Vikas Verma vs State Of H.P on 27 June, 2024

Bench: Tarlok Singh Chauhan, Sushil Kukreja

2024:HHC:4085 IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr. A. No. 345 of 2020 a/w .

Cr.A. No. 259 of 2020

Reserved on: 21.06.2024
Date of decision: 27.06.2024

Cr.A. No. 345 of 2020
Vikas Verma ...Appellant

Versus

State of H.P.
Cr.A. No. 259 of 2020
Yog Raj
r to ...Respondent

...Appellant

Versus

State of H.P. ...Respondent

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge. The Hon'ble Mr. Justice Sushil Kukreja, Judge.

Whether approved for reporting? Yes.

For the Appellant(s) : Mr. Ajay Kochhar, Sr. Advocate with Mr. Vivek Sharma, Advocate, for the appellant in Cr. A. No. 345/2020.

Mr. Hamender Singh Chandel, Advocate, for the appellant in Cr. A. No. 259 of 2020.

For the Respondent: Mr. Anup Rattan, A. G. with Mr. I. N. Mehta, Mr. Y. W. Chauhan, Sr. Addl.

A.Gs., Ms. Sharmila Patial, Mr. Navlesh Verma, Addl. A.Gs. and Mr. J. S. Guleria, Dy. A.G. Tarlok Singh Chauhan, Judge The appellants being aggrieved by the judgment of conviction and sentence passed by the learned Sessions Judge-II, Shimla, District Shimla, H.P. whereby appellant-convict Vikas Verma was sentenced to undergo; (i) rigorous imprisonment for .

life under Section 302 of the Indian Penal Code and to pay a fine to the tune of Rs. 25,000/- and in default of payment of fine, he was directed to further undergo simple imprisonment for one year; (ii) he was further sentenced to undergo rigorous imprisonment for a term of three years under Section 201 of the Indian Penal Code and to a pay fine of Rs. 10,000/- and in default of payment of fine, he was directed to further undergo simple imprisonment for three years and he was further sentenced to undergo rigorous imprisonment for three years under Section 25 of the Arms Act and to pay a fine of Rs.5,000/- and in default of payment of fine he was further directed to undergo simple imprisonment for three months; and the appellant-convict Yog Raj alias Kaku was sentenced to undergo rigorous imprisonment for three years under Section 201 of the Indian Penal Code and to pay fine to the tune of Rs.10,000/- and in default of payment of fine, he was further directed to undergo simple imprisonment for three years, have filed the instant appeals.

2. Since both these appeals arise out of same judgment, therefore, they were taken up together for hearing and are being disposed of by common reasoning.

3. It is not disputed by either of the sides that the factual matrix, as borne out from the evidence, has not been .

correctly recorded by the learned Sessions Judge and, therefore, the same are reproduced as it is hereunder:-

> i) On 19.12.2014, at about 9.10 A.M., the police of Police Station, Sunni received a telephonic message from 108 ambulance to the effect that one vehicle had fell down in Satluj river, on the basis of which Rapat No. 4 Ex.PW-23/A was recorded. Thereafter, ASI Prem Lal PW-25 rushed to the place of occurrence along with other police officials.
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> ii) After reaching on the spot, PW-25 ASI Prem Lal met with PW-1 Sh. Kanshi Ram, resident of Moongna, P.O. Shakra, Tehsil Karsog, presently working in I & PH. He has given his statement under Section 154 Cr.P.C. Ex.PW-1/A, in which, he has stated that on 19.12.2014, at about 7.45 A.M., he was on morning walk in his fields, which are adjoining to Satluj river, then, he noticed that one vehicle white in colour was

lying in Satluj river towards Shimla side, but nobody alive or dead was seen by him. Thereafter, he informed Sh. Yoginder resident of Shakra, who is residing nearer to Police Station, Sunni. After some time, police and Ambulance 108 came on the spot.

After inspecting the Dhank/spot, the police recovered .

documents of car bearing registration No. HP-62B-

0309 Indigo, but no dead body was found on the spot. As per the complainant, the vehicle might be coming from Shimla side. On the spot, road is quite wide and the accident might have taken place due to the rash and negligent driving. On the basis of Ex.PW- 1/A, PW-25 ASI Prem Lal sent a rukka to Police Station, Sunni, on the basis of which initially the case F.I.R. No. 65/2019 dated 19.12.2014 under Section 279 of the Indian Penal Code was registered.

iii) ASI Prem Lal PW-25 initially conducted the investigation on the spot. He prepared the spot map Ex.PW-25/A. He recovered R.C. Ex.PW-3/A and insurance Ex.PW-3/B vide memo Ex.PW-2/A in the presence of PW-2 Jagdish Kumar and HHC Hem Ram.

