence under Section 201 IPC.

77. As far as the death of the deceased is concerned, there was hardly any time gap between the two incidents i.e. the last seen alive and the fact of death of the deceased becoming known. All the events occurred between 11.00 p.m. to 12.00 a.m. at midnight of 29-9-2003. Thus, the contention raised on this ground is entirely without any merit.

78. On behalf of accused Shyamal, it was also contended that despite the identification parade being held, he was not identified by the witnesses and

16 (2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082
17 (2011) 3 SCC 109 : (2011) 1 SCC (Cri) 821

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also that the identification parade had been held after undue delay and even when details about the incident had already been telecasted on the television. Thus, the Court should not rely upon the identification of the accused persons as the persons involved in the commission of the crime and they should be given the benefit of doubt.

79. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

80. It is equally correct that CrPC does not oblige the investigating agency to necessarily hold the test identification parade. Failure to hold the test identification parade while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. There have been numerous cases where the accused is identified by the witnesses in the court for the first time. One of the views taken is that identification in court for the first time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the test identification parade is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of the witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence is however subjected to exceptions. Reference can be made to *Munshi Singh Gautam* v. *State of M.P.*[18] and *Sheo Shankar Singh* v. *State of Jharkhand*[8].

81. Identification parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that persons named as the accused in the case are actually the culprits. The identification parade primarily belongs to the stage of investigation by the police. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. Thus, it is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence with reference to the facts of a given case.

82. In the present case, certainly Shyamal Ghosh, the accused was not identified at the time of test identification parade held on 28-11-2003. However, Sadhu alias Satyajit Das was identified. PW 14 is the learned Judicial Magistrate who had recorded the statement of Manik Das under Section 164 CrPC as well as held the identification parade on 28-11-2003. Other accused were neither subjected to identification parade nor could the

18 (2005) 9 SCC 631 : 2005 SCC (Cri) 1269
8 (2011) 3 SCC 654 : (2011) 2 SCC (Cri) 25

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question of identifying them arise. The mere fact that Shyamal Ghosh, accused was not identified by Manik Das is not of great relevancy in the present case. Firstly, for the reason that Manik Das was never examined as a witness in the court and even his statement under Section 164 CrPC has not been relied upon by any court while convicting the accused. Secondly, not only one, but all the witnesses i.e. PW 7, PW 8, PW 9, PW 11, PW 17 and PW 19, duly identified the accused in the court and they did so without any demur or hesitation. Manik Das was a person who himself was under a threat and was asked to take the gunny bags for their disposal near the Barrackpore-Dum Dum Highway. Thus, we are of the considered view that non-identification of Shyamal Ghosh by Manik Das is inconsequential in the present case.

83. We may notice at this stage that having returned a finding that prosecution has been able to prove its case beyond reasonable doubt on the strength of the oral and documentary evidence produced by the prosecution, without taking into consideration the statement of Manik Das made under Section 164 CrPC, it is not necessary for us to examine whether the statement of Manik Das under Section 164 CrPC is admissible in evidence and what its evidentiary value is. The question of law is whether the statement recorded under Section 164 CrPC can be relied upon by the prosecution in a given case or not. We leave this question open.

84. Lastly, it was contended that the provisions of Section 34 IPC are not attracted in the present case as the prosecution has not been able to prove either common intention or participation of the accused persons in the commission of the crime. Resultantly, they could not have been held guilty of the offence under Section 302 read with Section 34 IPC. Before we discuss the evidence relevant to this aspect of the case, let us examine the law in relation to ingredients and application of Section 34 IPC.

85. In a very recent judgment of this Court in *Nand Kishore* v. *State of M.P.*[19], this Court discussed the ambit and scope of Section 34 IPC as well as its applicability to a given case as under: (SCC pp. 126-28, paras 20-26)

> "*20.* A bare reading of this section shows that the section could be dissected as follows:
>
> (*a*) Criminal act is done by several persons;
>
> (*b*) Such act is done in furtherance of the common intention of all; and
>
> (*c*) Each of such persons is liable for that act in the same manner as if it were done by him alone.
>
> In other words, these three ingredients would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved, then by fiction of law,

19 (2011) 12 SCC 120 : (2012) 1 SCC (Cri) 378

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criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 IPC must be done by several persons. The emphasis in this part of the section is on the word 'done'. It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity.

21. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally i.e. he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between 'common intention' on the one hand and 'mens rea' as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea. The latter may be coincidental with or collateral to the former but they are distinct and different.

22. Section 34 also deals with constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. If the common intention leads to the commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them. (Refer to *Brathi* v. *State of Punjab*[4].)

23. Another aspect which the court has to keep in mind while dealing with such cases is that the common intention or state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any predetermined plan to commit such an offence. This will always depend on the facts and circumstances of the case, like in the present case Mahavir, all alone and unarmed went to demand money from Mahesh but Mahesh, Dinesh and Nand Kishore got together outside their house and as is evident from the statements of the witnesses, they not only became aggressive but also committed a crime and went to the extent of stabbing him over and over again at most vital parts of the body puncturing both the heart and the lung as well as pelting stones at him even when he fell on the ground. But for their participation and a clear

4 (1991) 1 SCC 519 : 1991 SCC (Cri) 203

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frame of mind to kill the deceased, Dinesh probably would not have been able to kill Mahavir. The role attributable to each one of them, thus, clearly demonstrates common intention and common participation to achieve the object of killing the deceased. In other words, the criminal act was done with the common intention to kill the deceased Mahavir. The trial court has rightly noticed in its judgment that all the accused persons coming together in the nighttime and giving such serious blows and injuries with active participation shows a common intention to murder the deceased. In these circumstances, the conclusions arrived at by the trial court and the High Court would not call for any interference.

24. The learned counsel appearing for the appellant had relied upon the judgment of this Court in *Shivalingappa Kallayanappa* v. *State of Karnataka*[20] to contend that they could not be charged or convicted for an offence under Section 302 with the aid of Section 34 IPC. The said judgment has rightly been distinguished by the High Court in the judgment under appeal. In that case, the Supreme Court had considered the role of each individual and recorded a finding that there was no common object on the part of the accused to commit murder. In that case, the Court was primarily concerned with the common object falling within the ambit of Section 149 IPC. In fact, Section 34 IPC has not even been referred to in the aforereferred judgment of this Court.

25. Another case to which attention of this Court was invited is *Jai Bhagwan* v. *State of Haryana*[21]. In that case also, the Court had discussed the scope of Section 34 IPC and held that common intention and participation of the accused in commission of the offence are the ingredients which should be satisfied before a person could be convicted with the aid of Section 34 IPC. The Court held as under: (SCC p. 107, para 10)

> '*10*. To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (*i*) common intention and (*ii*) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case.'

26. The facts of the present case examined in the light of the above principles do not leave any doubt in our minds that all the three accused had a common intention in commission of this brutal crime. Each one of them participated though the vital blows were given by Dinesh Dhimar.

20 1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694
21 (1999) 3 SCC 102 : 1999 SCC (Cri) 388

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But for Mahesh catching hold of the arms of the deceased, probably the death could have been avoided. Nand Kishore showed no mercy and continued pelting stones on the deceased even when he collapsed to the ground. The prosecution has been able to establish the charge beyond reasonable doubt."

86. In *Lallan Rai* v. *State of Bihar*[22] this Court noticed the dominant feature for attracting the applicability of Section 34 IPC and dealt with the case where the contention was that several persons may have similar intention, yet they may not have common intention in furtherance of which they participated in an action. The Court noticed as under: (SCC pp. 275-77, paras 17-22)

"*17*. In para 44 of the judgment in *Suresh*[23] this Court (the majority view) stated: (SCC pp. 689-90)

'*44*. Approving the judgments of the Privy Council in *Barendra Kumar Ghosh*[24] and *Mahbub Shah*[25] cases a three-Judge Bench of this Court in *Pandurang* v. *State of Hyderabad*[26] held that to attract the applicability of Section 34 of the Code the prosecution is under an obligation to establish that there existed a common intention which requires a prearranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of all. This Court had in mind the ultimate act done in furtherance of the common intention. In the absence of a prearranged plan and thus a common intention even if several persons simultaneously attack a man and each one of them by having his individual intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section. In a case like that each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any or the other. The Court emphasised the sharing of the common intention and not the individual acts of the persons constituting the crime. Even at the cost of repetition it has to be emphasised that for proving the common intention it is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference and "incriminating facts must be incompatible with the innocence of the accused and incapable of explanation or any other reasonable hypothesis". Common intention, arising at any time prior to the criminal act, as contemplated under Section 34 of the Code, can thus be proved by circumstantial evidence.'

22 (2003) 1 SCC 268 : 2003 SCC (Cri) 301
23 *Suresh* v. *State of U.P.*, (2001) 3 SCC 673 : 2001 SCC (Cri) 601
24 *Barendra Kumar Ghosh* v. *King Emperor*, (1924-25) 52 IA 40
25 *Mahbub Shah* v. *King Emperor*, (1944-45) 72 IA 148
26 AIR 1955 SC 216 : 1955 Cri LJ 572

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18. In *Suresh*[23] this Court while recording the dominant feature for attracting Section 34 has the following to state: (SCC p. 686, para 39)

'*39*. The dominant feature for attracting Section 34 of the Penal Code (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.'

19. For true and correct appreciation of legislative intent in the matter of engrafting of Section 34 in the statute book, one needs to have a look into the provision and as such Section 34 is set out as below:

'**34.** ***Acts done by several persons in furtherance of common intention***.—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.'

20. A plain look at the statute reveals that the essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. It is trite to record that such consensus can be developed at the spot. The observations above obtain support from the decision of this Court in *Ramaswami Ayyangar* v. *State of T.N.*[27]

21. In a similar vein the Privy Council in *Barendra Kumar Ghosh* v. *King Emperor*[24] stated the true purport of Section 34 as below: (IA p. 51)

'[T]he words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several acts, whoever intentionally cooperates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes, as in other things, "they also serve who only stand and wait"[28].'

22. The above discussion in fine thus culminates to the effect that the requirement of a statute is sharing the common intention upon being

23 *Suresh* v. *State of U.P.*, (2001) 3 SCC 673 : 2001 SCC (Cri) 601
27 (1976) 3 SCC 779 : 1976 SCC (Cri) 518
24 (1924-25) 52 IA 40
28 John Milton, "On his blindness" (1655)

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present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused—though the same however depends upon the fact situation of the matter under consideration and no rule steadfast can be laid down therefor."

87. Upon analysis of the above judgments and in particular the judgment of this Court in *Dharnidhar* v. *State of U.P.*[29], it is clear that Section 34 IPC applies where two or more accused are present and two factors must be established i.e. common intention and participation of the accused in the crime. Section 34 IPC, moreover, involves vicarious liability and therefore, if the intention is proved but no overt act was committed, the section can still be invoked. This provision carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others, if he had the common intention to commit the act. The phrase "common intention" means a pre-oriented plan and acting in pursuance to the plan, thus, common intention must exist prior to the commission of the act in a point of time. The common intention to give effect to a particular act may even develop on the spur of the moment between a number of persons with reference to the facts of a given case.

88. The ingredients of more than two persons being present, existence of common intention and commission of an overt act stand established in the present case. The statements of the witnesses clearly show that all the eight accused were present at the scene of occurrence. They had demanded money and extended threat of dire consequences, if their demand was not satisfied. Thereafter, they had altercation with the deceased and the deceased was strangulated by the accused persons and then his body was disposed of by cutting it into pieces and packing the same in gunny bags and abandoning the same at a deserted place near the Barrackpore-Dum Dum Highway. Thus, all these acts obviously were in furtherance to the common intention of doing away with the deceased, if he failed to give them Rs 40,000 as demanded. The offence was committed with common intention and collective participation. The various acts were performed by different accused in presence of each one of them. In other words, each of the accused had common intention. Thus, we find that the argument on the application of Section 34 IPC advanced on behalf of the accused is without any substance.

89. For the reasons aforestated, we see no reason to interfere with the judgment of the High Court either on merits or on the quantum of sentence. Therefore, the appeals are dismissed.

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29 (2010) 7 SCC 759 : (2010) 3 SCC (Cri) 491

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(2012) 8 Supreme Court Cases 263

(BEFORE SWATANTER KUMAR AND F.M. IBRAHIM KALIFULLA, JJ.)

DAYAL SINGH AND OTHERS .. Appellants;

Versus

STATE OF UTTARANCHAL .. Respondent.

Criminal Appeal No. 529 of 2010†, decided on August 3, 2012

A. **Public Accountability, Vigilance and Prevention of Corruption — Corruption in Criminal Justice System — Investigating officer (SI) and government doctor deliberately favouring accused and acting in conscious and deliberate violation of their duty — Disciplinary proceedings, even after retirement of officials concerned — Initiation of — Power of trial court to direct — Punishment for contempt by High Court or Supreme Court for disobedience of such orders of trial court — Contempt of Courts Act, 1971 — S. 10 — Nature and Scope — Power of superior court to punish for contempt of inferior/subordinate court**

B. **Criminal Trial — Defective or illegal investigation — Investigation and doctor's report coloured with motivation — Dereliction of duty and misconduct by investigating officer and expert witness (doctor) or other material witnesses — Power of trial court to issue directions for disciplinary and other action against them, even after retirement of officials concerned — Such directions issued by trial court, affirmed and contempt notices issued to Higher Officials for not initiating disciplinary proceedings directed by trial court — Court's approach in appreciation of evidence in such cases**

— Court should ascertain on examination of prosecution case in its entirety whether there have been acts of omission and commission by investigating agency and other material witnesses which resulted in defective investigation and whether same were intentional and deliberate and adversely affected prosecution case — If investigation is found to be motivated, court should exercise higher degree of caution and care so as to ensure that despite attempt to misdirect trial, criminal justice system is not subverted — Court must record specific finding and reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to prosecution case, in breach of professional standards and investigative requirements of law, during course of investigation by investigating agency, expert witnesses and even PWs — Further, trial court would be justified in directing disciplinary authorities to take disciplinary or other action, whether such officer, expert or employee witness, is in service or has since retired

— Directions issued by Supreme Court against investigating officer (SI, PW 6) who conducted investigation and doctor (PW 3) who conducted post-mortem, both in a manner so as to defeat prosecution case, and other officials — Directors General, Health Services of U.P./Uttarakhand issued contempt notices as to why appropriate action be not initiated against them for not complying with directions contained in judgment of trial court for initiation of disciplinary proceedings against PW 3 — Abovesaid officials

† From the Judgment and Order dated 17-3-2008 of the High Court of Judicature of Uttarakhand at Nainital in Crl. A. No. 2050 of 2001 (Old No. 1324 of 1990)

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directed to take disciplinary action against Medical Officer, PW 3, whether he was in service or had since retired, for deliberate dereliction of duty, preparing a medical report which ex facie was incorrect and was in conflict with inquest report and statement of IO, PW 6 — Bar of limitation, if any, under the Rules not to come into play because they were directed by the order of the trial court to do so — Action even for stoppage/reduction in pension can appropriately be taken by the said authorities against PW 3 — Directors General of Police U.P./Uttarakhand directed to initiate, and expeditiously complete disciplinary proceedings against PW 6 SI, whether he was in service or had since retired, for acts of omission and commission and deliberate dereliction of duty — Criminal Procedure Code, 1973 — Ss. 156 to 161, 353 and 354 — Constitution of India — Arts. 136 and 129 — Service Law — Departmental enquiry — Initiation of, even after retirement of officials concerned — Directions by court — Contempt of Courts Act, 1971 — S. 10 — Nature and Scope — Power of superior court to punish for contempt of inferior/subordinate court (Paras 30 to 48)

C. **Criminal Trial — Fair and speedy trial — Object — Social justice — Rights of society and victim — To do justice not only to accused but also to society represented by prosecution by giving it a chance to prove its case — Aim is to ensure not only that no innocent person is punished but also that guilty persons do not escape — Constitution of India, Art. 21 (Paras 30 to 34)**

D. **Criminal Trial — Defective or illegal investigation — Investigation coloured with motivation — Acts of omission and commission committed by investigating agency and other material witnesses — Whether deliberate and adversely affected prosecution case — Medical evidence in conflict with eyewitness version**

— According to eyewitness version, accused persons inflicted lathi-blows on deceased which resulted in his death on the spot — Presence of eyewitnesses at the scene of occurrence not in doubt and their testimony found to be natural and trustworthy — Investigating officer (SI, PW 6) also found, in presence of panchas, injuries on the person of deceased and prepared inquest report recording his opinion that deceased died on account of those injuries — But doctor (PW 3), who conducted post-mortem, reported no external or internal injury and could not ascertain cause of death — No reason mentioned by IO also for non-disclosure of cause of death by doctor — Deceased's viscera handed over to police but either not sent to FSL or if sent, report thereof neither called for nor proved before court — Held, post-mortem report was prepared in a perfunctory manner deliberately, to misdirect prosecution and IO also acted in a negligent and designed manner with a view to shield accused which adversely affected prosecution case — But merely because of investigation being defective and motivated, it should not enure to the benefit of accused to the extent of his acquittal — Hence, in present case concurrent conviction of accused by courts below under Ss. 302/323/34 IPC, confirmed — Criminal Procedure Code, 1973 — Ss. 156 to 161 — Evidence Act, 1872 — S. 45 — Penal Code, 1860, Ss. 302/34 and 323/34 (Paras 18 to 26 and 40)

E. **Criminal Trial — Defective or illegal investigation — Investigation coloured with motivation — Acts of default/omission and commission by investigating officer and expert witness — If found to be so flagrant that**

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intentional and irresponsible attitude become apparent, investigation must be regarded as coloured by motivation and an attempt to save the accused (Paras 21 and 40)

F. **Criminal Trial — Defective or illegal investigation — Intentional acts of default/omission and commission by investigating officer (IO) and medical officer (MO) of government hospital — Dereliction of duty and misconduct — What would amount to — To be determined in the context of service to which such officers belong — Police officers and doctors are required to maintain duty decorum of high standards — Hence, whether their acts constituted dereliction of duty and misconduct should be determined on basis of such standards — Disciplinary proceedings to be initiated on directions of trial court in such cases, even after retirement of officials concerned — Service Law — Misconduct (Paras 18 to 40 and 47)**

G. **Evidence Act, 1872 — Ss. 45, 59 and 60 — Medical evidence — Expert report (post-mortem report) in conflict with eyewitness version — Which one should be given precedence — Manner in which court should appreciate evidence — If expert report found to be perfunctory, incorrect and outcome of deliberate attempt to misdirect prosecution case, whereas eyewitness version found to be trustworthy and credible and establishes prosecution case beyond reasonable doubt, eyewitness version should be preferred over expert report (post-mortem report) — Hence, in present case concurrent conviction of accused by courts below under Ss. 302/323/34 IPC, confirmed — Penal Code, 1860, Ss. 302/34 and 323/34 (Paras 35 to 40)**

H. **Evidence Act, 1872 — S. 45 — Expert report — Should be well authored and convincing — Report, duly proved, has evidentiary value — But it is not binding on court — Court should analyse report, read it in conjunction with other evidence and then decide whether it is reliable or not (Paras 35 to 40)**

I. **Criminal Trial — Witnesses — Related witness — Testimony of, if found to be natural and truthful, cannot be discarded merely because of his relationship with deceased/victim and being interested witness (Paras 13, 14, 45 and 46)**

J. **Penal Code, 1860 — Ss. 302/34 or S. 304 Pt. II r/w S. 34 and Ss. 323/34 — Common intention to cause death — Accused persons armed with lathis came with premeditated mind and started assaulting deceased without any provocation, till his death on the spot, and when PWs came to deceased's rescue, accused inflicted injuries on them also — Held, conviction under Ss. 302/34 for causing death of deceased and under Ss. 323/34 for causing injuries to PWs justified (Paras 13, 14, 45 and 46)**

The trial court found the accused persons guilty of offences under Section 302 read with Section 34 IPC for murder as well as under Section 323 read with Section 34 IPC for causing voluntary hurt to PWs 2 and 4. The court also commented adversely upon the professional capabilities and/or misconduct of the medical officer PW 3. It observed that since the doctor "had conducted in a manner not befitting the medical profession and prepared the post-mortem report against facts for reasons best known to him and was negligent in his duty in ascertaining the injuries on the body of the deceased, hence it is just and proper that the Director General, Medical Health, U.P. be informed in this regard for

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taking necessary action and for eradicating such practices in future". The High Court dismissed the appeal against the judgment of the trial court and affirmed the conviction and sentence recorded by the trial court.

Dismissing the appeal filed by the accused both on merits and on quantum of sentence, the Supreme Court

Held :

Court's approach in cases of motivated investigation and bought over expert witnesses

In a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a "fair trial", the Court should leave no stone unturned to do justice and protect the interest of the society as well. (Paras 30 and 34)

Sathi Prasad v. *State of U.P.*, (1972) 3 SCC 613 : 1972 SCC (Cri) 659; *Dhanaj Singh* v. *State of Punjab*, (2004) 3 SCC 654 : 2004 SCC (Cri) 851; *Paras Yadav* v. *State of Bihar*, (1999) 2 SCC 126 : 1999 SCC (Cri) 104; *Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8; *NHRC* v. *State of Gujarat*, (2009) 6 SCC 767 : (2009) 3 SCC (Cri) 44; *State of Karnataka* v. *K. Yarappa Reddy*, (1999) 8 SCC 715 : 2000 SCC (Cri) 61; *Ram Bali* v. *State of U.P.*, (2004) 10 SCC 598 : 2004 SCC (Cri) 2045; *Karnel Singh* v. *State of M.P.*, (1995) 5 SCC 518 : 1995 SCC (Cri) 977, *relied on*

In this case, the trial court has rightly ignored the deliberate lapses of the investigating officer SI PW 6 as well as the post-mortem report prepared by PW 3 the medical officer. The consistent statement of the eyewitnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW 3 and PW 6 are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court. (Para 41)

It is declared and directed that it shall be appropriate exercise of jurisdiction as well as ensuring just and fair investigation and trial that courts return a specific finding in such cases, upon recording of reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to the case of the prosecution, in breach of professional standards and investigative requirements of law, during the course of

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the investigation by the investigating agency, expert witnesses and even the witnesses cited by the prosecution. Further, the courts would be fully justified in directing the disciplinary authorities to take appropriate disciplinary or other action in accordance with law, whether such officer, expert or employee witness, is in service or has since retired. (Para 47.5)

Directions

The Directors General, Health Services of U.P./Uttarakhand are hereby issued notice under the provisions of the Contempt of Courts Act, 1971 as to why appropriate action be not initiated against them for not complying with the directions contained in the judgment of the trial court. The abovesaid officials are hereby directed to take disciplinary action against the Medical Officer, PW 3, whether he is in service or has since retired, for deliberate dereliction of duty, preparing a report which ex facie was incorrect and was in conflict with the inquest report and statement of PW 6. The bar on limitation, if any, under the Rules will not come into play because they were directed by the order of the trial court to do so. The action even for stoppage/reduction in pension can appropriately be taken by the said authorities against PW 3. The Directors General of Police U.P./ Uttarakhand are hereby directed to initiate, and expeditiously complete, disciplinary proceedings against PW 6 SI, whether he is in service or has since retired, for the acts of omission and commission, deliberate dereliction of duty in not mentioning reasons for non-disclosure of cause of death as explained by the doctor, not sending the viscera to the FSL and for conducting the investigation of this case in a most callous and irresponsible manner. The question of limitation, if any, under the Rules, would not apply as it is by the direction of the Court that such enquiry shall be conducted. (Para 47.2 to 47.4)

Dharnidhar v. *State of U.P.*, (2010) 7 SCC 759 : (2010) 3 SCC (Cri) 491; *Mano Dutt* v. *State of U.P.*, (2012) 4 SCC 79 : (2012) 2 SCC (Cri) 226; *Satbir Singh* v. *State of U.P.*, (2009) 13 SCC 790 : (2010) 1 SCC (Cri) 1250, *followed*

Jayabalan v. *UT of Pondicherry*, (2010) 1 SCC 199 : (2010) 2 SCC (Cri) 966; *Ram Bharosey* v. *State of U.P.*, AIR 1954 SC 704 : 1954 Cri LJ 1755; *Har Prasad* v. *State of M.P.*, (1971) 3 SCC 455 : 1971 SCC (Cri) 703; *Gudar Dusadh* v. *State of Bihar*, (1972) 3 SCC 118 : 1972 SCC (Cri) 438, *cited*

Acts of omission and commission on part of investigating officer and medical officer

Dereliction of duty or carelessness is an abuse of discretion under a definite law and misconduct is a violation of indefinite law. Misconduct is a forbidden act whereas dereliction of duty is the forbidden quality of an act and is necessarily indefinite. One is a transgression of some established and definite rule of action, with least element of discretion, while the other is primarily an abuse of discretion. The ambit of these expressions had to be construed with reference to the subject-matter and the context where the term occurs, regard being given to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires maintenance of strict discipline. An investigating officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. The consequences of these defaults should normally be attributable to negligence. Police officers and doctors, by their profession, are required to maintain duty decorum of high standards. The standards of investigation and the prestige of the profession are dependent upon the action of such specialised persons. (Paras 26 and 21)

State of Punjab v. *Ram Singh*, (1992) 4 SCC 54 : 1992 SCC (L&S) 793 : (1992) 21 ATC 435; *C. Muniappan* v. *State of T.N.*, (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402, *relied on*

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The investigating officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to act in accordance with the police manual and the known canons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in their approach and investigation. The Police Manual and even the provisions of CrPC require the investigation to be conducted in a particular manner and method which, stands clearly violated in the present case. PW 3 the medical officer concerned not only breached the requirement of adherence to professional standards but also became instrumental in preparing a document which, ex facie, was incorrect and stood falsified by the unimpeachable evidence of the eyewitnesses placed by the prosecution on record. This results in shifting of avoidable burden and exercise of higher degree of caution and care on the courts. If primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcement agency but also in the administration of justice. (Paras 21 and 26)

Awadh Bihari Yadav v. *State of Bihar*, (1995) 6 SCC 31, *relied on*

Expert opinion vis-à-vis eyewitness version

The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the court, it has to be well authored and convincing. (Para 39)

The purpose of expert testimony is to provide the trier of fact with useful, relevant information and to assist the court in arriving at a final conclusion. Such report is not binding upon the court. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. (Paras 38 and 40)

Where contradictions and variations between medical and ocular evidence are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. There can be reports which are, ex facie, incorrect or deliberately so distorted so as to render the entire prosecution case unbelievable. In this case PW 3 the medical officer was expected to prepare the post-mortem report with appropriate reasoning and not leave everything to the imagination of the court. He created a serious doubt as to the very cause of death of the deceased. His report apparently shows an absence of skill and experience and was, in fact, a deliberate attempt to disguise the investigation. The courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. Where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. (Paras 35, 40, 39 and 36)

Madan Gopal Kakkad v. *Naval Dubey*, (1992) 3 SCC 204 : 1992 SCC (Cri) 598, *followed*

Kamaljit Singh v. *State of Punjab*, (2003) 12 SCC 155 : 2004 SCC (Cri) Supp 343, *relied on*

B.R. Sharma: *Forensic Science in Criminal Investigation & Trial* (4th Edn.); *The New Wigmore: A Treatise on Evidence—Expert Evidence* (2004 Edn.), *relied on*

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Zuchowicz v. *United States*, 140 F 3d 381 (2d Cir CA 1998), *cited*

R-D/50327/CVRL

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The Judgment of the Court was delivered by

SWATANTER KUMAR, J.— Settled canons of criminal jurisprudence when applied in their correct perspective, give rise to the following questions for consideration of the Court in the present appeal:

(*a*) Where acts of omission and commission, deliberate or otherwise, are committed by the investigating agency or other significant witnesses instrumental in proving the offence, what approach, in appreciation of evidence, should be adopted?

(*b*) Depending upon the answer to the above, what directions should be issued by the courts of competent jurisdiction?

(*c*) Whenever there is some conflict in the eyewitness version of events and the medical evidence, what effect will it have on the case of the prosecution and what would be the manner in which the Court should appreciate such evidence?

2. The facts giving rise to the questions in the present appeal are that the fields of Gurumukh Singh and Dayal Singh were adjoining in Village Salwati

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within the limits of Police Station Sittarganj, District Udham Singh Nagar. These fields were separated by a mend (boundary mound). On 8-12-1985, Gurumukh Singh, the complainant, who was examined as PW 2, along with his father Pyara Singh, had gone to their fields. At about 12 noon, Smt Balwant Kaur, PW 4, wife of Pyara Singh came to the fields to give meals to Pyara Singh and their son Gurumukh Singh. At about 12.45 p.m., the accused persons, namely, Dayal Singh, Budh Singh and Resham Singh (both sons of Dayal Singh) and Pahalwan Singh came to the fields wielding lathis and started hurling abuses. They asked Pyara Singh and Gurumukh Singh as to why they were placing earth on their mend, upon which they answered that mend was a joint property belonging to both the parties. Without any provocation, all the accused persons started attacking Pyara Singh with lathis. Gurumukh Singh, PW 2, at that time, was at a little distance from his father and Smt Balwant Kaur, PW 4, was nearby. On seeing the occurrence, they raised an alarm and went to rescue Pyara Singh. The accused, however, inflicted lathi injuries on both PW 2 and PW 4.

3. In the meanwhile, Satnam Singh, who was ploughing his fields, which were quite close to the fields of the parties and Uttam Singh (PW 5) who was coming to his village from another village, saw the occurrence. These two persons even challenged the accused persons upon which the accused persons ran away from the place of occurrence. Pyara Singh, who had been attacked by all the accused persons with lathis fell down and succumbed to his injuries on the spot. Few villagers also came to the spot. According to the prosecution, pagri (Ext. 1) of one of the accused, Budh Singh, had fallen on the spot which was subsequently taken into custody by the police. Gurumukh Singh, PW 2, left the dead body of his deceased father in the custody of the villagers and went to the police station where he got the report, Ext. Ka-3, scribed by Kashmir Singh in relation to the occurrence. The report was lodged at about 2.15 p.m. on 8-12-1985 by PW 2 in presence of SI Kartar Singh, PW 6. FIR (Ext. Ka-4A) was registered and the investigating machinery was put into motion.

