

## State vs Sushil Sharma on 19 February, 2007

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**Author: P.K. Bhasin**

**Bench: R.S. Sodhi, P.K. Bhasin**

JUDGMENT

P.K. Bhasin, J.

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1. Conviction of the appellant Sushil Sharma for the murder of one Ms. Naina Sahni @ Ravi Naina Sahni vide judgment dated 03-11-2003 rendered by an Additional Sessions Judge, Delhi in Sessions case No. 88/96 pertaining to FIR No. 486/95 of Connaught Place police station and imposition of death sentence upon him vide order dated 07-11-2003 has led to the filing of an appeal by the appellant and making of a reference to this Court by the trial court for confirmation of the death sentence. The Reference and the appeal were taken up together for hearing and both are now being disposed of by this common judgment.

2. The relevant facts leading to the prosecution of the appellant Sushil Sharma along with one Keshav Kumar for the offence of murder and three other persons for harbouring Sushil Sharma after the murder have been noticed by the trial court in paras No. 112 and 17 and are as follows:

1. Accused Sushil Sharma former President of Delhi Youth Congress (I), Naina Sahni (hereinafter referred to as the deceased) former General Secretary of Delhi Youth Congress(I) Girls Wing were working for Delhi Youth Congress. Office of Delhi Youth Congress earlier used to be at 4, Bhai Veer Singh Marg, Gole Market, New Delhi. Later on office was shifted to 2, Talkatora Road, New Delhi. The deceased used to visit accused Sushil Sharma at the office of Youth Congress at both said places.

2. In the year 1992 accused Sushil Sharma obtained flat 8/2A at Mandir Marg from its allottee Shri Jagdish Pd. Deceased was also visiting accused Sushil Sharma in the said flat at Mandir Marg. At times she stayed there in the night also. Later it is investigated by the State that both accused Sushil Sharma and deceased had married at the said residence in their own way. The deceased, thereafter, continued to live in the said flat claiming to be the wife of accused Sushil Sharma till she was murdered.

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3. In the heart of the National Capital Territory at Ashoka Road India Tourism Development Corporation (ITDC) a company duly incorporated under the Companies Act, 1956 was running its unit called Ashok Yatri Niwas. ITDC entered into a license agreement on 10.11.94 with (i) Sh.Lalit Kishore Sachdeva s/o Sh.Ram Rattan Sachdeva r/o B-37 Gujranwala Town, Delhi (ii) Sh.Virender Kumar Nagpal s/o Sh.(late) Basant Lal r/o HIG 49, Sector E, Aliganj, Lucknow (iii) Sh.Manoj Malik s/o Sh.R.P.Malik r/o A-16 Nirman Vihar Delhi (iv) Sh.R.P.Sachdeva s/o Sh.Hansraj Sachdeva r/o 5/16 Line No. 2, Geeta Colony, Delhi and (v) accused Sushil Sharma s/o Sh.I.M.Sharma r/o MP-27 Maurya Enclave, Delhi partners of M/s. Excel Hotel and Restaurant Inc. 159 Kamla Market, Delhi. The license granted by ITDC permitted the user of park in front of main gate of Ashok Yatri Niwas towards Ashok Road by said partners of M/s. Excel Hotel and Restaurant for running a Bar-be-que. As per the license Bar-be-que was continuously run by the accused Sushil Sharma at said part of Ashok Yatri Niwas. The business of Bar-be-que being run there was called as Bagia Bar-be-que-. Arrangements were made of a kitchen, a tandoor in the said park. The park had fencing of bamboos called as Jafri and also for sitting of customers chair made of stem of tree.

4. On the night of 2/3rd July, 1995 Constable Abdul Nazir Kunju PW3 who was posted at police station Connaught Place a day or two earlier along with PW4 Chander Pal 3151/Delhi Home Guard were assigned the duty to patrol the area of Ashoka Road Western Court etc. While on patrol duty at about 11 p.m. they reached near Ashok Yatri Niwas they heard the cry of a woman namely Anaroo PW-7 crying, hotel mein aag lag gayi. Hearing cry both PW3 and PW4 rushed towards Janpath lane where Ashok Yatri Niwas is situated. They noticed boom of smoke spiraling and flames leaping out of Bagia Bar-be-que from the side of the kitchen. Constable Kunju then rushed to telephone available at near by telephone booth to inform the control room (100). But the same was closed. Constable Kunju then left Home Guard Constable Chander Pal at the said place and rushed to the police post Western Court situated nearby to inform the police station on wireless. On return Constable Kunju PW3 noticed that smoke and fire had increased.

5. Constable Kunju PW3 along with Home Guard Constable Chander Pal PW4 in order to find out the cause of smoke and fire entered the Bar-be-que from its back side. On entering from back side they found accused Keshav near Tandoor (a big oven) made for cooking articles of food. They also noticed accused Keshav putting wooden logs and small fire wood in the burning fire and increasing the fire with the aid of bamboo(balli), Constable Kunju PW3 asked accused Keshav that by such act fire would spread and complete hotel may be burnt. Accused Keshav then represented to Constable Kunju PW-3, I am a worker of a congress party. I am burning old banners, posters and waste papers of the party.

6. Patrolling officer SI Sh. Rajesh Kumar along with Sh. Majid Khan CW5 of Police Control Room, constable Sh. Ranbir Singh PW-62, security staff of hotel namely Sh. Rajiv Thakur PW2, Sh. Mahesh Prasad PW-35 Page 0796 also reached at Bar-be-que from the side of main gate of Ashok Yatri Niwas towards Ashok Road and reached at the gate of Bagia Bar-be-que seeing the fire. Accused Sushil Sharma was noticed by them standing by the side of kanat at the gate of Bar-be-que.

7. Foul and pungent smell being emitted at the Tandoor was observed by the police staff. There having arisen a suspicion SI Rajesh Kumar and Constable Kunju PW-3 detained accused Keshav Kumar. SI Rajesh Kumar along with security staff of the hotel who had reached there and accused Keshav then went upstairs of the hotel to find out if fire had spread there. While they were upstairs, they noticed that flames in the Tandoor had flared up again. SI Rajesh Kumar and others then rushed down stairs. By that time accused Sushil Sharma had run away from there.

8. The fire was doused. On getting closer to the Tandoor a torque of human being was noticed. Closer look revealed that it was a charred body of a female whose limbs had burnt. Intestines due to burning had come out of the body. Burnt bones were lying on the Tandoor. They also noticed near the Tandoor a black polythene sheet. Minute checking of sheet revealed blood spots at various places of polythene sheet.

9. Later Senior officers of the police including IO Niranjana Singh, senior officer of the hotel Sh. K.K. Tuli also reached there. Accused Keshav was then handed over to IO Niranjana Singh.

10. IO Niranjana Singh inspected the site. He noticed that over the Tandoor there was a burnt body. He looked at the body and found that the said body was of a woman aged 25-30 years. He also noticed that bones of one hand were lying on the Tandoor. One leg of the body was found burnt up to the knee while the other leg was found burnt up to the ankle. The other hand was also burnt up to the elbow and bones thereof were also on the Tandoor. Some of the hair of jura(hair knot) were not burnt. One plastic clip was in the hair knot. Teeth of the dead body were visible while intestines had come out.

11. The tiles(plates) on the wall near the Tandoor due to fire had fallen. A big bamboo of wood one corner of which was burnt was there. A polythene tarp on which some blood spots were there was there.

12. IO Niranjana Singh then recorded the statement of constable Kunju PW-3 in Hindi. The English translation is as follows:

I am a constable posted at Police Station Connaught Place. Today from 11.00 p.m. till 5.00 a.m. my duty was to patrol the area of Ashok Road, Western Court etc. At about 11.25 in the night I along with DHG Chander Pal No. 3515, while patrolling the area reached in the side lane of Ashok Yatri Niwas. I noticed a woman and two-three other men crying, hotel mein aag lag gayi aag lag gayi. I saw that from the wall side of Ashok Yatri Niwas, inside Bagia Bar- be-que restaurant there was smoke and flames of fire. I wanted to telephone 100 and also firebrigade from the telephone booth

stand installed there. But telephone booth was closed. I left DHG Chander Pal No. 3515/DHG at the site and rushed for telephoning to the Page 0797 police station and fire brigade to the picket of wireless which was on the back of Western court and nearby. From there with the aid of wireless I informed police station Connaught Place and from the CPWD inquiry of the Western Court I telephoned PCR and firebrigade. I returned to the site after about 20 minutes. The flames and smoke had increased. I entered Bagia Bar-be-que restaurant Along with DHG Chander Pal from the back side. I saw a young man whose name now I have come to know Keshav Kumar son of Chiranjilal r/o 2594 Bagichi Raghunath, Sadar Bazar, Delhi. On the Tandoor of the restaurant there were big-big wooden logs small wooden pieces of logs, he was pouring on the Tandoor and was increasing the fire by reversing the said wood by bamboos. I said to Keshav Kumar, by this the hotel would also be burnt. Keshav Kumar told me, He is a worker of the Congress party and was burning the old posters, banners and waste papers of the party. Foul smell was emitting out of the fire. In the meantime patrol officer SI RAJESH Kumar, PCR Head Constable Majid Khan, Constable Rajbir Singh and security staff of the hotel Sh. Rajiv Thakur, security guard Mahesh Prasad etc. also reached. At that time adjacent to a kanat installed at the gate of Bagia bar-be-que a young man whose name security guard Mahesh told Sushil Sharma and the owner of the restaurant was standing. An associate of Sushil Sharma who had a healthy body, middle height and was wearing blue coloured printed shirt and pant was also there and another young boy well built, middle height were also present in the restaurant towards the side of Tandoor. With the aid of buckets containing water the fire was doused. Because foul smell was emitting out of the fire a suspicion arose to me and also SI Rajesh. Keshav Kumar accused was detained at the site itself, then Along with Security staff and SI Rajesh I went on the roof of Bagia bar-be-que so as to find out if from PVC wire fire had entered into the hotel. When we were on the roof, fire again broke out from Tandoor. We all then rushed downside but by that time all the three persons Sushil Sharma and his two associates had run away from the restaurant. We went near the Tandoor and checked the Tandoor. We noticed in the burning wood a human body and checking the same with attention the burnt body was of an unknown lady whose legs from the foot side had burnt and burnt bones were lying on tandoor. Due to burning intestine had come out. Near the Tandoor a black coloured polythene tirpal was there. When we checked attentively the polythene tirpal, there were spots of blood at places. There was spots of blood on the pant and kurta accused Keshav Kumar was wearing. General Manager Ashok Yatri Niwas Sh. K.K.Tuli had also arrived. In his presence security guard Mahesh told me and SI Rajesh that Sushil Sharma had arrived there at about 10.15 p.m. in his maruti car No. DL 2CA 1872 white in colour which he was driving himself. He had entered the hotel. Arrival of car and its number has been entered in the hotel register. On the Page 0798 site Mahesh also told that Sushil Sharma was standing near Kanat. Security staff and police was not permitted inside the Bagia Bar-be-que by him to reach the fire saying that he was burning the old banners of Congress, poster and waste papers. Keshav Kumar, Sushil Sharma Along with his associates have murdered some unknown woman and were burning the dead body on the Tandoor so

as to destroy the evidence. I can recognize Sushil Sharma and his two associates very well and can identify them. Legal action be taken. Statement read over to me is correct.

Sd/-

Keshav Kumar

17. Accused Keshav had blood spots on his clothes. Accused Keshav was arrested. Blood stained clothes of Keshav Kumar a white kurta Ex. PW75/9 and white pant Ex. PW75/10 were taken into possession vide memo Ex. PW75/P.

3. The investigating officer PW-81 ACP Niranjan Singh seized from the place of fire one paijeb(anklet) besides other articles. After holding inquest proceedings he sent the dead body to RML hospital where Dr.Joginder Singh(PW-85) prepared the medico legal report Ex. PW-85/A in which he noticed the following condition of the charred body:

Whole body burnt exposing underlying bones and tissue, gastro intestinal contents are protruding outside. The left lower limb is amputated above the knee joint, right limb is amputated below knee joint. Brought dead.

4. Since by that time the identity of the dead body could not be established the investigating officer had made an application to the hospital authorities to preserve the dead body and at the same time in view of the disclosure made by Keshav Kumar the investigating officer started the search for Sushil Sharma and the Maruti Car in which he had come to his restaurant. Both could not be traced out and the police had to obtain arrest warrants for Sushil Sharma from the concerned Court. On 04-07-1995 the police got an information from Chanakya Puri police station that Maruti Car No. DL-2CA-1872 had been found abandoned at Malcha Marg near Gujarat Bhawan where he had gone and spent the night of 2nd/3rd July, 1995 with PW-31 Mr. D.K.Rao after fleeing from his Bagia restaurant. Accordingly the police team reached there and on inspection of the car dried blood in the dicky of the car and some hair stuck on the back side of the front seat were noticed. One wrist watch was also found in the car. On 04-07-1995 the police had also searched flat No. 8/2A, DIZ Area, Sector-II, Mandir Marg, Gole Market, New Delhi, where, as per the information supplied by accused Keshav Kumar, accused Sushil Sharma was residing. That flat was on the first floor. During the search of that flat the police had seized from there blood stained cloth piece of the mattress from a bed-room, blood stained carpet, some hair of a woman with blood on them, one lead of bullet, five empty cases of fired cartridges, some photos showing Sushil Sharma and Naina Sahni and one diary in which it was written Sushil Sharma loves Naina loves Sushil Sharma. Besides these things some documents pertaining to Bagia Bar-be Que Page 0799 were also seized. It was also noticed that the plywood over the air-conditioner had a bullet

mark/hole. That plywood piece was also taken into police possession. On enquiries from the houses in the neighborhood the investigating officer came to know that in that flat one Naina Sahni used to live with her husband Sushil Sharma. One Maruti Car No. DAC-3283 parked below that flat, which was found to be in the name of Naina Sahni, was also taken into possession by the police. The investigating officer then suspected that the dead body burnt in Bagia-Bar-be-Que could be that of Naina Sahni. So, he contacted her parents (CWs 1 and 2) for identification of the corpse but on seeing the charred body kept in the mortuary they simply wept but did not identify the same to be of their daughter Naina Sahni.

5. On 05-07-95 the dead body was identified to be that of Ms. Naina Sahni by one Matloob Karim(PW-12) who was also a worker of Congress Party and claimed himself also to be very close to Naina Sahni. On the basis of that identification, the recovery of photos of Sushil Sharma with Naina Sahni, diary, fired cartridge cases, some documents pertaining to Bagia Bar-be-Que etc. from flat No. 8/2A, Mandir Marg, recovery of car No. DL-2CA-1872 from Malcha Marg and the car of Naina Sahni as also the incident of burning of a dead body at the Bagia Bar-be-Que on the night of 2nd July, 1995 the investigating officer became sure that Naina Sahni only had been shot at in the bed room of flat No. 8/2A, Mandir Marg and then her body was removed to Bagia Bar-be-Que to be burnt there.

6. The charred corpse after having been identified by PW-12 Matloob Karim to be that of Naina Sahni was subjected to post mortem examination by Dr. Murari Prasad Sarangi(CW-6) on 5-7-1995. The condition of the burnt body as noticed by Dr. Sarangi in his report was as under:

(Eyes, Ears, Nose, Mouth, Teeth and Tongue etc.) Both eye lids with face charred, eye balls destroyed, ears, nose and lips were also charred, teeth were exposed and studded with soot, other natural orifices were studded with soot particles.

EXTERNAL EXAMINATION Revealed extensive charring of a female dead body beyond identification, having attained a Pugilistic attitude:

owing to coagulation of the muscle proteins.

Skull bone exposed, Partly burnt, blackened, showed multiple post mortem cracks with a few strands of partially burnt hair and metallic hair clip.

...intestines exposed to outside with portions of other internal organs in the abdomen, more on the left side.

Thoracic cage, intercoastal muscles and diaphragm were burnt more on the lt side.

Lt. thigh was chopped off, 28 cms. below left. And superiliac spine, underlying thigh bone cut from the back showing beveling from above downwards vide overleaf. No evidence of firearm discharge from internal examination of the organs.

HEAD and NECK Scalp tissue almost burnt except over a very insignificant (2.5 x 0.8 cm) area on the occipital region with a few strands of Page 0800 burnt hair. Skull showed multiple post mortem heat cracks partly charred and blackened.

#### BRAIN, MENINGES and CEREBRAL BLOOD VESSELS:

Reddish white thick heat haematoma present more on the left cerebral hemisphere above the dura adhered to the endocranium on the same side. Meninges intact and pale. Brain shrunken and substance looked pale, no injury or haemorrhage anywhere.

LARYNX, PHARYNX and OTHER NECK STRUCTURES Pharynx, Larynx and Tracheal rings intact larynx bone intact. Mucous membranes of Pharynx, Larynx and Trachea showed adhered soot particles. Blood vessels were destroyed and collapsed due to burns.

THORAX Burnt as mentioned above. Leg was chopped off 23 cm. below the knee. Both the bones of the leg exposed being cut from the front showing beveling below and inwards.

Patella (knee cap) bone was missing on the Rt. side Distal phalanges in the hand missing (chopped off) Upper limb was chopped off just below the elbow.

Trachea and Bronchi: Intact, mucosa of Tracheal rings smeared with black soot particles.

Pleural Cavity and Lungs: Pleural studded with carbon particles did not show any inflammatory sign to the naked eyes. Both lungs shrunken, desiccated and pale WT 200 gms. (Lt) 210 gms (Rt.) Abdominal wall, peritoneum: Abdominal and pelvic walls burnt, peritoneum- partly burnt.

Stomach and contents: Contained about 500 ml of brownish-semi liquid material, smelt alcoholic, walls looked pale Pancreas, small and large intestines: Shrunken, desiccated, protruded out, no injury/abnormality was noticed.

Dr. Murari Prasad Sarangi opined provisionally that the cause of death was due to haemorrhagic shock consequent to various anti-mortem injuries found on the dead body. The burns noticed on the dead body appeared to have been inflicted after death. Final opinion about the cause of death was kept pending by Dr. Sarangi till the receipt of the report about histopathological examination as well as the report of examination of viscera and blood sample. Although the investigating officer had also

asked for X-ray examination of the dead body to find out if there was any fire-arm injury, in view of the recovery of fired cartridges from the appellant's flat at Mandir Marg, but X-ray examination could be conducted since the X-ray machine was not in order at the time of post-mortem examination which was conducted at Lady Harding Medical College.