He further handed over the investigation to ASI Om Parkash In-charge Police Post Jalog PW-26/A.

iv) PW-26/A ASI Om Parkash on 20.12.2014 again visited the spot and recovered one shoe green and yellow in colour 'Addidas' with black sole Ex.P-2 from the Dhank on the spot. The same was taken into possession vide memo Ex.PW-4/A in the presence of .

PW-4 Sh. Sanjay Sharma and Yoginder Chand. The same was packed in parcel Ex.P-1 and sealed with seal impressions 'T' at five places. The specimen of seal impressions seal 'T' Ex.PW-4/B was separately taken on piece of cloth.

v) The police has made request to N.D.R.F. team to search the dead body on 22.12.2014. The dead body was searched by the police on the spot with the help of NDRF team, but no dead body was found.

vi) On 26.12.2014, the case file was handed over to S.H.O. Police Station, Suni, SI Tilak Raj PW-22 for further investigation as per the directions of the seniors police officer.

vii) On 28.12.2014, PW-22 again handed over the case file along with the remand form to PW-26A ASI Om Parkash with the directions to produce the accused persons before the Court. PW-26/A ASI Om Parkash produced the accused persons before J.M.I.C. (7), Shimla (at his residence) and obtained five days police remand. On the same day, the accused Vikas Verma made disclosure statement Ex.PW-11/A in the presence of PW-11 Sh. Binder and Sh. Ganesh .

Sharma to the effect that on 18.12.2014, he fired gun shot from his Geco double barrel licensed gun at place Shakrodi jungle upon Harish Sharma, who sustained injuries on his forehead. Thereafter, he lifted his dead body and blood stains came upon his jacket and he had kept the jacket and gun in

his quarter i.e. Prem Jia Niwas, Sanjauli, Cemetery in a room. At the instance of accused Vikas Verma, in the presence of PW-11 Binder Singh and Ganesh Sharma jacket coffee in colour Ex.P-19, gun licence Ex.P-20, gun Ex.P-14 along with eight live cartridges, out of which, four are in red colour Ex.P-16 and remaining four are in Khakhi colour Ex.P-17. The same were taken into possession vide memo Ex.PW-11/D and sealed with different parcels Ex.P-13, Ex.P-15 and Ex.P-18 and sealed with seal impressions 'O'. The specimen of seal impressions 'O' Ex.PW-7/C was separately taken on piece of cloth. The Khakha of gun Ex.PW-11/B was also prepared. He recorded the statements of the witnesses as per their version and also prepared the spot map Ex. PW-26/A. He also clicked the photographs Ex.PW-2/D-14.

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viii) After effecting the recovery of the aforesaid jacket/cartridge and gun, PW-26A ASI Om Parkash came back to Police Station and he deposited the parcels Ex.P-13, Ex.P-15 and Ex.P-18 with PW-20 MHC Shiv Kumar and produced both the accused persons before PW-22 SI/SHO Tilak Raj and also handed over the case file for further investigation.

ix) Apart from this, PW-26A ASI Om Parkash made a request to the Nodal Officer BSNL through S.P. Shimla to provide call details of Mobile numbers 94181-67313 and 94188-52608 of accused Vikas Verma and obtained the same from PW-18 Sh. Mohan Lal Hirwal which are Ex. PW18/A and Ex.PW18/B. He has also made request to obtain the call of mobile No.98161-48380 of deceased Harish Kumar and obtained the same from PW-19 Devinder Verma. PW-

26A also obtained call details Ex.PW19/F of accused Yog Raj from PW-19 Devinder Verma and he recorded the statements of Nodal Officers as per their versions.

x) The accused Vikas Verma made disclosure statement Ex. PW-8/A to PW-22 to the effect that the .

dead body of deceased was lifted by him with the help of co-accused Yog Raj alias Kaku from the spot where gunshot was fired towards Rajaihara Nallah and concealed the same in the bushes. Thereafter, the dead body of deceased was put in a jute bag (boru) and the same was put in the back seat of the car of deceased Harish Sharma bearing No. HP- 62B-

0309 and accused Yog Raj drove the aforesaid car towards Jagoh Dhank side. While, accused Vikas Verma was sitting in the back seat of the vehicle, cut off the neck of deceased Harish Sharma with knife and had thrown the knife and head of deceased from the Dhank towards Satluj river. The car of the deceased was brought to Moongna Dhank and thereafter both the accused persons pushed the car along with the dead body of Harish Sharma towards Satluj river side. The mobile phone of deceased Harish Sharma was also thrown in the bushes/Dhank near Moongana pump house. The accused Yog Raj alias Kaku also made similar disclosure statement Ex.