4. The two injured witnesses, namely, PW 2 and PW 4 were examined by Dr P.C. Pande, PW 1, the medical officer at the Public Health Centre, Sittarganj on the date of occurrence. At 4.00 p.m., the doctor examined PW 2 and noticed the following injuries on the person of the injured witness vide Injury Report, Ext. Ka-1.

Injury Report of PW 2

> "(*1*) Lacerated wound of 5 cm × 1 cm and 1 cm in depth. Margins were lacerated. Red fresh blood was present over wound. Wound was caused by a hard and blunt object. Wound was at the junction of left parietal and occipital bone 7 cm from upper part of left ear caused by blunt object. Advised x-ray. Skull A.P. and lateral and the injury was kept under observation.
>
> (*2*) Contusion of 6 cm × 2.5 cm on left side of body 3 cm above the left iliac crest. Simple in nature caused by a hard and blunt object."

According to the doctor, the injuries were caused by a hard and blunt object and they were fresh in duration.

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5. On 8-12-1985 at 7.30 p.m. Dr P.C. Pande (PW 1) examined the injuries of Smt Balwant Kaur, PW 4 and found the following injuries on her person vide Injury Report, Ext. Ka-2:

Injury Report of PW 4

"(*1*) Contusion 6 cm × 3 cm on left shoulder caused by a hard and blunt object.

(*2*) Contusion of 5 cm × 2 cm on lateral side of middle of left upper arm. Bluish red in colour caused by a hard and blunt object.

(*3*) Contusion of 4 cm × 2 cm on left parietal bone 6 cm from left ear caused by a hard and blunt object."

According to Dr Pande, these injuries were caused by a hard and blunt object and the duration was within 12 hours and the nature of the injuries was simple. According to Dr Pande the injuries of both these injured persons could have been received on 8-12-1985 at 12.45 p.m. by lathi.

6. As noted above, according to Dr Pande, the injuries were caused by a hard and blunt object and duration was within 12 hours. Thereafter, SI Kartar Singh, PW 6, proceeded to the place of occurrence in Village Salwati. He found the dead body of Pyara Singh lying in the fields. In the presence of panchas, including Balwant Singh, PW 8, he noticed that there were three injuries on the person of the deceased Pyara Singh and prepared inquest report vide Ext. Ka-6 recording his opinion that the deceased died on account of the injuries found on his body. After preparing the site plan, Ext. Ka-10, he also wrote a letter to the Superintendent, Civil Hospital, Haldwani for post-mortem, being Ext. Ka-9. The dead body was taken to the said hospital by Constable Chandrapal Singh, PW 7.

7. Dr C.N. Tewari, PW 3, medical officer in Civil Hospital, Haldwani, performed the post-mortem upon the body of the deceased and did not find any ante-mortem or post-mortem injuries on the dead body. On internal examination, he did not find any injuries and could not ascertain the cause of death. Further, he preserved the viscera and gave the post-mortem report, Ext. Ka-4. After noticing that there was no injury or abnormality found upon external and internal examination of the dead body, the doctor in his report recorded as under:

"Viscera in sealed jars handed over to the accompanying constables.

Jar 1: Sample preservative saline water.

Jar 2: Pieces of stomach.

Jar 3: Pieces of liver, spleen and kidney.

Death occurred about one day back.

Cause of death could not be ascertained. Hence, viscera preserved."

8. It appears from the record that the deceased's viscera, which allegedly was handed over by the doctor to the police, was either never sent to the forensic science laboratory (for short "the FSL") for chemical examination, or if sent, the report thereof was neither called for nor proved before the court. In fact, this has been left to the imagination of the court.

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9. The accused persons, at about 5.45 p.m. on the same day, lodged a written report at the same police station, which was received by Head Constable Inder Singh, who prepared the check report, Ext. C-1 and made appropriate entry. The case was registered under Section 307 of the Penal Code, 1860 (IPC) against PW 2 Gurumukh Singh. Dayal Singh was arrested in furtherance of the FIR, Ext. Ka-4A. He was also sent for medical examination and was examined by Dr K.P.S. Chauhan, CW 2. After examining the said accused at about 7.45 p.m., the doctor found two injuries on his person and prepared the report (Ext. C-4). According to Dr Chauhan, the injuries on the person of the accused could have been received by a firearm object and injuries were fresh within six hours.

10. The investigating officer completed the investigation and filed charge-sheet (Ext. Ka-11) against the accused persons on 15-1-1986. It may be noticed that in furtherance to Ext. C-2, neither any case was registered nor was any charge-sheet presented before the court of competent jurisdiction. The accused also took no steps to prove that report in court. They also did not file any private complaint.

11. Considering the ocular and other evidence produced by the prosecution, the learned trial court vide its judgment of conviction and order of sentence, both dated 29-6-1990, found the accused persons guilty of offences under Section 302 read with Section 34 IPC as well as under Section 323 read with Section 34 IPC. The trial court, while dealing with the arguments of the accused for application of Section 34, as well as the submission that the witnesses had not attributed specific role to the respective accused persons, held as under:

> "The attack was premeditated and the accused had come fully prepared to do the overt act. The injury was caused on the head of the deceased which is a vital part of the body at which it was aimed by employing lathi, it was clear that the accused persons had intended to cause death by giving blow on vital part of the body of the deceased. After receiving the injuries, the deceased fell down and even thereafter he was attacked by the accused persons and he died on the spot immediately. This all goes to show that the accused persons who all were armed with lathis and had attacked in furtherance of their common intention by surrounding Shri Pyara Singh. At that juncture when the occurrence took place suddenly and the witnesses were at some distance it was quite natural for the witnesses not to have noted as to whose lathi-blow caused the injuries on Shri Pyara Singh and also on the injured persons. It was thus quite natural in such circumstances for the witnesses not to have noted the minute details of the incident.
>
> The Hon'ble Supreme Court has held in *Har Prasad* v. *State of M.P.*[1] that in view of the large number of accused involved in the occurrence it is quite natural for the prosecution witnesses to get a bit confused. In fact, no cross-examination was made on this aspect of the case which has been discussed by me above.

1 (1971) 3 SCC 455 : 1971 SCC (Cri) 703 : 1971 Cri LJ 1135

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The fact that the accused persons had gone to the place of occurrence fully armed with lathis and immediately on the basis of 'mend' started attacking the deceased Shri Pyara Singh, indicates that they had gone there with premeditation and prior concert. All the four accused were physically present at the time of the commission of offence. The criminal act was done by the accused persons and they all had shared the common intention by engaging in that criminal enterprise for which they had come fully prepared. The prosecution has succeeded in showing the existence of common purpose or design. All the accused persons were confederates in the commission of the offence and they had participated in that common intention. Each of the accused person is liable for the act done in pursuance of that common purpose or design.

The acts done by the accused persons are similar as they all had come prepared armed with lathis and lathi-blows were struck on the deceased Shri Pyara Singh by the accused persons in furtherance of their common intention. Each of them is liable for the blows struck with lathi on the deceased and also on the injured persons. It is proved beyond all reasonable doubt that lathi-blow was struck on the head of Shri Pyara Singh which was a vital part and he died on the spot due to injuries. Whoever may have struck that lathi-blow, each of the accused person is liable for the lathi-blows struck on the vital part of the deceased. Since the lathi-blow was struck on the head of the deceased which is a vital part, the offence amounts to murder (see *Gudar Dusadh* v. *State of Bihar*[2]). The death of Shri Pyara Singh was caused in the occurrence and it is proved to the hilt and beyond all reasonable doubt that he died on the spot on account of lathi-blows inflicted on him. It is nobody's case that he died natural death. The accused persons have committed offence punishable under Sections 302/34 IPC and committed offence punishable under Sections 323/34 IPC for causing voluntary hurt to Shri Gurumukh Singh and Smt Balwant Kaur."

12. The above judgment of the trial court was assailed by the accused persons in appeal before the High Court. The High Court, vide its judgment dated 17-3-2008, dismissed the appeal and affirmed the judgment of conviction and order of sentence passed by the learned trial court giving rise to the present appeal.

13. From the narration of the above facts, brought on record by the prosecution and proved in accordance with law, it is clear that there are three eyewitnesses to the occurrence. Out of them, two are injured witnesses, namely, PW 2 and PW 4. PW 2 is the son of the deceased and PW 4 is the wife. Presence of these two witnesses at the place of occurrence is normal and natural. According to PW 4, she had gone to the place of occurrence to give food to her husband and son around 12 noon, which is the normal hour for lunch in the villages. The son of the deceased had come to the field with his father to work. They were putting earth on the mend which was objected

2 (1972) 3 SCC 118 : 1972 SCC (Cri) 438

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to by the accused persons who had come there with lathis and with a premeditated mind of causing harm to the deceased. Upon enquiry, the deceased informed the accused persons that the mend was a joint property of the parties. Without provocation, the accused persons thereupon started hurling abuses upon Pyara Singh and his son, and assaulted the deceased with lathis. PW 2 and PW 4 intervened to protect their father and husband respectively, but to no consequence and in the process, they suffered injuries. In the meanwhile, when the accused persons were challenged by PW 5 and Satnam Singh, who were close to the place of occurrence, they ran away. The presence of PW 2, PW 4 and PW 5 cannot be doubted. The statement made by them in the court is natural, reliable and does not suffer from any serious contradictions. Once the presence of eyewitnesses cannot be doubted and it has been established that their statement is reliable, there is no reason for the court to not rely upon the statement of such eyewitnesses in accepting the case of the prosecution. The accused persons had come with premeditated mind, together with common intention, to assault the deceased and all of them kept on assaulting the deceased till the time he fell on the ground and became breathless.

14. This Court has repeatedly held that an eyewitness version cannot be discarded by the court merely on the ground that such eyewitness happened to be a relation or friend of the deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, and statement of the witness is unworthy of credence that the court would examine the possibility of discarding such statements. But where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the court to discard the statements of such related or friendly witness.

15. The Court in *Dharnidhar* v. *State of U.P.*[3] took the following view: (SCC pp. 768-69, paras 12-13)

> "*12*. There is no hard-and-fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the court. It will always depend upon the facts and circumstances of a given case. In *Jayabalan* v. *UT of Pondicherry*[4], this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under: (SCC p. 213, paras 23-24)
>
> > '*23*. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses,

3 (2010) 7 SCC 759 : (2010) 3 SCC (Cri) 491
4 (2010) 1 SCC 199 : (2010) 2 SCC (Cri) 966

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the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.

24. From a perusal of the record, we find that the evidence of PWs 1 to 4 is clear and categorical in reference to the frequent quarrels between the deceased and the appellant. They have clearly and consistently supported the prosecution version with regard to the beating and the ill-treatment meted out to the deceased by the appellant on several occasions which compelled the deceased to leave the appellant's house and take shelter in her parental house with an intention to live there permanently. PWs 1 to 4 have unequivocally stated that the deceased feared threat to her life from the appellant. The aforesaid version narrated by the prosecution witnesses viz. PWs 1 to 4 also finds corroboration from the facts stated in the complaint.'

13. Similar view was taken by this Court in *Ram Bharosey* v. *State of U.P.*[5], where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same."

A similar view was taken by this Court in *Mano Dutt* v. *State of U.P.*[6] and *Satbir Singh* v. *State of U.P.*[7]

16. With some vehemence, it has then been contended on behalf of the appellant that the post-mortem report and the statement of PW 3 Dr C.N. Tewari, specifically state that no external or internal injuries were found on the body of the deceased. In other words, no injury was either inflicted by the accused or suffered by the deceased. In the face of this expert medical evidence, the statement of the eyewitnesses cannot be believed. The expert evidence should be given precedence and the accused persons are entitled to acquittal. This argument is liable to be rejected at the very outset despite the fact that it sounds attractive at first blush.

5 AIR 1954 SC 704 : 1954 Cri LJ 1755
6 (2012) 4 SCC 79 : (2012) 2 SCC (Cri) 226
7 (2009) 13 SCC 790 : (2010) 1 SCC (Cri) 1250

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17. No doubt the post-mortem report (Ext. Ka-4) and the statement of PW 3 Dr C.N. Tewari, does show/reflect that he had not noticed any injuries upon the person of the deceased externally or even after opening him up internally. But the fact of the matter is that Pyara Singh died. How he suffered death is explained by three witnesses, PW 2, PW 4 and PW 5, respectively. Besides this, the statement of the investigating officer, PW 6, also clearly shows that the body of the deceased contained three apparent injuries. He recorded in his investigative proceedings that the accused had died of these injuries and was found lying dead at the place of occurrence. It is not only the statement of PW 6, but also the panchas in whose presence the body was recovered, who have endorsed this fact. The course of events as recorded in the investigation points more towards the correctness of the case of the prosecution than otherwise. Strangely, Dayal Singh and other accused persons not only took the stand of complete denial in their statement under Section 313 of the Code of Criminal Procedure, 1973 (CrPC) but even went to the extent of stating that they had no knowledge (pata nahin) when they were asked whether Pyara Singh had died as a result of injuries.

18. We have already discussed above that the presence of PW 2, PW 4 and PW 5 at the place of occurrence was in the normal course of business and cannot be doubted. Their statements are reliable, cogent and consistent with the story of the prosecution. Merely because PW 3 and PW 6 have failed to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not be to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground. Reference in this regard can usefully be made to *C. Muniappan* v. *State of T.N.*[8]

19. Now, we will deal with the question of defective or improper investigation resulting from the acts of omission and/or commission, deliberate or otherwise, of the investigating officer or other material witnesses, who are obliged to perform certain duties in discharge of their functions and then to examine its effects. In order to examine this aspect in conformity with the rule of law and keeping in mind the basic principles of criminal jurisprudence, and the questions framed by us at the very outset of this judgment, the following points need consideration:

(*i*) Whether there have been acts of omission and commission which have resulted in improper or defective investigation.

(*ii*) Whether such default and/or acts of omission and commission have adversely affected the case of the prosecution.

(*iii*) Whether such default and acts were deliberate, unintentional or resulted from unavoidable circumstances of a given case.

(*iv*) If the dereliction of duty and omission to perform was deliberate, then is it obligatory upon the court to pass appropriate directions including directions in regard to taking of penal or other civil action against such officer/witness.

8 (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402 : AIR 2010 SC 3718

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20. In order to answer these determinative parameters, the courts would have to examine the prosecution evidence in its entirety, especially when a specific reference to the defective or irresponsible investigation is noticed in the light of the facts and circumstances of a given case.

21. The investigating officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to act in accordance with the Police Manual and the known canons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in their approach and investigation. A default or breach of duty, intentionally or otherwise, can sometimes prove fatal to the case of the prosecution. An investigating officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. Where the default and omission is so flagrant that it speaks volumes of a deliberate act or such irresponsible attitude of investigation, no court can afford to overlook it, whether it did or did not cause prejudice to the case of the prosecution. It is possible that despite such default/omission, the prosecution may still prove its case beyond reasonable doubt and the court can so return its finding. But, at the same time, the default and omission would have a reasonable chance of defeating the case of the prosecution in some events and the guilty could go scot-free. We may illustrate such kind of investigation with an example where a huge recovery of opium or poppy husk is made from a vehicle and the investigating officer does not even investigate or make an attempt to find out as to who is the registered owner of the vehicle and whether such owner was involved in the commission of the crime or not. Instead, he merely apprehends a cleaner and projects him as the principal offender without even reference to the registered owner. Apparently, it would prima facie be difficult to believe that a cleaner of a truck would have the capacity to buy and be the owner, in possession of such a huge quantity i.e. hundreds of bags of poppy husk. The investigation projects the poor cleaner as the principal offender in the case without even reference to the registered owner.

22. Even the present case is a glaring example of irresponsible investigation. It, in fact, smacks of intentional mischief to misdirect the investigation as well as to withhold material evidence from the court. It cannot be considered a case of bona fide or unintentional omission or commission. It is not a case of faulty investigation simpliciter but is an investigation coloured with motivation or an attempt to ensure that the suspect can go scot-free. This can safely be gathered from the following:

22.1. The entire investigation, including the statement of the investigating officer, does not show as to what happened to the viscera which was, as per the statement of PW 3, handed over to the constable PW 7, who, in turn, stated that the viscera had been deposited in the police station malkhana. In the entire statement of the investigating officer, there is no reference to viscera, its collection from the hospital, its deposit in the malkhana and whether it was sent to the FSL at all or not. If sent, what was the result and, if not, why?

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22.2. Conduct of the investigating officer is more than doubtful in the present case. In his statement, he had stated that he noticed three injuries on the body of the deceased. He also admitted that in the post-mortem report, no internal or external injuries were shown on the body of the deceased. According to him, he had asked PW 3 in that regard but the reply of the doctor was received late and the explanation rendered was satisfactory. Firstly, this reply or explanation does not find place on record. There is no document to that effect and secondly, even in his oral evidence, he does not say as to what the explanation was.

22.3. In his statement, PW 3 Dr C.N. Tewari, stated that he did not find any external or internal injuries even after performing the post-mortem on the body of the deceased. This remark on the post-mortem report apparently is falsified both by the eyewitnesses as well as the investigating officer. It will be beyond apprehension as to how a healthy person could die, if there were no injuries on his body and when, admittedly, it was not a case of cardiac arrest or death by poison, etc., more so, when he was alleged to have been assaulted with dandas (lathis) by four persons simultaneously. In any case, the doctor gave no cause for death of the deceased and prepared a post-mortem report which ex facie was incorrect and tantamounts to abrogation of duty. The trial court while giving the judgment of conviction, noticed that medico-legal post-mortem examination is a very important part of the prosecution evidence and, therefore, it is necessary that it be conducted by a doctor fully competent and experienced.

22.4. The court also commented adversely upon the professional capabilities and/or misconduct of Dr C.N. Tewari, as follows:

> "Whatever may have been the reasons but it is quite evident that Dr C.N. Tewari failed in his professional duty and he did not perform the post-mortem examination properly after considering the inquest report and the police papers sent to him. If his finding deferred from the finding of the panchas he should have informed his superior officers in that regard so that another opinion could have been obtained before the disposal of the dead body. The evidence leaves no room for doubt that Shri Pyara Singh was attacked with lathis as alleged by the prosecution and he received three injuries already referred to above which were mentioned in the inquest report (Ext. Ka-6)....
>
> The case of the prosecution cannot be thrown on account of the gross negligence and apathy of the Medical Officer Dr C.N. Tewari who had performed autopsy on the dead body of Shri Pyara Singh. Since the Medical Officer Dr C.N. Tewari had conducted in a manner not befitting the medical profession and prepared the post-mortem report against facts for reasons best known to him and was negligent in his duty in ascertaining the injuries on the body of the deceased, hence it is just and proper that *the Director General, Medical Health U.P. be informed in this regard for taking necessary action and for eradicating such practices in future*." (emphasis supplied)

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23. From the record, it is evident that the learned counsel appearing for the State was also not aware if any action had been taken against Dr C.N. Tewari. On the contrary, Mr Ratnakar Dash, learned Senior Counsel appearing for Dr C.N. Tewari, informed us that no action was called for against Dr C.N. Tewari as he had authored the post-mortem report and given his evidence truthfully and without any dereliction of duty. He also informed us that since Dr C.N. Tewari is now retired and is not well, this Court need not pass any further directions. We are not impressed with this contention at all.

24. We have already noticed that PW 3 Dr C.N. Tewari, certainly did not act with the requisite professionalism. He even failed to truthfully record the post-mortem report, Ext. Ka-4. At the cost of repetition, we may notice that his report is contradictory to the evidence of the three eyewitnesses who stood the test of cross-examination and gave the eye-version of the occurrence. It is also in conflict with the statement of PW 6 as well as the inquest report (Ext. Ka-6) prepared by him where he had noticed that there were three injuries on the body of the deceased. It is clear that the post-mortem report is silent and PW 3 did not even notice the cause of death. If he was not able to record a finding with regard to the cause of death, he was expected to record some reason in support thereof, particularly when it is conceded before us by the learned counsel for the parties, including the counsel for Dr C.N. Tewari that it was not a case of death by administering poison.

25. Similarly, the investigating officer has also failed in performing his duty in accordance with law. Firstly, for not recording the reasons given by Dr C.N. Tewari for non-mentioning of injuries on the post-mortem report, Ext. Ka-4, which had appeared satisfactory to him. Secondly, for not sending to the FSL the viscera and other samples collected from the body of the deceased by Dr C.N. Tewari, who allegedly handed over the same to the police, and their disappearance. There is clear callousness and irresponsibility on their part and deliberate attempt to misdirect the investigation to favour the accused.

26. This results in shifting of avoidable burden and exercise of higher degree of caution and care on the courts. Dereliction of duty or carelessness is an abuse of discretion under a definite law and misconduct is a violation of indefinite law. Misconduct is a forbidden act whereas dereliction of duty is the forbidden quality of an act and is necessarily indefinite. One is a transgression of some established and definite rule of action, with least element of discretion, while the other is primarily an abuse of discretion. This Court in *State of Punjab* v. *Ram Singh*[9] stated that the ambit of these expressions had to be construed with reference to the subject-matter and the context where the term occurs, regard being given to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires maintenance of strict discipline. The consequences of these defaults should normally be attributable to negligence. Police officers and doctors, by their profession, are required to maintain duty decorum of

9 (1992) 4 SCC 54 : 1992 SCC (L&S) 793 : (1992) 21 ATC 435

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high standards. The standards of investigation and the prestige of the profession are dependent upon the action of such specialised persons. The Police Manual and even the provisions of CrPC require the investigation to be conducted in a particular manner and method which, in our opinion, stands clearly violated in the present case. Dr C.N. Tewari, not only breached the requirement of adherence to professional standards but also became instrumental in preparing a document which, ex facie, was incorrect and stood falsified by the unimpeachable evidence of the eyewitnesses placed by the prosecution on record. Also, in the same case, the Court, while referring to the decision in *Awadh Bihari Yadav* v. *State of Bihar*[10] noticed that if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcement agency but also in the administration of justice.

27. Now, we may advert to the duty of the court in such cases. In *Sathi Prasad* v. *State of U.P.*[11] this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in *Dhanaj Singh* v. *State of Punjab*[12], held: (SCC p. 657, para 5)

> "*5*. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective."

28. Dealing with the cases of omission and commission, the Court in *Paras Yadav* v. *State of Bihar*[13] enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

29. In *Zahira Habibullah Sheikh (5)* v. *State of Gujarat*[14], the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of Bentham, who states that witnesses are the eyes and ears of justice. The Court issued a caution that in such situations, there is a greater

10 (1995) 6 SCC 31
11 (1972) 3 SCC 613 : 1972 SCC (Cri) 659
12 (2004) 3 SCC 654 : 2004 SCC (Cri) 851
13 (1999) 2 SCC 126 : 1999 SCC (Cri) 104 : AIR 1999 SC 644
14 (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8

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responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that: (SCC p. 398, para 42)

> "*42.* Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. *Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure a fair trial where the accused and the prosecution both get a fair deal. Public interest in proper administration of justice must be given as much importance, if not more, as the interest of the individual accused. In this courts have a vital role to play.*" (emphasis supplied)

30. With the passage of time, the law also developed and the dictum of the Court emphasised that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.

31. Reiterating the above principle, this Court in *NHRC* v. *State of Gujarat*[15] held as under: (SCC pp. 777-78, para 6)

> "*6.* ... '*35.* ... The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators.' (*Zahira Habibullah case*[14], SCC p. 395, para 35)"

15 (2009) 6 SCC 767 : (2009) 3 SCC (Cri) 44

14 *Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8

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32. In *State of Karnataka* v. *K. Yarappa Reddy*[16] this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the investigating officer could be put against the prosecution case. This Court, in para 19, held as follows: (SCC p. 720)

> "*19*. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the court be influenced by the machinations demonstrated by the investigating officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case."

33. In *Ram Bali* v. *State of U.P.*[17] the judgment in *Karnel Singh* v. *State of M.P.*[18] was reiterated and this Court had observed that: (*Ram Bali case*[17], SCC p. 604, para 12)

> "*12*. … In case of defective investigation the court has to be circumspect [while] evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective."

34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be

16 (1999) 8 SCC 715 : 2000 SCC (Cri) 61
17 (2004) 10 SCC 598 : 2004 SCC (Cri) 2045
18 (1995) 5 SCC 518 : 1995 SCC (Cri) 977

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deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a "fair trial", the Court should leave no stone unturned to do justice and protect the interest of the society as well.

35. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour of the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In *Kamaljit Singh* v. *State of Punjab*[19], the Court, while dealing with the discrepancies between ocular and medical evidence, held: (SCC p. 159, para 8)

> "*8*. It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out."

36. Where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.

> "*34*. … The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by [examining] the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert's opinion is accepted, it is not the opinion of the medical officer but [that] of the court."

(See *Madan Gopal Kakkad* v. *Naval Dubey*[20], SCC pp. 221-22, para 34.)

37. Profitably, reference to the value of an expert in the eye of the law can be assimilated as follows:

> "The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence.

19 (2003) 12 SCC 155 : 2004 SCC (Cri) Supp 343 : 2004 Cri LJ 28
20 (1992) 3 SCC 204 : 1992 SCC (Cri) 598 : (1992) 2 SCR 921

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If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use. It is required of an expert whether a government expert or private, if he expects, his opinion to be accepted to put before the court the material which induces him to come to his conclusion so that the court though not an expert, may form its own judgment on that material. If the expert in his evidence as a witness does not place the whole lot of similarities or dissimilarities, etc., which influence his mind to lead him to a particular conclusion which he states in the court then he fails in his duty to take the court into confidence. The court is not to believe the ipse dixit of an expert.

Indeed the value of the expert evidence consists mainly on the ability of the witness by reason of his special training and experience to point out the court such important facts as it otherwise might fail to observe and in so doing the court is enabled to exercise its own view or judgment respecting the cogency of reasons and the consequent value of the conclusions formed thereon. The opinion is required to be presented in a convenient manner and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words the value of expert evidence depends largely on the cogency of reasons on which it is based." [See *Forensic Science in Criminal Investigation & Trial* (4th Edn.), by B.R. Sharma.]

38. The purpose of expert testimony is to provide the trier of fact with useful, relevant information. The overwhelming majority rule in the United States, is that an expert need not be a member of a learned profession. Rather, experts in the United States have a wide range of credentials and testify regarding a tremendous variety of subjects based on their skills, training, education or experience. The role of the expert is to apply or supply specialised, valuable knowledge that lay jurors would not be expected to possess. An expert may present the information in a manner that would be unacceptable with an ordinary witness. The common law tried to strike a balance between the benefits and dangers of expert testimony by allowing expert testimony to be admitted only if the testimony were particularly important to aiding the trier of fact. Even in the United States, if the helpfulness of expert testimony is substantially outweighed by the risk of unfair prejudice, confusion or waste of time, then the testimony should be excluded under the relevant Rules, and State equally balanced. Expert testimony on any issue of fact and significance of its application has been doubted by the scholars in the United States. Even under the law prevalent in that country, the opinion of an expert has to be scientific, specific and experience based. Conflict in expert opinions is a well-prevalent practice there. While referring to such incidence David H. Kaye and other authors in *The New Wigmore: A Treatise on Evidence—Expert Evidence* (2004 Edn.) opined as under:

"The District Court opinion reveals that one pharmacologist asserted 'that Danocrine more probably than not caused plaintiff's death from pulmonary hypertension,' but it describes the reasoning behind this

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opinion in the vaguest of terms, referring only to 'extensive education and training in pharmacology' and an unspecified 'scientific technique' that 'relied upon epidemiological, clinical and animal studies, as well as plaintiff's medical records and medical history...'. The nature of these studies and their relationship to the patient's records is left unstated. The District Court incanted the same mantra to justify admitting the remaining testimony. It asserted that the other experts 'similarly base their testimony upon a careful review of medical literature concerning Danocrine and pulmonary hypertension, and plaintiff's medical records and medical history'.

The court of appeals[21] elaborated on the testimony of two of the experts. The physician 'was confident to a reasonable medical certainty that the Danocrine caused Mrs Zuchowicz's PPH' because of 'the temporal relationship between the overdose and the start of the disease and the differential etiology method of excluding other possible causes'. Yet the 'differential etiology' here was barely more than a differential diagnosis of PPH. The causes of PPH are generally unknown and it appears that the only other putative alternative causes considered were drugs other than Danocrine. It is not at all clear that such a 'differential etiology' is adequate to support a conclusion of causation to any kind of a 'medical certainty'. The pharmacologist, not being a medical doctor, testified 'to a reasonable degree of scientific certainty ... [that] the overdose of Danocrine, more likely than not, caused PPH...'. He postulated a mechanism by which this might have occurred: '(*1*) a decrease in estrogen; (*2*) hyperinsulinemia, in which abnormally high levels of insulin circulate in the body; and (*3*) increase in free testosterone and progesterone ... that ... taken together, likely caused a dysfunction of the endothelium leading to PPH'.

In sum, plaintiff's experts did not know what else might have caused the hypertension, and they offered a conjecture as to a causal chain leading from the drug to the hypertension. This logic would be more than enough to justify certain clinical recommendations—the advice to Mrs Zuchowicz to discontinue the medication, for example. But is it enough to allow an expert not merely to testify to a reasonable diagnosis of PPH, or 'unexplained pulmonary hypertension', as the condition also is known, but also be able to propound a novel explanation that has yet to be verified, even in an animal model?"

39. The Indian law on expert evidence does not proceed on any significantly different footing. The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the court, it has to be well authored and convincing. Dr C.N. Tewari was expected to prepare the post-mortem report with appropriate reasoning and not leave everything to the imagination of the

21 *Zuchowicz* v. *United States*, 140 F 3d 381 (2d Cir CA 1998)

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Court. He created a serious doubt as to the very cause of death of the deceased. His report apparently shows an absence of skill and experience and was, in fact, a deliberate attempt to disguise the investigation.

40. We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eyewitnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye-version given by the eyewitnesses, the court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise.