7. It is the prosecution case that accused Sushil Sharma in order to avoid his arrest by the police spent the night of 2nd July, 1995 at Gujarat Bhawan, Page 0801 New Delhi with PW-31 Shri D.K.Rao and from there he kept on going from one city to another. Sushil Sharma after going from Gujarat Bhawan had allegedly called up the said Mr. D.K.Rao on 4/07/95 from Bombay and at that time had told Mr. D.K. Rao that he had killed his wife. The news about the murder had spread throughout the country and the police everywhere was informed that Sushil Sharma was wanted in the present case. Sushil Sharma obtained anticipatory bail from a Sessions Court at Madras but it was cancelled by Madras High Court at the instance of the Delhi Police. Thereafter, as per the prosecution case, accused Sushil Sharma came to Bangalore but there he was arrested under Section 41 Cr.P.C.(a) on 10-07-1995 by Bangalore police when he was noticed moving around in a suspicious manner with one advocate Shri Anant Narain. Delhi Police was informed of his apprehension and then the police team from Delhi went to Bangalore and took over the custody of the appellant Sushil Sharma with the permission of the concerned Court on 11-07-1995. During the interrogation of Sushil Sharma at Bangalore it transpired that he was staying in one hotel by the name of Pie Vihar along with one advocate Sh. Anant Narain. Accused Sushil Sharma had led the police team to that hotel where his advocate Sh. Anant Narain was found in room No. 110 and from that room accused Sushil Sharma produced a briefcase which was found to contain one .32 bore revolver No. 1277725(make Arminus) with its license in the name of Sushil Sharma, four live cartridges and some other documents also. That brief case and all the articles found therein were seized by the investigating officer.

8. Accused Sushil Sharma was then brought to Delhi and pursuant to his disclosure statements he first got recovered one blood stained kurta-pyjama from the bushes near Gujarat Bhawan at Malcha Marg and then he also got recovered another blood stained kurta from Rangpuri area.

9. It appears that without waiting for the final opinion of Dr. Sarangi the investigating agency decided to get another post-mortem examination conducted from a Board of autopsy surgeons. Accordingly, second post-mortem examination was done on 12-07-1995 but this time by a team of three doctors headed by Dr. Bharat Singh(PW-44) and during that post-mortem examination Dr. M.P.Sarangi was also associated. During the course of the second post-mortem examination the dead body was subjected to X-ray examination and the X-ray reports showed the presence of one metallic piece in the skull and one in the neck region of the dead body. Those metallic pieces were then extracted out and were found to be lead



bullets. As per the post-mortem report of the Board of Doctors the cause of death of the deceased Naina Sahni was due to coma consequent upon fire-arm injury on the head which was found to be sufficient to cause death in the ordinary course of nature.

10. During investigation the bullets recovered from the body of the deceased, fired cartridge cases and one lead bullet which were recovered from flat No. 8/2A, Mandir Marg, the live cartridges and Arminus revolver recovered from the possession of accused Sushil Sharma at Bangalore were sent to Central Forensic Science Laboratory for examination by a ballistic expert. After examining them and resorting to test firing by using .32 live cartridges which were recovered from the briefcase of the appellant at Page 0802 Bangalore from the .32 Arminus revolver the ballistic expert Shri Roop Singh(PW-70) gave a report(Ex. PW-70/A) confirming that the .32 Arminus revolver was a fire-arm and was in working condition and had been fired through. He further opined that the five .32 cartridge cases and one lead bullet, which were recovered from the flat at Mandir Marg and the two lead bullets which were extracted from the skull and neck of the deceased had been fired from the said .32 Arminus revolver. Regarding the piece of plywood which had also been seized from the aforesaid flat at Mandir Marg on which a bullet hole had been noticed at the time of inspection of the flat and which had also been forwarded to CFSL Shri Roop Singh gave his opinion that the hole observed on the plywood piece could also have been caused by the afore-said .32 lead bullet recovered from the flat at Mandir Marg. Blood stained articles seized from the Bagia restaurant on the day of the incident, those recovered from the flat at Mandir Marg and the dried blood lifted from the dicky of appellant's car at Malcha Marg were also sent to Forensic Science Laboratory where on examination it was found that human blood found on all these articles was of B' group which was the blood group of the female whose body was being burnt on the tandoor and who later on was identified to be Naina Sahni @ Ravi Naina Sahni.

11. As per the prosecution case, DNA test was also got conducted from the Centre for Cellular and Molecular Biology, Hyderabad(CCMB) for confirming the identity of the corpse by sending there the blood samples of the parents of Naina Sahni and the tissues (muscle) from the thigh, radius and ulna bones and two ribs of the deceased. The DNA report (Ex. PW-87/A) confirmed that the dead body which was being burnt at the Bagia Bar-be-Que tandoor on the night of 2nd July, 1995 was that of Ms. Naina, who was the biological offspring of Smt. Jaswant Kaur(CW-1) and Shri Harbhajan Singh(CW-2).

12. After the completion of investigation the investigating officer (PW- 81) came to the conclusion that Naina Sahni was killed by accused Sushil Sharma since he was suspecting that she was having some relationship with Matloob Karim(PW-12) as well as other persons and after killing her he with the help of co-accused Keshav Kumar burnt her dead body on the tandoor of Bagia Bar-be-Que. After the incident accused Sushil Sharma was harboured to save him from punishment for the crime by three persons, namely, Jai Prakash, Rishi Raj Rathi and Ram Prakash Sachdeva and

accordingly a charge-sheet was filed in Magistrate's Court against these five accused persons alleging commission of offences under Sections 302/201/212/34 IPC. In due course, the case was committed to Sessions Court where the learned Additional Sessions Judge framed charges under Section 120-B read with Sections 302 and 201 IPC and also under Sections 302 and 201/120-B IPC against accused Sushil Sharma and Keshav Kumar while the remaining three accused persons, namely, Jai Prakash, Rishi Raj Rathi and Ram Prakash Sachdeva were charged individually under Section 212 IPC. All the accused persons had pleaded not guilty to the said charges framed against them and claimed trial.

13. While the prosecution evidence was going on during the trial accused Keshav Kumar had moved an application confessing his guilt as far as the charge against him under Section 201/120-B IPC was concerned and he Page 0803 requested the court for disposing of his case in view of his confession. In that application dated 21-11-98 accused Keshav Kumar had stated as under:

It is submitted that I am in Tihar Jail in custody for the last 3 years. Number of applications moved by me have been rejected. I have told the police as well as the court that I have not conspired in the murder of Naina. I was not with Sushil Sharma. I was serving in Bagia restaurant of Sushil Sharma. On 2.7.95 in the night about 9/10 p.m. Sushil Sharma came and said to me, close the restaurant. I said, customers are eating food. Let them eat, Sushil Sharma said, Have you not heard what I have said to you. Do what I am saying'. I put off the lights of the restaurant at the instance of Malik. Then he said to me to take out the bundle from the car. At that time Sushil said to me, I have murdered Naina. Immediately she is to be burnt in Tandoor. I got perturbed and continued to do as Sushil said. Sushil said Do what I say. Sushil Sharma put the dead body in the Tandoor and asked me to bring butter to raise the fire and put wood in the tandoor so that dead body is burnt. On account of fear I got more perturbed. I helped Sushil in the burning of the Tandoor at his instance. I am in custody for the last three years four months. My case be disposed of. Again I request that my case be disposed of.

However, at that time no orders were passed on that confession of this accused and his prayer for disposing of his case on the basis of his confession was kept pending till the conclusion of the trial.

14. After the conclusion of prosecution evidence statements of all the accused persons were recorded under Section 313 Cr.P.C. All of them pleaded false implication. As far as accused Keshav Kumar is concerned, at that stage also he admitted the correctness of the contents of his confessional application which had earlier been moved on his behalf by his counsel but added that it was moved because the Special Public Prosecutor had told him that he would be bailed out at the final stage of the trial. Accused Sushil Sharma stated in his statement under Section 313 Cr.P.C. that from the evening of 1.7.1995 to 6.7.1995 he was at Tirupati Balaji and then he came to

Madras on 7.7.1995. From Madras he gave a telephone call at his residence in Maurya Enclave in Delhi when he came to know that one ACP Alok Kumar had visited his residence on 3.7.1995 and had removed his vehicle, licensed revolver, license of the revolver and bullets. He also claimed that ACP had given his telephone number and had also left a message for him that he should talk to him on phone and when he telephoned that ACP he told him to get anticipatory bail otherwise he would be arrested. He then obtained anticipatory bail from a Sessions Court at Madras for a period of 14 days. On 8.7.1995 he was called for an enquiry at some police station at Madras and that day in the evening some police officers from Delhi reached there and he showed them all the papers and they were convinced. However, the police then brought him to Bangalore and showed his arrest there on 10.7.1995. He admitted that car No. DL-2CA-1872 belonged to him but regarding its recovery from Malcha Marg he pleaded that it was actually removed by the police from his residence at MP-27, Maurya Enclave, Delhi Page 0804 where it was parked by his driver. In answer to one of the questions he also admitted that he was living with Naina Sahni at Mandir Marg.

As far as his relationship with Naina Sahni, whom she had allegedly killed, is concerned this is what he had to say:

I knew Naina since 1985. She contested election of Shyama Parsad Mukherjee college. She lost. I was president of N.S.U.I. Delhi. She came in contact with me then. Her attendance was short in the college. She was not allowed to sit in the examination. Next year I got admitted her in the correspondence course. She was career oriented woman. She learned the course of Pilot. I helped her in that. She went to London for CPL (Commercial pilot license). From 1994 to January 1995 she lived in a flat Opp. Birla Mandir as paying guest. That flat belonged to a lady working in Doordarshan. I have shown that flat to police. Police did not cite her as witness. I used to be called at various functions organized at her residence Along with other lady friends associated with her business and pilot course. She started living separately from her parents after there was a dispute between her and her father. She then lived at Gole Market. In the functions which were organized at the residence at Gole Market her parents visited and I also visited. She had a servant Ramu @ Bilas. She was not allowing anyone else to stay there including her parents. I had no contact with her after January, 1995. She remained busy in her career and I remained involved in politics.

15. None of the accused persons had adduced any evidence in defense.

16. The learned Additional Sessions Judge after considering the evidence of the witnesses examined during the trial and making a thorough analysis of the same found accused Sushil Sharma guilty under Sections 302 and 201 IPC. Accused Keshav Kumar was, however, convicted only for the offence under Section 201 IPC for burning the dead body of deceased Naina Sahni. Other three accused persons were

acquitted of the charge under Section 212 IPC. Vide order dated 07-11- 2003 the learned Additional Sessions Judge awarded death sentence to accused Sushil Sharma for the offence of murder and he was also imposed a fine of Rs. 2000/-, in default of payment of which he was ordered to undergo rigorous imprisonment for one month. For his conviction under Sections 201/120-B IPC he was sentenced to rigorous imprisonment for seven years and also to pay a fine of Rs. 10,000/- and in default of payment of fine to undergo rigorous imprisonment for three months. Accused Keshav Kumar was awarded sentence of seven years rigorous imprisonment and to pay a fine of Rs. 10,000/- and in default of payment of fine to undergo rigorous imprisonment for three months.

17. Since the death sentence imposed upon Sushil Sharma required a confirmation by this Court as provided under Section 366 of the Code of Criminal Procedure, 1973 learned Additional Sessions Judge made a Reference to this Court and for challenging his conviction as well as the sentences awarded to him the convict Sushil Sharma filed an appeal. Accused Keshav Kumar, however, has not filed any appeal. So, we are now to decide the fate of convict Sushil Sharma only.

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18. The prosecution case is that the appellant Sushil Sharma had married one Naina Sahni and both of them were living together at flat No. 8/2A, DIZ Area, Mandir Marg, Gole Market, New Delhi till 02/07/95 when Sushil Sharma shot her dead with his licensed revolver. According to the prosecution he killed her because she was asking him to tell everybody that they were married to each other but he did not want to do that since it would have affected his political career and also because he had started suspecting that Naina Sahni had affairs with other persons also. As noticed already, the appellant Sushil Sharma had admitted that he knew Naina Sahni. Now, we are to consider whether from the evidence adduced by the prosecution it has been able to establish its case and whether conviction of the appellant Sushil Sharma is proper and if it is found to be so whether the death penalty is the only appropriate sentence which needs be awarded to him, as has been done by the learned Additional Sessions Judge. Undisputedly, there is no eye witness of the murder of Naina Sahni. So, the prosecution has sought to establish its case on the basis of circumstantial evidence and we shall now proceed to examine if the circumstances relied upon by the prosecution stand fully established from the evidence adduced by it and whether from those circumstances the guilt of accused Sushil Sharma stands established or not. Sh. K.K.Sud, learned senior counsel for the appellant and Ms. Mukta Gupta, learned Standing Counsel for the State took us very deep into the evidence of the witnesses during the course of hearing which became marathon since there were over ninety witnesses examined during the trial and voluminous documentary evidence was also referred to from both the sides. We may say at the outset that Mr.K.K.Sud, learned senior counsel for the appellant, with all the skill at his command had tried before us to break the chain of circumstances relied upon by the prosecution. As a defense counsel he was entitled to do that. Broadly stated, his thrust was to convince us that in this case the appellant has been a victim of circumstances and had been implicated because of political rivalry and the police had taken the services of each and every witness examined in this case under some pressure or the other and none

of them had deposed truly and not only that even the trial Judge did not give fair trial to him and, in fact, had acted as the prosecutor during the entire trial.

19. Way back in the year 1957, the Hon'ble Supreme Court in *Jummon and Ors. v. State of Punjab*, had observed that while dealing with a Death Reference High Court is to consider the proceedings in all their aspects and then to come to an independent conclusion after a fresh appraisal of entire evidence. We shall now proceed to undertake that exercise.

20. The first circumstance relied upon by the prosecution is that accused Sushi Sharma was running the Bagia Bar-be-Que in the lawns of Ashok Yatri Niwas at Ashoka Road and his co-accused Keshav Kumar was employed there. The accused has not claimed during the trial and it was not contended even before us also by his senior counsel that he had no concern whatsoever with the Bagia Bar-be-Que and not even in the Grounds of Appeal it has been claimed by the appellant that he had nothing to do with Bagia Page 0806 restaurant where there was a Bar-be-Que. In answer to the very first question put to the accused when examined under Section 313 Cr.P.C. accused Sushil Sharma had admitted that Bagia restaurant was being run as per an agreement with ITDC. Further, he also admitted that his Manager at Bagia Bar-be'Que was one Mr. Handa and the accountant was one Mr. Karan. Sushil Sharma had also not disputed that his co-accused Keshav Kumar was employed for Bagia Bar-be-Que who himself had also admitted that he was employed at the Bagia restaurant. So, it stands established that the appellant Sushil Sharma was the owner of Bagia Bar-be-Que and his co-accused Keshav Kumar was employed there.

21. The second circumstance relied upon by the prosecution against accused Sushil Sharma is that on the night of 02.07.1995 he came to the Bagia Bar-be-Que in his Maruti Car No. DL-2CA-1872 around 10 p.m. and after sometime he was seen there by the policemen burning a body of a woman on the tandoor of the Bar-be- Que with the help of his employee, accused Keshav Kumar. For establishing these facts the prosecution has examined quite a good number of witnesses. The first witness in this regard whose evidence we would notice is PW-7 Anaro Devi. She was examined on 3/10/97. She deposed that she had been running a vegetable shop near Ashok Yatri Niwas for twenty years and she used to sell vegetables to the Bagia restaurant. Two years back at about 11.30 p.m. when she was present at her shop fire had broken out in Bagia. One constable and a Home Guard came there when she informed them about the fire and asked them to extinguish the fire. As far as her statement that fire had broken out in the restaurant and one constable and a Home guard had come there is concerned the same was not challenged in her cross-examination. Mr. Sud had submitted that this vegetable vendor was having a kiosk on the pavement in the NDMC area and was always at the mercy of the police and so she had obliged the police by deposing in this case falsely. We do not think that this is any ground to disbelieve her. If she was having a kiosk allotted to her by NDMC then where was the occasion for her to be afraid of police. She is totally an independent witness whose testimony has remained unshaken. And after all what she has deposed against Sushil Kumar for which she might have been pressurized by the police. She has spoken only about fire taking place in the Bagia restaurant which Sushil Sharma himself has not disputed at any stage either during the trial or even before this Court. So, we do not think that there is any reason to disbelieve PW-7 Anaro.

22. The next witness examined for establishing the second circumstance is PW-3 Head Constable Abdul Nazir Kunju on whose statement the FIR of this case was recorded. He has re-iterated what he had narrated in his first information statement to the police which we have already re-produced in the earlier part of our judgment. He deposed that on 2nd July, 1995 he was posted as constable at police station Connaught Place. On the night of 2nd July, 1995 while patrolling in the area of Ashok Yatri, Western Court etc. along with a home guard constable Chander Pal when they reached near Ashok Yatri Niwas at about 11.20 p.m. they found that a lady and two-three other persons were crying that fire had broken out in the hotel on which he along with Chanderpall rushed to that place where he saw that smoke and Page 0807 flames of fire were coming out from the side of kitchen. He immediately tried to inform through 100 number from a nearby booth but the same was found closed. He then left the home guard at the spot and himself rushed towards the police post Western Court and from there he gave information to police station through wireless and also to fire brigade from PWD Enquiry of the Western Court and then rushed back to the spot. On reaching the spot he saw that the fire flames were going up and so he entered inside Bagia along with home guard Chander Pal and on reaching inside he saw that accused Keshav Kumar was standing near a tandoor and was keeping big and small pieces of wood into the tandoor and turning and shuffling them with a long wooden stick. On enquiry Keshav Kumar replied I am a worker of the Congress Party. I am burning the old banners, posters and waste papers etc. of my party. In the meantime the patrolling officer SI Rajesh Kumar, the staff of PCR and security officials Rajiv Thakur as well as Mahesh(PW-35) also came there. PW-3 then deposed that he saw accused Sushil Sharma, who was the owner of that restaurant as told to him by Mahesh, near the gate of the restaurant. He(PW-3) and SI Rajesh Kumar extinguished the fire. He went along with SI Rajesh Kumar and Keshav Kumar to the roof of the hotel to ascertain if the flames of the fire had reached the top or not and when they reached the roof and saw down from there that the fire again flared up from the tandoor and then they came down. PW-3 further deposed that since foul smell was emanating from the tandoor he and SI Rajesh Kumar became suspicious and when they went near the tandoor they saw a human body inside the tandoor whose hands and feet were completely burnt and intestines were protruding out from the stomach. On a close look they found that the dead body was of a female and a black coloured tarpaulin was also found lying near the tandoor on which blood was noticed at different places. Keshav Kumar was overpowered but Sushil Sharma had fled away from there. The SHO had also reached the spot and recorded his statement Ex. PW-3/A. On 13th he had identified accused Sushil Sharma in the police station as the same person whom he had seen standing near the kanaat at the gate of Bagia restaurant.