PW-8/B in the presence of PW-8 Sh. Dev Raj and PW-

9 Sh. Yash Pal.

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xi) PW-22 SI/SHO Tilak Raj, on the identification of both the accused persons recovered empty cartridge, blood stained soil and leaves near Shakrodi Nallah Ghasani. Empty cartridge Ex.P-12 was put in a cloth parcel Ex.P-11 and sealed with seal impression 'l' at four places. The accused Vikas Verma also identified the place where he fired gunshot upon the deceased Harish Sharma. PW-22 also clicked the photographs and also done videography and clicked the photographs Ex.PW2/D-3 and Ex.PW2/D-6 with the help of PW-2. The blood stained soil was put in white paper and sealed with seal impression 'l' at four places. The controlled sample of soil was also sealed with the same seal impression. The identification and recovery memo Ex.PW8/E with regard to control sample and recovery of blood stained soil was prepared. On the basis of Ex.PW8/E, PW-22 SI/SHO Tilak Chand prepared spot map Ex.PW22/A.

xii) On the further disclosure of the accused persons, at place Rajhera Nallah the accused Vikas Verma gave identification of bushes, where dead body of deceased Harish Sharma was concealed and blood .

stained soil of the same place was also picked up vide recovery memo Ex.PW8/D on the basis of which spot map Ex.PW-22/B was prepared. The spot photographs were also clicked with the help of PW-2 Sh. Jagdish at place Rajhera Nallah.

xiii) The accused persons have also

identification of Mori road, where the dead body of r given deceased was put in his Indigo car HP-62B-0309 and accused Vikas Verma cut the neck of the dead body and had thrown the same towards Jagoh Dhank and gave identification of the spot, on the basis of which identification memo Ex. PW8/F was prepared and spot map Ex.PW22/C was also prepared.

xiv) Both the accused persons have further given identification of Moongna road through Chaba road, where the dead body of deceased Harish which was kept in a jute bag(boru) was pushed along with the car of the deceased towards Satluj river and memo of identification Ex. PW-8/G was prepared. The spot map Ex.PW-25/A was already prepared by PW-25 A.S.I. Pem Lal on 19.12.2014.

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xv) The accused Vikas Verma produced one Samsung Mobile phone Ex.P-10 to PW-22 SI/SHO Tilak Raj. The same was identified by PW-12 Hitesh Sharma as of deceased Harish Sharma. The recovered Samsung Mobile was put in a cloth parcel and sealed with seal impression 'l' at four places. The specimen of seal impression Ex.PW-8/H and aforesaid mobile phone was taken into possession vide memo Ex.PW-8/C and PW-22 SI/SHO Tilak Chand has also prepared spot map Ex.PW-22/D. The

photographs of the spot Ex.PW-2/D-7 and Ex.PW-2/D-9 were also clicked by PW-2 Jagdish. After effecting the recovery of aforesaid articles, and preparing the spot map Ex.PW-22/E. PW-22 SI/SHO Tilak Chand came back to the Police Station along with accused persons and witnesses and recorded the statements of PW-8 Sh Dev Raj, PW-9 Yash Pal and PW-12 Hitesh Sharma as per their versions.

xvi) The aforesaid recovered case properties were deposited by PW-22 with PW-20 MHC Shiv Kumar.

xvii) SI/SHO Tilak Chand PW-22 had added Section 25 of the Arms Act as the recovery of double barrel gun .

was earlier effected on 28.12.2014 by PW- 26A ASI Om Parkash.

xviii) On 31.12.2014, PW-22 along with other police officials went to Moongna Dhank in Satluj river, where the Indigo car No. HP-62B-0309 was lying. The same was taken out with the help of small crane. No dead body was found in the car, however, key of the car and cover of rear seat were taken into possession along with one piece of bumper stated to contain blood stains. There were blood stains on the stone also. The stone was also taken into possession and put in different parcels Ex.PA-1, Ex.PB-1 and Ex.PC-1.

These parcels were sealed with seal impression 'H' at five places. The specimen of seal impression 'H Ex.PW-7/A was separately taken on a piece of cloth.

COPY The aforesaid three parcels were taken into possession vide memo Ex.PW-7/B. PW-22 prepared spot map Ex.PW-22/E and recorded the statements of the witnesses as per their versions. On 31.12.2014 after completing the spot investigation, PW-22 came back to the police station and deposited the parcels Ex.PA-1, Ex.PB-1 and Ex.PC-1 along with specimen seal impression with PW-20 MHC Shiv Kumar.