41. Reverting to the case in hand, the trial court has rightly ignored the deliberate lapses of the investigating officer as well as the post-mortem report prepared by Dr C.N. Tewari. The consistent statement of the eyewitnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW 3 and PW 6 are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court.

42. Despite clear observations of the trial court, no action has been taken by the Director General, Medical Health, Uttar Pradesh. We do not see any justification for these lapses on the part of the higher authority. Thus, it is a fit case where this Court should issue notice to show cause why action in accordance with the provisions of the Contempt of Courts Act, 1971 be not

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initiated against him and he be not directed to conduct an enquiry personally and pass appropriate orders involving Dr C.N. Tewari and if found guilty, to impose punishment upon him including deduction of pension. Admittedly, this direction was passed when Dr C.N. Tewari was in service. His retirement, therefore, will be inconsequential to the imposing of punishment and the limitation of period indicated in the service regulations would not apply in face of the order of this Court.

43. Similarly, the Director General of Police U.P./Uttarakhand also be issued notice to take appropriate action in accordance with the service rules against PW 6 SI Kartar Singh, irrespective of the fact whether he is in service or has since retired. If retired, then authorities should take action for withdrawal or partial deduction in the pension, and in accordance with law.

44. Lastly, the learned counsel for the appellant had, of course, with some vehemence, argued that the offence even if committed by the appellant, would not attract the provisions of Section 302 IPC and would squarely fall within the ambit of Part II of Section 304 IPC. In other words, he prays for alteration of the offence to an offence punishable under Part II of Section 304 IPC.

45. We are concerned with a case where four persons armed with lathis had gone to the fields of the deceased. They first hurled abuses at him and without any provocation started assaulting him with the dang (lathi) that they were carrying. Despite efforts to stop them by the wife and son of the deceased, PW 4 and PW 2, they did not stop assaulting him and assaulted both these witnesses also. Thereupon, they kept on assaulting the deceased until he fell down dead on the ground. Three injuries were noticed by the police on the body of the deceased including a protuberant injury on the head, which the court is only left to presume has resulted in his death.

46. In the absence of an authentic and correct post-mortem report (Ext. Ka-4), the truthfulness of the prosecution eyewitnesses cannot be doubted. In addition thereto, the stand taken by the accused that they had suffered injuries was a false defence. Firstly, according to the doctor, CW 2, it was injuries of a firearm, while even according to the defence, the deceased or his son were not carrying any gun at the time of occurrence. Secondly, they did not choose to pursue their report with the police at the time of investigation or even when the trial was on before the trial court. The accused persons had gone together armed with lathis with a common intention to kill the deceased and they brought their intention into effect by simultaneously assaulting the deceased. They had no provocation. Thus, the intention to kill is apparent. It is not a case which would squarely fall under Part II of Section 304 IPC. Thus, the cumulative effect of appreciation of evidence, as aforediscussed, is that we find no merit in the present appeal.

47. Having analysed and discussed in some elaboration various aspects of this case, we pass the following orders:

47.1. The appeal is dismissed both on merits and on quantum of sentence.

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47.2. The Directors General, Health Services of U.P./Uttarakhand are hereby issued notice under the provisions of the Contempt of Courts Act, 1971 as to why appropriate action be not initiated against them for not complying with the directions contained in the judgment of the trial court dated 29-6-1990.

47.3. The abovesaid officials are hereby directed to take disciplinary action against Dr C.N. Tewari, PW 3, whether he is in service or has since retired, for deliberate dereliction of duty, preparing a report which ex facie was incorrect and was in conflict with the inquest report (Exts. Ka-6 and Ka-7) and statement of PW 6. The bar on limitation, if any, under the Rules will not come into play because they were directed by the order dated 29-6-1990 of the Court to do so. The action even for stoppage/reduction in pension can appropriately be taken by the said authorities against Dr C.N. Tewari.

47.4. The Directors General of Police U.P./Uttarakhand are hereby directed to initiate, and expeditiously complete, disciplinary proceedings against PW 6 SI Kartar Singh, whether he is in service or has since retired, for the acts of omission and commission, deliberate dereliction of duty in not mentioning reasons for non-disclosure of cause of death as explained by the doctor, not sending the viscera to the FSL and for conducting the investigation of this case in a most callous and irresponsible manner. The question of limitation, if any, under the Rules, would not apply as it is by the direction of the Court that such enquiry shall be conducted.

47.5. We hold, declare and direct that it shall be appropriate exercise of jurisdiction as well as ensuring just and fair investigation and trial that courts return a specific finding in such cases, upon recording of reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to the case of the prosecution, in breach of professional standards and investigative requirements of law, during the course of the investigation by the investigating agency, expert witnesses and even the witnesses cited by the prosecution. Further, the courts would be fully justified in directing the disciplinary authorities to take appropriate disciplinary or other action in accordance with law, whether such officer, expert or employee witness, is in service or has since retired.

48. The appeal is accordingly dismissed.

SUPPLEMENTARY ORDER

49. Today, by a separate judgment, we have directed that action be taken against PW 3 Dr C.N. Tewari and PW 6 SI Kartar Singh. The Director General of Police and Director General, Health of State of Uttar Pradesh and/or Uttarakhand whoever is the appropriate authority, to take action within three months from today and report the matter to this Court. List for limited purpose on 15-10-2012.

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prescribed under the 1955 Rules are not entitled to have their seniority fixed on the basis of total length of service. As a corollary to this, we hold that the direction given by the High Court for refixation of the respondents' seniority by counting the ad hoc service cannot be approved.

31. In the result, the appeal is allowed, the impugned order is set aside and the writ petition filed by the respondents is dismissed. The parties are left to bear their own costs.

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(2012) 8 Supreme Court Cases 651

(BEFORE P. SATHASIVAM AND DR B.S. CHAUHAN, JJ.)

SHYAM BABU . . Appellant;

Versus

STATE OF UTTAR PRADESH . . Respondent.

Criminal Appeal No. 434 of 2006†, decided on September 7, 2012

A. **Penal Code, 1860 — Ss. 302, 307, 147, 148 and 149 — Murder — Reversal of acquittal, confirmed — Re-appreciation of evidence — Eyewitnesses — Credibility**

— Appellant and his brothers armed with guns, others armed with rifle, lathi, spear and country-made pistol, allegedly reached place of occurrence — Accused *M* allegedly told his associates that *G* was behaving in an arrogant manner and exhorted them to make an assault on him — Appellant and *M* allegedly fired at *G* with their respective guns thereby causing injuries to him — Whoever came to *G*'s his rescue, was fired at — 5 persons died on spot and one other received grievous injuries — Trial Judge, after noting certain discrepancies and relationship of eyewitnesses with deceased persons, disbelieved their version and, ultimately acquitted all accused persons — High Court analysed all materials, more particularly, evidence of eyewitnesses, medical evidence, FSL Report, etc., and rightly arrived at a categorical conclusion that prosecution had established its case beyond reasonable doubt against all accused persons — Eyewitnesses relied on by prosecution and believed by High Court were PW 3, injured person and PW 6, who corroborated entire statement of PW 1, the complainant in all material aspects of occurrence — All eyewitnesses were subjected to lengthy cross-examination — Nothing tangible could be brought on record to impair their credibility — Criminal Procedure Code, 1973 — S. 378 — Reversal of acquittal, justified (Paras 17 to 25)

B. **Criminal Trial — Witnesses — Related witness — Injured witness — Evidentiary value — Version of an eyewitness cannot be discarded merely on ground that such eyewitness happened to be a relative or friend of deceased — Where presence of eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to occurrence, it will not be permissible for court to discard statement of such**

† From the Judgment and Order dated 13-1-2006 of the High Court of Judicature of Allahabad in Government Appeal No. 159 of 1981

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related or friendly witnesses — There is no bar in law on examining family members or any other person as witnesses — In cases involving family members of both sides, it is a member of family or a friend who comes to rescue the injured — In the case on hand, PW 1 was closely related to all the deceased as he was son of deceased *P* and nephew of deceased *L* — PW 3, injured witness, was real brother of deceased *P* and *L* — PW 6 has admitted that he had some land in joint ownership with victims — Testimony of PWs cannot be discarded on ground of relationship alone as they appeared to be honest and truthful witnesses and their testimony has not been impaired in their lengthy cross-examination — High Court was justified on relying upon their evidence and reversing acquittal

(Paras 21 to 23)

Mano Dutt v. *State of U.P.*, (2012) 4 SCC 79 : (2012) 2 SCC (Cri) 226; *Dayal Singh* v. *State of Uttaranchal*, (2012) 8 SCC 263, *followed*

C. **Criminal Procedure Code, 1973 — Ss. 378 and 386 — Appeal against acquittal — Power of High Court in — Principles reiterated (Para 16)**

D. **Criminal Trial — Fair and speedy trial — Delay in disposal of appeal — Limitation Act, 1963 does not apply to criminal proceedings unless there is an express and specific provision — A criminal offence is considered as a wrong against State and society as well even though it is committed against an individual — Due to firing by accused, five persons died and one person was injured — Merely because High Court had taken nearly 25 yrs to dispose of appeal, appellant cannot be exonerated on ground of delay — Constitution of India — Art. 21 — Right to speedy trial — Effect of delay — Criminal Procedure Code, 1973, Ss. 378, 374 and 468 (Para 25)**

A.R. Antulay v. *R.S. Nayak*, (1992) 1 SCC 225 : 1992 SCC (Cri) 93; *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899; *P. Ramachandra Rao* v. *State of Karnataka*, (2002) 4 SCC 578 : 2002 SCC (Cri) 830; *Ranjan Dwivedi* v. *CBI*, (2012) 8 SCC 495, *relied on*

E. **Criminal Trial — Co-accused — Out of seven accused persons, appellant alone surviving, all the rest having died naturally — Appellant praying for exoneration from conviction and sentence based thereon — Due to gruesome incident, 5 persons lost their lives and one person sustained grievous injuries — Appellant herein and two others used guns, rifle and country-made pistol for the said diabolical act — Taking note of all these aspects and considering the gruesome murders, there is no reason to exonerate present sole appellant merely because other co-accused had died due to natural death — Penal Code, 1860, Ss. 302/149 (Para 24)**

State of U.P. v. *Mahipal*, Govt. Appeal No. 159 of 1981, decided on 13-1-2006 (All), *affirmed*

J-D/50510/CR

Advocates who appeared in this case :

V.K. Shukla, A.K. Tripathi and K.K. Mohan, Advocates, for the Appellant;

Gaurav Bhatia, Additional Advocate General (Ardhendumauli Kr. Prasad, Gautam Talukdar and Manoj Dwivedi, Advocates) for the Respondent.

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1. (2012) 8 SCC 495, *Ranjan Dwivedi* v. *CBI* 658*g*
2. (2012) 8 SCC 263, *Dayal Singh* v. *State of Uttaranchal* 657*f*
3. (2012) 4 SCC 79 : (2012) 2 SCC (Cri) 226, *Mano Dutt* v. *State of U.P.* 657*f*
4. Govt. Appeal No. 159 of 1981, decided on 13-1-2006 (All), *State of U.P.* v. *Mahipal* 653*c*, 654*f*, 658*e*
5. (2002) 4 SCC 578 : 2002 SCC (Cri) 830, *P. Ramachandra Rao* v. *State of Karnataka* 658*f-g*
6. (1994) 3 SCC 569 : 1994 SCC (Cri) 899, *Kartar Singh* v. *State of Punjab* 658*f-g*
7. (1992) 1 SCC 225 : 1992 SCC (Cri) 93, *A.R. Antulay* v. *R.S. Nayak* 658*f-g*

The Judgment of the Court was delivered by

P. SATHASIVAM, J.— This appeal has been preferred against the final judgment and order dated 13-1-2006 passed by the High Court of Judicature of Allahabad in *State of U.P.* v. *Mahipal*[1] whereby the Division Bench of the High Court allowed the appeal filed by the State and set aside the order of acquittal of the accused persons dated 8-9-1980 passed by the First Additional Sessions Judge, Etawah in Sessions Trial No. 77 of 1979.

2. The facts and circumstances giving rise to this appeal are as under. Moolu Singh and Kunji were real brothers. Prayag Singh, Pahunchi Lal and Lalta Prasad were sons of Moolu Singh. Badan Singh and Gaya Prasad were sons of Kunji. Ratan Singh is the son of Prayag Singh and Nathu Ram and Rajendra Singh were sons of Pahunchi Lal. Jaswant Singh was the son of Badan Singh and Ujagar Singh was the son of Gaya Prasad.

3. On 21-12-1978, at about 9.00 a.m. one Nathu Ram, the complainant and his father Pahunchi Lal were ploughing their field situated at Har Balapur, PS Bharthana. At that time, the complainant's uncle, Gaya Prasad along with his son Ujagar Singh were sowing their field which was nearer to the field of the complainant. At some distance, his uncle Prayag Singh along with his son Ratan Singh were also ploughing their field.

4. There was a water channel passing towards north of their fields and Mahipal Singh, the accused was irrigating his field through that channel. Since water was overflowing in the channel and entering into the sowed field of the complainant's uncle Gaya Prasad, he asked Mahipal Singh to repair the same. On this issue, an altercation took place between Mahipal Singh and Gaya Prasad. The accused Mahipal Singh left the place saying that he would see him.

5. In the meanwhile, Lalta Prasad, first cousin of Gaya Prasad and his nephew Jaswant Singh also reached there. At about 11.00 a.m., Nathu Ram and his father Pahunchi Lal resumed ploughing their field. At that time, accused Mahipal Singh and his brothers Shyam Babu and Tej Ram armed with guns, Indal having rifle and Bhabhooti with lathi, along with their father Ramjit with spear, and Babu Ram, son of Bhabhooti with country-made pistol, reached there. Mahipal Singh, standing near Gaya Prasad, told his associates that he was behaving in an arrogant manner and asked them to

1 Govt. Appeal No. 159 of 1981, decided on 13-1-2006 (All)

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make an assault on him. Thereupon, Shyam Babu and Mahipal Singh fired at Gaya Prasad with their respective guns thereby causing injuries to him. On seeing this, Ujagar Singh, son of Gaya Prasad, rushed to save his father and he also sustained pellet injuries by Tej Ram. At that time, Prayag Singh, Pahunchi Lal, Lalta Prasad and Jaswant Singh rushed to the scene of occurrence. Then Ramjit and Bhabhooti shouted that they should also be killed and immediately Indal fired at Jaswant Singh and Prayag Singh using rifle and Babu Ram and Mahipal Singh fired at Pahunchi Lal and Lalta Prasad with country-made pistol and gun respectively. All of them fell down in the field of Badan Singh except Prayag Singh, who received injuries. On hearing the hue and cry, Rajendra Singh brother of Nathu Ram and several other persons rushed to the spot and challenged the accused persons. On seeing them, all the accused persons fled away. Due to fatal injuries, Ujagar Singh, Jaswant Singh, Gaya Prasad, Pahunchi Lal and Lalta Prasad died on the spot and Prayag Singh received grievous injuries.

6. On the same day i.e. on 21-12-1978, an FIR was lodged by the complainant Nathu Ram, son of Pahunchi Lal, at PS Bharthana, Etawah against the abovementioned 7 persons under Sections 147, 148, 149, 307 and 302 of the Penal Code, 1860 (in short "IPC").

7. On 6-3-1979, after the filing of charge-sheet, the case was committed to the Court of Session and numbered as Sessions Trial No. 77 of 1979. The First Additional Sessions Judge, Etawah, by judgment dated 8-9-1980, acquitted all the seven accused persons holding that the prosecution has failed to prove beyond reasonable doubt the guilt of the accused persons in the case against them.

8. Being aggrieved, the State filed Government Appeal No. 159 of 1981 before the High Court. Pending appeal in the High Court, four accused persons viz. Ramjit, Mahipal Singh, Indal and Bhabhooti died due to natural death and the case against them stood abated. On 13-1-2006, the High Court allowed[1] the appeal filed by the State and convicted the remaining 3 accused persons viz. Shyam Babu, Babu Ram and Tej Ram under Sections 148, 307 and 302 read with Section 149 IPC and sentenced them to undergo rigorous imprisonment under various heads mentioned above including life sentence and all the sentences were to run concurrently.

9. Being aggrieved by the judgment of the High Court, the remaining 3 accused persons preferred an appeal before this Court under Section 379 of the Code of Criminal Procedure, 1973 (in short "the Code"). During the pendency of the appeal, 2 accused persons viz. Tej Ram and Babu Ram died and appeal against them stood abated and only one accused, Shyam Babu is before this Court facing conviction and sentence.

10. Heard Mr V.K. Shukla, learned counsel for the appellant-accused and Mr Ardhendumauli Kumar Prasad, learned counsel for the respondent State.

1 *State of U.P.* v. *Mahipal*, Govt. Appeal No. 159 of 1981, decided on 13-1-2006 (All)

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Discussion

11. The incident relates to the death of five persons and causing injury to one person. According to the prosecution, all the five persons were shot dead and one person sustained injuries due to firing by the accused persons. It is revealed from the post-mortem reports and the evidence of the doctor, who conducted autopsy on the dead bodies that death was caused due to shock and haemorrhage as a result of ante-mortem injuries about one day ago.

12. On receipt of the complaint, the investigating officer rushed to the spot and collected the bloodstained clothes of all the 5 deceased and also collected the samples of bloodstained earth near the place where dead bodies of all the 5 were lying and the same were sent to forensic science laboratory (FSL) for opinion which opined that the samples were found to be containing human blood.

13. After the filing of charge-sheet against all the accused, the prosecution examined several witnesses. Among them, Nathu Ram (PW 1), Prayag Singh (PW 3), injured witness and Mukut Singh (PW 6) were the persons who had actually witnessed the occurrence. In other words, PWs 1, 3 and 6 are the eyewitnesses to the occurrence. The trial Judge, after noting certain discrepancies and their relationship with the deceased persons, disbelieved their version and, ultimately, acquitted all the accused persons. On the other hand, the High Court, being the appellate court, analysed all the materials, more particularly, the evidence of eyewitnesses, medical evidence, FSL Report, etc., and arrived at a categorical conclusion that the prosecution has established the case against all the accused persons.

14. Inasmuch as 4 accused died during the pendency of the appeal before the High Court, the High Court convicted the remaining 3 accused, namely, Shyam Babu, Tej Ram and Babu Ram. Even during the pendency of the present appeal, 2 accused persons died, namely, Tej Ram and Babu Ram and as on date, we are concerned with only one accused, namely, Shyam Babu, the present appellant.

Power of the High Court in an appeal against acquittal

15. Mr V.K. Shukla, learned counsel for the appellant, submitted that in view of the acquittal of the accused persons by the trial court, the High Court was not justified in interfering with the decision of the trial court and modifying the acquittal into conviction.

16. It is true that it would not be possible for the appellate court to interfere with the order of acquittal passed by the trial court without rendering specific finding, namely, that the decision of the trial court is perverse or unreasonable resulting in miscarriage of justice. At the same time, it cannot be denied that the appellate court while entertaining an appeal against the judgment of acquittal by the trial court is entitled to reappreciate the evidence and come to an independent conclusion. We are conscious of the fact that in doing so, the appellate court should consider every material on record and the reasons given by the trial court in support of its order of acquittal and should interfere only on being satisfied that the view taken by

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the trial court is perverse and unreasonable resulting in miscarriage of justice. We also reiterate that if two views are possible on a set of evidence, then the appellate court need not substitute its own view in preference to the view of the trial court which has recorded an order of acquittal.

Reasoning on merits

17. Keeping the above principles in mind, let us consider the evidence led by the prosecution and the ultimate decision of the High Court. We have already mentioned that Nathu Ram (PW 1), Prayag Singh (PW 3) and Mukut Singh (PW 6) have appeared as eyewitnesses to the occurrence. PW 1, son of deceased Pahunchi Lal, has categorically narrated all the facts of the occurrence. According to him, at about 9 or 9.30 a.m., on the fateful day, he and his father were ploughing the field of Badan Singh which they had taken on "batai" and his uncle Gaya Prasad and his son Ujagar Singh were sowing crop in their field. He further deposed that his uncle Prayag Singh and his son Ratan Singh were ploughing their field situated at a distance of 40-50 footsteps from the field in which they were working. Mahipal Singh was irrigating his field through water channel abutting the field of Gaya Prasad and since the water was overflowing and entering into the field of Gaya Prasad, he asked Mahipal Singh to repair the same which resulted in an altercation between them and, thereafter, Mahipal Singh went away saying that he would teach him a lesson. By that time, Lalta Prasad and Jaswant Singh also reached there and all of them were sitting in the field of Badan Singh.

18. PW 1 further narrated that at about 11 a.m., when he and his father resumed ploughing their field, at that time, Shyam Babu (present appellant-accused) and Tej Ram with guns, Indal with rifle and Bhabhooti with lathi along with their father Ramjit with spear (ballam) and Babu Ram, the son of Bhabhooti with country-made pistol reached there. Mahipal Singh pointing at Gaya Prasad started shouting that he was speaking much and should be killed and, immediately thereafter, Shyam Babu and Mahipal Singh fired at Gaya Prasad using guns. When Ujagar Singh rushed towards his father to rescue him, he also received pellet injuries by Tej Ram. He further stated that immediately Pahunchi Lal, Prayag Singh, Lalta Prasad and Jaswant Singh also rushed to the scene of occurrence and then Ramjit and Bhabhooti shouted that they should also be killed. Thereafter, Indal and Babu Ram fired at Jaswant Singh and Pahunchi Lal with their respective weapons. The accused persons also fired at Lalta Prasad and Prayag Singh with their weapons. Ramjit and Bhabhooti also gave blows to the injured with their respective weapons. On sustaining fatal injuries, Pahunchi Lal, Ujagar Singh, Lalta Prasad, Gaya Prasad and Jaswant Singh died on the spot and Prayag Singh received firearm injuries at his back. He also stated that thereafter at about 12.00 noon he went to Police Station Bharthana, Etawah situated at a distance of 8 miles from his village and made a written complaint about the occurrence.

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19. The other eyewitnesses relied on by the prosecution and accepted by the High Court were Prayag Singh (PW 3), injured person and Mukut Singh (PW 6), who corroborated the entire statement of Nathu Ram (PW 1) in all material aspects.

20. A perusal of the cross-examination of these three eyewitnesses clearly shows that all of them were subjected to lengthy cross-examination but as rightly observed by the High Court, nothing tangible could be brought on record to impair their credibility. We were also taken through their evidence. We fully concur with the conclusion arrived at by the High Court and hold that the trial Judge committed an error in discarding the testimony of all the three eyewitnesses doubting their presence at the scene of occurrence.

Evidentiary value of related witnesses

21. Mr V.K. Shukla, learned counsel for the appellant submitted that since most of the prosecution witnesses are related to the deceased persons, the same cannot be relied on. We are unable to accept the said contention.

22. This Court has repeatedly held that the version of an eyewitness cannot be discarded by the court merely on the ground that such eyewitness happened to be a relative or friend of the deceased. It is also stated that where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the court to discard the statement of such related or friendly witnesses. To put it clear, there is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend, etc. These principles have been reiterated in *Mano Dutt* v. *State of U.P.*[2] and *Dayal Singh* v. *State of Uttaranchal*[3].

23. In the case on hand, Nathu Ram (PW 1) is closely related to all the deceased as he is the son of the deceased Pahunchi Lal and nephew of deceased Lalta Prasad. It is also true that Prayag Singh (PW 3), the injured witness, is the real brother of the deceased Pahunchi Lal and Lalta Prasad. Mukut Singh (PW 6) has also admitted in his cross-examination that he has some land in joint khata with the victims but their testimony cannot be discarded on the ground of relationship alone as they appeared to be honest and truthful witnesses and their testimony has not been impaired in their cross-examination. We have already referred to the lengthy cross-examination of all these persons and nothing has come out to impair their credibility. We have also observed that among these three eyewitnesses,

2 (2012) 4 SCC 79 : (2012) 2 SCC (Cri) 226
3 (2012) 8 SCC 263

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PW 3 is an injured witness and his evidence stands on a higher pedestal. There is no reason to either disbelieve his version or his presence at the place of occurrence. On the other hand, we agree with their statement and hold that the High Court was justified on relying upon their evidence.

Only surviving accused — Effect

24. Finally, Mr V.K. Shukla pointed out that inasmuch as the present appellant alone is the remaining accused since out of 7, other 6 accused persons died due to natural death, he may be exonerated from the conviction and sentence. In view of the clinching evidence led by the prosecution, we are unable to accept his submission. We should not forget that due to gruesome incident, 5 persons lost their lives and one person sustained injuries. It is also brought in evidence that Shyam Babu, appellant herein and Tej Ram used guns and the third one Babu Ram used country-made pistol for the said diabolical act of shooting. It is undisputed fact that 5 persons died and 1 person sustained injuries by use of such weapons. Even otherwise, the present appellant along with others was convicted by the High Court under Sections 148, 307 and 302 read with Section 149 IPC, hence he cannot be exonerated. Taking note of all these aspects and considering the gruesome murders, there is no reason to exonerate the present sole appellant-accused merely because the other co-accused died due to natural death.

Delay in disposal of appeal

25. It was argued by the learned counsel for the appellant that considering the fact that though the appeal was filed before the High Court at Allahabad in the year 1981, the same was disposed of by the High Court only on 13-1-2006[1] i.e. after a gap of 25 years and, the sole appellant be discharged from the commission of offence on the ground of delay. We are unable to accept the said contention. This Court, in a series of decisions, held that the Limitation Act, 1963 does not apply to criminal proceedings unless there is express and specific provision to that effect. It is also settled law that a criminal offence is considered as a wrong against the State and the society even though it is committed against an individual. After considering various decisions including the decision of the Constitution Bench of this Court in *A.R. Antulay* v. *R.S. Nayak*[4] and *Kartar Singh* v. *State of Punjab*[5] and a decision rendered by the seven learned Judges of this Court in *P. Ramachandra Rao* v. *State of Karnataka*[6] recently on 17-8-2012, a Bench of two Judges of this Court in *Ranjan Dwivedi* v. *CBI*[7] rejected the similar argument based on delay either at the stage of trial or thereafter.

26. In the case on hand, merely because the High Court had taken nearly 25 years to dispose of the appeal, the present appellant cannot be exonerated on the ground of delay. As stated earlier, it is not a case of single murder but

1 *State of U.P.* v. *Mahipal*, Govt. Appeal No. 159 of 1981, decided on 13-1-2006 (All)
4 (1992) 1 SCC 225 : 1992 SCC (Cri) 93
5 (1994) 3 SCC 569 : 1994 SCC (Cri) 899
6 (2002) 4 SCC 578 : 2002 SCC (Cri) 830
7 (2012) 8 SCC 495

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due to firing and gunshot, five persons died and one injured. Accordingly, we reject the said contention.

27. In the light of the above discussion, we are unable to accept the reasoning of the trial court and the submissions made by the learned counsel for the appellant. On the other hand, we fully agree with the conclusion arrived at by the High Court. Consequently, the appeal fails and the same is dismissed.

———

(2012) 8 Supreme Court Cases 659

(BEFORE ALTAMAS KABIR AND J. CHELAMESWAR, JJ.)

RATTAN LAL (SINCE DECEASED) THROUGH HIS LEGAL REPRESENTATIVES .. Appellant;

Versus

S.N. BHALLA AND OTHERS .. Respondents.

Civil Appeal No. 5787 of 2012†, decided on August 8, 2012

A. **Contract and Specific Relief — Termination/Discharge of Contract — Termination by Agreement — Contractual provisions for discharge — Contract terminable on exercise of option in case of stipulated situation — Duties to be discharged before discharge option became available, if any — Option if properly exercised**

— Option to seller to terminate the sale agreement if he applied to obtain sale permission/statutory clearances for sale within the time stipulated but could not obtain them within 6 months — Agreement terminated by respondent seller in exercise of said option on not obtaining sale permission/statutory clearances within 6 months — Held on facts, was not proper — In the absence of any positive efforts on the part of seller to procure the necessary sale permission and other clearances, seller was not entitled to determine the agreement in terms of the above option — Contract Act, 1872 — S. 37 — Specific Relief Act, 1963 — Ss. 10 and 14(1)(c) — Transfer of Property Act, 1882, S. 55(1)(g)

The respondents entered into an agreement with the appellant to sell their property to the appellant for a consideration of Rs 5,90,000. The appellant buyer paid a sum of Rs 50,000 to the respondents in advance to enable them to apply for necessary permission for the said sale and to obtain clearance certificate from the Tax Authorities. The agreement stipulated that on receipt of the said clearance, the respondents would inform the appellant about it, and, thereafter, the appellant would complete the sale within 60 days by paying the balance consideration. Clause 8 of the agreement stipulated that in case the respondents failed to apply for permission within 15 days from the date of the agreement, the appellant purchaser could determine the agreement whereupon the respondents were required to refund the earnest money and to pay damages to the appellant assessed at Rs 50,000. As per Clause 9 of the agreement, if the respondent sellers

† Arising out of SLP (C) No. 13490 of 2009. From the Judgment and Order dated 18-12-2008 of the High Court of Delhi at New Delhi in RFA No. 272 of 2004

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(2015) 1 Supreme Court Cases 776

(BEFORE F.M. IBRAHIM KALIFULLA AND ABHAY MANOHAR SAPRE, JJ.)

NAND KUMAR .. Appellant;

Versus

STATE OF CHHATTISGARH .. Respondent.