23. PW-4 is Constable Chandra Pal. He has deposed that on 2nd July, 1995 he was on patrolling duty along with Abdul Nazeer Kunju(PW-3) from 11 p.m. to 5 a.m. and while patrolling when they reached the side road of Ashok Yatri Niwas at about 11.30 p.m. they heard a woman and 2/3 men raising an alarm that some fire incident had taken place. They found that the said fire was inside Bagia Restaurant from where smoke and flames were appearing. Constable Abdul Nazeer Kunju while asking him to stay there went to make a telephone call to the police station and the fire brigade and came back within 15/20 minutes by which time the smoke and fire flames had become enriched. He also deposed that he along with constable Abdul Nazeer Kunju scaled the back side wall and entered the said restaurant for extinguishing the fire. On reaching near the tandoor they found that accused Keshav Kumar was trying to enrich the fire with the help of a wooden balli

whereupon he and constable Kunju asked him not to do so otherwise the fire would spread in the entire hotel but Keshav said that he was a worker of Congress Party and he had burnt the old banners and waste posters of his Page 0808 party. He thereafter deposed that entrance gate of Bagia Restaurant was covered by the side covering of thick cloth(kanaat) and accused Sushil Sharma, proprietor of the hotel, as told to him by security guard Mahesh Prasad(PW-35), was standing there wearing white coloured kurta payjama. He also deposed that Rajesh Sahib, constable Kunju along with security staff took Keshav Kumar on the roof of the hotel for checking as to whether the fire had spread in the hotel. He further deposed that the man wearing white kurta pajama standing near the side covering of thick cloth (accused Sushil Sharma) came near the oven and scratched the fire with a wooden balli as a result of which the flames again erupted. He further deposed that by the time Rajesh Sahab etc. came down accused Sushil Sharma had left from there. Foul smell was coming from the fire and on attentively seeing an unknown human body of a woman was found lying whose burnt bones were lying on the oven and the intestines were also appearing. He also deposed that the white kurta and pants of Keshav Kumar were stained with blood and he was arrested. PW-4 thereafter deposed that 10/12 days after the incident he was called at Tilak Marg where ACP and the investigating officer and accused Sushil Sharma were present and he had identified accused Sushil Sharma as the same person who had left Bagia restaurant after flaming up the fire on the night of 2nd July.

24. The trial Court had examined one PCR official also as a court witness. He is CW-5 Head Constable Majid Khan. He has deposed that on the night of 2nd July,1995 he was on duty on PCR Vehicle of which Ranbir Singh was the driver. They went to Ashok Yatri Niwas for drinking water and there they noticed fire in Bagia restaurant and then he Along with Ranbir driver and Mahesh Prasad went towards the gate of Bagia restaurant. There was a kanaat fixed at the gate and one man(appellant Sushil Sharma) was standing there from whom he enquired about the cause of fire. That man told him that they were burning old banners and waste papers and flags of Congress party and that man also said that he was leader of youth Congress. Mahesh Prasad then told him(CW-5) that that man was the owner of Bagia restaurant and his name was Sushil Sharma. This witness also deposed that accused Keshav Kumar was seen raising the fire and also that in the fire there was a human body of a woman. He also stated that Keshav Kumar had been apprehended at the spot itself while Sushil Sharma had run away. He correctly identified both accused Sushil Sharma and Keshav Kumar.

25. PW-5 Krishan Kumar Tuli during those days was the General Manager in Ashok Yatri Niwas. He deposed that in the intervening night of 2nd/3rd July, 1995 at 12.45 a.m. he received a telephonic call from the security staff that fire had broken out in Bagia Bar-be-Que restaurant on receipt of which he went to Bagia Restaurant. Some burnt pieces of wood were lying on the tandoor of Bagia Restaurant and a dead body of a woman of 25/30 years in burnt condition was seen between the woods on the tandoor. Accused Keshav Kumar, Manager of Bagia restaurant was also present.

26. During the cross-examination of PWs 3, 4, 5 and CW-5 it was not claimed on behalf of the accused that their statements that they had seen a dead body of a female being burnt on the tandoor of Bagia Bar-be-Que were not Page 0809 correct and nothing of the sort had happened on the night of 2nd July, 1995. Similarly no such suggestion was given to the investigating officer PW-81 ACP

Niranjan Singh that he had not lifted any charred body of a female from the tandoor at the Bagia Bar-be-Que that day. So, in the absence of any cross- examination of these material witnesses on this vital part of the prosecution case their statements in this regard stood admitted by the accused. It is now well settled that if a witness is not cross-examined on any relevant point deposed to by the witness its correctness cannot be disputed. Even during his examination under Section 313 Cr.P.C. Sushil Sharma did not claim that no such thing had happened in his Bagia restaurant. He simply claimed that he did not know anything in this regard. Of course, he denied his own presence there on the night of 2nd July, 1995.

27. Learned senior counsel for the appellant had sought to demolish the testimonies of PWs 3 and 4, the two policemen who had entered the Bagia restaurant on hearing the shouts about the fire in the restaurant, mainly on the ground that their conduct at that time negatives their very presence in that area. It was submitted that both these witnesses even after knowing that fire had taken place in the restaurant did nothing immediately to extinguish the fire and instead Constable Kunju(PW-3) went around from one place to another to inform the police control room and fire brigade and in his absence PW-4 constable Chander Pal also did nothing and kept on waiting for Kunju to come and only after Kunju came back after about twenty minutes that they went inside the hotel compound and extinguished the fire. Mr. Sud also submitted that Ashok Yatri Niwas itself is a very big hotel and, therefore, if at all PW-3 Kunju had to make a telephone call to the local police or police control room at first instance before doing anything himself regarding the fire he could have gone inside the hotel to make the telephone call but he did not go there and went around at different places looking for a telephone booth and that despite the fact that even near the hotel there were places from where he could make phone call he did not go there and went up to a distance of a kilometer for that purpose leaving the fire spot in flames. Mr. Sud further submitted that PWs 3 and 4 both claim to have scaled over the wall on the back side of the hotel to enter inside instead of entering from main gate. That also improbabilises their version. It was also contended that although PW-4 constable Chander Pal has claimed that accused Sushil Sharma had also come near the tandoor and had scratched the wood pieces when constable Kunju etc. had gone upstairs but despite that neither PW-4 nor PW-3 made any attempt to apprehend accused Sushil Sharma and it is not believable that if actually Sushil Sharma was there and these two policemen had smelt something foul they would have allowed him to go away like that. Mr. Sud contended that this abnormal conduct of PW-3 makes his very presence in the area around Ashok Yatri Niwas highly doubtful and being a policeman he was conveniently introduced as a witness by the investigating officer.

28. We find from the cross-examination of PW-3 that good number of pages have been unnecessarily wasted only to elicit from him that he could have made phone calls to the police and fire brigade from many nearby places instead of going up to a distance of half a kilometer. There is no doubt that these two Page 0810 witnesses behaved like that but that behavior of theirs is not sufficient to brush aside their version of the incident. Different persons react differently in a particular situation. PW-3 thought it proper to first ring up the fire brigade and the police station. That was his decision at that moment. At that time he was not suspecting any foul play. What we have to see if the evidence of these two witnesses, as it appears on record, inspires confidence or not. We find that it does inspire confidence. They could not have cooked up such a story unless it had actually happened that way. We also find from the cross- examination of PW-3 Kunju on behalf of



accused Keshav Kumar that it was suggested to this witness that Keshav Kumar had, in fact, informed him that he was the Manager of the hotel and that he was working as per the instructions of the owner. This suggestion put to the witness also confirms his presence at the Bagia Restaurant. One suggestion was put to PW-3 on behalf of Sushil Sharma that name of Sushil Sharma was taken by Mahesh Prasad(PW-35) at the time of recording of the FIR Ex. PW-3/A. Another suggestion put to this witness was that face of Keshav Kumar was quite black due to smoke and fire. These suggestions also confirm the presence of PW-3 at the Bagia Restaurant and also that of Sushil Sharma himself as otherwise Sushil Sharma could not have known that at the time of fire at the tandoor face of Keshav Kumar had become quite black due to smoke and fire. As far as the fact that these two witnesses did not make any efforts to apprehend Sushil Sharma is concerned we do not think that it makes any difference. Both of them have claimed that foul smell from the fire place could be felt by them when the persons who had gone to the roof of the hotel came back. By that time they had not suspected anything foul and so there was no occasion for constable Chander Pal to have apprehended Sushil Sharma before that. From the suggestion put to one of these witnesses on behalf of Sushil Sharma to the effect that the face of Keshav Kumar had become black due to smoke and that Keshav had taken the name of Sushil Sharma when FIR was being recorded it also appears to us that after seeing that lot of policemen had reached the spot accused Sushil Sharma kept on watching everything from some distance from where he could not be noticed by anyone. Another reason put forth by Mr. Sud for discrediting PW-2 Kunju was that he had been rewarded by the authorities and that shows that he had deposed falsely to get rewarded. There is no doubt that PW-3 was given cash reward by the Government in connection with this incident, as admitted by himself in cross-examination, but that does not show that he had been introduced as a witness after promising him that he would be rewarded if he would depose falsely against Sushil Sharma. This kind of an argument was once made before the Supreme Court also in *Laxmi Raj Shetty and Ors. v State of Tamil Nadu* (1988) 3 Supreme Court Cases, and the Supreme Court rejected it saying that just because a witness is rewarded for his exemplary and courageous act of helping the police in apprehending some offender he cannot be dubbed as a got-up witness and evidence of that witness cannot get impaired. So, just because in the present case PW-3 had been rewarded his evidence cannot be viewed with suspicion. We are, therefore, not inclined to doubt the veracity of PWs 3 and 4 as truthful witnesses.

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29. Regarding CW-5 Majid Khan it was submitted by Mr. Sud that he had been summoned by the trial Court as a Court witness to fill up the lacunae in the prosecution case. There is no doubt that this witness was not examined by the prosecution though cited in the list of witnesses and he was summoned by the trial Court but that does not mean that the trial Court was filling up any lacuna in the prosecution case. Nothing has been shown to us from which it could be said that this exercise of power by the trial Court, which undoubtedly vested in it, was exercised improperly. PW-5 K.K.Tuli is also a totally independent witness. So, we can say that from the evidence of PWs 3, 4, 5 and CW-5 it stands established beyond any shadow of doubt that on the night of 2nd July, 1995 dead body of some woman was being burnt on the tandoor of Bagia Bar-be-Que. It was being burnt by accused Keshav Kumar who, as noticed already, himself had also confessed about that during the trial. Even from the evidence of PW-85 Dr. Joginder Singh, who had examined the dead body for the first time

in the hospital where it was shifted, and the autopsy surgeons PW-44 Dr. Bharat Singh, Dr. T.D. Dogra(PW-68) and CW-6 Dr. Murari Prasad Sarangi it stands established that the charred corpse examined by them was that of a female and in this regard their findings were not challenged in their cross-examination on behalf of the accused and not even in the course of arguments before us by the learned senior counsel for the appellant.

30. Now, we come to the evidence about the presence of appellant Sushil Sharma at the Bagia restaurant on the night of 2nd July, 1995 and the prosecution allegations that he was also burning the body. On this aspect of the matter also the prosecution is relying upon evidence of PWs 3, 4 and CW-5. Their evidence we have already narrated. There are other witnesses also whose evidence has been relied upon by the prosecution to show the presence of Sushil Sharma at the Bagia Bar-be-Que. They are PW-1 Phillips and his wife PW-2 Nisha both of whom used to perform music programmes at the Bagia Bar-be-Que. PW-1 Phillips has deposed that he was working as stage programmer in Bagia Restaurant. On 2nd July, 1995 he was doing his duty as usual at night time and that day his guest Ganga had come to see him. He further deposed that at about 9.30 or 9.45 p.m. he had gone out to see off his guest and when he came back accused Sushil Sharma came there in Maruti car No. 1872. After five to seven minutes Manager Keshav Kumar asked him(PW-1) to close the programme and to go back to his house saying that his(PW-1's) duty was over. He also deposed that he closed his programme and Keshav Kumar switched off the lights and then they(PW-1 and his wife) left for their house.

31. PW-2 Nisha was employed as a singer at the Bagia Bar-be-Que. She deposed that on 2nd July, 1995 she along with her husband was on duty at Bagia Restaurant from 8 p.m. to 12 O' clock and they started their duty at 8 p.m. She also then deposed the facts as had been deposed by her husband Philips. She also claimed to have seen accused Sushil Sharma at about 10.15 p.m. at Bagia Bar-be-Que in maruti car No. 1872.

32. From the evidence of PWs 1-4 and CW-5 we find that all of them have deposed about the presence of accused Sushil Sharma at Bagia Bar-be-Que on the night of 2nd July, 1995. All of them were independent witnesses having Page 0812 no reason to depose falsely against the accused about his having been seen by them at his Bagia restaurant that night. However, learned senior counsel for the appellant had lots to say about the veracity of these witnesses. Regarding PWs 1 and 2 Mr. Sud had contended that they have been falsely introduced by the investigating officer to show the presence of Sushil Sharma at the Bagia Bar-be-Que on the night of 2nd July and the reality is that none of them used to perform any programme there nor holding of any musical events there was permissible since the restaurant had no permission from the authorities to have music programmes. We are, however, not impressed with this argument. PWs 1 and 2 have clearly deposed that they used to perform musical programmes at Bagia restaurant. Now, whether any permission was required to be obtained from some Government Department for such events or not and whether Sushil Sharma had obtained such permission were not the points in issue and necessary to have been established by the prosecution for making the evidence of PWs 1 and 2 acceptable. These two witnesses were not concerned with the compliance of the legal formalities, if any, by the owner of the restaurant for having musical evenings at the restaurant. They were artists and if they were asked to perform at the Bagia restaurant by its management they were not supposed to be

confirming before accepting the offer whether necessary permission from the authorities had been obtained or not. Nor, was the investigating officer required to investigate into this aspect when the witnesses were claiming that on the night of 2nd July they were doing music programme at the Bagia restaurant and that they had seen Sushil Sharma arriving at the restaurant in Maruti car No. 1872. Mr. Sud had also submitted that the evidence of PWs 1 and 2 is not consistent inasmuch as PW-1 had also deposed that one Ganga had come to Bagia restaurant on that night and he had after sometime gone out of the restaurant to see him off while PW-2 does not depose anything about the visit of some Ganga and further that Ganga has not been examined to corroborate the version of these two witnesses. The prosecution has also not produced any documentary evidence to show that any musical programmes were conducted by PWs 1 and 2 at the Bagia restaurant. We, do not think that for these reasons the evidence of PWs 1 and 2 can be discarded. There is hardly any inconsistency in their statements. There was no necessity of examining their guest Ganga. Their evidence did not require corroboration from any other witness. Both of them have in any case corroborated each other. In fact, their version stood admitted by the accused when it was suggested to PW-1 in cross-examination that when lights were switched off customers had raised objection. It was also contended by Mr. Sud that PW-5 K.K.Tuli, General Manager of Ashok Yatri Niwas has not claimed that at the Bagia Restaurant music programmes also used to be performed by PWs 1 and 2 and also that on 2nd July he had seen any stage there for such a programme and even PW-7 Anaro Devi, PW-35 Mahesh Prasad, security guard, and PW-3 Kunju and PW-4 Constable Chander Pal do not claim that they had seen any stage there and so for this reason also evidence of PWs 1 and 2 should not be believed. This submission is also devoid of substance. These witnesses were examined to depose about what they had witnessed that night and they have deposed about that. Their not saying anything about the existence of stage Page 0813 for musical programme at the Bagia restaurant cannot make the evidence of PWs 1 and 2 in any way unreliable.

33. Mr. Sud had also contended that in any event the presence of Sushil Sharma at the Bagia restaurant on the night of 2nd July is not at all established from the evidence of PWs 3, 4 and CW-5 who had all deposed falsely about the presence of Sushil Sharma at the time of burning of the dead body since they are policemen and so highly interested in the success of the case. It was also argued that the prosecution had cited the security guard of Ashok Yatri Niwas, Mahesh Prasad(PW-35), for establishing the presence of Sushil Sharma at the restaurant but he was not examined and was given up but later on he was summoned by the trial Court as a Court witness. He, however did not support the prosecution case in this regard and since all the above referred three policemen claimed that it was this security guard Mahesh Prasad who had told them that at the time of burning of dead body Sushil Sharma was the person standing at the gate of Bagia restaurant watching the burning of the dead body by Keshav Kumar and that he was the owner of Bagia restaurant their evidence becomes inadmissible being hearsay. Learned Counsel further contended that in any case the identification of Sushil Sharma by PWs 3 and 4 for the first time in Court is of no value at all since they did not know Sushil Sharma from before and no prior test identification parade was got done by the police for these witnesses.

34. In our view, evidence of PWs 3, 4 and CW-5 cannot be discarded because they are policemen. Being a policeman is no disqualification to be a witness in a criminal trial. They had no reason to depose falsely against the accused. They were on patrolling duty and so were expected to be in the

area under their jurisdiction. It was not unnatural for them to have been around Ashok Yatri Niwas at the time of incident at Bagia restaurant. We do not find anything in their cross-examination which may throw any doubt about the correctness of their version. We are also of the view that absence of a formal test identification parade in this case would not render the identification of Sushil Sharma by PWs 3 and 4 valueless. Both of them have claimed that they had seen accused Sushil Sharma at the police station some days after the incident and they had identified him to be the person whom they had seen at the Bagia restaurant on the night of 2nd July, 1995. In cross-examination it was not suggested to them that they had not seen Sushil Sharma at the police station. So, when these witnesses had already identified Sushil Sharma soon after his having been brought to Delhi from Bangalore holding of formal TIP was not necessary at all. In this regard Mr. Sud had also submitted that the statement of PWs 3 and 4 that they had seen Sushil Sharma at the police station was made as a result of their tutoring by the investigating officer to avoid the consequences of non-holding of formal TIP. We find from the cross-examination of the investigating officer PW-81 ACP Niranjana Singh that it was not put to him that he had intentionally called PWs 3 and 4 to the police station to show them Sushil Sharma. And, in fact, even if the investigating officer showed Sushil Sharma to these witnesses at the police station that would not be a ground to reject their testimony in Court nor can the prosecution case be thrown overboard for this reason. In this regard we can once again make a useful reference to the decision of the Supreme Court Page 0814 in *Laxmi Raj Shetty and Ors. v. State of Tamil Nadu* (supra) wherein also question of TIP was involved and the police had shown photos of the culprits to the witnesses during investigation. The identification of the accused in the Court was challenged on the ground that there was no prior formal identification parade. Rejecting that argument the Supreme Court had held that identification of the accused by the witnesses by seeing his photos also takes place of test identification parade and is admissible. In the present case the appellant was physically present at the police station when he was identified only few days after the incident by PWs 3 and 4 and so their evidence in Court cannot be rejected for want of formal test identification parade. And it is not that the prosecution is relying upon the evidence of only these two policemen. In addition to their evidence PWs 1 and 2 have also deposed about the presence of Sushil Sharma at the Bagia Restaurant. They were the artists engaged to perform at Sushil Sharma's restaurant and so knew him.

35. In any case, identification of some accused by the concerned witnesses during investigation stage in a formal test identification parade held by a Magistrate is not a substantive piece of evidence and cannot be made the basis of conviction if those very witnesses do not identify the accused during the trial. However, if the witnesses identify an accused in Court whom they had identified earlier during a test identification parade also then evidence of TIP would lend corroboration to the identification of the accused in Court by those witnesses. Thus, absence of prior test identification parade by itself cannot render the identification evidence of any witness inadmissible. It is for the Court to assess the value of identification of the accused in Court for the first time when the identifying witness did not know the accused earlier to the incident. If the evidence of the identifying witness inspires confidence it can be relied upon even if it is not corroborated by the evidence of identification in a test identification parade. This is the well settled position now. No authority was brought to our notice by the learned Counsel for the appellant wherein it is held that if there is no test identification parade the identification of an accused for the first time in Court by a witness will be rejected on that

ground alone. In the present case, as held by us already, we do not think that evidence of PWs 3 and 4 to the effect that they had seen accused Sushil Sharma at the Bagia restaurant on the night of 2nd July when dead body of a female was burning there is unreliable. They could not be discredited in cross-examination. They had no axe to grind against Sushil Sharma nor any motive was attributed to them for falsely claiming that Sushil Sharma was seen by them at the Bagia restaurant. We are also of the view that evidence of PWs 3 and 4 cannot be held as inadmissible being hearsay, as was the submission of Mr. Sud. There is no doubt that these witnesses have claimed that the name of Sushil Sharma was told to them by PW-35 Mahesh Prasad, the security guard, and PW-35 did not claim so in his evidence as a court witness but on that count the entire version of PWs 3 and 4 cannot be rejected. As far as the identity of Sushil Sharma is concerned they have clearly identified him in Court for which his name has no relevance. So, even if PW-35 had not told them so, as claimed by him, that would not render the identification of Sushil Sharma by PWs 3 and 4 doubtful. And as Page 0815 far as their statement that PW-35 had also told them that Sushil Sharma was the owner of Bagia Restaurant is concerned, even if it is ignored because PW-35 does not claim to have told them this fact also, it would not make any dent in the prosecution case since Sushil Sharma, as noticed already, has himself admitted that he was running the Bagia restaurant under an agreement with ITDC. Mr. Sud had also submitted that Mahesh Prasad when examined as a court witness had claimed that he Along with another person had apprehended two persons while they were running away and also that none of the accused present in Court were those two persons and further that the body lying on the tandoor was that of a man. Mr. Sud contended that since Mahesh Prasad was initially a prosecution witness, though finally examined as a court witness, his statement to that effect is binding on the prosecution. The contention was that the police has not disclosed as to who those two persons were who had been apprehended by Mahesh Prasad and some other person, as claimed by him, and what investigation was done about those two persons and in the absence of that information by the police the entire case becomes doubtful. We do not agree. There is no doubt that PW-35 had claimed so but that does not show that the evidence of other witnesses regarding the role of Sushil Sharma and Keshav Kumar becomes unreliable. On this aspect necessary cross-examination of investigation officer should have been done but that was not done and nothing was extracted from him which could show that some other persons other than Keshav Kumar were arrested at the spot. As far as the statement of Mahesh Prasad that he had seen the body of a man lying on the tandoor is concerned we think that in view of the evidence of the doctors who have clearly deposed that it was the body of a female the statement of Mahesh Prasad to the contrary cannot be given any importance.

36. There is circumstantial evidence also to show that Sushil Sharma had come to Bagia Restaurant on that night. It is the prosecution case, as spoken by PWs 1 and 2, that Sushil Sharma had come to Bagia restaurant on the night of 2nd July in Maruti Car No. 1872. In his statement under Section 313 Cr.P.C. Sushil Sharma had admitted that the said car belonged to him. That car was found abandoned by a constable(PW-72) of Chanakya Puri police station on 4/7/95 at Malcha Marg near Gujarat Bhawan. Presence of the said car at Malcha Marg lying abandoned there confirms the version of PWs 1 and 2 that on 2nd night Sushil Sharma had come to his restaurant in the said car and it also shows that after fleeing from the restaurant in his car he must have thought to abandon his car because the police might have flashed the messages all around to intercept that car wherever it is noticed. The appellant, however, has taken a plea that this car was parked by his driver at

his(appellant's) house in Maurya Enclave and from there it had been picked up by the police in his absence when he was at Tirupati from 1st July to 6th July. However, the appellant has not even attempted to establish it by examining anyone who might be living in his house including his driver to show that the police had in fact picked up his car from his house. So, this can be said to be a false plea taken by the appellant. We have, in any case, examined the prosecution evidence about the recovery of the said car of the appellant from Malcha Marg and found the same also to be reliable. The Page 0816 witness from Chanakya Puri police station is PW-72 Constable Mukesh Kumar who has deposed that on 4/7/95 he had noticed car No. DL-2CA-1872 lying abandoned at Malcha Marg while he was on patrolling duty there. He has also deposed that before leaving the police station he had been given the number of said car by the SHO saying that it was involved in the murder case of Connaught Place police station and he should keep an eye on the car with said number in case he comes across the car. This police witness had also no reason to depose falsely in this regard and we have no reason to disbelieve him nor anything material could be elicited from him in cross-examination which could discredit him.

37. We are, therefore, of the view that from the evidence of PWs 1-5, 7 and CW-5 and also the evidence about recovery of appellant's car at Malcha Marg as deposed by PW 72 and the investigating officer(PW-81) who claims to have seized the car from there it stands established beyond any doubt that on the night of 2nd July, 1995 the appellant was also at the Bagia Bar-be-Que burning the body of a female on the tandoor there with the help of his co-accused Keshav Kumar.

38. The third circumstance pressed into service by the prosecution is that the death of the female whose body was being burnt on the tandoor by the appellant and the other convict Keshav Kumar was homicidal. In our view the circumstance that body of the lady was being burnt on a tandoor of a Bar-be-Que, which is actually meant for roasting chicken, muttone etc. for human consumption, itself is sufficient to show that the lady had died a homicidal death. Bagia restaurant was not a cremation ground. There was no reason for burning the body of someone at the Bar-be-Que if it was not a homicidal death. That burning was done after turning out everyone from the restaurant. These tell-tale circumstances by themselves are sufficient for us to hold that this is a case of homicidal death. Apart from this circumstance, we are convinced from the post-mortem reports also that this is a case of homicidal death. Regarding the post-mortem reports it was submitted by the learned Counsel for the appellant that to give it a colour of homicidal death the police had pressurized even the autopsy surgeons who had conducted the second post-mortem-examination to show the presence of bullets in the skull and neck region of the dead body by implanting the same there which could be quite easily done since at the time of first post-mortem examination skull was separated from the body and in that process there became sufficient gap through which bullets could be inserted inside. It was also argued that in fact there was no necessity of second post-mortem and it was got done since in the first post-mortem report no firearm injury had been noticed by Dr. M.P.Sarangi who had conducted the post-mortem examination and the police wanted the doctors to show firearm injury since the licensed revolver and some cartridges belonging to the appellant had in the meantime been removed by the police from his house at Maurya Enclave during his absence and had fired through that revolver and then planted the bullets in the skull of the charred body. We, do not find any merit in these submissions also of Mr. Sud. From the post-mortem reports of PW-44 Dr. Bharat Singh, Dr. T.D. Dogra(PW-68) and CW-6 Dr. M.P. Sarangi it is more than evident

that this is a case of homicidal death. Their reports clearly indicate that the Page 0817 limbs of the unfortunate female were chopped off and bevelling was also noticed. As far as the submission of the learned Counsel for the appellant that lead bullets were implanted in the dead body at the time of second post-mortem is concerned the same has no legs to stand on and is without substance. For accepting this submission it will have to be held that the policemen who took the dead body to the mortuary and then to Civil Hospital for X-ray, the investigating officer, lower staff of the mortuary and also the autopsy surgeons had all joined hands to do that. We, however, do not find any circumstance emerging in the evidence of any of the witnesses who had been handling the dead body from which it could be inferred that bullets were implanted in the corpse. Only to the investigating officer PW-81 Niranjan Singh it was suggested in cross-examination that he had implanted the bullets in the skull which he denied and it is not acceptable that he had done that. And why should have he done that? He had no reason to do that and implicate a powerful political personality. In his cross-examination no motive was attributed to him.

39. Learned senior counsel for the appellant had also made a futile attempt to raise some doubt in our minds regarding the genuineness of the presence of lead bullets in the dead body of the deceased by pointing out that when first post-mortem examination was done by Dr. M.P.Sarangi he did not notice the presence of bullets in the dead body nor did he mention in his report that there was any signs of fire-arm injuries to the deceased and, therefore, it becomes suspicious as to how at the time of second post-mortem examination bullets could be found. We do not agree with this submission of the learned Counsel. Dr. M.P.Sarangi has himself claimed that he could not do X-ray examination of the body because the X-ray machine was not in working condition at that time and before he could get the X-ray examination also done the investigating agency had decided to get a fresh post-mortem examination done. It has been deposed by two of the doctors of the Board(PWs 44 and 68), with whom also Dr. Sarangi was associated during the second post-mortem, that when they got X-ray examination done then only the presence of two metallic pieces in the skull and neck of the corpse was noticed and on extraction the same were found to be lead bullets. It is, thus, clear that the lead bullets could be noticed only on X-ray examination and just because Dr. Sarangi could not notice the same with naked eyes it cannot be said that at the time when he conducted the post-mortem examination there were no lead bullets in the dead body and later on the same were implanted.

40. Learned trial Court has unnecessarily expressed its dissatisfaction about the manner in which Dr.Sarangi conducted the first post-mortem. Dr. Sarangi was the master in his field and the best judge to decide how he was to proceed. If during the second post-mortem examination the doctors could see certain signs in the corpse which could suggest the possibility of fire arm injury and necessitating X-ray examination and which signs went unnoticed by Dr. Sarangi it cannot be concluded there from that Dr. Sarangi had not conducted post-mortem examination properly. In fact, even as per the report of Board of Doctors it was not possible to give the exact location of entry wounds in view of extensive burns. If the investigating agency wanted a second opinion even before Dr. Sarangi could give his final opinion he could not have stopped Page 0818 the investigating agency from doing that. In these circumstances the remarks of the learned trial Judge against Dr.Sarangi that he had 'obstructed the administration of justice.' or that 'His conduct does not seem to be above board.' were unjustified. We do not see any reason to doubt the integrity or capability of

Dr. Sarangi as has been expressed by the trial Court against him in the judgment in quite harsh words. We definitely do not approve of those observations which would stand expunged from the judgment.

41. Proceeding further with the discussion about the nature of death, Mr. Sud had also submitted that even when second post-mortem was conducted X-ray was not done in the same hospital and for that purpose the dead body was taken in a police vehicle without any doctor accompanying the dead body to a Civil Hospital by a constable and in these circumstances the possibility of implanting of the lead bullets in the dead body during the period when body in custody of police for X-ray cannot be ruled out. We are unable to accept this argument also because no such suggestion was put to PW-57 SI Om Vir who had taken the dead body for X-ray examination that he had implanted the bullets during the period dead body remained with him or that he had handed over the body to someone else before handing it over to the radiologist. It was not suggested even to the radiologist Dr. P.S.Kiran(CW-7) that she had implanted bullets in the skull. Of course, as noticed already, it was suggested to the investigating officer in his cross-examination that he had fixed the bullets in the dead body but he refuted that imputation. Except putting this suggestion to the investigating officer there is no material brought on record by the accused to show that the investigating officer had any prior ill-will against Sushil Sharma. In the absence of that material we cannot accept that the investigating officer had done all this to implicate him. So, merely on the basis of speculative arguments raised by the learned Counsel we cannot accept that somebody had implanted the bullets in the dead body. And we say so despite the fact that it could be elicited from the autopsy surgeons Dr. Bharat Singh(PW-44) and Dr. Sarangi(CW-6) in cross-examination that in view of decomposition of the corpse and dissection it could not be distinguished if the firing was resorted to in the corpse and Dr. Sarangi admitting that in this case putting of bullets in the dead body could not be ruled out. Even Dr. Sarangi did not say that bullets had in fact been implanted in the skull after the first post-mortem. Dr. Bharat Singh had categorically opined that the firearm injuries on the head were ante- mortem. We have no reason to reject his opinion. In case Dr. Sarangi's final report after X-ray of the body had been awaited even he might have also opined that death was due to firearm injuries but he was not given the time to complete his job and so it cannot be said that he had ruled out firearm injury. All that he claimed is that he could not notice with naked eye any signs of firearm injury. Therefore, there can be no escape from the conclusion that the unfortunate woman whose body was being roasted on the tandoor had met with homicidal death.

42. Learned Counsel for the State had submitted that although the circumstance of the burning of the body of a female on the tandoor of the restaurant by Sushil Sharma itself is sufficient to show that he was responsible for the homicidal death of the unfortunate lady but there is other Page 0819 circumstantial evidence also to establish that the appellant Sushil Sharma had killed that lady. There is no doubt in our minds also that from the circumstances so far found to have been established are sufficient to hold that the appellant was responsible for the homicidal death of the lady, whosoever she was. Burning of the dead body on the tandoor of his restaurant and telling the policemen that he was burning party flags and posters are sufficient circumstances to show that Sushil Sharma was responsible for the homicidal death of that woman. We will, however, refrain from making any comment regarding the acquittal of Keshav Kumar for the charge of murder since the State, which we find these days is quite choosy in challenging acquittals, has not filed any appeal against the



acquittal of Keshav Kumar for the offence of murder. We are also of the view that even if it were to be held by us that the incident of burning of the body at Bagia restaurant alone would not show that Sushil Sharma had murdered the woman whose body was being burnt there are other tell-tale circumstances from which it can be concluded that Sushil Sharma was the murderer. We shall now consider those circumstances and the evidence adduced to establish them. As noticed already, the cause of death as given by the Board of Doctors which had conducted second post-mortem was the fire arm injuries on the head which were ante-mortem in nature and caused by a revolver or pistol. The lead bullets which were extracted out from the skull and the neck of the corpse were on examination by the ballistic expert Sh. Roop Singh(PW-70) found to be of .32'. The prosecution is claiming that the appellant after the incident had been running around from one city to another and finally he could be arrested at Bangalore on 10/07/95 and then the appellant had got recovered his licensed revolver of .32 bore Along with its license and four live cartridges from a room in Pie Vihar hotel at Bangalore where he was staying with one advocate Shri Anand Narain. And since the bullets found in the corpse were opined by the ballistic expert to have been fired from the said licensed revolver of the appellant, according to the prosecution, this circumstance also establishes beyond any doubt that the appellant only had pumped the bullets into the head of the deceased lady from his revolver.

43. The appellant has admitted that he did possess one .32 bore Arminus revolver prior to the present incident. He has, however, taken a plea that the police had removed his licensed revolver as also live cartridges and the license of that revolver from his house in Maurya Enclave when he was away to Tirupati Balaji Temple from 1st to 6th July, 1995. Mr. Sud had submitted that the police had misutilised the live cartridges and after firing the same from the revolver of the appellant at flat No. 8/2A, Mandir Marg where Naina Sahni was living alone implanted two of the fired lead bullets into the skull of the deceased and left five cartridge cases and one lead bullet at the said flat of Naina Sahni in order to show that she was killed there. Learned Counsel contended that the prosecution, therefore, cannot rely upon the circumstance that since the appellant was possessing a .32 bore revolver he only could have killed the deceased by firing through that revolver. The appellant has claimed that he was falsely shown as arrested at Bangalore while the fact is that after his anticipatory bail was cancelled by Madras High Court he himself had surrendered at Bangalore. He has denied Page 0820 that he was staying in Pie Vihar hotel at Bangalore or that he had got recovered a brief case from a room in that hotel. As far as the prosecution is concerned it has examined PW-47 Sh. K.V. Putta Thimmai Gouwda. He was posted as Circle Inspector at Hauze Kote Police station, Bangalore on 11.7.1995 when the appellant Sushil Sharma had allegedly after his arrest got recovered his revolver etc. He is one of the witnesses to the recoveries of the licensed revolver of the appellant, its license and live cartridges from room No. 110 of Pie Vihar Hotel at Bangalore. He has deposed that on 11.7.1995 Niranjana Singh (the Investigating Officer of this case) and one ACP Raj Mahender Singh( both of whom had gone to Bangalore on getting the information about the arrest of Sushil Sharma) had interrogated Sushil Sharma after taking over his custody from Bangalore police and further that Sushil Sharma had led the police party to Pie Vihar hotel, Bangalore. He further deposed that from room No. 110 Sushil Sharma produced one briefcase which contained one revolver, four live cartridges and some other articles which were then taken into police possession and sealed by the Investigating Officer Niranjana Singh. He identified the recovered revolver which is Ex.PW-47/2 and its license, which was also found in the briefcase was also

identified by this witness and the same is Ex.PW-47/3. This witness also deposed that the seized articles were seized vide memo Ex.PW-47/A. The other witnesses examined by the prosecution for establishing the recoveries of the revolver, live cartridges and the license etc. are PW-55 ACP Raj Mahendra who was posted in the Crime Branch of Delhi police on 11.7.1995, and the investigating officer PW-81 Niranjana Singh. Both these police officials have also deposed about these recoveries at the instance of the appellant Sushil Sharma from room No. 110 Pie Vihar hotel at Bangalore. All these three police officials corroborate each other on this aspect of the prosecution case and their evidence has remained unshaken in cross-examination on behalf of the accused. Learned senior counsel for the appellant had, however, sought to discard their evidence on the ground that the prosecution has not examined advocate Sh. Anant Narayan who was also allegedly present at the time of alleged recoveries in room No. 110, Pie Vihar hotel and there is no other independent witness to support those recoveries and based on the evidence of police witnesses only this Court should not accept the recoveries of the revolver and live cartridges etc. from Bangalore.

44. There is no doubt that as per the prosecution case when the police team led by Sushil Sharma had reached Pie Vihar hotel at Bangalore one Sh. Anant Narayan, advocate was present in room No. 110 but his non-examination cannot render the evidence of the three police officials unreliable since he was the advocate of Sushil Sharma and it was with him that the appellant was found moving around in a suspicious manner at Bangalore. So, non examination of Sh. Anant Narayan has no adverse effect on the prosecution case regarding the recoveries from Pie Vihar hotel at Bangalore.

45. Counsel for the appellant had also contended that the investigating officer had not disclosed at the Bangalore Airport that he was carrying with him revolver and live cartridges and since everyone knows that carrying of fire arms in an aeroplane is prohibited the only inference which can be drawn by this Court in the absence of evidence of disclosure of the presence of revolver Page 0821 and live cartridges with the investigating officer to the Airport Authorities is that no such recoveries were made at Bangalore and in fact the police had removed the same from the residence of the appellant. We do not think that even this submission of the learned Counsel has any substance. The investigating officer has claimed in his evidence that he had disclosed to the security staff at the Bangalore airport that he was carrying with him a revolver. We have no reason to disbelieve him. And in any case, even if the investigating officer had carried with him in the flight the revolver recovered from the possession of the appellant without disclosing the same to the security staff that would not belie the recovery the revolver etc. from Bangalore. At the most, the airport authorities could have taken action for the violation of security instructions against the investigating officer if at all there was any such lapse on his part and the security officials could detect the revolver at the airport. Learned State counsel had rightly submitted that recovery of revolver etc. from Pie Vihar Hotel at Bangalore cannot be doubted because it had not been mentioned in the remand application moved at Delhi that revolver had been recovered as at that time it was still not certain whether firing had been resorted to from appellant's Arminius revolver or from some other weapon.