Criminal Appeals No. 906 of 2012† with Nos. 900-902 and 908-14 of 2012, decided on October 31, 2014

A. **Penal Code, 1860 — S. 302 r/w Ss. 149 and 148 — Murder — Political rivalry — Unlawful assembly — Common object — Related witnesses alone examined — Non-examination of any independent witness — Conviction confirmed**

— Appellants with others killed *V*, *J* and his two sons *B* & *S*, and one *K* by severely beating them at different places with deadly weapons such as lathi, sword, ballam, tabbals and iron rods — Trial court convicted appellants on basis of evidence of PWs 1 and 3 — PW 1 is daughter of deceased *J*, and sister of deceased *B* and *S*, whereas PW 3 is wife of deceased *J* and mother of PW 1 and deceased *B* and *S* — High Court upheld conviction and sentence of appellants — Names of appellants are mentioned in dehati nalish (Ext. P-1) — Their names are also mentioned in statements of PWs 1 and 3, recorded under S. 161 CrPC — PWs 1 and 3 also categorically stated in their evidence in court about overt act played by appellants in committing the murders of *J* and his two sons *B* and *S* — Discrepancies, relied on by appellants, were so minor and insignificant that they do not, in any way, dilute their version — Held, as evidence of eyewitnesses, PWs 1 and 3 was found worthy of acceptance to prove the case, then it was not necessary for prosecution to examine any more eyewitnesses (independent witness)

(Paras 23, 24 and 28 to 33)

B. **Evidence Act, 1872 — S. 134 — Number of witness — Law does not say that prosecution must examine all eyewitnesses cited by prosecution — When evidence of two eyewitnesses, PWs 1 and 3 was found worthy of acceptance to prove the case then it was not necessary for prosecution to examine any more eyewitnesses — It is for prosecution to decide as to how many witnesses, and who should be examined as their witnesses for proving its case (Paras 31 and 32)**

Dismissing the appeal, the Supreme Court

Held :

When several people participate in commission of an offence with deadly weapons and attack one or more persons with an intention to kill them then the witnesses who are closely related to victim(s) are not expected to describe the incident in graphic detail and with such precision that which member and in what manner he participated in the commission of offence. Their evidence is required to be appreciated in its totality. (Para 30)

† From the Judgment and Order dated 11-5-2007 of the High Court of Chhattisgarh at Bilaspur in Crl. A. No. 785 of 2001

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Dalbir Kaur v. *State of Punjab*, (1976) 4 SCC 158 : 1976 SCC (Cri) 527; *Harbans Kaur* v. *State of Haryana*, (2005) 9 SCC 195 : 2005 SCC (Cri) 1213; *Namdeo* v. *State of Maharashtra*, (2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773; *Munshi Prasad* v. *State of Bihar*, (2002) 1 SCC 351 : 2002 SCC (Cri) 175, *followed*

In the first place, names of these accused are mentioned in dehati nalish (Ext. P-1). Secondly, their names are also mentioned in the statements of PWs 1 and 3, which were recorded under Section 161 CrPC. Likewise these two witnesses (PWs 1 and 3) also categorically stated in their evidence in court about the overt act played by accused persons in committing the murders of *J* and his two sons, *B* and *S*. In other words, a conjoint reading of these two statements clearly establishes the overt acts played by the accused persons while killing these three persons one after another on the same day. Thirdly and most importantly, the ocular evidence of two eyewitnesses (PWs 1 and 3) conclusively proves not only the involvement of the accused persons but their actual active role played in killing these three persons. Upon reappreciating the evidence and especially of the two eyewitnesses (PWs 1 and 3), it is found that their sworn testimonies deserve to be accepted. (Para 23)

M (PW 1) is the daughter of deceased *J*, and sister of deceased *B* and *S*, whereas *SB* (PW 3) is the wife of the deceased *J* and mother of *M* (PW 1) and the deceased *B* and *S*. In the case on hand, the mother and daughter saw with their naked eyes that their father/husband and two sons/brothers were being killed in their presence with the use of lathis, battle-axe, sword and rods by the accused persons mercilessly and both the helpless ladies standing in front of the mob (accused persons) with folded hands praying "please do not kill them and leave them". The accused persons did not listen to their prayer and with a predetermined motive killed the deceased persons by beating them due to which two of them died on the spot and one succumbed in the hospital after some time. It will be a travesty of justice, if the sworn testimonies of these two eyewitnesses are not believed, which remained consistent throughout on material issues. Indeed, there is no valid reason to disbelieve them. (Para 24)

Santosh Singh v. *State*, Criminal Appeal No. 785 of 2001, decided on 11-5-2007 (Chh), *affirmed*

C. **Penal Code, 1860 — Ss. 149, 141, 142 and 147 — Vicarious liability under — Imposition of — Requirements for — Punishment prescribed by S. 149 is vicarious and does not always proceed on basis that the offence has been actually committed by every member of unlawful assembly — What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with other members of assembly, common object as defined by S. 141 IPC (Paras 19 to 21)**

Masalti v. *State of U.P.*, AIR 1965 SC 202 : (1965) 1 Cri LJ 226; *Om Prakash* v. *State of Haryana*, (2014) 5 SCC 753 : (2014) 2 SCC (Cri) 710, *relied on*

Baladin v. *State of U.P.*, AIR 1956 SC 181 : 1956 Cri LJ 345, *held, limited*

J-D/54092/CR

Advocates who appeared in this case :

Dharam Bir Raj Vohra, Yash Pal Dhingra and Binay Kr. Das, Advocates, for the Appellant;

Dharmendra Kr. Sinha, Apoorv Kurup, V.C. Shukla, C.D. Singh and Ms Sakshi, Advocates, for the Respondent.

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Chronological list of cases cited ***on page(s)***

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4. (2005) 9 SCC 195 : 2005 SCC (Cri) 1213, *Harbans Kaur* v. *State of Haryana* 786*a-b*, 786*b*
5. (2002) 1 SCC 351 : 2002 SCC (Cri) 175, *Munshi Prasad* v. *State of Bihar* 786*e-f*
6. (1976) 4 SCC 158 : 1976 SCC (Cri) 527, *Dalbir Kaur* v. *State of Punjab* 786*a-b*
7. AIR 1965 SC 202 : (1965) 1 Cri LJ 226, *Masalti* v. *State of U.P.* 783*c-d*, 783*d*, 784*e-f*, 784*f*
8. AIR 1956 SC 181 : 1956 Cri LJ 345, *Baladin* v. *State of U.P.* 783*c-d*, 783*d*, 783*f*, 784*b-c*, 784*e*, 784*f-g*

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J.— These appeals have been directed against the final common judgment dated 11-5-2007 passed by the High Court of Chhattisgarh at Bilaspur in *Santosh Singh* v. *State*[1], whereby the High Court upheld the conviction and sentence of the appellants herein under Section 302 read with Sections 149 and 148 of the Penal Code, 1860 (in short "IPC") which was awarded to them by the Sessions Court whereas the High Court allowed the criminal appeals of other accused and acquitted them of the charges by setting aside the judgment of the Sessions Court dated 12-7-2001 in Sessions Trial No. 342 of 1995 to that extent.

2. The concluding part of the impugned judgment[1] of the High Court reads as under:

> "In the result, the appeals filed by accused Raj Kumar Singh, Dhananjay, Rohit, Nirmal, Surjan, Santosh Singh, Gopal Das, Chhatram, Balchand and Devilal succeeds. The conviction and sentences imposed upon them under Section 302 read with Sections 149 and 148 IPC are set aside. They are acquitted of the said charges.
>
> (*a*) Balchand, Devilal, Chhatram and Surjan are on bail. Their bail bonds are discharged and they need not surrender to their bail bonds.
>
> (*b*) Santosh Singh, Rohit, Gopal Das, Raj Kumar Singh, Nirmal and Dhananjay are in detention since 18-1-1995. They are directed to be released forthwith, if not required in any other case.
>
> The appeal filed by accused Rameshwar Singh stands abated.
>
> The appeals filed by accused Kumar Singh, Nande Singh, Nand Kumar, Baran, Jaipal, Resham Lal, Guharam, Amritlal and Basant Das are dismissed. The conviction and sentences imposed upon them under Section 302 read with Sections 149 and 148 IPC are maintained. Baran, Jaipal and Resham Lal are on bail. Their bail bonds are discharged and

1 Criminal Appeal No. 785 of 2001, decided on 11-5-2007 (Chh)

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they are directed to surrender before the trial court forthwith to serve out the remaining sentence."

3. The question that arises for consideration in these appeals is whether the High Court was justified in upholding the conviction and sentence of the present appellants.

4. In order to appreciate the issue involved in these appeals, it is necessary to state the prosecution case in brief infra.

5. In Village Bhaismudi in District Janjgir, there were two groups of villagers. One group consisted of deceased Jawahar Singh, Bhupendra Singh and others whereas the other group consisted of the appellants herein and other accused. There were disputes between the two groups on account of Panchayat elections in the village and also several other reasons. In the intervening night of 16-1-1995 and 17-1-1995, the accused persons convened a meeting and hatched up a conspiracy to eliminate Jawahar Singh and others. The accused persons accordingly formed an unlawful assembly with a common object to murder Viki Singh, Jawahar Singh, Bhupendra Singh, Shailendra Singh—both sons of Jawahar Singh, and Kalicharan and in furtherance of this common object, all accused persons with deadly weapons (lathi, sword, ballam, tabbals, iron rods) first went to the residence of Viki Singh near a place called Nawa Talab, and killed Viki Singh by severely beating him with the weapons which they had carried with them. The accused persons then proceeded towards the agricultural field of Jawahar Singh where they killed Jawahar Singh and his two sons—Bhupendra Singh and Shailendra Singh by severely beating them with the weapons, which they were carrying with them. Thereafter, the accused party proceeded to a place called Holha Chowk of Bhaismudi and killed Kalicharan with the aid of same weapons.

6. Madhubala Bai (PW 1) reported this incident by lodging *dehati nalish* (Ext. P-1) on the spot on 17-1-1995 around 3.00 p.m. At this stage it is proper to reproduce the substance of the contents of Ext. P-1 hereinbelow:

> "... that she is resident of Village Bhaismudi, at about 11.30 a.m. she was at her shop, at that time, Kariya Sabaria came crying to her shop and said that Viki Singh has been murdered near Nawa Talab by Shiv Sena persons, namely, Kumar Singh, Nande Singh, Guharam, Rohit, Jaipal, Resham, Rajkumar Singh, Prahlad Singh, Rameshwar Singh, Dhananjay, Nand Kumar, Santosh and others. When she reached the spot, she saw that all these persons were carrying lathi, rod, battle-axe, etc. They were crying and saying 'let us now go to the field of Jawahar Singh and finish them there', they started going towards the agricultural field of her father. She and her mother also followed them and requested that once they should save (*sic* spare) their life, but they did not accede to their request. While going to the agricultural field, she informed Vinay Singh that Babuji has been murdered near Nawa Talab, Nirmal Kashyap, Amrit, Basant and Baran were also along with them. After reaching the agricultural field, these persons attacked her father Jawahar Singh and

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brothers Bhupender Singh and Shailender Singh with lathi and tabbal as a result of which her father Jawahar Singh and brother Bhupender Singh succumbed to the injuries sustained by them instantaneously, and brother Shailender Singh succumbed to the injuries after 15-20 minutes. All these persons have committed the murder of her father and brothers."

7. On receipt of the aforesaid report, Brajender Singh (PW 16), the Head Constable of Police Station Janjgir, registered the FIR (Ext. P-64) for commission of the offence under Sections 302, 147, 148 and 149 IPC. Brajender Singh (PW 16) gave intimation in respect of the death of Shailendra Singh (Ext. P-65) whereas intimation in respect of the death of Bhupendra Singh and Jawahar Singh were given by M.L. Shandilya (PW 22), Inspector of Police, Exts. P-70 and P-71.

8. After giving necessary notices (Exts. P-2, P-51, and P-63), the investigating officer prepared inquest of Bhupendra Singh (Ext. P-3), Shailendra Singh (Ext. P-52) and Jawahar Singh (Ext. P-64). Dr P.K. Narula (PW 12) conducted post-mortem on the body of Bhupendra Singh (Ext. P-56). In his opinion, the cause of death of Bhupendra Singh was due to shock as a result of haemorrhage on account of extensive homicidal head injury. Dr U.C. Sharma (PW 13) conducted post-mortem on the body of Jawahar Singh, who vide his report (Ext. P-59) opined that cause of death of Jawahar Singh was due to shock and haemorrhage as a result of extensive head injury and that the death is homicidal in nature. Dr A.K. Paliwal (PW 14) conducted post-mortem on the body of Shailendra Singh and vide his report (Ext. P-61) opined that cause of death was due to shock resulting from haemorrhage caused by extensive head injury and that death is homicidal in nature.

9. After completing the investigation and collecting all the evidence, the charge-sheet was filed against 29 accused persons for commission of offences punishable under Sections 147, 148, 149 and 302 IPC in the Court of Judicial Magistrate First Class, Janjgir, who in turn committed the case to the Sessions Judge, Bilaspur, who in turn transferred it to the Additional Sessions Judge. During the trial, one of the accused Prahlad Singh, died.

10. The prosecution examined as many as 22 witnesses at the trial to prove the case. The statements of the accused persons were then recorded under Section 313 of the Criminal Procedure Code, 1973 (hereinafter referred to as "CrPC"), in which all the accused persons denied their involvement in the commission of the offences and also denied the material collected against them in the form of evidence. They stated that they were falsely implicated in the crime and are thus innocent. One of the accused, Ganesh, stated that the deceased and their party members were indulged in selling illicit liquor and since members of their party Shiv Sena were not allowing them to do such acts which included the accused, who were also the members of Shiv Sena, they were falsely involved in this case due to this grudge against them. He also stated that since in Panchayat elections, some candidates of the deceased party had lost the election and hence, they were

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hostile to the accused persons. Another accused Gopal Das stated that on the date of incident, he was at Raigarh for medical test. The accused in defence examined Lalit Kumar (DW 1) and Dinesh Chandra Pathak (DW 2).

11. The trial court, by the judgment dated 12-7-2001, acquitted eight accused and convicted the remaining accused. All the convicted appellants were directed to undergo life imprisonment under Section 302 read with Sections 148 and 149 with a fine of Rs 2000 each.

12. The convicted accused persons filed appeals in the High Court. By the impugned judgment[1], the High Court upheld the conviction of nine accused persons by dismissing their appeals and acquitted the remaining accused persons by allowing their appeals. One appeal was held abated due to death of the accused.

13. The details regarding conviction/acquittal of the accused persons by the High Court are mentioned hereinbelow:

Name and number of the appellant-accused	*Acquittal/Conviction*
Gopal Das (A-3)	Acquitted
Kumar Singh (A-4)	*Conviction upheld*
Rajkumar Singh (A-5)	Acquitted
Baran (A-6)	*Conviction upheld*
Amrit (A-7)	*Conviction upheld*
Guharam (A-8)	*Conviction upheld*
Jaipal (A-9)	*Conviction upheld*
Santosh Singh (A-10)	Acquitted
Nande Singh (A-11)	*Conviction upheld*
Resham (A-13)	*Conviction upheld*
Rameshwar Singh (A-14)	Appeal Abated
Dhananjay (A-15)	Acquitted
Rohit Kumar Karsh (A-16)	Acquitted
Nirmal (A-17)	Acquitted
Basant (A-19)	*Conviction upheld*
Surjan (A-20)	Acquitted
Chhatram (A-24)	Acquitted
Balchand (A-25)	Acquitted
Devilal (A-27)	Acquitted
Nand Kumar (A-28)	*Conviction upheld*

14. Against this judgment of the High Court, the convicted accused persons have preferred these appeals before this Court questioning the correctness of the impugned judgment[1] insofar as their conviction and sentence is concerned.

1 *Santosh Singh* v. *State*, Criminal Appeal No. 785 of 2001, decided on 11-5-2007 (Chh)

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15. The learned counsel for the appellants, while assailing the conviction and sentence of the appellants, contended that the High Court was not right in upholding the conviction of the appellants. It was further contended that there was no role played by any of the appellants in the commission of the offence in question and nor was there any overt act played by any of them so as to render them liable to suffer conviction and sentence under Sections 302/147/148/149 IPC. The learned counsel urged that non-examination of Kariya Sabaria, who was an important eyewitness even according to the prosecution, has rendered the appellants' conviction bad in law. The learned counsel maintained that where group of persons commits any crime, it becomes necessary for the prosecution to prove the role of every person of such group in commission of the offence including what every person actually did such as whether he actually assaulted the deceased, which weapon he used, how much force he used, whether he was the aggressor, whether his role was prominent and if so to what extent, etc. The learned counsel submitted that since evidence adduced by the prosecution is lacking on these material issues, and hence the appellants must be given the benefit of doubt and they be acquitted of the charges alike those acquitted by the trial court and the High Court and lastly, it was urged that since the conviction is based solely on the testimony of interested witnesses (PWs 1 and 3), who were related to the deceased persons and, therefore, their testimony was not reliable for convicting the appellants for want of any other independent eyewitness.

16. The learned counsel for the respondent State, in reply, while supporting the impugned judgment[1] contended that no case is made out to call for any interference in the impugned judgment[1]. Firstly, he submitted that the High Court was right in upholding the appellants' conviction and sentence; secondly, both the courts below rightly appreciated the evidence adduced by the prosecution, which was sufficient in the ordinary course to sustain the finding of conviction under Section 302 read with Sections 147/148/149 IPC; thirdly, the appellants' conviction was based on the testimony of two eyewitnesses, namely, Madhubala Bai (PW 1) and Saraswati Bai, (PW 3), whose presence at the time of occurrence was not disputed; fourthly, keeping in view the law laid down by this Court in several decisions explaining therein the parameters to be applied for convicting any member of unlawful assembly, the prosecution was able to adduce sufficient evidence to sustain the appellants' conviction; and lastly, looking to the gruesome murders committed by the appellants killing as many as five persons with a predetermined motive, this Court should uphold the conviction and sentence of all the appellants, who are sailing in the same boat and dismiss these appeals.

17. Coming first to the question as to whether the death of three persons, which is the subject-matter of these appeals, namely, Jawahar Singh, Shailendra Singh and Bhupendra Singh is homicidal. We are of the

1 *Santosh Singh* v. *State*, Criminal Appeal No. 785 of 2001, decided on 11-5-2007 (Chh)

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considered opinion that it is homicidal in nature. It is amply established from the medical evidence of the three doctors, namely, Dr P.K. Narula (PW 12), Dr U.C. Sharma (PW 13) and Dr A.K. Paliwal (PW 14) and their respective post-mortem reports (Exts. P-56, P-59 and P-61) as also ocular evidence of two eyewitnesses, Smt Madhubala Bai (PW 1) and Saraswati Bai (PW 3). We, therefore, uphold the finding of the two courts below on this issue.

18. This takes us to the main question as to whether the courts below were justified in holding the appellants guilty for committing murder of three persons named above?

19. Before we peruse the ocular evidence adduced by the prosecution, it is necessary to take note of the law on the question as to under what circumstances, a member of an unlawful assembly can be held to have committed an offence in pursuance of the common object of such assembly of which he is a member.

20. While distinguishing on facts and then explaining the view taken by this Court in *Baladin* v. *State of U.P.*[2], the four-Judge Bench speaking through Gajendragadkar, J. in *Masalti* v. *State of U.P.*[3], laid down the following principle of law on the aforesaid question: (*Masalti case*[3], AIR pp. 210-11, para 17)

> "*17.* ... in *Baladin* v. *State of U.P.*[2] ... it was observed by Sinha, J., who spoke for the Court that it is well settled that mere presence in an assembly does not make a person, who is present, a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under Section 142 IPC. The argument is that evidence adduced by the prosecution in the present case does not assign any specific part to most of the accused persons in relation to any overt act, and so, the High Court was in error in holding that the appellants were members of an unlawful assembly. ... It appears that in *Baladin*[2] the members of the family of the appellants and other residents of the village had assembled together; some of them shared the common object of the unlawful assembly, while others were merely passive witnesses. Dealing with such an assembly, this Court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an

2 AIR 1956 SC 181 : 1956 Cri LJ 345
3 AIR 1965 SC 202 : (1965) 1 Cri LJ 226

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assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in *Baladin*[2] assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in *Baladin*[2] must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition of law…."

21. Recently, this Court in *Om Prakash* v. *State of Haryana*[4] placed reliance on the aforesaid principle laid down in *Masalti*[3] in following words: (SCC pp. 760-61, para 15)

"*15.* The aforesaid enunciation of law was considered by a four-Judge Bench in *Masalti* v. *State of U.P.*[3], which distinguished the observations made in *Baladin*[2] on the foundation that the said decision should be read in the context of the special facts of the case and may not be treated as laying down an unqualified proposition of law. The four-Judge Bench, after enunciating the principle, stated as follows: (AIR p. 211, para 17)

'*17.* … it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly.

2 *Baladin* v. *State of U.P.*, AIR 1956 SC 181 : 1956 Cri LJ 345
4 (2014) 5 SCC 753 : (2014) 2 SCC (Cri) 710
3 *Masalti* v. *State of U.P.*, AIR 1965 SC 202 : (1965) 1 Cri LJ 226

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In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.' "

22. Keeping the aforesaid principle of law in mind, when we peruse the prosecution evidence, we have no hesitation in upholding the findings of the courts below. We do this for the following reasons.

23. In the first place, names of these accused are mentioned in *dehati nalish* (Ext. P-1). Secondly, their names are also mentioned in the statements of PW 1 and PW 3, which were recorded under Section 161 CrPC. Likewise these two witnesses (PWs 1 and 3) also categorically stated in their evidence in court about the overt act played by the accused persons in committing the murders of Jawahar Singh and his two sons, Bhupendra and Shailendra. In other words, a conjoint reading of these two statements clearly establishes the overt acts played by the accused persons while killing these three persons one after another on the same day. Thirdly and most importantly, the ocular evidence of two eyewitnesses (PWs 1 and 3) conclusively prove not only the involvement of the accused persons but their actual active role played in killing these three persons. We have undertaken the exercise of appreciating the evidence and especially of the two eyewitnesses (PWs 1 and 3) and we find that their sworn testimonies deserve to be accepted.

24. It is not in dispute, as it has come in evidence, that Madhubala (PW 1) is the daughter of the deceased Jawahar Singh, and sister of the deceased Bhupendra and Shailendra, whereas Saraswati Bai (PW 3) is the wife of the deceased Jawahar and mother of Madhubala (PW 1) and the deceased Bhupendra and Shailendra. In the case on hand, the mother and daughter saw with their naked eyes that their father/husband and two sons/brothers were being killed in their presence with the use of lathis, battle-axe, sword and rods by the accused persons mercilessly and both the helpless ladies standing in front of the mob (accused persons) with folded hands praying "please do not kill them and leave them". The accused persons did not listen to their prayer and with a predetermined motive killed the deceased persons by beating them due to which two of them died on the spot and one succumbed in the hospital after some time. It will be a travesty of justice, if we do not believe the sworn testimonies of these two eyewitnesses, which in our considered opinion, remained consistent throughout on material issues. Indeed, there is no valid reason for this Court to disbelieve them.

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25. The submission of the learned counsel for the appellants that since PWs 1 and 3 were in close relation with the deceased persons being wife/mother or daughter/sister and that they should not be believed for want of evidence of any independent witness, deserves to be rejected in the light of the law laid down by this Court in *Dalbir Kaur* v. *State of Punjab*[5] and *Harbans Kaur* v. *State of Haryana*[6], which lays down the following proposition: (*Harbans Kaur case*[6], SCC p. 198, para 7)

> "*7.* There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused."

26. In *Namdeo* v. *State of Maharashtra*[7], this Court further held: (SCC p. 164, para 38)

> "*38.* … it is clear that a close relative cannot be characterised as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

27. We follow this well-settled principle of law for rejecting the submissions of the learned counsel for the appellants.

28. Yet another submission of the learned counsel that due to discrepancies in the evidence of PWs 1 and 3 and in their statements recorded under Section 161 CrPC, the same should not be relied on and deserves to be rejected in the light of the law laid down by this Court in *Munshi Prasad* v. *State of Bihar*[8], which reads as under: (SCC p. 362, para 10)

> "*10.* (*i*) … Incidentally, be it noted that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. If the general tenor of the evidence given by the witness and the trial court upon appreciation of evidence forms opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of, and we do not see any justification to pass a contra-note, as well, on perusal of the evidence on record."

5 (1976) 4 SCC 158 : 1976 SCC (Cri) 527
6 (2005) 9 SCC 195 : 2005 SCC (Cri) 1213
7 (2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773
8 (2002) 1 SCC 351 : 2002 SCC (Cri) 175

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29. As mentioned above, we have not been able to notice any major discrepancies in their statements and whatever discrepancies, which were relied on by the learned counsel, were so minor and insignificant that they do not, in any way, dilute their version.

30. In our considered view, when several people participate in commission of an offence with deadly weapons and attack one or more persons with an intention to kill them then the witnesses who are closely related to the victim(s) are not expected to describe the incident in graphic detail and with such precision that which member and in what manner he participated in the commission of offence. Their evidence is required to be appreciated in its totality. In the case on hand, PWs 1 and 3 elaborately narrated the entire incident by taking the names of every accused whom they knew to be the residents of the same area. We, therefore, find no merit in the submission of the learned counsel and accordingly reject it.

31. We are also not impressed by the arguments of the learned counsel appearing for the appellants when he contended that one eyewitness, Kariya was not examined and hence it has weakened the case of the prosecution.

32. The law does not say that the prosecution must examine all the eyewitnesses cited by the prosecution. When the evidence of two eyewitnesses, PWs 1 and 3 was found worthy of acceptance to prove the case then it was not necessary for the prosecution to examine any more eyewitnesses. It is for the prosecution to decide as to how many and who should be examined as their witnesses for proving their case. Therefore, we find no merit in this submission.

33. In the light of the foregoing discussion, we find no merit in the appeals which fail and are accordingly dismissed. As a result, the conviction and sentence awarded to the appellants by the courts below are upheld.

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2019
Dec. 6

(BEFORE L. NAGESWARA RAO AND HEMANT GUPTA, JJ.)

DARSHAN SINGH .. Appellant;

Versus

2-Judge Bench

STATE OF PUNJAB .. Respondent.

Criminal Appeals No. 1688 of 2009† with
No. 1690 of 2009, decided on December 6, 2019

A. **Criminal Trial — Circumstantial Evidence — Links in the chain of circumstances — Completely proved by prosecution — Deceased victim strangulated to death and her face burnt with acid beyond recognition — Motive behind murder, stands established — Testimonies of witnesses, trustworthy — Conduct of accused persons after murder, found suspicious — Disclosure statement of one of accused leading to recovery of half empty bottle of acid, used for disfigurement of face of deceased, with intention to avoid identification of dead body — Even though witness of last seen could not identify accused persons in court as persons who threw jute bag (containing body of deceased), fact that jute bag was thrown by a man and a woman on TVS motorcycle is relevant in chain of events in support of prosecution case — Extra-judicial confession of one of accused stands supported by medical evidence — Prosecution proving chain of circumstances to prove guilt of accused persons — Conviction confirmed**

— Deceased victim had inherited 5 bigha of land of *G* (son of deceased, who died issueless) — *A* (other son of deceased, since acquitted), *J* (appellant-accused, son of *A*) and *S* (appellant-accused, who died during pendency of present appeals after being released on bail, wife of *A*) were not happy with such inheritance — Out of instant land, she sold 1 bigha and gave remaining 4 bighas on lease to *A* — However, *A* was not paying lease amount to her — Panchayat was also convened over such dispute, where accused threatened deceased

— FIR was lodged by PW 7, that when he had gone to his field, he noticed foul smell emanating from land of *P* near dump of wheat husk — He noticed a jute bag with maggots around it and suspected it to be a dead body of a man or a woman — He reported matter to police which was recorded by SHO (PW 15) — PW 13 (son-in-law of deceased) stated, that his mother-in-law (deceased) was residing in a room — He identified dead body kept in mortuary, to be of his mother-in-law — He alleged, that she was murdered by *A*, his wife *S*, his son *J* and one *D* (another appellant-accused, servant of *A*) — Trial court convicted appellants *J*, *S* and *D*, while acquitting *A* — High Court upheld conviction of appellants

— Held, that lease money was not being paid to deceased was stated by Sarpanch (PW 11) and also by PW 13 (son-in-law of deceased) — That lease money was the only source of survival of the old woman (deceased) who was living in a separate room and not with her son, *A* — PW 11 also deposed that only a sum of Rs 1000 was paid with a promise to pay another sum of Rs 1000

† Arising from the Judgment and Order in *Jagmohan Singh* v. *State of Punjab*, 2009 SCC OnLine P&H 2085 (Punjab and Haryana High Court, Crl. A. No. 726-DB of 2007, dt. 19-2-2009)

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later — It, thus, transpires that deceased was living separately and was not being paid the lease money which was necessary for her survival

— Further, appellants were not found in village soon after occurrence as deposed by PW 13 and investigating officer (PW 15) — They did not attend cremation or prayer ceremony which was held after one week — Such conduct of appellants of not being available in village, is a strong circumstance of their conduct post death

— Post-mortem report indicates fracture of hyoid bone — As per post-mortem report, dupatta around neck of deceased had two turns which is unusual for a woman, more so, for a woman of age of deceased — Argument that no ligature mark was found on deceased is of no relevance, as body was infected with maggots — Therefore, ligature mark on soft tissue would not have survived

— Furthermore, bottle of acid was recovered on basis of disclosure made by accused *S* — Photographs that were taken showed disfigurement of face of deceased — Such disfigurement was caused by pouring of acid with intention to avoid identification of dead body

— Although witness (PW 14) of last seen could not identify appellants, but fact remains that he identified, that a jute bag was thrown by a man and a woman who came on a TVS motorcycle — Therefore, even though such witness could not identify appellants in court as persons who had thrown jute bag, fact that jute bag was thrown by a man and a woman on TVS motorcycle, is relevant in chain of events in support of prosecution case

— Appellant *D* was convicted on basis of extra-judicial confession made before PW 16 in which he deposed that he gave a chair blow on the flank of deceased — Post-mortem report shows fracture of hyoid bone, an irregular wound over left breast and fracture of 6th and 7th rib — Therefore, extra-judicial confession made by *D* is also supported by medical evidence — Further, *D* had also disclosed that he had kept concealed a folding iron chair in house of *A*, and said chair was recovered

— In such facts and circumstances, prosecution proved chain of circumstances, to hold appellants guilty of offences charged — Hence, conviction of appellants stands confirmed — Confession — Extra-judicial confession/Hearsay — Of accused — Relevance of, when corroborates prosecution case, particularly the medical evidence — Identification — Identification of dead body/corpus delicti — When disfigured by acid by accused, to prevent identification — Penal Code, 1860 — S. 302 — Evidence Act, 1872, S. 27 (Paras 21 to 27)

Jagmohan Singh v. *State of Punjab*, 2009 SCC OnLine P&H 2085, *affirmed*

Jagmohan Singh v. *State of Punjab*, 2010 SCC OnLine SC 69; *Ajay Singh* v. *State of Maharashtra*, (2007) 12 SCC 341 : (2008) 1 SCC (Cri) 371; *S. Arul Raja* v. *State of T.N.*, (2010) 8 SCC 233 : (2010) 3 SCC (Cri) 801; *Sharad Birdhichand Sarda* v. *State of Maharashtra*, (1984) 4 SCC 116 : 1984 SCC (Cri) 487; *Devi Lal* v. *State of Rajasthan*, (2019) 19 SCC 447 : 2019 SCC OnLine SC 39; *Ram Lal* v. *State of H.P.*, (2019) 17 SCC 411 : 2018 SCC OnLine SC 1730, *referred to*

Madan Gopal Kakkad v. *Naval Dubey*, (1992) 3 SCC 204 : 1992 SCC (Cri) 598; *Piara Singh* v. *State of Punjab*, (1977) 4 SCC 452 : 1977 SCC (Cri) 614, *cited*

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B. **Criminal Trial — Conduct of accused, complainant, witnesses, etc. — Conduct of accused — Relevance — Murder by family of deceased**

— Murder trial — Appellant-accused (daughter-in-law and grandson of deceased victim, along with their servant) not found in village soon after occurrence — They did not attend cremation of deceased or prayer ceremony which was held after one week — Such conduct of appellants of not being available in village, is a strong incriminating circumstance — Evidence Act, 1872 — S. 8 — Penal Code, 1860, S. 302 (Para 22)

C. **Criminal Trial — Medical Jurisprudence/Evidence — Asphyxia/Throttling/Strangulation/Hanging — Death due to strangulation — No ligature mark found on deceased — When of no relevance**

— Post-mortem report indicates fracture of hyoid bone — As per post-mortem report, dupatta around neck of deceased had two turns which is unusual for a woman, more so, for a woman of age of deceased — Argument that no ligature mark was found on deceased, held, is of no relevance, as body was infected with maggots — Therefore, ligature mark on soft tissue would not have survived — Penal Code, 1860, S. 302 (Para 23)

D. **Criminal Trial — Circumstantial Evidence — Last seen together — Witness of — Could not identify accused persons in court — When such fact has no effect in chain of events in support of prosecution case**

— Held, although witness (PW 14) of last seen could not identify appellants, but fact remains that he identified that a jute bag was thrown by a man and a woman who came on a TVS motorcycle — Therefore, even though witness could not identify appellants in court as persons who had thrown jute bag, fact that jute bag was thrown by a man and a woman on TVS motorcycle is relevant in chain of events in support of prosecution case — Identification — Identification of accused (Para 25)

Appeals dismissed Y-D/63373/CR

Advocates who appeared in this case :
D.P. Singh, Ms Sonam Gupta, Ms Ishita Jain and Sanjay Jain, Advocates, for the Appellant;
Ms Jaspreet Gogia, Ms Mandakini Singh, Ms Ashima Mandla and Ms Anupriya, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

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2. (2019) 17 SCC 411 : 2018 SCC OnLine SC 1730, *Ram Lal* v. *State of H.P.* 86*c*
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The Judgment of the Court was delivered by

HEMANT GUPTA, J.— The judgment and order dated 19-2-2009[1] passed by the Division Bench of the High Court of Punjab and Haryana in an appeal filed by the three appellants is subject-matter of challenge in the present appeals. It is admitted at Bar that the appellant Swaran Kaur died during pendency of the present appeals after she was released on bail by this Court on 4-10-2010[2].