46. In our view, the evidence of the three police officials regarding the recoveries of revolver, its license and live cartridges from the possession of appellant Sushil Sharma inspires full confidence and required no further assurance. As far as the appellant is concerned he has claimed that his licensed revolver Along with its license and live cartridges were taken away by one ACP Alok Kumar

of Delhi police from his residence at Maurya Enclave in Delhi. We consider this to be a false plea because the appellant has not even attempted to establish the same either by adducing necessary evidence in his defense or from the evidence of prosecution witnesses. He has taken a plea that when he was away to Tirupati he had been informed on phone when he had called up his residence that one ACP Alok Kumar had taken away revolver etc. from his house. The appellant has, however, neither disclosed as to who had informed him that the police had visited his house and had taken away his revolver etc. nor has he examined that person or anyone else from his family who might be staying in the house at Maurya Enclave where he claims to have been residing those days.

47. We are, therefore, of the view that the prosecution has also been able to establish that the appellant was carrying with him at Bangalore .32 bore revolver (Arminus) with live cartridges. Since, the ballistic expert Sh. Roop Singh (PW-70) had given his opinion, correctness of which opinion was not challenged before us by the senior counsel, after examining the aforesaid revolver of the appellant and the bullets extracted from the skull of the deceased that those two bullets had been fired through the said revolver of the appellant there can be no other conclusion which we can arrive at except that it was the appellant Sushil Sharma only who had killed the deceased woman whose body was being burnt on the tandoor of Bagia restaurant on the night of 2nd July, 1995. It was then submitted by the learned Counsel for the appellant that since the appellant was specifically charged for the murder of Naina Sahni only he cannot be convicted unless it is also established that Page 0822 the body being burnt on the tandoor of Bagia restaurant was that of Naina Sahni. Mr. Sud contended that the prosecution has failed miserably to establish the identity of the corpse and that although it has sought to establish the identity of the corpse by examining some witnesses but evidence of none of those witnesses is reliable. It was also submitted that even the DNA test relied upon by the prosecution cannot be accepted since evidence in that regard suffers from many infirmities.

48. Now, we come to the evidence regarding the identity of the corpse lifted from the tandoor of Bagia Bar-be-Que. As noticed already, the prosecution case is that the deceased was one Naina Sahni and she was the wife of appellant Sushil Sharma although they had not got married publicly. It is also the case of the prosecution that Sushil Sharma and Naina Sahni were living together as husband and wife in flat No. 8/2A, DIZ Area, Mandir Marg, Gole Market, New Delhi. As noticed already, accused Sushil Sharma had admitted when he was examined by the trial Court under Section 313 Cr.P.C. that he knew Naina Sahni since 1985. He had also admitted that since there was some dispute between her and her father, CW-2 Harbhajan Singh, she had started living separately in Gole Market where he (accused) used to go whenever he was invited by her to attend the functions which used to be organized at her residence. Sushil Sharma had also admitted that CW-1 Smt. Jaswant Kaur was the mother of Naina Sahni. When a question was put to him in his statement under Section 313 Cr.P.C. that CW Jaswant Kaur had deposed she did not join any marriage of Naina Sahni but he (Sushil Sharma) was living with Naina Sahni his answer was (at p.419 of trial court proceedings and page No. 351 of paper book, part-6) that 'It is incorrect. Naina Sahni lived Along with me at Gol Market'. So, Sushil Sharma admits that he was living with one Naina Sahni. However, besides this admission of the appellant there is a lot of other reliable evidence adduced by the prosecution to establish that both of them were living together as husband-wife at Mandir Marg flat.

49. Smt. Jaswant Kaur, the mother of Naina Sahni, was examined by the trial Court as a Court witness(CW-1) and her father Shri Harbhajan Singh was also examined as a Court witness(CW-2). Both of them have deposed that Naina Sahni was their daughter. CW-2 Shri Harbhajan Singh also deposed that his daughter Naina Sahni was residing in Gole Market, Mandir Marg with her husband accused Sushil Sharma. CW-1 Smt. Jaswant Kaur also deposed that Naina Sahni was living with accused Sushil Sharma at Gole Market. When they were cross-examined on behalf of accused Sushil Sharma it was not even suggested to anyone of them that they had wrongly deposed that accused Sushil Sharma and Naina Sahni were living together in a flat at Mandir Marg as a married couple. So, their statements that Sushil Sharma and Naina Sahni were living together as husband and wife stood admitted by Sushil Sharma. Learned senior counsel for the appellant had, however, contended that the mother of Naina Sahni had claimed in her cross-examination that she had not attended the marriage of her daughter Naina then how can it be believed that Sushil Sharma and Naina Sahni were married to each other. Mr. Sud contended that there is no other witness also who could claim to have attended their marriage and, therefore, it cannot be said that Page 0823 the evidence of the parents of Naina Sahni is sufficient to hold that Sushil Sharma and Naina Sahni were living together as husband and wife. We are, however, not at all impressed with this submission of Mr. Sud. In the absence of any cross-examination of parents of Naina Sahni on their statement that accused Sushil Sharma and Naina Sahni were living together in a flat at Mandir Marg and that of CW-2 Shri Harbhajan Singh that his daughter Naina Sahni had married accused Sushil Sharma, their statements in this regard have remained unchallenged and stood admitted by accused Sushil Sharma. So, there was no need to examine anyone else who might have attended the marriage of the appellant and Naina Sahni.

50. Besides these two witnesses there is evidence of one Ram Niwas Dubey who has been examined as PW-82. He has claimed that he was the personal servant of accused Sushil Sharma. He deposed that accused Sushil Sharma was living with his wife Naina Sahni at flat No. 8/2A, Mandir Marg. He also deposed that he knew Naina Sahni since 1992 when she used to visit the office of Youth Congress of which accused Sushil Sharma was the President. He himself was also living in the same flat at Mandir Marg where Sushil Sharma and Naina Sahni were living. In his cross-examination also it was not disputed on behalf of accused Sushil Sharma that Sushil Sharma and Naina Sahni were living together at Mandir Marg in a flat. It was also not suggested to him that his statement that Sushil Sharma and Naina Sahni were husband and wife was not correct. Criticising the evidence of this witness Mr. Sud had submitted that his evidence is also of no worth because in cross-examination he had stated that it was Naina Sahni who had told him that she was married to Sushil Sharma and that shows that he himself did not know about their relationship and so his statement in this regard cannot be relied upon because it is in the nature of hearsay evidence. We are not impressed with this argument also. PW-81 was asked on behalf of appellant himself during cross-examination as to how he was claiming that Sushil Sharma and Naina Sahni were married to each other and it was then that he had stated that Naina Sahni herself had told that their marriage had been performed. Thereafter it was not challenged that Naina Sahni had never told him so. Having elicited an unfavorable answer from the witness in cross-examination the appellant cannot avoid its consequences. It had also been deposed by PW-82 that Sushil Sharma used to beat Naina Sahni. In this regard all that was suggested to him in cross-examination was that Sushil Sharma never beat Naina Sahni in his (PW-82's) presence and not that Sushil Sharma never beat her or that

they did not even live together in flat No. 8/2A. So, it is clear that the appellant Sushil Sharma was not interested in disputing his relationship with Naina Sahni and their living together in flat No. 8/2A. And that is evident from another suggestion also put to PW-82 in cross-examination. It was suggested to him that Naina Sahni used to return home in the cars of Ministers. That suggestion which, of course was denied by PW-82, shows that Sushil Sharma was clearly admitting that Naina Sahni was living in flat No. 8/2A and he himself was also living with her as otherwise he could not have seen Naina Sahni coming back home in the cars of Ministers. This suggestion also shows that the appellant was also admitting that PW-82 was also residing in the same flat as otherwise there Page 0824 was no occasion for putting him this kind of a suggestion which he was not expected to admit or deny unless he was staying in the same flat where they were staying. So from the statement of PW-82 also it stands established that accused Sushil Sharma and Naina Sahni were living together as husband and wife in flat No. 8/2A at Mandir Marg.

51. The prosecution has also examined one couple living in a flat opposite to flat No. 8/2A. PW-11 Mrs. R.K.Chaudhary, is a retired Government servant. She has deposed that in July, 1995 she was living in flat No. 8/2B, DIZ Area, Gole Market. She has also deposed that accused Sushil Sharma was living with his wife Naina in flat No. 8/2A which was in front of her flat. She also deposed that Sushil Sharma and Naina had stayed in that flat for about 2' years. She had seen both of them in their flat in the evening of 2nd July, 1995. This statement of PW-11 remained unchallenged during her cross-examination on behalf of accused Sushil Sharma. In cross-examination when it was asked from her whether she had seen Sushil Sharma and Naina before 2nd July, 1995 her answer was that both of them used to be present in the house almost daily. Another question put to this witness in cross-examination was as to how she came to know about the name of Naina. She answered that Naina herself had told her name. These questions put to this witness also show that accused Sushil Sharma was not disputing that he was living with Naina Sahni in the flat at Mandir Marg.

To the same effect is the testimony of PW-9 Shri M.L.Chaudhary, who is the husband of PW-11. He also fully corroborated the statement of his wife PW-11 Mrs. R.K. Chaudhary that accused Sushil Sharma was living with his wife in flat No. 8/2A, Gole Market, Sector-II. He stated that he was living in flat No. 8/2B since 1991 and that accused Sushil Sharma and his wife started living in flat No. 8/2A in the year 1992. In his cross-examination on behalf of accused Sushil Sharma it was asked from him whether it was his guess only that Sushil Sharma and Naina Sahni were residing there as husband and wife and in reply this witness admitted that it was his guess only. However, no suggestion was put to him that Sushil Sharma and Naina Sahni were not living in flat No. 8/2A as claimed by him. A neighbour would be fully justified in guessing that a young couple living in the next door house must be husband and wife unless there is something very suspicious noticed in their relationship or behavior. So, just because PW-9 says that it was his guess only that Sushil Sharma and Naina Sahni were a married couple his testimony does not become worthless, as was contended by the senior counsel for the appellant.

52. The prosecution is also relying upon the testimony of PW-12 Sh. Matloob Karim who, as noticed already, was the first one to identify the dead body being burnt at Bagia Bar-be-Que to be that of Naina Sahni. He has deposed that he was the Organising Secretary of Youth Congress in the year 1989 when accused Sushil Sharma was its President and Naina Sahni was the General Secretary. He

also deposed that he knew Naina Sahni from 1984 when they were in the student's union of Delhi University and because of their association they had fallen in love with each other but they could not marry being from different religions. They, however, continued to be close friends. He got married in December, 1988 while Naina Sahni married Sushil Sharma in 1992 as told to him by Naina herself. This witness further Page 0825 deposed that before her marriage Naina Sahni used to reside at 24/3, West Patel Nagar and after her marriage she was living at 8/2A, DIZ Area, Gole Market with Sushil Sharma. In his cross-examination it was not claimed that that Sushil Sharma did not even know him. PW-12 was asked to tell the address of Naina Sahni in Gole Market. It was perhaps thought that he would not be in a position to give the address which may throw some doubt about the veracity of his testimony. However, he correctly gave the address of Naina Sahni to be 8/2A, DIZ Area, Gole Market. In his cross-examination which was quite lengthy the whole focus was to tarnish the character of Naina Sahni and not to dislodge his statement that Sushil Sharma and Naina Sahni were living together at Mandir Marg. Learned Counsel for the appellant had made an attempt to persuade us to ignore the testimony of this witness stating that he had clearly a motive to falsely implicate the appellant because of political rivalry and also because he could not succeed in marrying Naina Sahni. However, we are not persuaded to accept this submission also of Mr. Sud. Nothing has been elicited from this witness in his cross-examination from which it could be inferred that he had any scores to settle with Sushil Sharma as members of the Youth Wing of the Congress Party or that they had ever contested any election for any particular post and one had defeated the other. In fact, in cross-examination this witness in answer to a question had stated that he had never contested any election. This witness has fairly claimed that he was in love with Naina Sahni but when they could not get married they parted and he then got married to a girl of his own community and Naina married Sushil Sharma. In cross-examination it was asked from PW-12 if he had been meeting Naina Sahni even after her marriage clandestinely. This suggestion also conveys an admission of Sushil Sharma that Naina Sahni was married to Sushil Sahrma. Although these kind of suggestions, as noticed already, were being put to PW-12 to show that Naina Sahni was a woman of loose character which allegation could not be established merely on the basis of these suggestions but in the process it stood definitely admitted by Sushil Sharma that he was married to Naina Sahni. We can, therefore, safely rely upon the statement of this PW-12 Matloob Karim also in favor of the prosecution case to the effect that accused Sushil Sharma and Naina Sahni were living together in flat No. 8/2A, DIZ Area, Sector- II, Mandir Marg, Gol Market, New Delhi.

53. PW-15 is yet another independent witness examined by the prosecution to establish that Sushil Sahrma was living in the flat at Mandir Marg with Naina Sahni as her husband. He is Head Constable Amba Das. PW-15 was during July, 1995, when this incident took place, the Beat Constable of Mandir Marg area. He has deposed that he knew Sushil Sharma as he was a prominent leader of Congress Party. Once he had gone to the house of Sushil Sharma while on duty for verification of the houses there and at that time accused Sushil Sharma had met him and told him that he should take care of his car No. DL-2CA-1872 and of car No. DAL-3283 of his wife and also to take care of their house as well since he and his wife did not stay at home during day time. This witness also deposed that on 02-07-1995 at about 9.30 p.m. he had seen accused Sushil Sharma going somewhere in his white Maruti Car No. DL-2CA-1872 from the parking area of the complex Page 0826 where he was living and at that time Sushil Sharma had waived his hand towards him but did not talk to him as he (Sushil Sharma) was in a hurry. This witness examined by the prosecution

also could not be discredited in cross-examination. Except for putting him a suggestion that on 02-07-1995 he had not seen Sushil Sharma going away in his car, which he denied, his statement about Sushil Sharma living out Mandir Marg with his wife had remained unchallenged. Mr. Sud had cited some judgments reported as , and in support of his contention that just because some witness is not cross-examined on some point(s) it would not show that accused accepts that version of the witness if the version of the witness is intrinsically unreliable. This proposition would however not help the appellant here because evidence of none of the witnesses discussed above can be said to be intrinsically unreliable. In fact, in a judgment reported as (1998) 3 Supreme Court Cases 560, State of UP v. Nahar Singh and Ors. Hon'ble Supreme Court had very clearly held (in para 13) that if any part of testimony of a witness is not challenged in cross-examination the Court should believe it to be correct. All of them are wholly reliable witnesses and we see no reason to disbelieve anyone of them. Mr. Sud would like us to say that everybody on this earth had conspired against the appellant Sushil Sharma to get him convicted. We are, however, not persuaded to accept that right from a poor vegetable vendor(PW-7 Anaro), constables(PWs 3 and 4) and top police officers including the investigating officer ACP Niranjan Singh, doctors including the autopsy surgeons Dr. Bharat Singh and Dr. T.D.Dogra, everybody had conspired to depose falsely against Sushil Sharma.

54. Mr. Sud had also contended that the investigating officer should have examined some paperwallah, cablewallah, dhobi etc. of Mandir Marg area to show that Sushil Sharma and Naina Sahni were living in flat No. 8/2A, Mandir Marg, Gole Market. It was also contended that flat No. 8/2A was a Government flat and was allotted to one Jagdish Prasad Sharma in 1993 and his statement was also recorded under Section 161 Cr.P.C. but still he has also not been examined by the prosecution and so adverse inference should be drawn against the prosecution for the non-examination of all these witnesses and particularly that of Jagdish Prasad who if had been examined would have belied the prosecution story that Sushil Sharma and Naina Sahni were living in flat No. 8/2A since 1992. Yes, the investigating officer could have examined these people also but if has not done that we cannot reject or doubt the veracity of the witnesses who have been examined. In criminal trials it is the quality of the testimony of the witnesses examined which matters and not the number of witnesses. An accused has no right to guide the investigating agency as to in which direction it should move and who all should be examined. It is always the prerogative of the investigating officer and, of course, when the trial begins the court can then also summon witnesses who may not have been cited by the prosecution, if it is considered necessary to reach to the truth. Here, we may also observe that even though the appellant Sushil Sharma has disputed that he was living at the flat in Mandir Marg with Naina Sahni and has claimed that in fact he was living in house No. MP-27, in Maurya Enclave, Pitampura, Delhi but he has not made Page 0827 even attempted to establish that which he could have easily done by examining his family members living with him or some one from his neighborhood there. We may notice here that in support of the submission for converting death sentence into that life imprisonment the appellant has submitted an affidavit of his father Shri Inder Mani Sharma stating therein the mitigating circumstances, which we shall be considering at the appropriate stage. Now, if the appellant has now been able to persuade his father to come forward to his rescue regarding the sentence to be imposed on him in case of dismissal of his appeal, he could have very well produced his father during the trial to show that he was actually living in Maurya Enclave. His non-examination shows that in fact even he was not willing to depose falsely that his son Sushil was living with him. And if the appellant knew that

some Jagdish Prasad, a Government official, was in fact the allottee of flat No. 8/2A and this flat had been allotted to him only in 1993 and so it could not have been in possession of Naina Sahni from 1992, as claimed by prosecution, he could have examined him also as a defense witness. He has not done that also.

55. The fact that Sushil Sharma was living at Mandir Marg flat with Naina Sahni gets further strengthened from recovery of some documents pertaining to his Bagia restaurant (Ex.PW-11/1-20) on 4/7/95 from the said flat which would not have been there in case he was actually not living there. In this regard the appellant's plea is that the documents of Bagia restaurant were taken by the police from PW-5 K.K.Tuli and shown to have been recovered from the said flat. This plea is also rejected since it was not even suggested to PW-5 in cross-examination that he had handed over these documents Ex.PW-11/1-20 to the police. We have examined the evidence of independent witnesses PW-13 Dhara Singh in whose presence these documents were recovered from the flat at Mandir Marg. His evidence also inspires full confidence. Mr. Sud had submitted that this witness was indulging in illegal conversions from one religion to another and so was under the thumb of the police and for that reason he had been picked up by the police to become a witness of these recoveries. However, we do not find anything elicited from him in his cross-examination from which we could infer that he was under any pressure of the police.

56. We are, therefore, of the view that from the evidence of PWs 9, 11, 12, 13, 15, 82 and CWs 1 and 2 (parents of Naina Sahni), which we have analysed independently, it stands established beyond any doubt that accused Sushil Sharma was living with Naina Sahni in flat No. 8/2A, Mandir Marg, New Delhi as her husband. In fact, even if we were to accept the case of the appellant that he was not the husband of Naina Sahni that finding would still not have been of any benefit for the appellant. The fact is that he was living with her, as had been admitted by himself in his statement under Section 313 Cr.P.C. It also stands established that in the evening of 2nd July, 1995 Sushil Sharma and Naina Sahni were together present in the flat at Mandir Marg and at about 9.30 p.m. Sushil Sharma was seen going in his maruti car from Mandir Marg by PW-15 HC Amba Prasad, the Beat Constable of that area and sometime thereafter he was seen at his Bagia restaurant. After that day Naina Sahni was not seen alive by anyone. Page 0828 Her mother has claimed that she did not meet Naina after this incident and her father has also deposed that she was dead. In these circumstances, it was for Sushil Sharma to have explained as to where Naina Sahni had disappeared after 2nd July, 1995 if actually her body was not being burnt or to have disclosed as to whose corpse it was. In the absence of any explanation coming forth from his side there can be no other conclusion except that it was Naina Sahni only whose body was burnt on the tandoor of Bagia Bar-be-Que.

57. We are further of the view that even if we had come to the conclusion that Sushil Sharma was not living with Naina Sahni at the Mandir Marg flat still the finding would have been that he only had killed her. The bullets extracted from the corpse were found to have been fired through .32 bore Arminius revolver of the appellant. The prosecution case is that when the police went to that flat on being informed by accused Keshav Kumar that Sushil Sharma was living there five fired cartridge cases and a lead bullet were found lying there and those cartridges and the lead bullet were also found by the ballistic expert Shri Roop Singh to have been fired from the licensed revolver of Sushil Sharma. We have already rejected the plea of the appellant that his revolver etc. were removed by



the police from his house at Maurya Enclave in his absence. Appellant has claimed that Naina Sahni only was living in the said flat. So, from these facts the only conclusion is that Naina Sahni only had been shot at in her flat and the appellant only had done that. Learned senior counsel had, however, submitted that the recovery of cartridge cases from the said flat is highly doubtful and in fact the same had been kept there by the police itself after removing the appellant's licensed .32 bore Arminius revolver and its cartridges from his house at Maurya Enclave and firing from that revolver to show that Naina Sahni was murdered there. He also contended that the evidence of the witnesses to these recoveries is highly doubtful. It was contended that even though the cartridge cases were allegedly found in the flat on 4th July, 1995 but on that day the same were not taken into possession by the police and were seized on 5th July and that fact definitely casts a serious doubt about the genuineness of the said recoveries from the flat since there was no good reason for the investigating officer to have left such highly incriminating articles in the flat itself for a day. Learned Counsel had also submitted that if actually five cartridge cases and one lead bullet had been found in the flat on 3rd July the same should have been immediately seized and sent to CFSL which was not done and that fact also makes the whole story doubtful. In support of this submission Mr. Sud had cited one judgment also which is reported as Baldev Singh v. State of Punjab.

58. In this regard the investigating officer PW-81 ACP Niranjan Singh has claimed that he had decided to lift the cartridges from the flat in the presence of some expert from CFSL and next day in the presence of experts the same were lifted. He has stated that the flat was kept under surveillance of the SHO of the Mandir Marg police station from 3rd July and so there was no risk of these cartridges being removed from the flat between 3rd and 5th July. We Page 0829 have no reason to view the decision of the investigating officer not to seize the cartridges on 4th July with any suspicion and to hold that he had not seized the same since actually the same were not found in the flat. We have gone through the evidence of PW-16 Shri V.N.Sehgal, former Director of CFSL and that of police witnesses including the investigating officer on this aspect of the matter and have not found anything either in their chief-examination or cross-examination which could have made their evidence unreliable and the recoveries of five fired cartridge cases, one lead bullet from the flat suspect. Mr. Sud submitted that Shri V.N.Sehgal has claimed that Shri Roop Singh, ballistic expert had lifted the cartridges etc. from the flat but Shri Roop Singh does not claim so in his evidence and that shows that the alleged recoveries on 5th July, 1995 were an eye-wash. We do not agree. If actually the investigating officer had not found fired cartridges in the flat on 4th July he would not have made the application Ex.PW-81/X-1 on 5/7/95 to the autopsy surgeon for getting X-ray also done for finding out if there was any firearm injury which he was suspecting to be possible because of his having found fired cartridges and one lead bullet and a bullet hole on the ply-board on the air-conditioner in the room in the flat at Mandir Marg. And similarly late sending of recovered arm and ammunition to CFSL by the investigating officer in the facts and circumstances of this case cannot be made a ground to jettison whole lot of reliable evidence adduced by the prosecution. And if Shri Roop Singh did not speak about these recoveries on 5th July in his presence and had simply confined his evidence to his report, referred to already, that would also not make the recoveries of cartridges from the flat doubtful. In case the accused wanted to belie the version of Mr. Sehgal Mr. Roop Singh could have been asked in cross-examination if he had lifted cartridges from the flat. That was not done. Thus, recovery of cartridges belonging to appellant Sushil Sharma from the flat of Naina Sahni and blood on various articles lying there also shows that at least on 2nd July, 1995

Sushil Sharma had definitely gone to her flat and had shot her dead and after killing her he had taken the corpse to his Bagia restaurant for being burnt there. We have already held that the plea of the appellant that his revolver and cartridges were removed from his house at Maurya Enclave by ACP Alok Kumar is a false plea. So, whether Sushil Sharma was the husband of Naina Sahni or not and whether he was living with Naina Sahni or not we have no manner of doubt from the evidence discussed already about the fact that Sushil Sharma had definitely killed her in her flat at Mandir Marg by firing at her from his revolver on the night of 2nd July, 1995. We are saying 'definitely' for Sushil Sharma because his co-accused Keshav Kumar was also tried with him for the conspiracy to murder Naina Sahni but the learned trial Court did not find sufficient circumstantial against him for that charge and the State has not challenged that decision of the trial Court.

59. The prosecution is also relying upon the result of DNA test for establishing that it was the body of Naina Sahni which was burnt at the Bagia Bar-be-Que. Importance and utility of DNA test is now too well known in criminal matters. It is not disputed that DNA test is very useful for establishing the identity of a dead person whose body is recovered which is not in an identifiable condition because of decomposition etc. It was observed by the Hon'ble Page 0830 Supreme Court in *Smt. Kamti Devi v. Poshni Ram* that 'The result of genuine DNA test is said to be scientifically accurate.'

60. In this case, for DNA test blood samples of the parents of Naina Sahni and the tissues taken from the thigh portion of the dead body, two ribs and pieces of radius and ulna bones were sent to the Centre for Cellular and Molecular Biology at Hyderabad (CCMB). There the blood samples of the parents of Naina Sahni and the afore-said samples from the body of the deceased were subjected to DNA test by the experts in the field of DNA, namely, Dr. Lalji Singh and Dr. G.V. Rao and the DNA test confirmed that the body which was burnt on the tandoor of Bagia Bar-be-Que was that of Naina Sahni, the offspring of CW-2 Shri Harbhajan Singh and CW-1 Smt. Jaswant Kaur. Sh. Harbhajan Singh (CW-2) has testified before the trial Court that he had four children out of whom his daughter Naina Sahni was not alive while his other three children were alive. CW-1 Smt. Jaswant Kaur has also deposed that she had not seen her daughter Naina Sahni after this incident. These statements of the parents of Naina Sahni have not been disputed by Sushil Sharma. In the DNA report Ex. PW-83/B-2 also it was stated that since other children of Shri Harbhajan Singh and Smt. Jaswant Kaur were alive the charred remains were definitely that of Ms. Naina Sahni.

61. Mr. Sud, learned Counsel for the appellant would however, submit that no reliance can be placed on the DNA report relied upon the prosecution in the present case for some good reasons. He started his attack on the DNA evidence with the submission that Dr. G.V. Rao (PW-87) who had actually conducted the DNA test was not an 'expert' within the ambit of Section 45 of the Indian Evidence Act when he did this test and also that the DNA report is in any case not signed by him but one Dr. Lalji Singh (PW-83) claims to have signed it. The contention was based on the premise that Dr. Rao had not done his Ph.d. in 1995. This argument is totally misconceived one. Section 45 of the Evidence Act does not lay down the qualifications of an expert whose opinion can be relevant in a criminal trial. In this regard we may make a useful reference to the following observations of the Supreme Court in one of its judgments reported as (1999) 7 Supreme Court Cases 280 :

17. Section 45 of the Evidence Act which makes opinion of experts admissible lays down that when the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

62. In this case, Dr. G.V.Rao has claimed that in 1995 he was doing post doctoral research work and that he had already done Ph.d. in forensic aspects of DNA fingerprinting. He also claimed that he had examined around Page 0831 1300 cases pertaining to DNA Fingerprinting and that he had appeared in various courts throughout the country as an expert of DNA Fingerprinting. We have no reason to doubt his credentials as an 'expert' as contemplated in Section 45 of the Indian Evidence Act.

63. Mr. Sud then submitted that the DNA report relied upon by the prosecution is actually signed by PW-83 Dr. Lalji Singh who is the former Director of CCMB but he himself had not conducted the DNA test and only supervised the same when it was being conducted by Dr. G.V.Rao. So, the report which is not signed by Dr.Rao is in any event of no use for the prosecution. In our view this submission has also no substance. Dr. Lalji Singh was a senior scientist at the CCMB in the year 1995. Evidence of these two witnesses when read together would clearly show that both of them had worked as a team even though both of them were individually also fully competent to conduct the DNA test. Dr. Rao had clarified in his chief-examination that Dr. Lalji Singh being the Director of CCMB was the authorized signatory of the reports from CCMB so he had signed the reports Ex. PW-83/C-1 to Ex. PW-83/C.

64. He further claimed that he was applying the technique of DNA fingerprinting as an Assistant to Dr. Lalji Singh. So, we reject this technical objection raised by the counsel for the appellant. It was submitted by the learned senior counsel for the appellant that from the evidence of various prosecution witnesses examined on this aspect it becomes clear that the prosecution has not been able to satisfy the genuineness of the samples got examined from the CCMB Hyderabad and further that there was every possibility of the samples of the blood of the parents of Naina Sahni and the so called parts of the charred body having been tampered with and consequently no reliance can be placed on the DNA report which has been proved through Dr. Lalji Singh(PW-83) and Dr. G.V.Rao(PW-87) from CCMB, Hyderabad.

65. As noticed already, DNA test was carried out with the blood samples of the parents of Naina Sahni and the tissues(muscle) taken from the burnt body of the woman lifted from the tandoor of the Bagia Bar-be-Que. Regarding the taking of tissue samples Dr. M.P.Sarangi(CW-6) is the witness. He had conducted the first post-mortem examination. It is the case of the appellant that he had conducted the post-mortem examination quite fairly. CW-6 has claimed that on 06-07-95 he had taken tissue samples and ribs/bones from the dead body and had sealed them and handed over to

the investigating officer to be delivered to Dr. Lalji Singh and Dr. Lalji Singh has also deposed that he was present at the mortuary at the time of taking of these samples and further that on 7/7/95 in the morning the sealed box containing these samples were taken over by him at the airport from the investigating officer before leaving for Hyderabad. Mr. Sud submitted that the prosecution has not placed on record any written request of the investigating officer for taking tissue samples, ribs etc. from the dead body. Dr. Sarangi had admitted in cross-examination that no entry was made in the mortuary register about the taking of tissue samples from the body and, therefore, the very first step in the process for DNA test i.e. taking of tissues etc. from the dead body becomes doubtful. However, for this reason no fault can be found with the Page 0832 taking of tissues etc. by Dr. Sarangi. Why should he have deposed falsely that he had taken the tissues etc. from the dead body on the request of the investigating officer for being delivered to Dr. Lalji Singh who had also come to the mortuary for collecting the tissue samples and it was at his advice that muscle tissue, bones and ribs were extracted from the body. Dr. Lalji Singh is an eminent scientist in the field of DNA fingerprinting. Luckily for him his credentials as an expert were not doubted by the learned Counsel for the appellant. Of course an attempt was definitely made on behalf of the appellant to malign him also by suggesting to him during cross-examination that he had obliged the police. However, the appellant has not been able to bring out anything in his cross-examination from which such a conclusion could be arrived at by us. All these attempts to malign the doctors and scientists were as a result of clear impression in the mind of the appellant that he had really no escape route left.

66. PW-42 Dr. Naveen Jain had taken blood samples of the parents of Naina Sahni. He has deposed that in July 1995 he was posted in casualty of RML Hospital. On 13th July, 1995 he was a duty doctor there and SHO Cannanught Place came there with two persons namely Sh. Harbhajan Singh and his wife Smt. Jaswant Kaur. Dr. Lalji Singh from Hyderabad had also accompanied them and he took about 10 ml each of blood of both Harbhajan Singh and Smt. Jaswant Kaur. He also deposed that he had signed the form of identification card Ex.PW-42/A-B along with Dr. Lalji Singh and the SHO. PW-83 Dr. Lalji Singh, Director of Centre for Cellular and Molecular Biology, Hyderabad deposed that on 6th July, 1995 he was in Delhi when he received a telephone call from Director General Dr. R.A. Mashelkar, CSIR who told him that Commissioner of Delhi Police had approached him to request him to take up this case. He deposed that on the same day he was taken to police station in the office of DCP Dr. Aditya Arya. Thereafter he was taken to Lady Harding hospital where a dead body was kept and Mr. Niranjana Singh, SHO, Dr. Aditya Arya, DCP and 2-3 constables were there. The doctor there took out two ribs, bone of the hand and muscle pieces from the thigh and put them in separate container and sealed. He carried the samples duly sealed to CCMB, Hyderabad and handed over the whole box containing samples to Dr. G.V. Rao. He deposed that on 13.7.1995 he collected the blood samples of suspected parents namely Sh. Harbhajan Singh and Jaswant Kaur at Ram Manohar Lohia hospital and identification card Ex.PW-42/A and Ex.PW-42/B were filled and signed by him. He further deposed that he had also prepared a card of tissue samples. He took the blood samples on ice to CCMB, Hyderabad on 13.7.1995 and handed over to Dr. G.V. Rao. He also deposed that he supervised the analysis carried out by Dr. G.V. Rao and had discussions also with him. After analysis and discussions, Dr. G.V. Rao had prepared a report Ex.PW-83/B and that on analysis it was found that the deceased was related to the suspected parents.

67. Learned Counsel for the appellant had tried to show that there was every possibility of tampering of the samples. He, however, could not tell us as to what kind of tampering with the samples could be done to bring about a positive report that DNA extracted from the tissues of the charred body and from the blood of the parents matches thereby confirming that the body burnt Page 0833 on the tandoor of Bagia restaurant on the night of 2nd July, 1995 was that of Naina Sahni. Mr. Sud, however, went on maintaining that the prosecution has not ruled out tampering of both the samples. We will now examine the worth of those submissions also. Mr. Sud submitted that even though the tissue samples were allegedly taken by Dr. Lalji Singh to Hyderabad on 7th July in the morning although the same were taken from the dead body on 6th July but there is no proof that the samples were deposited in the malkhana to be kept in safe custody there for the night. There is no doubt that the blood samples were not deposited in the malkhana and the same remained with the investigating officer but that fact does not show that the blood samples were tampered with by the investigating officer. In this regard we may notice here that Dr. Lalji Singh in his cross-examination on behalf of the accused that the parcel containing the tissue sample, ribs etc. had remained with him but in the custody of the police after it was taken at Lady Harding Hospital on 6th and he took over his custody at the airport on 7th morning so, it cannot be accepted that there was any possibility of tampering of the samples by the investigating officer whom in any case it was not even suggested in cross-examination that he had tampered with the samples.

68. Mr. Sud then submitted that even though Dr. Lalji Singh claims to have taken the samples to Hyderabad on the 7th morning and says that samples were handed over to him at the airport but the prosecution documents belie his claim in that regard. Learned Counsel drew our attention to one document Ex. PW- 83/C which is a letter dated 13-07-95 written by DCP, New Delhi District to the Director, CCMB, Hyderabad wherein a request was made by the DCP to the Director, CCMB to depute some expert from his Institute for collecting necessary samples for establishing the identity of Naina Sahni. Our attention was also drawn to Ex. PW-83/D which is a forwarding note giving details of the samples which were to be sent to CCMB. Reference to this forwarding note is made in Ex. PW-83/C also. Mr. Sud submitted that these documents clearly show that the blood sample of the parents of Naina Sahni as well as the sample taken from the body had not been sent to Hyderabad till 13th July and, therefore, the statement of Dr. Lalji Singh had he had collected the tissue samples etc. on 6th July is either false or some fresh samples were sent to CCMB vide the said letter dated 13-07-95 but there is no evidence regarding taking of fresh samples from the charred body. Learned Counsel also highlighted some discrepancies in the documents which were prepared by Dr. Lalji Singh after taking the samples as well as some documents on which photographs of the parents of Naina Sahni had been affixed at the time of taking of their blood samples. Learned Counsel submitted that these infirmities have remained unexplained and cast a serious doubt about the genuineness of the DNA test relied upon by the prosecution.

69. In our view, nothing significant turns around these documents pointed out by the counsel for the appellant. The substantive evidence regarding the DNA test is that of two experts, namely, Dr. Lalji Singh and Dr. G.V.Rao both of whom have given a very detailed narration about the test conducted by them. They have deposed about each and every step of the DNA test. Dr. Lalji Singh has categorically deposed that after collecting the samples of Page 0834 the tissues as well as the blood of the parents of the deceased from Delhi he had handed them over to Dr. G.V.Rao immediately on

reaching Hyderabad and Dr. G.V.Rao has also deposed that immediately on receipt of the samples he had started conducting the tests. Their testimony cannot be jettisoned merely on the basis of some insignificant deficiencies in the preparation of the documents prepared by them for the purpose of maintaining the identity of the samples intact. From their cross-examination nothing could be elicited which could show that the tests conducted by them were not preceded by safe custody of the samples or that during the course of tests proper procedure/technique was not followed by them. Dr. Lalji Singh has claimed that on 6th July, 1995 he was not given any letter of request for collecting the tissue samples but was orally requested. He also claimed that on 13-07-95 he had come again to Delhi and had collected the blood samples of Shri Harbhajan Singh and Smt. Jaswant Kaur. In view of this statement of Dr. Lalji Singh it is quite possible that when he came on 13th July, 1995 to Delhi he might have been given the afore-said letter dated 13-07-95 and a forwarding note annexed therewith for record purposes but these documents do not in any way make the testimony of Dr. Lalji Singh that on 6th July, 1995 he had taken the tissue samples doubtful at all. Mr. Sud had also submitted with lot of force that Dr. Lalji Singh personally collecting the samples within a week by coming all the way to Delhi from Hyderabad shows that he was under the influence of the police and he wanted to go out of the way to oblige the police by giving a report which was favorable to the prosecution story. In our view this submission has also not force and we cannot reject the testimony of Dr. Lalji Singh, who undoubtedly is an eminent scientist in the country in the field of DNA tests, on this flimsy ground. If on the request of the police he had come to Delhi to personally collect the samples it shows his sincerity towards his job as an expert in DNA tests and he wanted to ensure that samples are taken properly. It may be noticed that the DNA technology had not become very popular during those days and, therefore, Dr. Lalji Singh taking that much personal interest in the taking of samples should not be viewed with suspicion. These kinds of accusations against eminent scientists appear to have been made by the appellant out of desperation. We have already noticed in the beginning of the judgment that the appellant Sushil Sharma's statement under Section 313 Cr.P.C. was quite argumentative which showed his knowledge about the law relating to criminal trials and we have no manner of doubt that when he made allegations against each and every witness examined in this case of being unfair to him under the pressure of the police he must have realized that there was no door open for him from which he could escape from the clutches of law. We have very minutely gone through the evidence of Dr. Lalji Singh and Dr. G.V.Rao, who had conducted the DNA test, and we are not found any infirmity in their evidence which could persuade us to reject the test carried out by them and their conclusion that the samples of the charred body were of Naina Sahni. We are also of the view that if at all, the appellant had any doubt about the genuineness of the samples used for the DNA test he could have very well made a prayer for taking fresh blood samples of the parents of Naina Sahni for DNA test and comparing its result with the result Page 0835 already available regarding the DNA test of the samples of the charred body. He did not choose to do that and instead resorted to mud-slinging on the competence as well as integrity of the eminent scientists of the country. We are, therefore, of the view that the DNA test also establishes the identity of the woman who was being burnt on the tandoor of Bagia restaurant and it re-enforces our finding already arrived at from other circumstances that it was Naina Sahni only whose body had been burnt on the tandoor and it is not that we are basing our findings only on the DNA test. Even if DNA test had not been got conducted by the investigating agency the finding would have still been that the body of Naina Sahni only was being burnt on the tandoor.