2. An FIR was lodged by Jarnail Singh (PW 7) on 28-3-2005 at 12.35 p.m. He was the member of Nagar Palika, Morinda and had taken 7 bigha of land on lease from Pritpal Singh, Mohan Singh sons of Khushal Singh on which he had sown wheat crop. He had also taken 7 bigha of land on lease from Faqir Chand where again he had sown wheat crop. He stated that the wheat in the land of Faqir Chand is of small size but the wheat in the land of Pritpal Singh was 2½ feet in height. He further stated that at about 10.30 a.m. in the morning on that day, he along with Mohinder Singh Lamberdar (Village Headman) and Hari Pal had gone to his field but noticed a foul smell emanating from the land of Pritpal Singh near dump of wheat husk. He noticed a jute bag with maggots around it and suspected it to be a dead body of a man or a woman. The land was near the bypass that was frequented by people, however, it was lying closed because of rains. He left Hari Pal and Mohinder Singh Lamberdar at the spot and went to report the matter to the police. Such statement was recorded by Balwant Singh, SHO who later appeared as PW 15. The investigations were initiated, dog squad and finger print experts were called at the spot. Case was registered against unknown persons. Copy of FIR was sent to the Magistrate concerned.

3. On examination of the body in the inquest proceedings (Ext. PL), one telephone diary, a plastic bag, a jute bag and ladies wearing cloth were found. The body was found to be decomposed and could not be identified. A Dupatta was found around the neck. The post-mortem was conducted on 30-3-2005. The dead body was identified by Ujjagar Singh and Kuldeep Singh (PW 13).

4. Dr Harbhajan Singh (PW 6) along with Dr Navtejpal Singh and Dr Gulshan conducted the post-mortem and gave their report (Ext. PG). The Dupatta was found wrapped around the neck with two turns. No ligature mark was found present but skin over the hyoid bone taken for histopathological examination. The underlying hyoid bone was found fractured. The probable time of death was 10 days between death and post-mortem examination. The chemical examination report (Ext. PH) stated that Aluminium Phosphide Insecticide was detected in the samples containing parts of small and large intestine of the deceased. Phosphine, a constituent of Aluminium Phosphide, was detected in decomposed pieces of liver, spleen and kidney. Dr Harbhajan Singh on the request of the police opined that the cause of death is poisoning due to Aluminium Phosphide Insecticide, haemorrhage and haemo-thorax due to injury in the left chest as described in the post-mortem report.

1 *Jagmohan Singh* v. *State of Punjab*, 2009 SCC OnLine P&H 2085
2 *Jagmohan Singh* v. *State of Punjab*, 2010 SCC OnLine SC 69

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5. After completion of the investigations including recording of the statement of the witnesses under Section 161 of the Code of Criminal Procedure, 1973 (for short "the Code"), accused Avtar Singh, Jagmohan Singh, Swaran Kaur and Darshan Singh were made to stand trial. The deceased, Surjit Kaur, was mother of accused Avtar Singh. Swaran Kaur is wife and Jagmohan Singh is son of Avtar Singh. The accused Darshan Singh was a servant at Avtar Singh's house.

6. The prosecution story is that Surjit Kaur (deceased) had inherited 5 bigha of land of Gurmit Singh (other son of deceased) who died issueless and accused Avtar Singh, Jagmohan Singh and Swaran Kaur were not happy with this inheritance. Out of this land, she sold 1 bigha and gave the remaining 4 bighas on theka (lease) to accused Avtar Singh at the rate of Rs 4000 per bigha. However, Avtar Singh had not been paying the lease amount to her. Panchayats had also been convened over this dispute, where the four accused threatened the deceased.

7. The learned Sessions Judge vide judgment and order dated 23-5-2007/26-5-2007 acquitted Avatar Singh but convicted Jagmohan Singh, Swaran Kaur and Darshan Singh.

8. The prosecution relied upon PW 7 Jarnail Singh, on whose statement the prosecution process was initiated. He deposed that the investigating officer had recovered one small diary from the inner pocket of undershirt of the deceased which had some telephone numbers and was taken in possession vide memo Ext. PM. PW 8 Jagtar Singh, a milk man, deposed that he kept some acid with him for checking the fat of milk. He further stated that accused Swaran Kaur had come to him to get some acid to clean the rust on a cooking vessel and a toilet seat. She took ½ a bottle of acid from him. PW 10, Sohan Singh Patwari, had produced the record of the land of Gurmit Singh inherited by the deceased. He produced mutation, Ext. PR and Jamabandi, Ext. PS. PW 11 is Harpal Singh, the Sarpanch of Village Sahauran. He deposed that the deceased came to him on 15-3-2005 with a grievance that Avtar Singh had not been paying lease money to her and he should facilitate the payment. He requested Avtar Singh and Swaran Kaur to give the lease money to Surjit Kaur and they promised to give the lease money of Rs 2000 by 20-3-2005. He later got to know that Surjit Kaur had died.

9. The material witness is Kuldeep Singh (PW 13), son-in-law of the deceased, married to Gurnam Kaur, daughter of Amar Singh about 36 years back. He stated that his mother-in-law Surjit Kaur has been residing in a room (Chaubara). Out of 5 bighas of land, she had sold 1 bigha of land for Rs 1,02,000. Out of sale consideration, Rs 95,000 was deposited by her in the Post Office. The remaining 4 bigha of land was given on lease to Avtar Singh at the rate of Rs 4000 per bigha. Since, Avtar Singh was not paying lease money, there were differences between mother and son. He deposed that in the month of March 2005, Swaran Kaur, daughter-in-law of the deceased informed him that Surjit Kaur had left after taking Rs 1000 from them towards lease money. It was on 29-3-2005, he received a telephone call and also read in the newspaper that a dead body was found. He identified the dead body of his mother-in-law which was kept in the mortuary. He alleged that she has been murdered by Avtar Singh, his wife Swaran Kaur, his son Jagmohan Singh and one Darshan Singh.

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10. Sukhdev Singh (PW 14) has been examined as a person of last seen. He deposed that on 22-3-2005 at about 5.30 a.m., one man and one woman came on TVS motorcycle and they were carrying a gunny bag. He did not identify the accused in court. He read in the newspaper on 28-3-2005 that a dead body was lying on bypass road.

11. The investigating officer Balwant Singh was examined as PW 15. He deposed that on 29-3-2005, Kuldeep Singh (PW 13) and Ujjagar Singh, sons-in-law of the deceased identified the dead body from clothes as the face was disfigured by pouring acid. Kuldeep Singh and Ujjagar Singh had named the accused as suspects. Thereafter, the investigating officer conducted the raids for arresting the accused. He stated that the accused could not be traced in Village Sahauran and other places. Thereafter, on 30-3-2005, Bhupinder Singh (PW 16) brought the accused Darshan Singh, Jagmohan Singh and Swaran Kaur and got their statements recorded. He arrested the accused. Further, accused Swaran Kaur made a disclosure in police custody that she had kept concealed half empty bottle of acid in her house behind a photo on a shelf and could get the same recovered. The said acid bottle was recovered. On 31-3-2005, he arrested accused Avtar Singh in a raid conducted in Village Sahauran. Further, on 1-4-2005, accused Jagmohan Singh gave a disclosure statement that he has kept concealed his TVS motorcycle in a room and he could get it recovered. Thereafter, accused Darshan Singh disclosed that he had kept a folding iron chair concealed in the house of Avtar Singh and he could get it recovered. Both the TVS motorcycle and folding iron chair were recovered from the disclosed places and were taken into possession.

12. The prosecution also examined Bhupinder Singh (PW 16) as the witness of extra-judicial confession. He stated that he was present in his house on 30-3-2005. At about 10 a.m., accused Swaran Kaur, Jagmohan Singh and Darshan Singh present in the court came to his house. Swaran Kaur told him that they have committed a big blunder and that she had put a Dupatta on the neck of her mother-in-law Surjit Kaur and was strangulated. Darshan Singh gave a Kursi (chair) blow on the flank of Surjit Kaur when Jagmohan Singh caught hold of Surjit Kaur by her arms and, as a result thereof, Surjit Kaur died. Swaran Kaur also told him that she poured acid on deceased face. The dead body was kept in a gunny bag and put in a cupboard. Swaran Kaur further stated that the dead body was taken on a motorcycle for being thrown in the canal along with Jagmohan Singh. However, when they reached the bridge there was "Kacha Rasta" (unmetalled path) and because of the water, the motorcycle could not pass through and they threw the gunny bag in the fields of wheat. Swaran Kaur also said that police were looking for them and asked him to produce them before the police as he was acquainted with the police. Accused Jagmohan Singh also confessed that a big mistake had been committed by them and they had killed Surjit Kaur. Darshan Singh also confessed that he along with Swaran Kaur and Jagmohan Singh have committed the murder of Surjit Kaur and recounted the same story. They also disclosed the motive of the murder being that Surjit Kaur was asking for lease money of her land. Further, Bhupinder Singh (PW 16) stated that he produced the accused before the police on 30-3-2005. He also stated that prior to the visit of the accused persons to his house on 30-3-2005, he had no idea about the death of deceased Surjit Kaur.

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However, he stated that he does not remember whether he has mentioned the confessions in his statement recorded under Section 161 of the Code before the police.

13. The learned trial court relied upon the statement of Bhupinder Singh (PW 16) and that of Kuldeep Singh (PW 13) to convict the accused Jagmohan Singh, Swaran Kaur and Darshan Singh. The learned trial court found that the testimony of Sukhdev Singh (PW 14) cannot be used to prove the culpability as he could not establish the identity of those persons in the court. The learned trial court found that there is no challenge to the testimony of Kuldeep Singh (PW 13) that deceased Swaran Kaur had been living alone in a room which shows that she was not living with her son Avtar Singh and his family in the old age indicating that relations of the deceased with her son and daughter-in-law were not cordial. Statement of Harpal Singh (PW 11) Sarpanch was referred to come to the conclusion that Surjit Kaur approached him complaining non-payment of lease money by her son Avtar Singh. He came to know about death of Surjit Kaur from the newspaper reports.

14. The High Court dismissed the appeals filed by the appellants relying upon the statements of Kuldeep Singh (PW 13) and Bhupinder Singh (PW 16) and the motive proved by Harpal Singh (PW 11).

15. Before this Court, the learned counsel for the appellants submitted that the prosecution has failed to complete the chain of events so as to lead only one conclusion that the appellants and the appellants alone have committed the crime. The evidence of last seen has not been believed by the trial court. In the absence of evidence of last seen, the other evidence is of extra-judicial confession. It is argued that extra-judicial confession is a weak evidence and can be made basis of conviction if the person before whom confession is made appear to be unbiased and not even remotely inimical to the accused. Reference was made to the judgment reported as *Ajay Singh* v. *State of Maharashtra*[3] and *S. Arul Raja* v. *State of T.N.*[4]

16. It is also argued that no motive can be attributed to the accused as the deceased was last seen by Kuldeep Singh (PW 13) on 20-3-2005 and as per medical evidence, the probable time of death is 20-3-2005 or so. It is thus argued that the witness was the only person who had met the deceased immediately prior to her death and it is he who has to explain the death of the deceased. The deceased was staying in Village Behrampur, Village of Kuldeep Singh (PW 13). Therefore, in the absence of any evidence that deceased was staying in Village Sahauran, the findings recorded by the courts below are not sustainable. It is also argued that as per post-mortem report (Ext. PJ), cause of death is poisoning due to Aluminium Phosphide insecticide, haemorrhage and haemo-thorax, but there is no evidence as to how the poison was administered nor there was any recovery of poison. It is contended that if the death was due to strangulation, poison in the body negates the prosecution story. It is also argued that a fracture of hyoid bone does not necessarily mean strangulation. He placed reliance upon *Sharad Birdhichand Sarda* v. *State of Maharashtra*[5]

3 (2007) 12 SCC 341 : (2008) 1 SCC (Cri) 371
4 (2010) 8 SCC 233 : (2010) 3 SCC (Cri) 801
5 (1984) 4 SCC 116 : 1984 SCC (Cri) 487

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and *Devi Lal* v. *State of Rajasthan*[6] as to how the circumstantial evidence can be made basis for conviction and that none of the circumstances are satisfied by the prosecution.

17. On the other hand, Ms Gogia, learned counsel for the State argued that though the evidence of last seen has not been accepted but the fact remains that the statement of Sukhdev Singh (PW 14) is relevant to the extent that he had seen one man and a woman on TVS motorcycle though he could not identify the person who were riding on such motorcycle. Still further, Harpal Singh (PW 11), the Sarpanch had deposed in respect of motive of the offence as the deceased had inherited the property of Gurmit Singh, her other son who died issueless. It is the share of the property of Gurmit Singh which became the point of conflict inasmuch as the said land was given on lease by the deceased to her other son Avtar Singh. Surjit Kaur had even approached Sarpanch for non-payment of lease money by the accused. The learned counsel for the State also refers to the statement of Kuldeep Singh (PW 13), son-in-law of the deceased to the effect that she was living separately and not with her son and daughter-in-law. He deposed about the inheritance of land of Gurmit Singh and lease of land to Avtar Singh at the rate of Rs 4000 per bigha. In cross-examination, he stated that Gurmit Singh died in the year 2003. He also stated that deceased was first married to Bant Singh and her second marriage was with Amar Singh. She had a girl child from her first marriage. Ujjagar Singh is the husband of that girl. The statement of Ujjagar Singh was also recorded in the police station identifying dead body of the deceased. Further, Kuldeep Singh states that on 29-3-2005, he received a telephone call and read in the newspaper that a dead body has been found giving description of the body and the clothes. He identified the dead body as that of his mother-in-law. In cross-examination, he deposed that on 20-3-2005, Surjit Kaur had not come to his house (in Village Behrampur Zimidara) but he met her in Panchayat, Village Sahauran. He had not gone to visit in-laws house on 20-3-2005. He inquired from several relatives about the availability of Surjit Kaur. He deposed that none of the accused were present at the time of cremation in the Village Sahauran and none of Avtar Singh's children were present at the time of cremation. Further, a prayer meeting was held after seven days of cremation on a Sunday, here one son of Avtar Singh along with his younger daughter was present. He further stated that the deceased had visited his house 25 days prior to the occurrence for 2 days and that he never telephoned her between the time she left his place till 20-3-2005, when he met her in the Panchayat at Village Sahauran. He denied the suggestions that deceased never went back to Village Sahauran.

18. The learned counsel for the State further submitted that Balwant Singh (PW 15), Investigating Officer deposed that he opened gunny bag wherein a dead body of woman was recovered. He got photograph of the dead body. On further search of the dead body on 29-3-2005, he recovered a small telephone diary which was lying in the inner side pocket of the undershirt of the dead body and was having telephone numbers of some persons. Such diary was taken in possession vide recovery memo, Ext. PM. He got published the photograph and news of the recovery of unidentified dead body of a woman. He had also

6 (2019) 19 SCC 447 : 2019 SCC OnLine SC 39

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tried to contact by calling the numbers noted in the diary. It was on 29-3-2005, Kuldeep Singh and Ujjagar Singh, sons-in-law of the deceased came to the mortuary and identified the dead body as that of Surjit Kaur from the clothes as the face of dead body was disfigured by pouring acid. The photographs produced in evidence proves the disfigurement of the face and that the body could be identified only by the clothes worn by the deceased. He deposed that he conducted raids for arresting the accused named by Kuldeep Singh and Ujjagar Singh but could not find the accused in Village Sahauran. It was on 30-3-2005, Bhupinder Singh (PW 16) produced the accused Darshan Singh, Swaran Kaur and Jagmohan Singh before whom they have made confessional statements. It was stated that Avtar Singh has not suffered any extra-judicial confession before Bhupinder Singh (PW 16). On the basis of disclosure statement of Swaran Kaur (Ext. PZ), empty half bottle of acid was recovered from her house.

19. The learned counsel for the State relies upon judgment of this Court reported as *Ram Lal* v. *State of H.P.*[7] to contend that the evidence of extra-judicial confession need not in all cases be corroborated. It was held as under: (SCC para 14)

> "*14*. It is well settled that conviction can be based on a voluntary confession but the rule of prudence requires that wherever possible it should be corroborated by independent evidence. Extra-judicial confession of the accused need not in all cases be corroborated. In *Madan Gopal Kakkad* v. *Naval Dubey*[8], this Court after referring to *Piara Singh* v. *State of Punjab*[9], held that the law does not require that the evidence of an extra-judicial confession should in all cases be corroborated. The rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated."

20. We have heard the learned counsel for the parties and find no merit in the present appeals.

21. Gurmit Singh, other son of deceased, passed away in 2003. The deceased inherited his share of land. Out of the 5 bighas of land so inherited, she sold 1 bigha for Rs 1,02,000 whereas she leased the remaining 4 bighas to her other son, Avtar Singh. The lease money was not being paid to her and this fact has been stated by Sarpanch (Harpal Singh) (PW 11) and also by Kuldeep Singh (PW 13), the son-in-law of the deceased. The lease money was the only source of survival of the old woman who was living in a separate room and not with her son, Avtar Singh. Harpal Singh (PW 11) has also deposed that only a sum of Rs 1000 had been paid with a promise to pay another sum of Rs 1000 later. It, thus, transpires that the deceased was living separately and was not being paid the lease money which was necessary for her survival.

22. Further, the appellants were not found in the village soon after the occurrence as deposed by Kuldeep Singh (PW 13) and investigating officer Balwant Singh (PW 15). They did not attend the cremation or the prayer ceremony which was held after one week. The conduct of the appellants of

7 (2019) 17 SCC 411 : 2018 SCC OnLine SC 1730
8 (1992) 3 SCC 204 : 1992 SCC (Cri) 598
9 (1977) 4 SCC 452 : 1977 SCC (Cri) 614

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not being available in the village is a strong circumstance of their conduct post death.

23. There is no evidence led by the prosecution of administering Aluminium Phosphide but the post-mortem report indicates fracture of hyoid bone. As per post-mortem report, the Dupatta around the neck of the deceased had two turns which is unusual for a woman, more so, for a woman of the age of deceased. The argument that no ligature mark was found on the deceased is of no relevance as the body had been infected with maggots. Therefore, the ligature mark on the soft tissue would not have survived.

24. Furthermore, the bottle of acid was recovered on the basis of disclosure made by accused Swaran Kaur. The photographs that were taken showed disfigurement of the face of the deceased. Such disfigurement was caused by pouring of acid with intention to avoid identification of the dead body.

25. Although the witness (PW 14) of last seen could not identify the appellants, but the fact remains that he identified that a jute bag was thrown by a man and a woman who came on a TVS motorcycle. Therefore, even though the witness could not identify the appellants in court as the persons who had thrown the jute bag, the fact that the jute bag was thrown by a man and a woman on a TVS motorcycle is relevant in chain of events in support of the prosecution case.

26. Another argument raised by Mr D.P. Singh which needs mention is that Darshan Singh is not a member of family and has no motive in the commission of crime. It is observed that Darshan Singh was convicted on the basis of extra-judicial confession made before Bhupinder Singh (PW 16). In the extra-judicial confession, Darshan Singh has deposed that he has given a kursi (chair) blow on the flank of Surjit Kaur. The post-mortem report (Ext. PJ) shows fracture of hyoid bone, an irregular wound over the left breast and fracture of the 6th and 7th rib. Therefore, the extra-judicial confession made by Darshan Singh is also supported by medical evidence. Further, Darshan Singh had also disclosed that he had kept concealed a folding iron chair in house of Avtar Singh, the said chair was recovered. The prosecution has proved the chain of circumstances to hold the appellants guilty of the offences charged.

27. In view of the evidence led and the finding recorded by the courts below, we do not find any merit in the present appeals. Accordingly, both the appeals are dismissed. The sentence of the appellants were suspended by this Court. They shall now surrender to undergo the remaining sentence.

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3-Judge Bench
2020
Sep. 30

(2020) 10 Supreme Court Cases 517

(BEFORE ROHINTON FALI NARIMAN, NAVIN SINHA AND INDIRA BANERJEE, JJ.)

SUBED ALI AND OTHERS .. Appellants;

Versus

STATE OF ASSAM .. Respondent.

Criminal Appeal No. 1401 of 2012†, decided on September 30, 2020

A. **Penal Code, 1860 — S. 34 — Common intention — How inferred — Foundation for conviction on basis of common intention — Principle of vicarious/constructive liability — Principles summarised**

Held :

Common intention consists of several persons acting in unison to achieve a common purpose, though their roles may be different. The role may be active or passive is irrelevant, once common intention is established. There can hardly be any direct evidence of common intention. It is more a matter of inference to be drawn from the facts and circumstances of a case based on the cumulative assessment of the nature of evidence available against the participants. (Para 14)

The foundation for conviction on the basis of common intention is based on the principle of vicarious responsibility, by which, a person is held to be answerable for the acts of others with whom he shared the common intention. The presence of the mental element or the intention to commit the act, if cogently established, is sufficient for conviction, without actual participation in the assault. It is, therefore, not necessary that before a person is convicted on the ground of common intention, he must be actively involved in the physical activity of assault. If the nature of evidence displays a prearranged plan and acting in concert pursuant to the plan, common intention can be inferred. A common intention to bring about a particular result may also develop on the spot as between a number of persons deducible from the facts and circumstances of a particular case. The coming together of the accused to the place of occurrence, some or all of whom may be armed, the manner of assault, the active or passive role played by the accused, are, but only some of the materials for drawing inferences. (Paras 15 to 19)

Ramaswami Ayyangar v. *State of T.N.*, (1976) 3 SCC 779 : 1976 SCC (Cri) 518; *Nandu Rastogi* v. *State of Bihar*, (2002) 8 SCC 9 : 2003 SCC (Cri) 177; *Surendra Chauhan* v. *State of M.P.*, (2000) 4 SCC 110 : 2000 SCC (Cri) 772; *Nand Kishore* v. *State of M.P.*, (2011) 12 SCC 120 : (2012) 1 SCC (Cri) 378, *affirmed*

B. **Penal Code, 1860 — Ss. 302/34 — Brutal assault leading to death of two — Murder committed in furtherance of common intention, if established — Dispute with regard to money, apparent from evidence of witnesses — Consistent nature of evidence available against accused persons (3 in number) — Evidence of eyewitnesses, found credible — Minor inconsistencies and**

† Arising from the Judgment and Order in *Subed Ali* v. *State of Assam*, 2012 SCC OnLine Gau 111 (Gauhati High Court, Crl. A. No. 32 of 2009, dt. 3-4-2012)

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contradictions in evidence of eyewitnesses, inconsequential — Acquittal of 2 co-accused (on benefit of doubt), of no avail to accused persons, in view of consistent nature of evidence available against them — Sufficient light at the time of occurrence for identification of accused persons, present — Moreover, parties were known to each other from before, therefore, identification in dusk, undoubtable — No infirmity in conviction of accused persons with aid of S. 34 made out — Hence, their conviction under Ss. 302/34, and sentence of life imprisonment along with fine and default stipulation, stands confirmed (Paras 8 to 21)

Karnail Singh v. *State of Punjab*, 1954 SCR 904 : AIR 1954 SC 204 : 1954 Cri LJ 580, *relied on*

Ramaswami Ayyangar v. *State of T.N.*, (1976) 3 SCC 779 : 1976 SCC (Cri) 518; *Nandu Rastogi* v. *State of Bihar*, (2002) 8 SCC 9 : 2003 SCC (Cri) 177; *Surendra Chauhan* v. *State of M.P.*, (2000) 4 SCC 110 : 2000 SCC (Cri) 772; *Nand Kishore* v. *State of M.P.*, (2011) 12 SCC 120 : (2012) 1 SCC (Cri) 378; *Subed Ali* v. *State of Assam*, 2012 SCC OnLine Gau 111, *affirmed*

Appeal dismissed Y-D/65990/CR

Chronological list of cases cited ***on page(s)***

1. 2012 SCC OnLine Gau 111, *Subed Ali* v. *State of Assam* 518*e-f*
2. (2011) 12 SCC 120 : (2012) 1 SCC (Cri) 378, *Nand Kishore* v. *State of M.P.* 523*c-d*
3. (2002) 8 SCC 9 : 2003 SCC (Cri) 177, *Nandu Rastogi* v. *State of Bihar* 522*f*
4. (2000) 4 SCC 110 : 2000 SCC (Cri) 772, *Surendra Chauhan* v. *State of M.P.* 523*a*
5. (1976) 3 SCC 779 : 1976 SCC (Cri) 518, *Ramaswami Ayyangar* v. *State of T.N.* 522*b-c*
6. 1954 SCR 904 : AIR 1954 SC 204 : 1954 Cri LJ 580, *Karnail Singh* v. *State of Punjab* 520*f-g*

The Judgment of the Court was delivered by

NAVIN SINHA, J.— The conviction of the appellants under Sections 302/34 of the Penal Code, 1860 (for short "IPC") by the Sessions Judge, North Lakhimpur, has been affirmed[1] by the High Court, sentencing them to life imprisonment along with fine and a default stipulation. Thus, the present appeal by the appellants.

2. The prosecution alleged that the two deceased, Abdul Motin and Abdul Barek were assaulted on 5-8-2005 at about 6.00 p.m. while they were returning from the market on bicycles along with others. Abdul Barek died on the spot. Abdul Motin died in the hospital during the course of treatment the same night. Originally there were five named accused persons. Accused 3 and 5 have been acquitted giving them the benefit of doubt. We are not informed of any appeal preferred against their acquittals.

3. Shri Gaurav Agrawal, learned counsel for the appellants, submitted that if two of the accused have been acquitted giving them the benefit of doubt on basis of the same evidence, the conviction of the appellants is unjustified and they too are entitled to acquittal on benefit of doubt. There are several

1 *Subed Ali* v. *State of Assam*, 2012 SCC OnLine Gau 111

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inconsistencies in the evidence of the eyewitnesses PWs 5, 6, 7 and 9. The occurrence had taken place after darkness had engulfed, making identification doubtful relying on the cross-examination of PW 6. PW 1 deposed that he had been informed by Babulal and Asgar Ali that the appellants were the assailants. The prosecution has not examined either of them. The eyewitnesses have deposed of assault upon the two deceased by Appellants 2 and 3 only. There is no allegation that Appellant 1 was armed in any manner or that he also assaulted any one of the two deceased. Thus, there is no material to infer common intention with regard to Appellant 1. Appellants 2 and 3 are, therefore, individually liable for their respective assault upon the two deceased. The recoveries attributed to the appellants have been disbelieved. It was lastly submitted that no charge had been framed under Section 34 IPC.