70. That is still not the end of circumstances relied upon by the prosecution. They are still aplenty. We now come to the motive part of the prosecution case which undoubtedly plays a very significant role in a case based on circumstantial evidence alone. It is the case of the prosecution that the relations between appellant Sushil Sharma and Naina Sahni were not cordial because Sushil Sharma had started suspecting that Naina Sahni had extra-marital affairs with other persons and because of that he used to give beatings to her and he had also given instructions to his domestic servant PW-82 Ram Niwas Dubey to keep a track on her movements and to report to him as to where she was going and whom she was meeting. To establish this aspect of its case again the prosecution is relying upon the evidence of the neighbours of Sushil Sharma, namely, PW-9 Mr. M.L. Chaudhary and his wife PW-11 Mrs. R.K. Chaudhary as also on the evidence of PW-82 Ram Niwas Dubey, the servant of accused Sushil Sharma. In addition, the prosecution has also examined PW-12 Matloob Karim, who as noticed already was a person who claimed to be quite close to Naina Sahni and it was he who had identified the corpse of the woman picked up from the tandoor of Bagia- Bar-be-Que on the night of 2nd July, 1995. Besides deposing about the fact that Sushil Sharma and Naina Sahni were living together in the flat at Mandir Marg PWs 9 and 11 have also deposed about the relationship between Sushil Sharma and Naina Sahni. PW-11 Mrs. R.K. Chaudhary had deposed that one day, which was a holiday, when they were watching television in their house they heard some noise from outside upon which they opened the door of their drawing room and saw that Sushil Sharma and Naina were scuffling with each other and Sushil was pulling her back inside the house but she (Naina) wanted to get herself released from him and wanted to come out of the house. In cross-examination on behalf of Sushil Sharma it was asked from her if she understood the meaning of scuffling. She answered that question and explained properly as to what was meant by scuffling. As far as PW-9 is concerned he also claimed in his cross-examination by the Special Public Prosecutor that once Sushil Sharma was pulling her (Naina) inwards whereas she was resisting and that at that time several persons had gathered over there.

71. Learned senior counsel for the appellant had submitted that both these witnesses should not be believed because their statements regarding the sole incident narrated by them are highly vague and bereft of material particulars however, we feel that the details of the incident narrated by them Page 0836 could have been elicited during their cross-examination but no such effort was made and, therefore, the appellant cannot make a grievance that the statements of PWs 9 and 11 should be discarded on this aspect of the matter being vague. These two witnesses could not be discredited in their cross-examination on behalf of accused Sushil Sharma. Both these witnesses had no reason to depose falsely against Sushil Sharma nor any motive was attributed to them in cross-examination for deposing falsely and, therefore, we see no reason to reject their testimonies.

72. PW-82 Sh. Ram Niwas Dubey deposed that he was working with accused Sushil Sharma, the Adhyaksha of Youth Congress, as peon from 1989 till April, 1995 at 4, Bhai Veer Singh Marg, Gole Market from where the office of Youth Congress was shifted to Talkatora Road, New Delhi. He then deposed that the accused obtained flat No. 8/2A at Mandir Marg in 1992 where he was living with his wife Naina Sahni whom he knew since 1992 as she was General Secretary in the office of the Congress and used to visit accused Sushil Sharma at the office at Talkatora. He himself was living in the night inside the flat and used to observe them quarreling with each other on the topic of shaadi. Naina Sahni used to ask Sushil Sharma as to when they would disclose their marriage publicly to

which accused Sushil used to say that at the appropriate time everyone would be told about their marriage. Once Naina Sahni had told him that accused Sushil had put sindoor on her head in front of the temple inside the flat. He thereafter deposed that there used to be quarrel between the two on her insistence of everyone being told about their marriage and the accused used to beat Naina Sahni by legs, fists and dandas. He further deposed that at the instance of accused Sushil he used to go along with Naina Sahni for reporting to the accused about her movements since Sushil Sharma suspected the fidelity of Naina Sahni. Although in his cross-examination on behalf of accused Sushil Sharma it was put to him that he never worked in the house No. 8/2A of accused Sushil Sharma, which suggestion he categorically denied, but we see no reason to disbelieve this witness also. He had also no reason to depose falsely against accused Sushil Sharma nor any motive for falsely deposing against Sushil Sharma was attributed to him in cross-examination. A suggestion was given to this witness in cross-examination that Sushil Sharma had never beaten Naina Sahni in his presence and not that Sushil Sharma had, in fact, never beaten her. It had also been put to this witness that Naina Sahni used to come back to her home in the cars of Ministers. By putting these kind of suggestion to PW-82 Sushil Sharma admits that in fact this witness was also living in flat No. 8/2A as otherwise there was no point in putting to him that Naina Sahni used to come back in the cars of Ministers. Obviously this witness could have answered this kind of a question only if he was living in the same flat. Therefore, just because the prosecution has not brought on record any documentary evidence such as ration card to show that PW-82 Ram Niwas Dubey was also staying with Sushil Sharma and Naina Sahni at flat No. 8/2A, Mandir Marg it cannot be said that the prosecution has failed to establish this fact, as was also the argument advanced by the learned senior counsel for the appellant.

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73. Regarding the kind of relationship between the appellant and Naina Sahni the prosecution had also examined PW-12 Matloob Karim. He has deposed that in 1989 he was Organising Secretary of Youth Congress whereas accused Sushil Sharma and Naina Sahni were the President and the General Secretary respectively. He then deposed that he and Naina Sahni had been working together since 1984 from the time of NSUI and because of their association they fell in love with each other but being of different religions they could not marry but continued to be close friends. He also deposed that despite his marriage with in December, 1988 Naina and himself used to meet and talk as before. He further deposed that after August 1989 Naina told him to enquire about the antecedents of Sushil as he had proposed to marry her and he after making enquiries from Sushil's friends told her that Sushil was not a good person. Naina told accused Sushil Sharma about that who told her that the people were jealous of his progress and that he was a very good person. He then deposed that in the end of 1992 Naina rang him up and stated that she had solemnized her marriage with Sushil Sharma and that prior to her marriage she had disclosed every thing to Sushil about her friendship with him(Matloob Karim). He went on to depose that five six months subsequent thereto he received a phone call from Naina saying that she was trapped and that Sushil Sharma was not a good man, he hurls abuses and thrashes her on trivial matters. He further deposed that on being advised to inform police or her parents Naina told that parents will not co-operate with her because she had solemnized her marriage with Sushil on her own and in case of informing police Sushil will implicate her in a false case as he had good relations with higher police authorities. Some days after



Naina again rang him up and stated that Sushil had turned her out of the house and she asked for help. He also deposed that on 2-7-95 also between 3 and 4 p.m. Naina telephoned him to request him to get her migrated to Australia. This witness also could not be discredited in cross-examination and we see no reason to disbelieve him and reject his evidence being that of a jilted lover having a motive to falsely implicate the appellant because of his himself not being able to make her his life companion, as was also the argument advanced by Mr. Sud.

74. Thus, on the basis of evidence of PWs 9, 11,12 and 82 it also stands established beyond reasonable doubt that accused Sushil Sharma did not have very good relations with Naina Sahni because she was insisting on his telling everyone that they were married couple which he did not want and also because he was suspecting that she was having affairs with other persons also including her former lover PW-12 Matloob Karim. In view of the reliable evidence of all these witnesses we also come to the conclusion that there was a strong motive for the appellant Sushil Sharma to have killed Naina Sahni after having spent good number of years with her as her husband.

75. The prosecution had also relied upon extra-judicial confession of the appellant made before PW-31 Shri D.Kishore Rao, an IAS Officer. He has deposed that he had stayed at Gujarat Bhawan from 26th June, 1995 up to the early morning of 3rd July, 1995. On the midnight of 2nd and 3rd June, 1995 accused Sushil Sharma came to Gujarat Bhawan and met him. At that time he was looking tense, disturbed and in abnormal condition and told him Page 0838 'kuch gadbad hai' (there is something wrong). He further deposed that Sushil Sharma had also said to him 'I am tired. I want to take rest' and then saying so Sushil Sharma had lied down on the cot and said that they would discuss tomorrow. He further deposed that when in the morning he was about to leave for going to Ahmedabad Sushil Sharma told him to tell Gujarat Bhawan people to give the room for two days to Mr. Jai Prakash. PW-31 Rao had further deposed that in good faith he had asked the reception counter clerk to make reservation of the room and thereafter he himself went to Ahmedabad. On 4th morning Sushil Sharma called him up on telephone from Bombay and told him that he was in serious problem and when he asked Sushil Sharma as to what was the problem he hesitatingly said that he had shot dead his wife. He then advised Sushil Sharma to surrender himself before the police telling him as to why he had called him up. We find from the impugned judgment of the trial Court that the learned trial Judge has disbelieved Mr. Rao's statement that Sushil Sharma had telephoned him on 4th July and had made a confession to him on phone. The learned Judge, however, came to another conclusion, which is not even the prosecution case, to the effect that Sushil Sharma must have made the confession before this witness, if at all it was made, in the night of 2nd July, 1995 itself when he had stayed with him at Gujarat Bhawan and the witness had set up the story of extra judicial confession on telephone on 04-07-1995 with ulterior motive to save himself from the punishment of offence under Section 212 IPC for having harboured Sushil Sharma after having come to know that he had committed a murder. We are also inclined to ignore the evidence of PW-31 regarding the extra judicial confession which he claims to have been made to him by the appellant on telephone for the reason that if at all any such confession had been made by the appellant before him he would have immediately reported the matter to the police which he admittedly did not do and for the first time he came out with the story of telephonic confession of Sushil Sharma on 20th July, 1995. The explanation given by him in cross-examination to the effect

that he did not report the matter anywhere because he had advised Sushil Sharma to surrender before the police hardly appears to be convincing. However, we are unable to subscribe to the view taken by the trial Court that if at all any extra judicial confession had been made by Sushil Sharma to this witness it was made during the night of 2nd /3rd July, 1995. There was no basis whatsoever for the trial Court to have come to this conclusion. It is well settled that in criminal cases there is no room for conjectures and surmises. The prosecution is supposed to establish its case as is put forth by it and if the case is disbelieved on any aspect by the Court then the Court cannot make out a new case on its own for the prosecution. So, we do not approve of the finding of the trial Court that the appellant had made the confession before Mr. D.K.Rao during the night of 2nd/3rd July, 1995.

76. The learned trial Court not only came to the finding which was not even the case of the prosecution but it also observed that PW-31 Mr. Rao had by giving shelter to Sushil Sharma on the night of 2nd July after having come to know that he had committed a murder had made himself liable for being prosecuted for the offence under Section 212 IPC but the State had let him off by citing him as a prosecution witness. After observing like this the learned Page 0839 Additional Sessions Judge ordered that a copy of his judgment along with the testimony of Shri Rao and some other witnesses who had been examined from Gujarat Bhawan be sent to the Chief Metropolitan Magistrate to be treated as a complaint for the afore-said offence by Mr. Rao and also directed the Chief Metropolitan Magistrate to give a hearing to Shri D.K.Rao before taking cognizance in the matter. We feel, that making this kind of a direction for the Chief Metropolitan Magistrate was not at all justified when the witness himself had not claimed that he knew about the murder of 2nd night itself and there is no other evidence from which such knowledge could be inferred and without that knowledge on the part of the witness it cannot be said that he had harboured the appellant in the night of 2nd July, 1995. So, while we agree with the finding of the trial Court that the statement of PW-32 regarding appellant's making confession to him on phone is not acceptable but we do not subscribe to the finding that confession must have been made by the appellant to PW-31 on the night of 2nd/3rd, July, 1995 and for that reason PW-31 had made himself liable for being prosecuted under Section 212 IPC. The direction given to the Chief Metropolitan Magistrate for prosecuting Mr. Rao would, therefore, stand re- called.

77. In order to lend more assurance to the prosecution case in general there is also evidence adduced to show that on 19/07/95 accused Sushil Sharma had after his arrest got recovered one kurta having human blood on it from near the bushes in the area of Rangpuri in Delhi. This recovery has been challenged on behalf of the appellant on the ground that except for the police witnesses (PW-66 and PW-81) there is no other independent witness to establish that recovery and, therefore, no reliance should be placed on this piece of evidence. We have gone through the evidence of the police witnesses in this regard and find nothing elicited from them in their cross-examination which could throw any doubt on the genuineness of the said recovery. Just because there is evidence of only police witnesses the recovery of blood stained kurta at the instance of the appellant cannot be rejected. Learned Counsel for the appellant had submitted that the prosecution had sought to establish recovery of another blood stained kurta pyjama also at the instance of the appellant from a place near Gujarat Bhawan but the trial Court had not accepted that recovery because no public witness had been joined. Mr. Sud submitted that strangely enough that yardstick was not applied to the recovery of the kurta from the Rangpuri area which was also not witnessed by any independent

witness from the public and the trial Judge on his own observed that these days public is reluctant to become witnesses in an investigation of a crime. In our view for this reason the evidence in this regard cannot be discarded. The other recovery has not been relied upon by the trial Court primarily for the reason that on those clothes there was no blood detected. In any case, we are also of the view and in full agreement with the submission advanced by the learned Counsel for the State that even if this corroborative piece of evidence is totally excluded from consideration the guilt of the appellant would still stand established from various other circumstances which we have already found to have been established beyond any shadow of doubt.

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78. The prosecution is also relying upon the confession made by the other convict Keshav Kumar by taking recourse to Section 30 of the Evidence Act. We have already noticed that during the trial Keshav Kumar had moved an application praying for disposing of his case immediately. In that application he had admitted that he had burnt the dead body of Naina Sahni on the asking of Sushil Sharma who had brought the corpse to Bagia restaurant in his car. He had, however, denied his involvement in the murder. Learned Counsel for the appellant had submitted that the confession of Keshav Kumar, which he had in any case retracted at the stage of 313 Cr.P.C. by claiming that he had moved that application on the assurance of public prosecutor that he would be bailed out, could not be used against Sushil Sharma since it was not 'proved' in evidence and secondly because the trial Court could not have kept that application pending for being considered at the final stage of the case. We agree that the confession of Keshav Kumar cannot be used against Sushil Sharma. Section 30 of the Evidence Act is attracted when a confession of one of the accused facing trial with others is 'proved' by the prosecution. Confession can be proved only during evidence. That would mean that confession sought to be relied upon against an accused other than its maker should have been made before the trial began and then during evidence it has to be proved and only then the same may be utilized by the Court against the co-accused since in that situation only the co-accused against whom that confession is being sought to be used would get an opportunity to challenge the evidence of the witnesses who are examined to prove that confession. Otherwise the accused against whom confession of his co-accused is being relied upon would get adversely affected without getting any opportunity to demolish the evidence about the confession. So, we are of the view that in this case since the confession of Keshav Kumar was not introduced and proved during the prosecution evidence it cannot be used against Sushil Sharma. And in this view of the matter, we need not go into the other point raised by the counsel for the appellant that the trial Court was bound to act on the confession immediately when it was made and could not have kept its decision pending and since no decision was taken at the time when the confessional application was moved by Keshav Kumar it could not have been used against Sushil Sharma later on.

79. With this last conclusion we have exhausted the list of circumstances pressed into service by the prosecution and given our findings and have also dealt with all the submissions of the learned Counsel for the appellant except the plea that the appellant had not been given a fair trial by the learned trial Judge. We would now deal with this contention also before summing up our conclusions. This grievance raised on behalf of the appellant was in addition to the general submission of his counsel that all the prosecution witnesses right from a poor vegetable vendor to

the eminent scientists of the country had been introduced in this case and had deposed falsely to secure conviction of Sushil Sharma. We have already rejected Mr. Sud's entire criticism about the veracity of all the material witnesses whose evidence we have ourselves examined and analysed independently in detail taking into consideration all the grounds of attack put forth by Mr. Sud. As far as the grievance that the appellant did not get a fair trial is concerned, the Page 0841 submission of the learned senior counsel was that the trial Judge was bent upon helping the prosecution by resorting to extensive questioning of the witnesses himself in order to destroy whatever beneficial to the accused had been extracted by the defense counsel during cross-examination and also by summoning many witnesses as court witnesses whom even the prosecution did not want to examine and also by inspecting the Bagia restaurant to find out if witnesses of the incident were speaking truthfully or not. It was also contended that the witnesses who actually should have been summoned were not summoned by the trial Judge and further that the trial Judge has been unjustifiably disallowing many important questions which were sought to be put in cross-examination of the witnesses. It was also submitted that the trial Judge had been extensively questioning the witnesses and criticizing the special public prosecutor for not effectively examining his witnesses. Another criticism made was that the trial Judge had also assumed the role of an expert also by first calling from the malkhana the kurta which the appellant had allegedly got recovered from Rangpuri and then opining that it had a burn mark implying thereby that the appellant had also burnt the dead body. That finding was given when even the expert from CFSL could not notice any burn mark on that kurta. All this was done by the trial Judge, according to the learned senior counsel, because of the fact that those days the electronic and print media had sensationalized this case and had started a parallel trial which definitely had prejudiced the appellant. In support of these submissions regarding the role played by the trial Judge in this case learned Counsel also cited one judgment of the Supreme Court *Ram Chander vs State of Haryana* (1981) 3 Supreme Court Cases 191.