4. The learned counsel for the State submitted that the eyewitnesses PWs 5, 6, 7 and 9 are consistent with regard to the participation of the appellants in the assault. The acquittal of the two co-accused on benefit of doubt can be of no avail to the appellants in view of the nature of evidence available with regard to them. Common intention is clearly established by the fact that the appellants were armed and lay in wait for the two deceased who were accosted while returning from the market and the assault followed leading to the death of the two.

5. We have considered the submissions on behalf of the parties. The two deceased were returning from the market accompanied by PWs 5, 6, 7 and 9. They were intercepted by the appellants after which the assault followed. Abdul Barek died on the spot. The post-mortem report of the deceased was conducted by PW 8, who found the following injuries on his person:

> "During post-mortem examination, left leg of the deceased was found amputated at 8 cm above left ankle joint. The wound of the amputated part was incised looking of sizes 6 cm × 4 cm a clean bevelled sharp cut was seen in both bones of the leg. The muscles, major blood vessels were also damaged through and through. The detached part was also seen with the same injury. The injury was ante-mortem in nature. The other organs were found healthy."

6. Likewise, the post-mortem of Abdul Motin was done by PW 10, who found the following injuries on his person:

> "Rigor mortis present on 6th upper and lower limbs. The body was very pale, multiple sharp cuts in 6th lower limbs. The left foot was cut about 1st above the ankle joint and separate from the upper leg and was not found with body at the time of my post-mortem examination.
>
> 1. Sharp cut in the lower limbs, left leg at about 1" above the ankle joint causing complete detachment of left foot from left leg. Both leg bones, skin, soft tissues and vessels were cut through causing extensive 8 haemorrhages, skin margins. All wounds were sharp and retracted. Muscles, ligaments vessels were also retracted.

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2. Sharp cut right leg, about 2" in size at the anterior part at the junction of upper and middle thread. It was obliquely placed and causing cut in the skin, cut and fracture of right tibia and medial part of calf muscle and vessels and caused bleeding.

3. Another sharp cut in middle thread of right leg about 2" in size placed in anterior medial part, outer skin, caused cut and fracture of right tibia, causing sufficient haemorrhage. It also cut the calf muscles.

4. Sharp cut on the lateral side of the right ankle causing sharp cut obliquely down. It was also about 3½" in size causing about 2/3rd separation of ankle of the right foot. The skin, lower end of fibula ligaments and muscles and vessels and upper part of calcaneus bone was cut through, causing anterior haemorrhage.

All the injuries were ante-mortem in nature. Other organs were found healthy."

7. A GD entry was made at the North Lakhimpur Police Station at 9.00 p.m. on 5-8-2005 on oral information by PW 1 who was the Gaonburah, that some unknown persons had assaulted the two deceased, one of whom died on the spot, and the other had been taken to the hospital. A formal FIR was lodged on 6-8-2005 at 3.15 p.m. by the brother of the deceased after the injured was also deceased, naming five accused including the appellants.

8. Charges were framed against the five accused under Sections 147, 341 and 302 IPC. The charge under Section 341 IPC was held not to have been proved against the accused. The Sessions Judge acquitted Accused 3 and 5 based on the evidence of PWs 1 and 5 giving them the benefit of doubt with regard to their presence and participation. Since the number of accused persons now fell below five, conviction of the appellants followed under Sections 302/34 IPC. The acquittal of the two co-accused in the facts of the case, despite the deposition of the eyewitnesses, can be of no avail to the appellants in view of the consistent nature of the evidence available against them. Minor inconsistencies and contradictions in the evidence of the eyewitnesses are considered inconsequential. Their evidence on all material aspects are consistent lending credibility to their eyewitness account. We find no infirmity in the conviction of the appellants with the aid of Section 34. In *Karnail Singh* v. *State of Punjab*[2], it was held as follows: (SCC p. 207, para 8)

"*8.* ... But if the facts to be proved and the evidence to be adduced with reference to the charge under Section 149 would be the same if the charge were under Section 34, then the failure to charge the accused under Section 34 could not result in any prejudice and in such cases the substitution of Section 34 for Section 149 must be held to be a formal matter."

2 1954 SCR 904 : AIR 1954 SC 204 : 1954 Cri LJ 580

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9. PW 1 is not an eyewitness to the occurrence. The fact that both Babul Ali and Asgar Ali have not been examined by the prosecution is considered irrelevant in view of the evidence of the investigating officer PW 12 when confronted by the prosecution, he denied that PW 1 had ever made any such statement to him during investigation.

10. PW 5 was an eyewitness accompanying the two deceased. He deposed that there was sufficient light at the time of occurrence for identification. In his cross-examination he deposed that Appellant 1 stopped the two deceased after which Appellant 2 assaulted Abdul Barek on the leg with a sharp cutting weapon. The second deceased, Abdul Motin tried to flee after he was injured by Appellant 3, but was chased by the accused and caught near the house of Mamud Ali at which point of time the witness ran away fearing for his own safety. Later he learnt that the two persons had been deceased.

11. Similarly, PWs 6, 7 and 9 deposed that Appellant 1 stopped the deceased, Appellant 2 assaulted deceased Abdul Barek with a "Dao", who died on the spot. Appellant 3 assaulted Abdul Motin and injured him. The injured tried to flee from the place of occurrence. He was chased by the accused persons and caught near the house of Mamud Ali where he was brutally assaulted. He was then dragged to the spot where Abdul Barek was lying. The injured was taken to the hospital and died the same night. The deposition of PW 6 in his cross-examination with regard to darkness affecting identification is inconsequential in view of the consistent evidence of PWs 5, 7 and 9 that it was evening time after sunset but not dark, making identification in the dusk possible. In any event, it is apparent that the parties were known to each other from before, and therefore, identification in the dusk cannot be doubted.

12. We, therefore, find no reason to doubt the presence and assault on the two deceased by Appellants 2 and 3 to grant them acquittal on any benefit of doubt or parity with the acquitted accused, merely because no appeal has been preferred.

13. That leaves for our consideration the submission of Shri Agrawal that Appellant 1 is entitled to acquittal as he cannot be said to have shared any common intention with Appellants 2 and 3 and who are liable for their individual acts.

14. Common intention consists of several persons acting in unison to achieve a common purpose, though their roles may be different. The role may be active or passive is irrelevant, once common intention is established. There can hardly be any direct evidence of common intention. It is more a matter of inference to be drawn from the facts and circumstances of a case based on the cumulative assessment of the nature of evidence available against the participants.

15. The foundation for conviction on the basis of common intention is based on the principle of vicarious responsibility by which a person is held to be answerable for the acts of others with whom he shared the common

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intention. The presence of the mental element or the intention to commit the act if cogently established is sufficient for conviction, without actual participation in the assault. It is, therefore, not necessary that before a person is convicted on the ground of common intention, he must be actively involved in the physical activity of assault. If the nature of evidence displays a prearranged plan and acting in concert pursuant to the plan, common intention can be inferred. A common intention to bring about a particular result may also develop on the spot as between a number of persons deducible from the facts and circumstances of a particular case. The coming together of the accused to the place of occurrence, some or all of whom may be armed, the manner of assault, the active or passive role played by the accused, are but only some of the materials for drawing inferences.

16. In *Ramaswami Ayyangar* v. *State of T.N.*[3], in order to establish common intention it was observed as follows: (SCC p. 783, para 12)

> "*12.* ... The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim, or may otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his coparticipants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Section 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the "criminal act". The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them."

17. In *Nandu Rastogi* v. *State of Bihar*[4], with regard to the inference for common intention this Court observed as follows: (SCC p. 16, para 17)

> "*17.* ... They came together, and while two of them stood guard and prevented the prosecution witnesses from intervening, three of them took the deceased inside and one of them shot him dead. Thereafter they fled together. To attract Section 34 IPC it is not necessary that each one of the accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance

3 (1976) 3 SCC 779 : 1976 SCC (Cri) 518
4 (2002) 8 SCC 9 : 2003 SCC (Cri) 177

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thereof each one played his assigned role by doing separate acts, similar or diverse."

18. In *Surendra Chauhan* v. *State of M.P.*[5], it was noticed that absence of a positive act of assault was not a necessary ingredient to establish common intention observing: (SCC p. 117, para 11)

> "*11.* Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them."

19. A similar view was taken in *Nand Kishore* v. *State of M.P.*[6]

20. Coming to the facts of the present case, Appellant 1 lay in wait along with the other two appellants who were armed. Appellant 1 stopped the two deceased who were returning from the market. The assault commenced after the deceased had halted. That there was some dispute with regard to money is apparent from the evidence of the witnesses. Abdul Barek died on the spot as a result of the brutal assault. Abdul Motin was injured in the first assault upon him by Appellant 3, after which he tried to flee. Appellant 1 along with the other accused chased him, caught hold of him near the house of Mamud Ali where he was brutally assaulted. Abdul Motin was then dragged by the accused persons to the place where Abdul Barek lay motionless. To our mind no further evidence is required with regard to existence of common intention in Appellant 1 to commit the offence in question. We, therefore, find no reason to grant any benefit to Appellant 1 on the plea that there is no role or act of assault attributed to him, denying the existence of any common intention for that reason.

21. Resultantly, we find no reason to interfere with the conviction and sentence of the appellants. The appeal is dismissed.

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5 (2000) 4 SCC 110 : 2000 SCC (Cri) 772
6 (2011) 12 SCC 120 : (2012) 1 SCC (Cri) 378

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3-Judge Bench
2020
Oct. 29

(2020) 10 Supreme Court Cases 733

(BEFORE SANJAY KISHAN KAUL, KRISHNA MURARI AND HRISHIKESH ROY, JJ.)

CHUNTHURAM .. Appellant;

Versus

STATE OF CHHATTISGARH .. Respondent.

Criminal Appeal No. 1392 of 2011†, decided on October 29, 2020

A. **Penal Code, 1860 — Ss. 302/34 and 201/34 — Murder trial — Appellant-accused along with one co-accused (since acquitted), allegedly assaulted deceased with axe and stick, which resulted in his death on the spot — Land dispute between accused and victim, as also fact, that deceased was charged with murder of brother of the accused, leading to animosity, as cause of murder — High Court, while acquitting co-accused, upheld conviction of appellant under Ss. 302/34 and 201/34 — Held, in view of serious infirmities in prosecution evidence, conviction of appellant, reversed**

— Recovery of alleged weapons of assault on basis of statement of accused, never linked to crime — Although trial court had referred to chemical analyst's report of weapons sent for chemical examination, to conclude presence of blood on exhibits, but, purported chemical analyst report, not found available with case records, suggesting that prosecution did not produce any chemical analyst report in instant case — Vital forensic evidence withheld by prosecution, which warrants adverse inference against prosecution

— There were infirmities in conduct of test identification parade — Testimony of eyewitness (PW 4), whose testimony was found unreliable so far as acquitted co-accused is concerned, held, is equally unreliable against appellant-accused, particularly because of his poor vision and hearing capacity — Further, conduct of eyewitness also unnatural and contrary to human nature, as he knew victim and his family and allegedly saw fatal assault on victim, and yet, kept quiet about incident — No material to show any proximate and immediate motive for crime present — In view of aforesaid infirmities in prosecution evidence, conviction of appellant, stands reversed — Criminal Trial — Witnesses — Eyewitness — Reliability of — Poor vision and hearing capacity — Impact of — Evidence Act, 1872 — S. 60 — Impaired faculties of alleged eyewitness — Effect (Paras 8 to 19)

Ramkishan Mithanlal Sharma v. *State of Bombay*, (1955) 1 SCR 903 : AIR 1955 SC 104 : 1955 Cri LJ 196; *Amar Singh* v. *State (NCT of Delhi)*, 2020 SCC OnLine SC 826, *followed*

Musheer Khan v. *State of M.P.*, (2010) 2 SCC 748 : (2010) 2 SCC (Cri) 1100, *affirmed*

Chunthu Ram v. *State of Chhattisgarh*, Criminal Appeal No. 513 of 2002, order dated 15-2-2008 (Chh), *partly reversed*

Selveraj v. *State of T.N.*, (1976) 4 SCC 343 : 1976 SCC (Cri) 620, *cited*

† Arising from the Judgment and Order in *Chunthu Ram* v. *State of Chhattisgarh* (Chhattisgarh High Court, Crl. A. No. 513 of 2002, dt. 15-2-2008)

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B. **Criminal Trial — Clues and Tell-Tale Signs/Forensics — Vital forensic evidence being kept away — Effect of — Drawing of adverse inference is warranted**

— Held, when vital forensic evidence is kept away, adverse inference will have to be drawn against prosecution — Although trial court had referred to chemical analyst's report, of weapons sent for chemical examination, to conclude presence of blood on exhibits, but, purported chemical analyst report, is not found available with case records, suggesting, that prosecution did not produce any chemical analyst report in instant case — Vital forensic evidence was withheld by prosecution, which draws adverse inference against prosecution — Evidence Act, 1872, S. 114 Ill. (g) (Para 9)

C. **Criminal Trial — Identification — Test Identification Parade (TIP) — Evidentiary value of — When identifications are held in police presence — Effect of**

— Held, test identification evidence is not substantive piece of evidence, but can only be used in corroboration of statements in court — Also, when identifications are held in police presence, resultant communications tantamount to statements made by identifiers to a police officer in course of investigation, and they fall within ban of S. 162 CrPC — Evidence Act, 1872 — S. 9 — Criminal Procedure Code, 1973, S. 162 (Paras 10 and 11)

Ramkishan Mithanlal Sharma v. *State of Bombay*, (1955) 1 SCR 903 : AIR 1955 SC 104 : 1955 Cri LJ 196, *followed*

Musheer Khan v. *State of M.P.*, (2010) 2 SCC 748 : (2010) 2 SCC (Cri) 1100, *affirmed*

D. **Criminal Trial — Conduct/Reaction/Behaviour of witness — Unnatural conduct of eyewitness — Murder trial — Eyewitness knew deceased and claimed to have seen assault on deceased by appellant-accused and another person, but, he did not take any proactive steps in matter, to either report to police or inform any of family members of deceased — Inference from**

— Held, such conduct of eyewitness, is contrary to human nature — He knew victim, allegedly saw fatal assault on victim, and yet, kept quiet about incident — If he had occasion to actually witness assault, his reaction and conduct does not match up to ordinary reaction of a person, who knew deceased and his family — His testimony, therefore, deserves to be discarded — Evidence Act, 1872 — S. 8 — Penal Code, 1860, Ss. 302/34 and 201/34 (Paras 15 and 16)

Amar Singh v. *State (NCT of Delhi)*, 2020 SCC OnLine SC 826, *followed*

E. **Criminal Trial — Proof — Benefit of doubt — If two views are possible on evidence adduced in a case, one pointing to guilt of accused and other to his innocence — Which view to be adopted — Held, in such case, view favourable to accused should be adopted (Para 18)**

Appeal allowed Y-D/66313/CR

Advocates who appeared in this case :
Yashraj Singh Deora (Amicus Curiae), Advocate, for the Appellant;
Nishanth Patil, Advocate, for the Respondent.

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Chronological list of cases cited ***on page(s)***

1. 2020 SCC OnLine SC 826, *Amar Singh* v. *State (NCT of Delhi)* 738*e*
2. (2010) 2 SCC 748 : (2010) 2 SCC (Cri) 1100, *Musheer Khan* v. *State of M.P.* 737*c*
3. Criminal Appeal No. 513 of 2002, order dated 15-2-2008 (Chh), *Chunthu Ram* v. *State of Chhattisgarh* **(partly reversed)** 735*b-c*, 737*a*
4. (1976) 4 SCC 343 : 1976 SCC (Cri) 620, *Selveraj* v. *State of T.N.* 738*g*
5. (1955) 1 SCR 903 : AIR 1955 SC 104 : 1955 Cri LJ 196, *Ramkishan Mithanlal Sharma* v. *State of Bombay* 737*e-f*

The Judgment of the Court was delivered by

HRISHIKESH ROY, J.— The present appeal challenges the judgment and order dated 15-2-2008[1] of the Chhattisgarh High Court, whereby Criminal Appeal No. 513 of 2002 was disposed of upholding the conviction of the appellant in terms of the conclusion reached by the learned Additional Sessions Judge, Jashpurnagar (hereinafter referred to as "the trial court") in Sessions Case No. 149 of 2001. The trial court convicted the appellant and co-accused Jagan Ram, under Sections 302/34 of the Penal Code, 1860 (for short "IPC") and sentenced them to undergo life imprisonment and fine of Rs 500 each and for the conviction under Sections 201/34 IPC three years' imprisonment and fine of Rs 500 each was ordered. The co-accused Jagan Ram was however acquitted by the High Court.

2. The case of the prosecution is that on 14-6-2001 at 1900 hrs when the deceased Laxman was returning from Tamta Market to Pandripani Village, the appellant Chunthuram and the co-accused Jagan Ram assaulted him with axe and stick, and Laxman died on the spot. The FIR was lodged by Mahtoram (PW 1), the father of the deceased stating therein that when his son did not return home from Tamta Market at night and enquiries were made in the village, his grandson Santram informed him that Chunthuram and Jagan Ram had killed Laxman and concealed his dead body in a pit. The informant rushed to the location and found the injury inflicted on the dead body of his son. The FIR mentioned a land dispute between the accused and the victim as also the fact that the deceased Laxman was charged with murder of one Sildhar, the brother of the two co-accused and because of this animosity, the accused had murdered Laxman.

3. Following the investigation, charges were framed and the case was committed for trial. The prosecution examined seven witnesses to prove the charges. The accused in their Section 313 CrPC statements pleaded innocence and alleged false implication.

4. On evaluation of the evidence, the trial court reached a guilty verdict and sentenced both accused accordingly.

1 *Chunthu Ram* v. *State of Chhattisgarh*, Criminal Appeal No. 513 of 2002, order dated 15-2-2008 (Chh)

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5. In the resultant criminal appeal, the High Court referred to the testimony of Bhagat Ram (PW 4) who admitted that he could not recognise the second person at the spot and could identify only Chunthuram. On this testimony of the eyewitness, the co-accused Jagan Ram was acquitted. The High Court however upheld the conviction of Chunthuram referring to the testimony of the eyewitness Bhagat Ram (PW 4) as it was corroborated by other evidence.

6. We have heard Mr Yashraj Singh Deora, the learned Amicus Curiae for the appellant. The learned counsel has painstakingly taken us through the evidence on record to firstly point out that recovery of the weapons of assault from the house of the accused, was never linked to the crime and therefore the recovered articles can be of no use for the prosecution. The so-called identification of the lungi by Filim Sai (PW 3), whose testimony is made the basis of establishing the presence of Chunthuram at the site of the incident, is next questioned by Mr Deora. The credibility of the sole eyewitness Bhagat Ram (PW 4) with his poor eyesight (inability to see anything beyond a distance of two feet) coupled with his weak hearing is challenged by the learned advocate by highlighting the fact that the incident occurred on a cloudy evening. According to the learned counsel the past land dispute does not provide a direct motive for the murder since the said dispute was finally resolved more than two years prior to the incident and the murder of Sildhar was allegedly related to the said dispute. Explaining the simple injuries found on the two accused, Mr Deora reads Dr P. Sutharu's (PW 7) evidence who in his cross-examination admitted that the simple injuries on Chunthuram could be due to thorny shrubs.

7. In his turn, Mr Nishanth Patil, the learned counsel for the State adverts to the land dispute and the fact that the deceased Laxman was tried for murder of Sildhar, the brother of the accused to argue that the appellant had the motive for the crime. The State counsel then refers to the weapons of assault and the recovery of those from the place pointed out by the accused. According to Mr Patil, the eyewitness Bhagat Ram (PW 4), heard the deceased cry out and saw him being assaulted by Chunthuram and another which establishes the presence of the accused and this evidence must be given due weightage. The State therefore argues that the prosecution has discharged its burden to sustain the conviction through projection of motive, recovery of the murder weapons and wearing articles, the testimony of the eyewitness and other related evidence.

Discussion and conclusion

8. The alleged weapons of assault recovered on the basis of statement of the accused could be a key evidence to support the prosecution, but unfortunately, the recovered articles were never linked to the crime. The police sent them to the CHC for examination and the CHC doctor (PW 7) had stated that the injuries found on the body could have been caused by those weapons. However, in his cross-examination, the doctor admitted that bloodstains or other marks on the exhibits could not be seen. The weapons were reportedly sent for chemical

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examination and although the trial court had referred to the report of chemical analyst to conclude the presence of blood on the exhibits but the purported chemical analyst report is not found available with the case records. Moreover, there is no mention of any such report in the High Court's judgment[1]. This would suggest that the prosecution did not produce any chemical analyst report in the case.

9. The relevant forensic evidence for the seized shirt (supposedly worn by the co-accused Jagan Ram acquitted by the High Court) was withheld by the prosecution. When such vital forensic evidence is kept away, an adverse inference will have to be drawn against the prosecution.

10. To establish the presence of Chunthuram at the place of incident, the courts relied on the test identification parade and the testimony of Filim Sai (PW 3). The test identification evidence is not substantive piece of evidence but can only be used, in corroboration of statements in court. The ratio in *Musheer Khan* v. *State of M.P.*[2] will have a bearing on this issue where A.K. Ganguly, J. writing for the Division Bench succinctly summarised the legal position as follows: (SCC p. 756, para 24)

> "*24*. It may be pointed out that identification test is not substantive evidence. Such tests are meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines."

11. The infirmities in the conduct of the test identification parade would next bear scrutiny. The major flaw in the exercise here was the presence of the police during the exercise. When the identifications are held in police presence, the resultant communications tantamount to statements made by the identifiers to a police officer in course of investigation and they fall within the ban of Section 162 of the Code. (See *Ramkishan Mithanlal Sharma* v. *State of Bombay*[3].)

12. The next important flaw is that while the pahchan patra of the TIP mentions that three lungis were presented, the related witness was shown only one lungi for identification as per the own statement of the witness Filim Sai (PW 3). Such infirmities would therefore, render the TIP unworthy of acceptance, for supporting the prosecution.

13. Inconsistencies are also found in the statement of PW 3 as regards the spot inspection report prepared by the police and the recovery of the lungi. PW 3 stated that lungi was found 10-12 steps from the dead body. However, the spot report noted that the lungi was found at a distance of 150 ft from the body and in a plastic bag. In any case, the material exhibit may have no bearing since Filim Sai (PW 3) admitted that similar lungi is worn by many

1 *Chunthu Ram* v. *State of Chhattisgarh*, Criminal Appeal No. 513 of 2002, order dated 15-2-2008 (Chh)
2 (2010) 2 SCC 748 : (2010) 2 SCC (Cri) 1100
3 (1955) 1 SCR 903 : AIR 1955 SC 104 : 1955 Cri LJ 196

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farmers in the village. No distinguishing factor to link the exhibit to the accused Chunthuram is presented except a vague averment that the appellant was seen wearing lungi on many occasions. Therefore it would be unsafe in our view, to link the appellant with the exhibit, relied upon by the prosecution.

14. The testimony of the eyewitness Bhagat Ram (PW 4) will now bear scrutiny. His testimony was discarded by the High Court to acquit the co-accused Jagan Ram. To reach a different conclusion for the appellant Chunthuram, the eyewitness' testimony was found to have been corroborated by Taj Khan (PW 2). The question therefore is whether Bhagat Ram (PW 4) can be treated as a reliable eyewitness of the incident. The witness Bhagat Ram admitted to having poor eyesight and through his cross-examination it was elicited that witness is incapable of seeing things beyond one or two feet. The witness also admitted that when he left Tamta Market, it was dark and cloudy as it was raining on that day. Besides he claimed to have heard the deceased cry out for help while being attacked. The record indicates that PW 4 was at a distance of 200 yards when he heard the cry. However, Taj Khan (PW 2) who was only around 54 yards away from the place of the incident and was expected to better hear the victim's cry, never heard anything. This would render the testimony of Bhagat Ram unreliable, particularly because of the poor vision and hearing capacity of the witness.

15. Next the unnatural conduct of PW 4 will require some scrutiny. The witness Bhagat Ram was known to the deceased and claimed to have seen the assault on Laxman by Chunthuram and another person. But curiously, he did not take any proactive steps in the matter to either report to the police or inform any of the family members. Such conduct of the eyewitness is contrary to human nature. In *Amar Singh* v. *State (NCT of Delhi)*[4], one of us, Krishna Murari, J. made the following pertinent comments on the unreliability of such eyewitness: (SCC para 32)

> "*32*. The conviction of the appellants rests on the oral testimony of PW 1 who was produced as eyewitness of the murder of the deceased. Both the learned Sessions Judge, as well as High Court have placed reliance on the evidence of PW 1 and ordinarily this Court could be reluctant to disturb the concurrent view but since there are inherent improbabilities in the prosecution story and the conduct of eyewitness is inconsistent with ordinary course of human nature we do not think it would be safe to convict the appellants upon the uncorroborated testimony of the sole eyewitness. Similar view has been taken by a three-Judge Bench of this Court in *Selveraj* v. *State of T.N.*[5] wherein on an appreciation of evidence the prosecution story was found highly improbable and inconsistent of ordinary course of human nature concurrent findings of guilt recorded by the two courts below were set aside."

4 2020 SCC OnLine SC 826
5 (1976) 4 SCC 343 : 1976 SCC (Cri) 620

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16. The witness here knew the victim, allegedly saw the fatal assault on the victim and yet kept quiet about the incident. If PW 4 had the occasion to actually witness the assault, his reaction and conduct does not match up to ordinary reaction of a person who knew the deceased and his family. His testimony therefore deserves to be discarded.

17. On the motive aspect, the land dispute was finally decided and it was stated by Mahtoram, PW 1 (father of the deceased) that Sildhar was murdered when the said land dispute was still pending. If this be the situation, without any further material to show any proximate and immediate motive for the crime, it would be difficult to accept the cited motive, to support the conviction.

18. We might also reiterate the well-established principle in criminal law which propagates that if two views are possible on the evidence adduced in a case, one pointing to the guilt of the accused and the other to their innocence, the view favourable to the accused should be adopted.

19. With the above understanding of the law and the related discussion on the infirmities in the prosecution evidence, the appellant according to our assessment, has made out a case for interference. The appeal therefore is allowed and the judgments of the trial court as also of the High Court are consequently set aside.

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(2021) 5 Supreme Court Cases 435

2J

(BEFORE MOHAN M. SHANTANAGOUDAR AND R. SUBHASH REDDY, JJ.)

KRISHNA LAL CHAWLA AND OTHERS . . Appellants;

Versus

STATE OF UTTAR PRADESH AND ANOTHER . . Respondents.