80. We have very minutely examined the evidence of the witnesses examined by the prosecution and also the judgment under challenge and find that the allegation against the trial Judge of being biased towards the appellant is absolutely devoid of any substance. Just because the learned Judge exercised his powers under Section 311 Cr.P.C. and Section 165 of the Evidence Act liberally during the marathon trial he cannot be said to have exercised those powers to nail the appellant. It was his genuine attempt to bring about the truth. In fact, we were told by Mr. Sud himself that at one stage during the trial the Judge who was doing the trial at Patiala House Courts and who has finally convicted the appellant was transferred to a Civil Court and then at the request of the appellant the High Court had transferred the case to the same Judge. Now, that the appellant has been held guilty by that Judge he has resorted to levelling of allegations of bias against that very Judge. We do not approve this kind of a stand taken in this appeal by the appellant. These kind of tactics by an accused never yield dividends and if at all these allegations have been made with a hope that this Court may order re-trial then the hope of the appellant can be said to be absolutely misconceived. We have gone through the judgment cited by Mr. Sud and find that in that case the trial Judge had intimidated and rebuked the witnesses who had not stuck to their statements made by them to the police during investigation and threatened them that in case their statements were going to be as per Page 0842 their police version they would be prosecuted for perjury. That is not the situation here at all. No witness had deposed under any such threat by the trial Judge. We had also asked learned Counsel whenever he pointed out to us some questions disallowed to be put to witnesses in

cross-examination as to what prejudice had been caused by that to the accused and also to tell us as to what favorable answers he could have expected from the witnesses and what effect the same would have had on the case of the accused if at all those answers had been what the accused expected. Learned senior counsel, however, did not give any response which shows that these kind of arguments were being advanced without any seriousness. As far as the grievance of the appellant's counsel against the media publicity of the case is concerned we do not think that anything would turn around this plea. We find that this is now becoming a main ground of challenge whenever some conviction takes place. We, however, feel that despite the fact that in this case the learned trial Judge has also noticed in his judgment that this case had attracted lot of media attention his decision is based on a fair, unbiased and unprejudiced analysis and assessment of the evidence before him. As far as parallel media trial of criminal cases is concerned, that takes place since these days media people are briefed on day to day basis by the police, representatives of the accused and even accused persons themselves also quite often speak before the cameras of various TV channels. In these circumstances media cannot be blamed for highlighting the facts which are spoken to before the cameras by the representatives of the prosecution as well as the accused. We have also experienced that these days whenever media people highlight some crime the investigating agencies perform their functions with much more diligence and perfection. We, therefore, reject the argument that the appellant did not get a fair trial.

81. Now, we would sum up the various circumstances which we have found to have been established beyond any shadow of doubt and to be sufficient enough to uphold the conviction of the appellant Sushil Sharma. These are those circumstances:

- 1) The appellant Sushil Sharma was running a restaurant by the name of Bagia Bar-be-Que in the compound of Ashok Yatri Niwas at Ashoka Road, New Delhi and his co-accused Keshav Kumar was one of the employees kept there by the appellant.
- 2) On the night of 2nd July, 1995 a body of a female was being burnt on the tandoor of the said Bagia Bar-be-Que by the appellant and his employee Keshav Kumar.
- 3) At the time of post-mortem examination of the charred corpse of that unfortunate woman bullets were noticed embedded in the skull and neck region and those bullets were found by the ballistic expert to have been fired from the .32' Arminus revolver which the appellant admittedly possessed during those days..
- 4) The woman whose body was being burnt had met with homicidal death.
- 5) Appellant Sushil Sharma was living in flat No. 8/2A, DIZ Area, Sector- II, Mandir Marg, Gole Market, New Delhi with one Naina Sahni d/o Shri Harbhajan Singh and Smt. Jaswant Kaur and both of them Page 0843 were seen together in the said flat in the evening of 2nd July, 1995 and after that day Naina Sahni was not seen alive by anyone.

6) Sushil Sharma was suspecting that Naina Sahni was having affairs with other persons and Naina Sahni had started telling Sushil Sharma to declare publicly that they were husband and wife which he did not want to do and so he had a strong motive to kill her.

7). On 4th July, 1995 five fired cartridge cases of .32' and one lead bullet of .32' and some blood stained articles were recovered from flat No. 8/2A, DIZ Area, Sector-II, Mandir Marg, Gole Market, New Delhi and those cartridge cases and lead bullet were also found by the ballistic expert to have been fired from the licensed Arminius .32' revolver of Sushil Sharma and the blood on different articles was found to be of AB Group which was the blood group of Naina Sahni.

8) The appellant Sushil Sharma had after his arrest got recovered one blood stained kurta from the area of Rangpuri in Delhi while in police custody.

9) The charred corpse lifted from the tandoor of Bagia Bar-be-Que on the night of 2nd/3rd July, 1995 was found to be that of Naina Sahni d/o Shri Harbhajan Singh and Smt. Jaswant Kaur.

82. After having found the aforesaid circumstances relied upon by the prosecution to have been established beyond any shadow of doubt we have no hesitation in coming to the conclusion that all these circumstances form a complete chain from which there can be no other conclusion except that it was the appellant Sushil Sharma who was responsible for the murder of Naina Sahni. There is no circumstance consistent with his innocence. All these circumstances rule out any possibility or even probability of the appellant Sushil Sharma being innocent. Although we are fully satisfied that guilt of the appellant stands established from these circumstances and we require no further assurance from any other evidence but the prosecution has in any case placed at our disposal circumstance of false pleas taken by Sushil Sharma to cement its case further. We have held that Sushil Sharma had taken the false pleas that on 2nd July, 1995 he was at Tirupati and also that during his absence from 1st July to 6th July, 1995 the police had removed his licensed .32bore Arminius revolver and its ammunition as well as his car No. DL-2CA-1872 from his house at Maurya Enclave. We, therefore, do not find any infirmity in the trial Court's decision except to the extent we have differed with its views regarding the evidence of PW-31 Mr. D.K.Rao which was relied upon by the prosecution to establish extra judicial confession of the appellant as also the direction given for the prosecution of Mr. Rao which would stand recalled. There is no merit in the appeal of Sushil Sharma and the same is liable to be dismissed.

83. We now come to the sentence of death awarded to the appellant Sushil Sharma by the learned trial Court. Way back in the year 1974 Hon'ble Supreme Court had observed in a judgment reported as 1974(4) SCC 443 Page 0844 that once guilt of an accused is established the punitive dilemma begins and in latter judgment reported as 2003 JCC(3) 1952 it was observed that this said dilemma reaches its peak when the magnitude of the crime is enormous. Before we give our decision on this aspect of the matter in the present case we would like to notice the guidelines laid down by the Hon'ble Supreme Court from time to time which the Courts should keep in mind whenever they are

to decide whether death penalty should be awarded to the convicted accused. Many judgments were cited before us from both sides. However, we need not refer to each one of them and it would be sufficient to refer to only one recent judgment which takes into consideration most of the earlier judgments on the point. That judgment is reported as *State of Rajasthan v. Kheraj Ram* and we reproduce below the relevant part of the judgment dealing with the death sentence:

26. Section 302 IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the court as to its application. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary criminological thought and movement. It is not difficult to discern that in the Code, there is a definite swing towards life imprisonment. Death sentence is ordinarily ruled out and can only be imposed for 'special reasons', as provided in Section 354(3). There is another provision in the Code which also uses the significant expression 'special reason'. It is Section 361. Section 360 of the 1973 Code re-enacts, in substance, Section 562 of the Criminal Procedure Code, 1898 (in short 'the old Code'). Section 361 which is a new provision in the Code makes it mandatory for the court to record 'special reasons' for not applying the provisions of Section 360. Section 361 thus casts a duty upon the court to apply the provisions of Section 360 wherever it is possible to do so and to state 'special reasons' contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the statute-book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors. Criminal justice deals with complex human problems and diverse human beings. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed.

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27. ...

28. ...

29. ...

30. In *Bachan Singh v. State of Punjab* it has been observed that : (SCC p. 751, para 209) A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionable foreclosed.

31. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. In order to apply these guidelines, inter alia, the following questions may be asked and answered: (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence' (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favor of the offender'

32. Another decision which illuminatingly deals with the question of death sentence is *Machhi Singh v. State of Punjab*.

33. In *Machhi Singh* and *Bachan Singh* cases the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category were indicated.

34. In *Machhi Singh* case it was observed:

The following questions may be asked and answered as a test to determine the 'rarest of rare' case in which death sentence can be inflicted:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence'

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favor of the offender' (SCC p. 489, para 39) The following guidelines which emerge from *Bachan Singh* case will have to be applied to the facts of each individual case where the question of imposition of death sentence arises:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate Page 0846 punishment having regard to the relevant circumstances of the



crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. (SCC p. 489, para 38) In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. (SCC pp. 487-88, paras 32-33) (2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland. (SCC p. 488, para 34) (3) When murder of a member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation. (SCC p. 488, para 35) (4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed. (SCC p. 488, para 36) (5) When the victim of murder is an innocent child, or a helpless woman or an old or infirm person or a person vis-a-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community. (SCC pp. 488-89, para 37) If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the Page 0847 answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so. (SCC p. 489, para 40)

84. On the point of sentence the trial Court's following observations may be noticed:

19. In the light of the aforesaid propositions laid down by the Hon'ble Supreme Court I have to see whether the circumstances of the case are such that death sentence is warranted as submitted by Sh. Ahluwalia. Since accused Sushil has left the matter to the wisdom of the court, it becomes the duty of the court to do an intellectual exercise in the matter so that fair justice is done to the accused as well. Accordingly, I apply

the principles set out by the Hon'ble Supreme Court as noted above to the facts and circumstances of the present case from the various perspectives I can imagine.

From these observations of the trial Court is clear that no mitigating circumstances were highlighted by the convict Sushil Sharma before the trial Court and he had left the everything to the judicial discretion of the trial Judge. The learned trial Judge then, duty bound as he was to undertake the exercise himself for preparing the balance sheet of mitigating and aggravating circumstances, did do that for the sake of justice and after taking into consideration all the facts and circumstances came to the following conclusion:

The act of the accused is covered by the observations of the Hon'ble Supreme Court in AIR 1983 SC 957 under the heading of MANNER OF COMMISSION OF MURDER. It is an extremely brutal diabolical act. Naina Sahni was living alongiwth the accused. The evidence indicated that she was treating the accused as her husband. Even the father of the accused deposed that accused was her husband. The evidence indicated that the deceased is a person vis-'-vis whom the accused Sushil was in a position of domination or trust. The evidence indicated that the deceased Naina Sahni had been living along with accused after leaving the parents without recognized formal marriage between them. In such circumstances her position at flat No. 8/2A Mandir Marg was that of a helpless woman. Therefore, the facts and circumstances of the case are also covered by clause V PERSONALITY OF VICTIM OF MURDER. The case of the accused is duly covered by clause I and V of the judgment of the Hon'ble Supreme Court as noted above in Machhi Singh v. State of Punjab .

22. ... the accused even then cannot be saved of capital punishment in view of clause V noted above of the judgment as reported in Machhi Singh's case since accused vis-vis the deceased Naina Sahni was in a position of domination or trust...

85. Before this Court the learned Counsel for the appellant placed on record one affidavit of Shri Inder Mani Sharma, father of the appellant, in support Page o848 of the prayer for not confirming the death sentence in the event of this Court maintaining the conviction of appellant. In the affidavit of the father of the appellant it has been stated that the appellant is his only son and he has spent the prime time of his life in custody ever since he was apprehended in 1995. It has also been claimed by the father of the appellant that he and his wife are both aged and have been suffering from various ailments and all these years they have been managing their affairs with great difficulty and not only that on account of paucity of funds and limited sources of income he could not be of any assistance to his son during the long drawn trial and , in fact, he could not even visit his son in the jail all these years. It is further stated in the affidavit that the deponent and his wife in the evening of their life crave for mercy and submit with all humility that the death sentence given to their son is unwarranted. The appellant's father has also claimed that he is a pious man and has been performing various social, religious and charitable works and he was also the founder member of Gopal Mandir Trust, Pitam Pura, Delhi. He has also highlighted

the fact that all these years his son has shown exemplary conduct in the jail and has always exhibited trust and confidence in the process of law and further that except the present involvement and implication of the appellant he had absolutely clean record. Lastly, it has been stated that the appellant is a commerce graduate from Delhi University and he has enjoyed very good reputation and he has been undertaking a number of social activities.

86. From the side of the State learned Counsel Ms. Mukta Gupta fully supported the afore-quoted observations of the trial Court made while awarding death penalty to the appellant and before this Court she made a fervent plea for confirming the death sentence.

87. After giving our thoughtful and anxious consideration to all the facts and circumstances of the case we are also of the firm view that there cannot be a better case for awarding death penalty than the present one. The appellant definitely killed a helpless woman with whom he was enjoying life by living with her as her husband but with reluctance to proclaim openly that she was his wife and when he thought that no more he would be able to avoid declaring publicly that Naina Sahni, who he thought was having affairs with other big and mighty people also, was his wife he decided to finish her off before she could tell the whole world about their relationship. The appellant admittedly was pursuing political career right from his youth and he must be having big ambitions to achieve in his political life and at the same time he must be apprehensive also that he might lose the support of his followers and the sympathy of the public in general in case it became known to everyone that he was living with a fellow female leader of the youth without claiming her to be his wife. That fate of his political career he never wanted and he could avoid that only by dispatching Naina Sahni to the other world. We have already found that he had thus a very strong motive to get rid off Naina Sahni. So, the appellant must have been waiting for some good opportunity to get rid of the deceased and, therefore, it cannot even be said that the incident was not pre-planned and was a result of sudden reaction, as had been claimed on behalf of the appellant in the Grounds of Appeal taken at the time of filing of the appeal by relying upon the recovery of a bottle of Page 0849 Vodka from the flat at Mandir Marg. Perhaps the appellant wanted to convey that the incident must have taken place under the influence of liquor. We, however, do not think that all that happened on the spur of moment. The appellant had not only pumped bullets in the head of the deceased but had also chopped off her limbs and then heroically took the body to his restaurant in the heart of the city and placed it on the tandoor and burnt it. That reflects not only the extreme depravity of the appellants mind but also his preparedness for that brutal act. All that could not have been done by a person under the influence of liquor. The appellant knew what he had done and how he had to deal with the body of Naina Sahni. At the Bagia restaurant he and his employee were claiming that they were burning the old posters of Party flags. With that gut and confidence Sushil Sharma had behaved that night and now he wants us to accept that all that happened

suddenly. We are, however, not ready to accept this plea at all and show any sympathy to the appellant.

88. We do not think that the circumstances highlighted in the affidavit of the father of the appellant are sufficient enough to outweigh the aggravating circumstances. In a judgment reported as , Mahendra Nath Dass v. State of Assam the Supreme Court had while confirming the death sentence of the convict of that case had not attached any importance to the fact that the convict was a young man of 33 years and was having unmarried sisters and aged parents. In that case the convict had killed the deceased with a sword and amputated the hand and severed the head and then had taken the body majestically to the police station. That, according to the Supreme Court, showed extreme depravity of the convict. Similarly in another case of death sentence decided by the Hon'ble Supreme Court and which is reported as , a plea was raised that since the accused was young boy he should not be given the extreme penalty of death but that plea was not accepted and it was observed by the Hon'ble Supreme Court that this compassionate ground of the accused being young could not be considered as relevant considering the fact that he had committed the murder in a cold-blooded and brutal manner. We may also make a useful reference to the following views expressed by the Hon'le Supreme Court in Dhananjay Chatterjee alias Dhana v. State of West Bengal which also dissuade us from accepting the plea of leniency and mercy raised on behalf of the appellant:

n our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should Page 0850 impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

89. In the present case, we find that the act of the appellant reflects extreme depravity. The gruesome manner in which the appellant had killed Naina Sahni and dealt with her body must have shocked the conscience of the community at large and we unhesitatingly say that the abhorrent act of the appellant has definitely shocked our judicial conscience also. The already-quoted observations of the trial Court made while dealing with the point of death sentence show that the appellant had not expressed any remorse at all when the case had reached the stage of hearing on the point of sentence. As noticed already, he had left the matter of sentence up to the judicial discretion of the trial Court. This kind of an attitude of a convict was considered even by the Hon'ble Supreme Court to be circumstance weighing against the award of life imprisonment for a ghastly murder. That was the view taken by the Apex Court in Holi Ram Bordoloi v. State of Assam 2005 (3) SCC 793 and we reproduce below the relevant observations made in para No. 18 of the judgment:

'18.' But in the case on hand, there is nothing to show that there was repentance by the accused at any point of time or an explanation for the occurrence. Even when questioned under Section 235(2), Criminal Procedure Code, the accused stated that he had nothing to say on the point of sentence. The fact that the appellant remained silent would show that he has no repentance for the ghastly act he committed

90. It appears that even after having been found guilty of murder the appellant Sushil Sharma was perhaps thinking that he was all powerful being a leader of the youth of the country forgetting that in this kind of a situation nobody comes forward to help a person like him and, as noticed already, none from his family even had come forward to his rescue during the stage of investigation or even during the trial to substantiate certain defenses taken by him. That fact also shows that he was not being liked even by his own near and dear ones and that factor rules out any possibility of his reforming himself. People like the appellant who are power drunk and have no value for human life are definitely a menace for the society at large and deserve no mercy. As a leader of the youth the appellant should have shown courage in some other field in place of butchery. The act of the appellant is so abhorrent and dastardly that in case death penalty is not awarded to him it would be a mockery of justice and conscience of the society at large would be shocked. This is surely a case which falls within the category of 'rarest of rare cases' in which no other punishment except the death penalty would be justified. There are no chances of this kind of a person reforming himself. Learned Counsel for the appellant had also made a half-hearted plea for converting the death sentence into that of life imprisonment because of the fact that the incident took place in 1995 and till 2007 the case has not yet attained finality and the appellant's Page 0851 fate is uncertain and in any case after the pronouncement of death sentence for him by the trial Court he is dying everyday. We, however, are not inclined to accept this compassionate plea also. In the facts and circumstances of this case there appears to be no room for compassion. In one case reported as the Hon'ble Supreme Court has observed that long pendency of a matter by itself cannot justify a lesser sentence. Learned senior counsel for the appellant had also contended that as far as the burning of the dead body on the tandoor is concerned that was only a step towards destruction of the evidence of the crime and its not that a living person was charred to death and, therefore, the post-crime conduct of the appellant should not be considered to be an aggravating circumstance. While refusing to accept this submission also of the learned Counsel for the appellant we may make a useful reference to another judgment of the Hon'ble Supreme Court reported as 1999 (9) SCC 581 wherein the two convicted accused had after raping and murdering one girl had thrown her dead body into a septic tank. This post-crime conduct of the convicts was commented upon by the Hon'ble Supreme Court in these words 'the accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human body.'

91. We, therefore, while dismissing the appeal of the convict Sushil Sharma uphold the death penalty also awarded to him by the learned trial Court for the offence of murder. The reference made by the learned Additional Sessions Judge stands answered accordingly.

92. Before we part with these matters we would like to express our appreciation for very valuable assistance rendered by the learned senior counsel Shri K.K. Sud for the appellant and Ms. Mukta Gupta, learned Standing Counsel for the State.