Criminal Appeal No. 283 of 2021†, decided on March 8, 2021

A. **Criminal Procedure Code, 1973 — Ss. 200 to 204 — Frivolous or vexatious complaints — Duty and powers of Magistrate/trial court in preventing abuse of court process — Exercise of power under S. 165 of the Evidence Act to order production of material and put forth questions of any form at any time, demonstrating central role played by the Magistrate in the quest for justice and truth in criminal proceedings, to judiciously stem frivolous litigation — Principles summarised**

— Trial courts have the power to not merely decide on acquittal or conviction of the accused person after the trial, but also the duty to nip frivolous litigations in the bud even before they reach the stage of trial by discharging the accused in fit cases — This would not only save judicial time that comes at the cost of public money, but would also protect the right to liberty that every person is entitled to under Art. 21 of the Constitution — In this context, the trial Judges have as much, if not more, responsibility in safeguarding fundamental rights, as the Supreme Court — Evidence Act, 1872 — S. 165 — Constitution of India, Art. 21

B. **Criminal Procedure Code, 1973 — Ss. 200 to 204 and 482 — Second complaint against same accused in respect of same incident/transaction — Impermissibility — Held, such second complaint is not only impermissible but would be violative of Art. 21 of the Constitution — Moreover in present case, conduct of complainant in filing a delayed second complaint in respect of the very same incident, suppressing material facts, and utilising fresh proceedings to materially improve on his earlier version, in totality, amounted to gross abuse of the process of court — Summoning order on second complaint, quashed**

— Initially, respondent filed a non-cognizable report on 5-8-2012 against the appellants alleging offences under Ss. 323, 504 and 506 IPC — Information also filed on part of the appellants on 5-8-2012, which registered as non-cognizable report, alleging offences under Ss. 323, 504 and 506 IPC against respondent and his wife — Subsequently, on application filed by the appellants on 27-4-2017 under S. 155(2) CrPC, non-cognizable report filed by the appellants directed to be registered as FIR and investigation conducted, and on 17-9-2017 a charge-sheet filed against respondent and his wife under Ss. 323, 325, 504 and 506 IPC and the Magistrate framed charges against respondent and his wife, but not even a single witness examined till date

† Arising out of SLP (Crl.) No. 6432 of 2020. Arising from the Judgment and Order in *Krishna Lal Chawla* v. *State of U.P.*, 2020 SCC OnLine All 1062 (Allahabad High Court, Matters under Article 227 No. 2561 of 2020, dt. 28-9-2020)

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— Being aggrieved with charge-sheet filed against him, respondent instituted a fresh private complaint on 11-5-2018 against the appellants under S. 200 CrPC in respect of the very same incident that took place on 5-8-2012 — In this private complaint, not only new allegations added but all allegations found wilder and different from the averments made in initial NCR filed by respondent on 5-8-2012 — Further, not only three additional eyewitnesses inducted in this private complaint, but allegations of fraud, injury to bull, forging of affidavit, etc. which were not found in the initial complaint also found in the private complaint — In the fresh complaint case instituted by him, respondent deliberately suppressed the material fact that a charge-sheet was already filed in relation to the same incident, against him and his wife — Magistrate issued process against the appellants based on this vexatious private complaint — While confirming this order, the Sessions Judge found to have made a new case in favour of respondent by reading S. 506 Pt. II IPC punishable by 7 yrs in the place of S. 506 IPC, probably only to bring the private complaint within the prescribed period of limitation under S. 468 CrPC — Nobody claimed that the offence under S. 506 Pt. II took place — Hence, the courts held to have taken extra interest to improve the case of the respondent

— Further held, if the respondent was aggrieved by lack of speedy investigation in the earlier case filed by him, the appropriate remedy would have been to apply to the Magistrate under S. 155(2) CrPC for directions to the police in this regard and thus, filing a private complaint without any prelude, after a gap of six years from the date of giving information to the police, smacks of mala fides on the part of respondent — Thus, conduct of respondent in filing a delayed complaint case, suppressing material facts, and utilising fresh proceedings to materially improve on his earlier version, in totality, held amounting to gross abuse of the process of court — Resultantly, impugned summoning order directed to be quashed — Constitution of India, Arts. 21, 226, 136 and 32 (Paras 13 to 28)

C. **Constitution of India — Art. 21 — Right of speedy trial — Scope of — Reiterated, includes not only the actual trial before the court, but also the preceding stages of inquiry and police investigation as well**

D. **Constitution of India — Arts. 21 and 19 — Investigation into criminal offences and fundamental rights of individuals — Duty of Court — It is incumbent upon Court to preserve delicate balance between the power to investigate offences, and the fundamental right of the individual to be free from frivolous and repetitive criminal prosecutions forced upon him by the might of the State or by vexatious complaints**

E. **Criminal Procedure Code, 1973 — S. 154 — Second FIR in respect of an offence or different offences committed in the course of the same transaction — Held, not only impermissible but would be violative of Art. 21 of the Constitution**

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F. **Constitution of India — Arts. 226, 136 and 142 — Institution of proceedings to harass hapless litigants — Duty of Court — Held, it is the constitutional duty of Court to quash criminal proceedings that are instituted by misleading the court and abusing its processes of law, only with a view to harass hapless litigants — Criminal Procedure Code, 1973, S. 482**

Held :

Any further complaint by the same complainant or others against the same accused, subsequent to the registration of a case in respect of the very same incident, is prohibited under CrPC because an investigation in this regard would have already started and further complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint, hence will be prohibited under Section 162 CrPC. (Para 6)

Though, said legal position is rendered in the context of a case involving cognizable offences, the same principle would also apply where a person gives information of a non-cognizable offence and subsequently lodges a private complaint with respect to the same offence against the same accused person. Even in a non-cognizable case, the police officer after the order of the Magistrate, is empowered to investigate the offence in the same manner as a cognizable case, except the power to arrest without a warrant. Therefore, the complainant cannot subject the accused to a double whammy of investigation by the police and inquiry before the Magistrate. (Para 7)

Upkar Singh v. *Ved Prakash*, (2004) 13 SCC 292 : 2005 SCC (Cri) 211; *T.T. Antony* v. *State of Kerala*, (2001) 6 SCC 181 : 2001 SCC (Cri) 1048, *applied*

A second FIR (which is not a cross-case) in respect of an offence or different offences committed in the course of the same transaction is not only impermissible but it violates Article 21 of the Constitution. (Para 9)

Article 21 of the Constitution guarantees that the right to life and liberty shall not be taken away except by due process of law. Permitting multiple complaints by the same party in respect of the same incident, whether it involves a cognizable or private complaint offence, will lead to the accused being entangled in numerous criminal proceedings. As such, he would be forced to keep surrendering his liberty and precious time before the police and the courts, as and when required in each case. Such an absurd and mischievous interpretation of the provisions of the CrPC will not stand the test of constitutional scrutiny, and therefore cannot be adopted. (Para 10)

Amitbhai Anilchandra Shah v. *CBI*, (2013) 6 SCC 348 : (2014) 1 SCC (Cri) 309, *followed*

A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that Section 173(8) CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. However, it would be appropriate to conduct further investigation with the permission of the court. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation

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by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. (Para 11)

T.T. Antony v. *State of Kerala*, (2001) 6 SCC 181 : 2001 SCC (Cri) 1048, *followed*

Ram Lal Narang v. *State (Delhi Admn.)*, (1979) 2 SCC 322 : 1979 SCC (Cri) 479, *cited*

Thus, it is incumbent upon the Court to preserve the delicate balance between the power to investigate offences under the CrPC, and the fundamental right of the individual to be free from frivolous and repetitive criminal prosecutions forced upon him by the might of the State. If Respondent 2 was aggrieved by lack of speedy investigation in the earlier case filed by him, the appropriate remedy would have been to apply to the Magistrate under Section 155(2) CrPC for directions to the police in this regard. Filing a private complaint without any prelude, after a gap of six years from the date of giving information to the police, smacks of mala fides on the part of Respondent 2. (Para 12)

Ram Dhan v. *State of U.P.*, (2012) 5 SCC 536 : (2012) 3 SCC (Cri) 237; *K.D. Sharma* v. *SAIL*, (2008) 12 SCC 481; *Vakil Prasad Singh* v. *State of Bihar*, (2009) 3 SCC 355 : (2009) 2 SCC (Cri) 95; *Abdul Rehman Antulay* v. *R.S. Nayak*, (1992) 1 SCC 225 : 1992 SCC (Cri) 93, *followed*

Immediately after the criminal justice system is set in motion, its course is almost entirely dependent on the judicial application of mind by the Magistrate. When a police complaint is filed on the commission of a cognizable offence under Section 154 CrPC, the Magistrate decides if the charge against the accused person is made out before the trial begins. Separate procedure is prescribed if the complaint under Section 200 CrPC is filed. The aforesaid provisions make it abundantly clear that the Magistrate carries the stream of criminal proceeding forward after it is set in motion by the informant/complainant. Consequently, and automatically, the Magistrate also carries the responsibility for ensuring this stream does not carry forward in cases where it should not. (Para 17)

The aforesaid powers bestowed on the Magistrate have grave repercussions on individual citizens' life and liberty. Thus, these powers also confer great responsibility on the shoulders of the Magistrate — and must be exercised with great caution, and after suitable judicial application of mind. (Para 18)

Summoning of an accused in a criminal case is a serious and grave matter, and the Magistrate must only allow criminal law to take its course after satisfying himself that there is a real case to be made. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant

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and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused. (Para 18)

Pepsi Foods Ltd. v. *Special Judicial Magistrate*, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400, *followed*

No doubt, one of the objects behind the provisions of Section 202 CrPC is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. (Para 19)

Thus, it is clear that, on receipt of a private complaint, the Magistrate must *first*, scrutinise it to examine if the allegations made in the private complaint, inter alia, smack of an instance of frivolous litigation; and *second*, examine and elicit the material that supports the case of the complainant. (Para 19)

Chandra Deo Singh v. *Prokash Chandra Bose*, AIR 1963 SC 1430 : (1963) 2 Cri LJ 397, *followed*

It is said that every trial is a voyage of discovery in which the truth is the quest. In India, typically, the Judge is not actively involved in "fact-finding" owing to the adversarial nature of our justice system. However, Section 165 of the Evidence Act, 1872 by providing the Judge with the power to order production of material and put forth questions of any form at any time, marks the influence of inquisitorial processes in our legal system. This wide-ranging power further demonstrates the central role played by the Magistrate in the quest for justice and truth in criminal proceedings, and must be judiciously employed to stem the flow of frivolous litigation. (Para 20)

All of this leads to one inescapable conclusion. That the trial Judge has a duty under the Constitution and the CrPC, to identify and dispose of frivolous litigation at an early stage by exercising, substantially and to the fullest extent, the powers conferred on him. (Para 21)

All India Judges' Assn. (1) v. *Union of India*, (1992) 1 SCC 119 : 1992 SCC (L&S) 9, *followed*

Roshni Sinha: "*Examining Pendency of Cases in the Judiciary*", PRS INDIA (8-8-2019), *referred to*

Frivolous litigation should not become the order of the day in India. From misusing the public interest litigation jurisdiction of the Indian courts to abusing the criminal procedure for harassing their adversaries, the justice delivery system should not be used as a tool to fulfil personal vendetta. One needs to keep in mind, that in the process of litigation, there is an innocent sufferer on the other side, of every irresponsible and senseless claim. He suffers long drawn anxious periods of nervousness and restlessness, whilst the litigation is pending, without any fault on

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his part. He pays for the litigation, from out of his savings (or out of his borrowings), worrying that the other side may trick him into defeat, for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. A falsely accused person not only suffers monetary damages but is exposed to disrepute and stigma from society. While running from pillar to post to find a lawyer to represent his case and arranging finances to defend himself before the court of law, he loses a part of himself. (Para 22)

Subrata Roy Sahara v. *Union of India*, (2014) 8 SCC 470 : (2014) 4 SCC (Civ) 424 : (2014) 3 SCC (Cri) 712, *relied on*

Trial courts have the power to not merely decide on acquittal or conviction of the accused person after the trial, but also the duty to nip frivolous litigations in the bud even before they reach the stage of trial by discharging the accused in fit cases. This would not only save judicial time that comes at the cost of public money, but would also protect the right to liberty that every person is entitled to under Article 21 of the Constitution. In this context, the trial Judges have as much, if not more, responsibility in safeguarding the fundamental rights of the citizens of India as the highest court of this land. (Para 23)

State of Punjab v. *Rafiq Masih*, (2014) 8 SCC 883 : (2014) 4 SCC (Civ) 657 : (2014) 6 SCC (Cri) 154 : (2014) 3 SCC (L&S) 134; *Monica Kumar* v. *State of U.P.*, (2008) 8 SCC 781 : (2008) 3 SCC (Cri) 649; *Sirajul* v. *State of U.P.*, (2015) 9 SCC 201 : (2015) 3 SCC (Cri) 749; *State of Haryana* v. *Bhajan Lal*, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426, *followed*

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12. (1998) 5 SCC 749 : 1998 SCC (Cri) 1400, *Pepsi Foods Ltd.* v. *Special Judicial Magistrate* 447*e*
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17. AIR 1963 SC 1430 : (1963) 2 Cri LJ 397, *Chandra Deo Singh* v. *Prokash Chandra Bose* 448*b*

The Judgment of the Court was delivered by

MOHAN M. SHANTANAGOUDAR, J.— Leave granted. This appeal arises out of the final order and judgment of the High Court of Judicature at Allahabad (hereinafter "the High Court") dated 28-9-2020[1], dismissing Miscellaneous Petition No. 2561 of 2020 filed by the appellants herein praying for quashing of the following orders:

1.1. Order dated 4-4-2019 of the learned Additional Chief Judicial Magistrate, Meerut (hereinafter "the Magistrate") in Complaint Case No. 2943 of 2018, issuing summons against the appellants.

1.2. Order dated 13-1-2020 of the learned Additional District and Sessions Judge, Meerut (hereinafter "the Sessions Judge") in Criminal Revision No. 202 of 2019, dismissing the appellants' revision application against the aforesaid summoning order.

2. The brief facts leading to this appeal are as follows:

2.1. The appellants and Respondent 2 are neighbours. The genesis of the proceedings before us lies in a physical altercation that took place between the appellants, and Respondent 2 and his wife on 5-8-2012. While the occurrence of such an altercation is an admitted fact between the parties, the details thereof form the crux of this prolonged litigation.

2.2. On 5-8-2012, Respondent 2 filed non-cognizable report ("NCR") No. 158 of 2012 against the appellants alleging offences under Sections 323, 504 and 506 of the Penal Code, 1860 (hereinafter "IPC"). It was his case that the appellants came to his house, beat him and his wife with iron rods, and threatened to kill them.

2.3. The son of Appellant 1 also filed information on 5-8-2012, which was registered as non-cognizable report (NCR) No. 160 of 2012 with Daurala Police Station, alleging offences under Sections 323, 504 and 506 IPC against Respondent 2 and his wife. This report counter-alleged that Respondent 2 and his wife came to the appellants' house, beat them up with wooden sticks and iron rods, and threatened to kill their family.

1 *Krishna Lal Chawla* v. *State of U.P.*, 2020 SCC OnLine All 1062

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2.4. It seems that even prior to the alleged occurrences, there were disputes between the parties in 2006. A mutual settlement took place on 6-2-2006 by which Respondent 2 agreed to pay a penalty of Rs 3000 to Appellant 1. Subsequently, in another dispute, on 21-12-2013, the Special Chief Judicial Magistrate imposed a penalty of Rs 1500 on Appellant 4. Be that as it may, the fact remains that the parties have been at loggerheads from 2006 onwards. It appears that they have been fighting litigations on one pretext or the other since 2006. Though they were agriculturists and neighbours, peace did not prevail between them, which resulted in a number of cases being lodged by them against each other.

2.5. The appellants filed an application under Section 155(2) of the Code of Criminal Procedure, 1973 (hereinafter "CrPC") before the Magistrate on 27-4-2017, almost 5 years after the alleged incident, seeking permission for the police to investigate NCR No. 160 of 2012. The learned Magistrate directed that NCR No. 160 of 2012 filed by the appellants be registered as FIR in Crime No. 283 of 2017. Investigation was conducted, and on 17-9-2017 a charge-sheet was filed against Respondent 2 and his wife under Sections 323, 325, 504 and 506 IPC. Subsequently, the Magistrate framed charges against Respondent 2 and his wife. There is nothing on record to show that even a single witness has been examined till date, though charges were framed by the Magistrate long back. Thus, there has been considerable delay in these proceedings, during both the investigation and trial stages.

2.6. Being unsatisfied with the allegations made and charge-sheet filed against him, Respondent 2 instituted a fresh private complaint against the appellants under Section 200 CrPC in Complaint Case No. 2943 of 2018 in respect of the very incident that took place on 5-8-2012. This private complaint was filed only on 11-5-2018, that is, about six years from the date of alleged incident. In the private complaint, not only new allegations were added but all allegations are wilder and different from the averments made in NCR No. 158 of 12, though the incident is the same as of 5-8-2012 and between the same parties. It may not be necessary for us to narrate the contents of the private complaint inasmuch as we find and have satisfied ourselves that the allegations made in the private complaint are absolute material improvements over the allegations in NCR No. 158 of 12.

2.7. Among other things, not only three additional eyewitnesses are inducted in the private complaint, but allegations of fraud, injury to bull, forging of affidavit, etc. which were not found in the 2012 complaint are also found in the private complaint. The private complaint for the first time mentions commission of offences under Section 429 IPC and Sections 10 and 11 of the Prevention of Cruelty to Animals Act, 1960. It is an admitted fact that Appellant 4 had inflicted injury on Respondent 2's bull on 26-9-2011, for which Appellant 4 had voluntarily confessed and accepted penalty of Rs 1500 from the Magistrate as mentioned supra. Be that as it may, we see no reason why Respondent 2 chose to rehash this incident in the private complaint given that Appellant 4 has already been convicted for the offence, and it is of no relevance to the present case.

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2.8. Curiously, the Magistrate was pleased to issue process against the appellants based on this vexatious private complaint, which came to be confirmed by the learned Sessions Judge in the impugned order. The learned Sessions Judge has thus not only misunderstood Section 200 CrPC and its scope but also made a new case in favour of Respondent 2 by reading Section 506 Part II IPC which is punishable by 7 years in the place of Section 506 IPC, probably only to bring the private complaint within the prescribed period of limitation under Section 468 CrPC. It is nobody's case that the offence under Section 506 Part II has taken place, which means that the courts took extra interest to improve the case of the respondent complainant.

3. This appeal is filed challenging both the orders of the Magistrate as well as the Sessions Judge in respect of issuance of process, as mentioned supra.

4. The learned counsel for Respondent 2 sought to justify the impugned orders by relying on the following excerpt from this Court's decision in *Upkar Singh* v. *Ved Prakash*[2], which clarified the import of its previous holding in *T.T. Antony* v. *State of Kerala*[3]: (*Upkar Singh case*[2], SCC p. 299, para 23)

> "*23*. Be that as it may, if the law laid down by this Court in *T.T. Antony case*[3] is to be accepted as holding that a second complaint in regard to the same incident filed as a counter-complaint is prohibited under the Code then, in our opinion, such conclusion would lead to serious consequences. This will be clear from the hypothetical example given hereinbelow i.e. if in regard to a crime committed by the real accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question, consequently he will be deprived of his legitimated right to bring the real accused to book. This cannot be the purport of the Code."

Therefore, *Upkar Singh*[2] clarified that this Court's previous decision in *T.T. Antony*[3] will not bar the filing of a second complaint with respect to the same incident, if such second complaint is filed as a counter-complaint by the other party.

5. We are in agreement with the aforementioned construction of *T.T. Antony*[3]. However, we fail to see how this position of law comes to Respondent 2's rescue. The question posed in the present case for consideration before us is wholly different, and concerns the validity of the private complaint filed by Respondent 2, after an earlier information filed as NCR No. 158 of 2012 — both of which were filed by the same party, against the same accused, and in relation to the same incident that too after the charge-sheet was filed in case arising out of NCR No. 160 of 12 in Crime No. 283 of 2017 after taking due permission of the Magistrate. The aforementioned portion of *Upkar Singh*[2] relied on by Respondent 2, thus, does not benefit his case.

2 (2004) 13 SCC 292 : 2005 SCC (Cri) 211
3 (2001) 6 SCC 181 : 2001 SCC (Cri) 1048

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6. Indeed, a closer look at the decision in *Upkar Singh*[2] takes us to the contrary conclusion. In regard to the question of material improvements made in a subsequent private complaint by the same complainant against the same accused with regard to the same incident, it may be useful to refer to the following excerpt from *Upkar Singh*[2], which further clarifies the holding in *T.T. Antony*[3]: (*Upkar Singh case*[2], SCC pp. 297-98, para 17)

> "*17.* ... In our opinion, this Court in that case only held that *any further complaint by the same complainant or others against the same accused*, subsequent to the registration of a case, is prohibited under the Code because an investigation in this regard would have already started and *further complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint, hence will be prohibited under Section 162 of the Code*." (emphasis supplied)

It is the aforementioned part of the holding in *Upkar Singh*[2] that bears directly and strongly upon the present case.

7. This Court in *Upkar Singh*[2] has clearly stated that any further complaint by the same complainant against the same accused, after the case has already been registered, will be deemed to be an improvement from the original complaint. Though *Upkar Singh*[2] was rendered in the context of a case involving cognizable offences, the same principle would also apply where a person gives information of a non-cognizable offence and subsequently lodges a private complaint with respect to the same offence against the same accused person. Even in a non-cognizable case, the police officer after the order of the Magistrate, is empowered to investigate the offence in the same manner as a cognizable case, except the power to arrest without a warrant. Therefore, the complainant cannot subject the accused to a double whammy of investigation by the police and inquiry before the Magistrate.

8. We are cognizant of the fact that in the present case, no investigation had begun pursuant to NCR No. 158 of 2012 filed by Respondent 2 for a certain period. However, the overall concern expressed by this Court in *Upkar Singh*[2], about the misuse of successive complaints by the same party, where the second complaint is clearly propped up to materially improve on the earlier one, resonates with us. We regret to say that the same thing which this Court had categorically prohibited in *Upkar Singh*[2] has happened in the present case.

9. The grave implications of allowing such misuse may be understood better in light of the following exposition by this Court in *Amitbhai Anilchandra Shah* v. *CBI*[4]: (SCC p. 373, para 37)

> "*37.* This Court has consistently laid down the law on the issue interpreting the Code, *that a second FIR in respect of an offence or*

2 *Upkar Singh* v. *Ved Prakash*, (2004) 13 SCC 292 : 2005 SCC (Cri) 211
3 *T.T. Antony* v. *State of Kerala*, (2001) 6 SCC 181 : 2001 SCC (Cri) 1048
4 (2013) 6 SCC 348 : (2014) 1 SCC (Cri) 309

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different offences committed in the course of the same transaction is not only impermissible but it violates Article 21 of the Constitution. In *T.T. Antony*[3], this Court has categorically held that registration of second FIR (*which is not a cross-case*) is violative of Article 21 of the Constitution." (emphasis supplied)

10. Article 21 of the Constitution guarantees that the right to life and liberty shall not be taken away except by due process of law. Permitting multiple complaints by the same party in respect of the same incident, whether it involves a cognizable or private complaint offence, will lead to the accused being entangled in numerous criminal proceedings. As such, he would be forced to keep surrendering his liberty and precious time before the police and the courts, as and when required in each case. As this Court has held in *Amitbhai Anilchandra Shah*[4], such an absurd and mischievous interpretation of the provisions of the CrPC will not stand the test of constitutional scrutiny, and therefore cannot be adopted by us.

11. The implications of such successive FIRs on an individual's rights under Article 21 of the Constitution has been elaborated further in *T.T. Antony*[3]: (SCC p. 200, para 27)

"*27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court.* There cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In *Narang case*[5] it was, however, observed that it would be appropriate to conduct further investigation with the permission of the court. *However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC.*" (emphasis supplied)

12. Thus, it is incumbent upon this Court to preserve this delicate balance between the power to investigate offences under the CrPC, and the fundamental right of the individual to be free from frivolous and repetitive criminal prosecutions forced upon him by the might of the State. If Respondent 2 was aggrieved by lack of speedy investigation in the earlier case filed by him, the appropriate remedy would have been to apply to the Magistrate under Section 155(2) CrPC for directions to the police in this regard. Filing a private complaint without any prelude, after a gap of six years from the date of giving information to the police, smacks of mala fides on the part of Respondent 2.

3 *T.T. Antony* v. *State of Kerala*, (2001) 6 SCC 181 : 2001 SCC (Cri) 1048
4 *Amitbhai Anilchandra Shah* v. *CBI*, (2013) 6 SCC 348 : (2014) 1 SCC (Cri) 309
5 *Ram Lal Narang* v. *State (Delhi Admn.)*, (1979) 2 SCC 322 : 1979 SCC (Cri) 479

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13. It is also crucial to note that in the fresh complaint case instituted by him, Respondent 2 seems to have deliberately suppressed the material fact that a charge-sheet was already filed in relation to the same incident, against him and his wife, pursuant to NCR No. 160 of 2012 (Crime No. 283 of 2017) filed by Appellant 1's son. No reference to this charge-sheet is found in the private complaint, or in the statements under Section 200 CrPC filed by Respondent 2 and his wife. In fact, both the private complaint and the statement filed on behalf of his wife, merely state that the police officials have informed them that investigation is ongoing pursuant to their NCR No. 158 of 2012. The wife's statement additionally even states that no action has been taken so far by the police. It is the litigant's bounden duty to make a full and true disclosure of facts. It is a matter of trite law, and yet bears repetition, that suppression of material facts before a court amounts to abuse of the process of the court, and shall be dealt with a heavy hand (*Ram Dhan* v. *State of U.P.*[6]; *K.D. Sharma* v. *SAIL*[7]).

14. It is also pertinent to note that as on 5-8-2012, Appellant 1 was a 76-year-old man; Appellant 2 was suffering from epileptic seizures; and Appellant 4 was of unsound mind. There is no equity in allowing them to be dragged into criminal proceedings pertaining to a petty offence, instituted 6 years after the alleged incident. The sword of Damocles cannot be allowed to forever hang on their heads, falling unpredictably at the whims of a litigant seeking to harass and persecute at will. We gain strength in our conclusions from Article 21 of the Constitution, which encapsulates the right to a speedy trial. This right has been interpreted to include not only the actual trial before the Court, but also the preceding stages of inquiry and police investigation as well (*Vakil Prasad Singh* v. *State of Bihar*[8]; *Abdul Rehman Antulay* v. *R.S. Nayak*[9]).

15. The sum of the above circumstances and precedents leads us to what we see as an inevitable conclusion. That Respondent 2's institution of the fresh complaint case in 2018 under Section 200 CrPC was a concerted effort to mislead the Magistrate with the oblique motive of harassing the appellants with a frivolous and vexatious case against them. That the same was a counterblast to the charge-sheet dated 17-9-2017 filed against Respondent 2 and his wife in the case registered by the appellant. The history of ill will and malice between the parties leads further credence to Respondent 2's motivations for tying up the appellants in frivolous and harrowing criminal litigation, long years after the alleged incident. Respondent 2's conduct in filing a delayed complaint case, suppressing material facts, and utilising fresh proceedings to materially improve on his earlier version, in totality, amounts to gross abuse of the process of court.

6 (2012) 5 SCC 536 : (2012) 3 SCC (Cri) 237
7 (2008) 12 SCC 481
8 (2009) 3 SCC 355 : (2009) 2 SCC (Cri) 95
9 (1992) 1 SCC 225 : 1992 SCC (Cri) 93

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Role of the lower judiciary in preventing abuse of court process

16. We find it imperative to observe that this is a case that should not have been allowed to reach as far as this Court. The justice dispensation machinery in India is plagued with backlogs, with 70% of the pendency before the subordinate courts being on the criminal side.[10] A significant factor in this backlog is the vast mass of frivolous litigation instituted year after year by litigants with an intent to use the courts of justice for their own mischievous ends. Curtailing such vexatious litigation is, thus, a crucial step towards a more effective justice system—a step that cannot be taken without the active involvement of the lower judiciary, especially in criminal proceedings.

17. Immediately after the criminal justice system is set in motion, its course is almost entirely dependent on the judicial application of mind by the Magistrate. When a police complaint is filed on the commission of a cognizable offence under Section 154 CrPC, the Magistrate decides if the charge against the accused person is made out before the trial begins. Separate procedure is prescribed if the complaint under Section 200 CrPC is filed. The aforesaid provisions make it abundantly clear that the Magistrate carries the stream of criminal proceeding forward after it is set in motion by the informant/complainant. Consequently, and automatically, the Magistrate also carries the responsibility for ensuring this stream does not carry forward in cases where it should not.

18. The aforesaid powers bestowed on the Magistrate have grave repercussions on individual citizens' life and liberty. Thus, these powers also confer great responsibility on the shoulders of the Magistrate — and must be exercised with great caution, and after suitable judicial application of mind. Observations in a similar vein were made by this Court in *Pepsi Foods Ltd.* v. *Special Judicial Magistrate*[11]: (SCC p. 760, para 28)

> "*28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course.* It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. *The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto.* He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. *It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.*" (emphasis supplied)

10 Roshni Sinha, "*Examining Pendency of Cases in the Judiciary*", PRS INDIA (8-8-2019).
11 (1998) 5 SCC 749 : 1998 SCC (Cri) 1400

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This Court, thus, clearly emphasised that the power to issue a summoning order is a matter of grave importance, and that the Magistrate must only allow criminal law to take its course after satisfying himself that there is a real case to be made.

19. Similarly, the power conferred on the Magistrate under Section 202 CrPC to postpone the issue of process pursuant to a private complaint also provides an important avenue for filtering out of frivolous complaints that must be fully exercised. A four-Judge Bench of this Court has eloquently expounded on this in *Chandra Deo Singh* v. *Prokash Chandra Bose*[12]: (AIR p. 1433, para 7)

> "7. … *No doubt, one of the objects behind the provisions of Section 202 CrPC is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint.* It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant." (emphasis supplied)

Thus, it is clear that, on receipt of a private complaint, the Magistrate must *first*, scrutinise it to examine if the allegations made in the private complaint, inter alia, smack of an instance of frivolous litigation; and *second*, examine and elicit the material that supports the case of the complainant.

20. It is said that every trial is a voyage of discovery in which the truth is the quest. In India, typically, the Judge is not actively involved in "fact-finding" owing to the adversarial nature of our justice system. However, Section 165 of the Evidence Act, 1872 by providing the Judge with the power to order production of material and put forth questions of any form at any time, marks the influence of inquisitorial processes in our legal system. This wide-ranging power further demonstrates the central role played by the Magistrate in the quest for justice and truth in criminal proceedings, and must be judiciously employed to stem the flow of frivolous litigation.

21. All of this leads to one inescapable conclusion. That the trial Judge has a duty under the Constitution and the CrPC, to identify and dispose of frivolous litigation at an early stage by exercising, substantially and to the fullest extent, the powers conferred on him. This Court has earlier emphasised on the high degree of responsibility shouldered by the trial Judges in *All India Judges' Assn.*

12 AIR 1963 SC 1430 : (1963) 2 Cri LJ 397

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(1) v. *Union of India*[13]. Ranganath Misra, C.J. (as he was then) writing for himself and two others stated: (SCC p. 134, para 42)

> "*42*. The trial Judge is the kingpin in the hierarchical system of administration of justice. He directly comes in contact with the litigant during the proceedings in Court. On him lies the responsibility of building up of the case appropriately and on his understanding of the matter the cause of justice is first answered. The personality, knowledge, judicial restraint, capacity to maintain dignity are the additional aspects which go into making the Court's functioning successful."

22. Frivolous litigation should not become the order of the day in India. From misusing the public interest litigation jurisdiction of the Indian courts to abusing the criminal procedure for harassing their adversaries, the justice delivery system should not be used as a tool to fulfil personal vendetta. The Indian judiciary has taken cognizance of this issue. In 2014, this Court elucidated as follows, the plight of a litigant caught in the cobweb of frivolous proceedings in *Subrata Roy Sahara* v. *Union of India*[14]: (SCC p. 642, para 191)

> "*191*. … One needs to keep in mind, that in the process of litigation, there is an innocent sufferer on the other side, of every irresponsible and senseless claim. He suffers long drawn anxious periods of nervousness and restlessness, whilst the litigation is pending, without any fault on his part. He pays for the litigation, from out of his savings (or out of his borrowings), worrying that the other side may trick him into defeat, for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his."

While the Court's ruling pertained to civil proceedings, these observations ring true for the criminal justice machinery as well. We note, with regret, that 7 years hence, and there has still been no reduction in such plight. A falsely accused person not only suffers monetary damages but is exposed to disrepute and stigma from society. While running from pillar to post to find a lawyer to represent his case and arranging finances to defend himself before the court of law, he loses a part of himself.

23. As aforesaid, the trial courts and the Magistrates have an important role in curbing this injustice. They are the first lines of defence for both the integrity of the criminal justice system, and the harassed and distraught litigant. We are of the considered opinion that the trial courts have the power to not merely decide on acquittal or conviction of the accused person after the trial, but also the duty to nip frivolous litigations in the bud even before they reach the stage of trial by discharging the accused in fit cases. This would not only save judicial time that comes at the cost of public money, but would also protect the right

13 (1992) 1 SCC 119 : 1992 SCC (L&S) 9
14 (2014) 8 SCC 470 : (2014) 4 SCC (Civ) 424 : (2014) 3 SCC (Cri) 712

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to liberty that every person is entitled to under Article 21 of the Constitution. In this context, the trial Judges have as much, if not more, responsibility in safeguarding the fundamental rights of the citizens of India as the highest court of this land.

24. As recorded by us above, the present controversy poses a typical example of frivolous litigants abusing court process to achieve their mischievous ends. In the case before us, the Magistrate was aware of the significant delay in the filing of private complaint by Respondent 2, and of the material improvements from the earlier NCR No. 158 of 2012 which were made in the private complaint. It was incumbent on the Magistrate to examine any possibility of abuse of process of the court, make further enquiries, and dismiss the frivolous complaint at the outset after judicial application of mind.

25. However, this was not done — the Magistrate issued process against the appellants by order dated 4-4-2019, and this controversy has now reached this Court for disposal.

26. It is a settled canon of law that this Court has inherent powers to prevent the abuse of its own processes, that this Court shall not suffer a litigant utilising the institution of justice for unjust means. Thus, it would be only proper for this Court to deny any relief to a litigant who attempts to pollute the stream of justice by coming to it with his unclean hands. Similarly, a litigant pursuing frivolous and vexatious proceedings cannot claim unlimited right upon court time and public money to achieve his ends.

27. This Court's inherent powers under Article 142 of the Constitution to do "complete justice" empowers us to give preference to equity and a justice-oriented approach over the strict rigours of procedural law (*State of Punjab* v. *Rafiq Masih*[15]). This Court has used this inherent power to quash criminal proceedings where the proceedings are instituted with an oblique motive, or on manufactured evidence (*Monica Kumar* v. *State of U.P.*[16]). Other decisions have held that inherent powers of High Courts provided in Section 482 CrPC may be utilised to quash criminal proceedings instituted after great delay, or with vengeful or mala fide motives. (*Sirajul* v. *State of U.P.*[17]; *State of Haryana* v. *Bhajan Lal*[18].) Thus, it is the constitutional duty of this Court to quash criminal proceedings that were instituted by misleading the court and abusing its processes of law, only with a view to harass the hapless litigants.

28. In this Court's quest for complete justice, and to bring peace between the parties, who are fighting various litigations since 2006, we exercise our powers under Article 142 to quash all the litigations between the parties arising out of this incident.

15 (2014) 8 SCC 883 : (2014) 4 SCC (Civ) 657 : (2014) 6 SCC (Cri) 154 : (2014) 3 SCC (L&S) 134
16 (2008) 8 SCC 781 : (2008) 3 SCC (Cri) 649
17 (2015) 9 SCC 201 : (2015) 3 SCC (Cri) 749
18 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 : AIR 1992 SC 604

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Our conclusions

29. The impugned judgment of the High Court dated 28-9-2020 in *Krishna Lal Chawla* v. *State of U.P.*[1] is set aside.

30. The proceedings in Complaint Case No. 2943 of 2018, including the order of summons against the appellants dated 4-4-2019 be quashed.

31. Further, proceedings pursuant to NCR No. 158 of 2012 dated 5-8-2012 filed by Respondent 2 also be quashed, in order to foreclose further frivolous litigation.

32. Any other criminal cases between the parties initiated by them in relation to the incident dated 5-8-2012, including the criminal proceedings arising from NCR No. 160 of 2012 (Crime No. 283 of 2017) instituted by the appellants, are quashed in exercise of our powers under Article 142 of the Constitution, in the interests of giving quietus to these criminal proceedings arising out of a petty incident 9 years ago.

33. The appeal is allowed in the aforesaid terms.

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1 2020 SCC OnLine All 1062

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2J

(BEFORE DR D.Y. CHANDRACHUD AND M.R. SHAH, JJ.)

RAKESH AND ANOTHER .. Appellants;

Versus

STATE OF UTTAR PRADESH AND ANOTHER .. Respondents.

Criminal Appeal No. 556 of 2021†, decided on July 6, 2021

A. **Penal Code, 1860 — Ss. 302/34 — Death of deceased due to gunshot injury and injuries by knife/sharp weapon — Appreciation of evidence — Conviction of 3 accused persons under S. 302 r/w S. 34, held, rightly upheld by High Court**

— Entire depositions of both eyewitnesses to incident found trustworthy and reliable — Their presence at the time of incident with deceased has been established and proved by prosecution — Their presence at the time of incident is also found natural — Both eyewitnesses are thoroughly cross-examined on each and every aspect pointed out by defence — However, they have fully supported case of prosecution — They have specifically stated about one of accused who fired from gun and injury sustained by deceased because of it

— Injury by gun was established and proved from medical evidence and deposition of doctor who conducted post-mortem of deceased — For convicting accused recovery of weapon used in commission of offence is not a sine qua non — It is not possible to reject credible ocular evidence of eyewitnesses who witnessed shooting — Therefore, merely because ballistic report shows that bullet recovered does not match with gun recovered, it is not possible to reject credible and reliable deposition of eyewitnesses

— Further, injuries by knife/sharp weapon on different parts of body of deceased show common intention to murder on part of the other two accused — Furthermore, the said accused who inflicted the knife injuries could not establish that the said knife injuries were inflicted when victim had already died, as contended by them (*see* Shortnote *B*)

— Prosecution has successfully proved motive of crime being prior long-time enmity between deceased and accused who fired on deceased — Defence has failed to prove any circumstances by which it can be said that accused persons were falsely implicated in case — Hence, courts below rightly convicted accused persons under S. 302 r/w S. 34 IPC — Therefore, conviction of all three appellant-accused stands confirmed

— So far as A-1 is concerned, there is direct evidence against him of using gun and shooting deceased — Therefore, he can even be convicted under S. 302 IPC, without aid of S. 34 IPC — Both courts below rightly convicted A-1 under S. 302 IPC and other accused A-2 and A-3 under S. 302 IPC with aid of S. 34 IPC — Arms Act, 1959, Ss. 4/25 (Paras 8 to 17)

† Arising from the Judgment and Order in *Rakesh* v. *State of U.P.*, 2018 SCC OnLine All 6006 (Allahabad High Court, Criminal Appeal No. 2811 of 2008, dt. 10-9-2018)

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Yogesh Singh v. *Mahabeer Singh*, (2017) 11 SCC 195 : (2017) 4 SCC (Cri) 257; *Prabhu Dayal* v. *State of Rajasthan*, (2018) 8 SCC 127 : (2018) 3 SCC (Cri) 517; *Himanshu Mohan Rai* v. *State of U.P.*, (2017) 4 SCC 161 : (2017) 2 SCC (Cri) 322, *impliedly relied on*

Rakesh v. *State of U.P.*, 2018 SCC OnLine All 6006, *affirmed*

B. **Penal Code, 1860 — Ss. 302/34 — Murder in furtherance of common intention — Whether established — Defence contention that some of the accused had caused injuries with sharp weapon to deceased *after* he had already died from gunshot injuries — Tenability of — Effect of constructive liability attracted under S. 34, when sharing of common intention to murder has been established by the accused concerned**

— It was submitted in defence that at the most it can be said that A-2 and A-3 caused injuries on dead body as according to them they caused injuries after gunshot fired on deceased and he fell down and died — That therefore, it is case of A-2 and A-3 that having caused injuries on dead body, they could not have been convicted for offence punishable under S. 302 IPC

— Firstly, held, it is required to be noted that A-2 and A-3 are convicted with aid of S. 34 IPC — In any case, there is no evidence at all on record to suggest that when deceased sustained injuries by knives by A-2 and A-3 and deceased sustained Injuries 2 to 8, by the time he was dead — Much reliance was placed on deposition of PW 1 by defence that he admitted that after gunshot injury, deceased fell down and died — However, he does not say that when A-2 and A-3 caused injuries by knives at that time deceased was dead — Therefore, defence has failed to establish and prove that at the time when deceased sustained Injuries 2 to 8 by knives used by A-2 and A-3, he was dead (Para 13)

C. **Evidence Act, 1872 — Ss. 60 and 45 — Murder by gunshot and from injuries caused by sharp weapon — Manner in which sharp weapon was described by witnesses — Whether material — Opinion of doctor as to nature of weapon as inferred from the wounds — Whether could have primacy over direct eyewitness evidence**

— It was case of defence that according to eyewitnesses weapon used was "dagger" (sharp-edged on both sides) and not "knife" (sharp-edged on only one side) and what is recovered is "knife", and PW 2 subsequently improved his deposition that the accused persons concerned caused injuries by "knives" — It is case of defence that even doctor in his cross-examination stated that it is very doubtful to say that injuries were by sharp cutting weapon on both sides — Effect of the same on credibility of prosecution case

— Held, it is to be noted that doctor answered question which was put to him — One is required to consider entire evidence as a whole with other evidence on record — Mere one sentence here or there and that too to the question asked by defence in cross-examination cannot be considered stand alone — Even otherwise it is to be noted that what is stated by doctor/medical officer can at the most be said to be his opinion — He is not eyewitness to incident — PWs 1 and 2 have categorically stated that other accused persons inflicted blows by knives — Same is supported by medical evidence and

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deposition of PW 5 — It is sufficient that Injuries 2 to 8 are by sharp cutting weapon — Injuries 2 to 8 are on different parts of body which show intention and conduct on part of accused A-2 and A-3 that they shared the common intention to murder the deceased — Therefore, they are rightly convicted under S. 302 IPC with aid of S. 34 IPC — Their presence and participation was established and proved by prosecution by examining PWs 1 and 2 who are found to be reliable and trustworthy witnesses — Penal Code, 1860, Ss. 302/34 (Para 14)

D. **Criminal Trial — Appreciation of Evidence — Contradictions, inconsistencies, exaggerations or embellishments — Minor contradictions immaterial — Held, minor contradictions which do not go to root of matter and/or such contradictions are not material contradictions (Para 9)**

Yogesh Singh v. *Mahabeer Singh*, (2017) 11 SCC 195 : (2017) 4 SCC (Cri) 257; *Prabhu Dayal* v. *State of Rajasthan*, (2018) 8 SCC 127 : (2018) 3 SCC (Cri) 517, *impliedly relied on*

E. **Criminal Trial — Injuries, Wounds and Weapons — Generally — Recovery of weapon used in commission of offence for convicting accused — If mandatory — Held, for convicting accused, recovery of weapon used in commission of offence is not a sine qua non (Para 12)**

F. **Criminal Trial — Injuries, Wounds and Weapons — Ballistic report showing that bullet recovered did not match with gun recovered — Effect of, on reliable deposition of eyewitnesses, if any — Held, merely because ballistic report shows that bullet recovered does not match with gun recovered, it is not possible to reject credible and reliable deposition of eyewitnesses (Para 12)**

Himanshu Mohan Rai v. *State of U.P.*, (2017) 4 SCC 161 : (2017) 2 SCC (Cri) 322, *impliedly relied on*

G. **Criminal Trial — Appreciation of Evidence — Generally — How evidence is required to be considered — Held, one is required to consider entire evidence as a whole with other evidence on record — Mere one sentence here or there and that too to the question asked by defence in cross-examination, cannot be considered stand alone (Para 14)**

Appeal dismissed Y-D/67779/CR

Advocates who appeared in this case :
Vinod Diwakar, Additional Advocate General [Rishi Malhotra (Amicus Curiae) and Arjun Dewan, Advocates], for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. (2018) 8 SCC 127 : (2018) 3 SCC (Cri) 517, *Prabhu Dayal* v. *State of Rajasthan* 194*c-d*
2. 2018 SCC OnLine All 6006, *Rakesh* v. *State of U.P.* 191*a*, 191*f*, 191*f-g*, 195*a*, 195*b*
3. (2017) 4 SCC 161 : (2017) 2 SCC (Cri) 322, *Himanshu Mohan Rai* v. *State of U.P.* 194*d-e*
4. (2017) 11 SCC 195 : (2017) 4 SCC (Cri) 257, *Yogesh Singh* v. *Mahabeer Singh* 194*c-d*

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The Judgment of the Court was delivered by

M.R. SHAH, J.— Feeling aggrieved and dissatisfied with the impugned judgment and order dated 10-9-2018 passed by the High Court of Judicature at Allahabad in *Rakesh* v. *State of U.P.*[1], by which the High Court has dismissed the said appeal preferred by the appellants original accused challenging their conviction for the offence punishable under Section 302 read with Section 34 of the Penal Code, 1860, passed by the learned Additional District and Sessions Judge, Fast Track Court No. 2, Hathras (hereinafter referred to as the learned "trial court"), original Accused 1 and 3 have preferred the present appeal.

2. That both the appellants herein along with one another accused Suresh were tried by the learned trial court for the offences punishable under Section 302 read with Section 34 IPC for having killed one Bhishampal Singh in an incident which happened on 28-1-2006. The role attributed to A-1 Rakesh was that he used countrymade pistol and caused injuries on the deceased. It was alleged that so far as Suresh and Anish — A-2 and A-3 are concerned, they assaulted the deceased with their respective knives. That after the full-fledged trial, the learned trial court held all the accused guilty for the offence punishable under Section 302 read with Section 34 IPC and sentenced all of them to undergo life imprisonment. The accused were also convicted for the offences punishable under Sections 4/25 of the Arms Act for which a separate sentence was also imposed by the learned trial court. While convicting the accused, the learned trial court heavily relied upon the depositions of PW 1 and PW 2 eyewitnesses and also the medical evidence and the deposition of Dr Santosh Kumar PW 5 who conducted the post-mortem on the body of the deceased.

3. Feeling aggrieved and dissatisfied with the judgment and order of conviction and sentence passed by the learned trial court convicting the accused for the offence punishable under Section 302 read with Section 34 IPC and imposing the sentence of life imprisonment and also for the offences under the Arms Act, all the accused preferred appeal before the High Court being Criminal Appeal No. 2811 of 2008. By the impugned judgment[1] and order, the High Court has dismissed the said appeal and has confirmed the conviction of the accused for the offences under Section 302 read with Section 34 IPC and the sentence imposed of life imprisonment.

4. Feeling aggrieved and dissatisfied with the impugned judgment[1] and order of the High Court, original Accused 1 Rakesh and Accused 3 Anish have preferred the present appeal. It appears that original Accused 2 Suresh has not preferred any appeal.

5. Shri Rishi Malhotra, learned Amicus Curiae has appeared on behalf of the appellants and Shri Vinod Diwakar, learned Additional Advocate General has appeared on behalf of the State of Uttar Pradesh and Shri Arjun Dewan, learned advocate has appeared on behalf of the original complainant.

1 2018 SCC OnLine All 6006

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5.1. Shri Rishi Malhotra, learned Amicus Curiae has vehemently submitted that both, the learned trial court as well as the High Court have committed a grave error in convicting the accused, relying upon the depositions of PW 1 and PW 2.

5.2. It is vehemently submitted that so far as PW 2 is concerned, his presence on the spot at the time of the incident is absolutely doubtful. It is submitted that even according to him he came subsequent to the occurrence of the incident. It is submitted that as such he has specifically admitted in the cross-examination that when they had reached the court at 10.30 a.m., the next date of hearing was given as the Presiding Officer was not there. It is submitted that he was also confronted about the fact that he had come to the spot only after receiving the information about the incident. It is submitted that PW 2 has specifically admitted that he reached the court before the deceased and PW 1 at 10.00 a.m. and had moved an application for exemption from appearance of the accused in that case. According to the learned counsel appearing on behalf of the appellants, he also admitted that on 29-1-2006 he alone came to the court and did not have a word with the deceased on the morning of 28-1-2006. It is submitted therefore no reliance could have been placed upon the deposition of PW 2.

5.3. It is further submitted by the learned Amicus Curiae that as such and it is an admitted position that there was an enmity and prior disputes between the accused and the deceased and even PW 1. It is submitted that the deceased was facing criminal trial under Section 307 IPC on the allegation of murder attempt on A-1 Rakesh. It is submitted therefore there is all possibility of falsely implicating A-1 Rakesh.

5.4. It is further submitted that so far as the other accused — A-2 and A-3, namely, Suresh and Anish are concerned, from the ocular evidence as well as medical evidence, it is clear that they caused injuries on the deceased after the deceased died i.e. on the dead body. It is submitted therefore that when they inflicted injuries on the dead body i.e. after the deceased died by gunshot, they could not be convicted for the offence punishable under Section 302 as by the time accused A-2 and A-3 were alleged to have caused injuries, the deceased had died. It is submitted that even PW 1 in his cross-examination has admitted that the moment deceased received gunshot injury he fell down and died.

5.5. It is further submitted that even according to PW 1 and even PW 2 the matter was already adjourned and even the "sick note" was given on behalf of the deceased. It is submitted therefore when the "sick note" was given and the matter was already adjourned, there was no reason for the deceased and PW 1 to come to court. It is submitted that it is very much doubtful that the deceased and PW 1 reached the court and/or went to the court room.

5.6. It is further submitted by the learned Amicus Curiae appearing on behalf of the appellants that even there are material contradictions insofar as use of weapon by A-2 and A-3 is concerned. It is submitted that what was recovered was "knife" and PW 2 has categorically stated that the deceased was assaulted by "dagger" and not by "knife".

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5.7. It is submitted that there is a difference between "dagger" and "knife". It is submitted that even Dr Santosh Kumar PW 5 has specifically admitted that Injuries 2 to 8 (incised injuries) cannot be caused by stabbing by knife. It is submitted that the doctor has specifically admitted in the cross-examination that incised Injuries 2 to 8 are not mentioned clean-cut and it was difficult to state that the alleged weapon was not sharp on both the sides.

5.8. It is further submitted that it has also come in evidence that as per the ballistic report, the bullet did not match with the alleged pistol used by the accused Rakesh.

5.9. It is submitted that the appellants are in custody since January 2006 and have already undergone more than 15 years of sentence.

5.10. Making the above submissions, it is prayed to allow the present appeal and quash and set aside the conviction and sentence imposed by the learned trial court, confirmed by the High Court.

6. Shri Vinod Diwakar, learned Additional Advocate General appearing on behalf of the State of Uttar Pradesh has vehemently submitted that in the facts and circumstances of the case, no error has been committed by the learned trial court convicting the accused, relying upon the depositions of PW 1 and PW 2.

6.1. It is submitted that both, PW 1 and PW 2 are trustworthy and reliable witnesses. It is submitted that their presence at the time of incident has been established and proved by the prosecution by examining PW 1 and PW 2. It is submitted that both, PW 1 and PW 2 have been fully and thoroughly cross-examined and considering the entire evidence/deposition of PW 1 and PW 2, their presence at the time of incident has been established and proved. It is submitted that on each and every aspect on which the learned counsel appearing on behalf of the accused — defence has made submissions, PW 1 and PW 2 were cross-examined. It is submitted that thereafter on appreciation of entire evidence on record, the learned trial court has convicted the accused and the same has been rightly confirmed by the High Court.

6.2. It is submitted that in the present case the motive has been established and proved. It is submitted that the defence has failed to establish and prove that they were falsely implicated in the case.

6.3. It is further submitted by the learned Additional Advocate General appearing on behalf of the State of Uttar Pradesh that as such nothing is on record and/or there is no evidence on record to even suggest that A-2 and A-3 caused injuries on the deceased by the time he died. It is submitted that the aforesaid defence is not borne out at all either from the deposition of PW 1, PW 2 or even PW 5.

6.4. It is submitted that as such the prosecution has fully established and proved that on 28-1-2006 the deceased, PW 1 and PW 2 attended the court. It is submitted that, however, the court was not available on that date as the learned Presiding Officer was on inspection and therefore before they reached, the matter was adjourned. It is submitted that "sick note" on behalf of the deceased has already been explained by PW 1 in his deposition.

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6.5. It is further submitted that in the present case even recovery of weapon/weapons used by the accused has been established and proved.

6.6. It is further submitted that even the accused did not lead any evidence to prove that they were not present on the spot at the time of incident and that they were present elsewhere.

7. Shri Arjun Dewan, learned advocate appearing on behalf of the original complainant has adopted the submissions made by the learned Additional Advocate General appearing on behalf of the State of Uttar Pradesh. In addition, it is vehemently submitted by the learned counsel appearing on behalf of the complainant that the evidence of PW 1 and PW 2 is credible. It is submitted that their presence at the time of incident has been established and proved. It is submitted that PW 2 has consistently stated that he saw the accused herein on a motorcycle going towards the deceased victim and he witnessed Accused 1 Rakesh shooting the deceased victim and Accused 2 Suresh assaulting the deceased with a knife. It is submitted that there might be some minor contradictions but as held by this Court in *Yogesh Singh* v. *Mahabeer Singh*[2] and *Prabhu Dayal* v. *State of Rajasthan*[3], that minor discrepancies should not be given undue importance that do not go to the root of the matter.

7.1. Now so far as the submission on behalf of the accused that as per the ballistic report the bullet found did not match with the gun recovered, it is submitted that as held by this Court in *Himanshu Mohan Rai* v. *State of U.P.*[4], in a case where the ballistic report is contrary to the evidence of the witnesses, but the statements of the witnesses have inspired the confidence of the Court and have been held to be credible and reliable, then such a contradiction between the ballistic report and the credible evidence of a witness cannot be the basis of rejecting the evidence of a witness. It is submitted that at the most the recovery of the weapon/gun may not be believed, but when PW 1 and PW 2 have specifically stated that it was A-1 who fired and caused injury on the deceased which is fully supported by the medical evidence — Injury 1 and in fact there was a gunshot injury on the deceased and therefore on the aforesaid aspect, PW 1 and PW 2 are fully supported by the medical evidence, the aforesaid cannot be a ground to acquit the accused.

7.2. It is submitted that there is a recovery of knife at the instance of A-1, which was used by A-2 for commission of the offence. It is submitted that as such no question with respect to knife recovered can cause Injuries 2 to 8 was put to Dr Santosh Kumar PW 5.

7.3. It is further submitted that even in the recovery memo which was immediately taken during the course of investigation had the signatures of PW 1. It is submitted therefore the presence of PW 1 has already been established and proved.

2 (2017) 11 SCC 195 : (2017) 4 SCC (Cri) 257
3 (2018) 8 SCC 127 : (2018) 3 SCC (Cri) 517
4 (2017) 4 SCC 161 : (2017) 2 SCC (Cri) 322

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7.4. It is further submitted that as such there are concurrent findings of fact recorded by the learned trial court as well as the High Court, which are on appreciation of evidence on record. It is submitted that therefore no case is made out to interfere with the impugned judgment[1] and order of conviction and sentence imposed by the learned trial court, confirmed by the High Court.

8. We have heard the learned counsel for the respective parties at length. We have carefully gone through the judgment and order of conviction and sentence passed by the learned trial court as well as the impugned judgment[1] and order passed by the High Court. We have also reappreciated the entire evidence on record, more particularly the depositions of PW 1, PW 2 and PW 5. We have also considered the injuries found on the dead body of the deceased.

9. From the judgment and order passed by the learned trial court, it appears that while convicting the accused, the court has heavily relied upon the depositions of PW 1, PW 2 and PW 5. PW 1 and PW 2 are stated to be the eyewitnesses to the incident. Having gone through the entire depositions of PW 1 and PW 2 and even the cross-examination of the aforesaid two witnesses, we are of the firm opinion that both, PW 1 and PW 2 are trustworthy and reliable witnesses. Their presence at the time of incident with the deceased has been established and proved by the prosecution. The presence of PW 1 and even PW 2 at the time of incident is natural. PW 1 is the son of the deceased who accompanied the deceased to attend the court. Similarly, PW 2 also was required to attend the court and therefore he reached the court and thereafter he saw the incident. Both the witnesses have been fully and thoroughly cross-examined. There may be some minor contradictions, however, as held by this Court in a catena of decisions, minor contradictions which do not go to the root of the matter and/or such contradictions are not material contradictions, the evidence of such witnesses cannot be brushed aside and/or disbelieved.

10. In the present case, both the aforesaid witnesses are thoroughly cross-examined on each and every aspect pointed out by the defence. However, they have fully supported the case of the prosecution. PW 1 has also explained the giving of the "sick note" on behalf of the deceased when such a question was asked in the cross-examination. PW 1 has categorically stated that when they reached, the matter was already adjourned as the learned Presiding Officer was on inspection and was not available in the court. By the time they reached, the matter was already adjourned. As at the time when the matter was adjourned the deceased and PW 1 could not reach the court, the learned advocate gave the sick note and prayed for exemption. The matter came to be adjourned and thereafter PW 1 and the deceased reached the court. From the entire evidence on record, it is established and proved that the deceased and PW 1 went to the court, thereafter the matter was adjourned and thereafter while returning just 15 to 20 minutes away from the court, the incident had taken place. The place of incident has been established and proved by the prosecution.

1 *Rakesh* v. *State of U.P.*, 2018 SCC OnLine All 6006

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11. Now so far as the submission on behalf of the defence that PW 2 stated that he reached the spot subsequently after he received the message is concerned, what is required to appreciate and consider the evidence as a whole. When a specific question was asked to him that in the statement before the police, he stated that he reached subsequently, PW 2 has specifically denied the same and he has categorically stated that no such statement was given by him to the police and he does not know how such a statement was recorded in his statement. No question has been asked by the defence to the person/IO who recorded the statement of PW 2. Considering the entire deposition as a whole, we are of the opinion that the prosecution has been successful in proving the presence of PW 1 and PW 2 at the time and place of incident. They are found to be trustworthy and reliable.

12. Now so far as the submission on behalf of the accused that as per the ballistic report the bullet found does not match with the firearm/gun recovered and therefore the use of gun as alleged is doubtful and therefore benefit of doubt must be given to the accused is concerned, the aforesaid cannot be accepted. At the most, it can be said that the gun recovered by the police from the accused may not have been used for killing and therefore the recovery of the actual weapon used for killing can be ignored and it is to be treated as if there is no recovery at all. For convicting an accused recovery of the weapon used in commission of offence is not a sine qua non. PW 1 and PW 2, as observed hereinabove, are reliable and trustworthy eyewitnesses to the incident and they have specifically stated that A-1 Rakesh fired from the gun and the deceased sustained injury. The injury by the gun has been established and proved from the medical evidence and the deposition of Dr Santosh Kumar, PW 5. Injury 1 is by gunshot. Therefore, it is not possible to reject the credible ocular evidence of PW 1 and PW 2 — eyewitnesses who witnessed the shooting. It has no bearing on credibility of deposition of PW 1 and PW 2 that A-1 shot deceased with a gun, particularly as it is corroborated by bullet in the body and also stands corroborated by the testimony of PW 2 and PW 5. Therefore, merely because the ballistic report shows that the bullet recovered does not match with the gun recovered, it is not possible to reject the credible and reliable deposition of PW 1 and PW 2.

13. Now so far as the submission on behalf of the defence that at the most it can be said that A-2 and A-3 caused injuries on the dead body as according to them they caused injuries after the gunshot fired on the deceased and the deceased fell down and died. Therefore, it is the case on behalf of A-2 and A-3 that having caused the injuries on the dead body, they could not have been convicted for the offence punishable under Section 302 IPC. However, it is required to be noted that A-2 and A-3 are convicted with the aid of Section 34 IPC. Apart from that, there is no evidence at all on record to suggest that when the deceased sustained injuries by knives by A-2 and A-3 and the deceased sustained Injuries 2 to 8, by the time he was dead. Much reliance has been placed on the deposition of PW 1 by the defence that he admitted that after the gunshot injury, the deceased fell down and died. However, he does not say that when A-2 and A-3 caused injuries by knives at that time the deceased was

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dead. Therefore, the defence has failed to establish and prove that at the time when the deceased sustained Injuries 2 to 8 by the knives used by A-2 and A-3, he was dead.

14. It is also the case on behalf of the defence that according to the witnesses/eyewitnesses the weapon used was "dagger" and not "knife" and what is recovered is "knife" and PW 2 has subsequently improved his deposition that the other accused caused injuries by knives. It is the case on behalf of the defence that even the doctor in his cross-examination has stated that it is very doubtful to say that the injuries were by sharp cutting weapon on both sides. However, it is to be noted that the doctor answered the question which was put to him. One is required to consider the entire evidence as a whole with the other evidence on record. Mere one sentence here or there and that too to the question asked by the defence in the cross-examination cannot be considered stand alone. Even otherwise it is to be noted that what is stated by the doctor/medical officer can at the most be said to be his opinion. He is not the eyewitness to the incident. PW 1 and PW 2 have categorically stated that the other accused inflicted the blows by knives. The same is supported by the medical evidence and the deposition of PW 2. Injuries 2 to 8 are sufficient by the sharp cutting weapon. Injuries 2 to 8 are on different parts of the body which show the intention and conduct on the part of the other accused A-2 and A-3. Therefore, they are rightly convicted for the offence punishable under Section 302 IPC with the aid of Section 34 IPC. Their presence and participation have been established and proved by the prosecution by examining PW 1 and PW 2 who are found to be reliable and trustworthy witnesses.

15. In the present case, the prosecution has been successful in proving the motive. There was a prior long-time enmity between the deceased and the accused A-1. Even the deceased was also facing trial for the offence under Section 307 IPC at the instance of A-1. The defence has failed to prove any circumstances by which it can be said that they are falsely implicated in the case.

16. In view of the above and for the reasons stated above, no interference of this Court is called for. The learned trial court and the High Court have rightly convicted the accused for the offence punishable under Section 302 read with Section 34 IPC.

17. So far as A-1 is concerned, there is a direct evidence against him using the gun and shooting the deceased. Therefore, even he can be convicted for the offence punishable under Section 302 IPC, without the aid of Section 34 IPC. As observed hereinabove, both the courts below have rightly convicted A-1 for the offence punishable under Section 302 IPC and other accused — A-2 and A-3 for the offence punishable under Section 302 IPC, with the aid of Section 34 IPC. Under the circumstances, the appeal fails and deserves to be dismissed and is accordingly dismissed.