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xix) On the same day, the Indigo car bearing No. HP-

62B-0309 was handed over on Sapurdari to PW-12 Sh. Hitesh Sharma vide memo Ex.PW-7/C in the presence of PW-7 Sunil Kumar and Rakesh Kumar.

xx) The dead body of deceased was searched, but the same could not be traced.

xxi) On 05.01.2015, accused Vikas Verma again made disclosure statement to the effect that on 18.12.2014, after sitting in the rear seat of the Indigo car, he had cut the neck of dead body of Harish with the help of knife/Churri and he had thrown the head of dead body and knife towards Jagoh Dhank. His disclosure statement Ex.PW-13/A was separately recorded in the presence of PW-13 Arun Kumar and Lalit Kumar. On the basis of disclosure statement Ex.PW-13/A, the accused Vikas

Verma led the police party towards Jagoh Dhank and went on foot towards Dhank and brought one knife from the bushes and produced the same before PW-22 SI/SHO Tilak Chand. He prepared Khakha of knife Ex. PW-13/B and put knife Ex.P-22 in a cloth parcel Ex.P-21 and sealed with seal impression 'U' at five places. The specimen .

of seal impression 'U' Ex.PW-13/C was separately taken on a piece of cloth. The same was taken into possession vide memo Ex.PW-13/D and PW-22 spot map Ex.PW-22/F. The parcel Ex.P-21 containing knife Ex.P-22 was deposited with PW-20 MHC Shiv Kumar.

xxii) On 04.01.2015, PW-22 SI/SHO Tilak Chand moved an application Ex.PW-15/A to Tehsildar Suni to supply spot map on scale and to supply the copy of Jamabandi and later on obtained the same.

xxiii) On 06.01.2015, PW-22 SI/SHO Tilak Chand went to the house of accused Yog Raj. His driving licence Ex. PW-5/B was taken into possession vide memo Ex.PW-5/A in the presence of PW-5 Constable Karan Singh. On 07.01.2015, PW-22 moved an application to the Medical Officer, Sunni with a request to take blood samples of Bhoop Ram PW-29 and blood sample of Smt. Gaura Devi PW-30 both the parents of the deceased Harish Sharma. PW-22 also filled Appendix-l form of Smt. Gaura Devi Ex.PW-22/G and Appendix-l form of Sh. Bhoop Ram Ex.PW-22/H and also identified both the parents of the deceased before the Medical Officer PW-32. The blood samples .

of PW-29 and PW-30 were taken by PW-32 Dr. Girish.

E COPY He also filled the identification form of Smt. Gaura Devi Ex.PW-30/A and identification form of Bhoop Ram Ex.PW-29/A and had drawn blood samples on FTA cards and sealed the same with seal impressions of Civil Hospital, Sunni and handed over the same to PW-22 SI/SHO Tilak Raj. PW-22 recorded the statements of Budhi Ram, Asha Kumari, Kamlesh Verma and Hem Lata as per their versions.

xxiv) The case property in the shape of samples collected on different dates was sent to S.F.S.L. Junga. On 27.02.2015, after receiving the S.F.S.L. reports Ex.PW-17/A and Ex.PW-22/M, PW-22 recorded the statements of MHC Shiv Kumar, Kamlesh Kumar and Jagdish Kumar as per their versions. PW- 22 also recorded the statements of PW-14 Budhi Ram Sharma, who is running a Karyana shop at village Shakrodi to the effect that on 18.12.2014 at about 8.00 P.M., the accused Yog Raj alias Kaku along with another person came on his shop and demanded disposable glasses and Namkeen. After purchasing disposable glasses and Namkeen, both of them left his shop.

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4. The prosecution, in order to prove its case, has examined as many as 28 witnesses.

5. On closure of prosecution evidence, the statements of accused persons under Section 313 Cr.P.C. were recorded to which they pleaded false implication, but they did not led any evidence in their defence.

6. After recording the statements of the accused persons, the police filed the supplementary challan and PW-29, PW-30, PW-31 and PW-32 were examined.

7. On the application of the accused persons, PW-22 SI/SHO Tilak Raj and PW-26A, ASI Om Parkash were again recalled for further cross-examination and supplementary statements under Section 313 Cr.P.C of both the accused persons were recorded. They were again asked to enter into their defence but they have opted not to lead any evidence in support of their defence.

8. The learned Court below after recording evidence and evaluating the same, sentenced the accused/appellants as aforesaid.

We have heard learned counsel for the appellants and learned Deputy Advocate General and have gone through .

the material placed on record

9. Admittedly, there is no eye-witness in this case. The prosecution has based its case entirely on circumstantial evidence. The learned trial Court culled out the following circumstances:-

> 1. The accused Vikas Verma alongwith deceased Harish Kumar used to go for hunting towards Sunni/Basantpur side and on 18.12.2014, the deceased was telephonically called by accused Vikas Verma for hunting towards Basantpur/Shakrodi Jungle side.
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> 2. First information report, recovery of car bearing No. HP-62B-0309. R.C., Insurance and shoe of the deceased from the right bank of Satluj river on 19/20.12.2014.
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> 3. Arrest of accused persons on 27.12.2014 and recovery of gun, eight live cartridges, gun licence and jacket of the accused Vikas Verma and recovery of mobile Ex.P-10 of deceased at the instance of accused persons, recovery of blood stained soil, leaves and empty cartridge from Shakrodi jungle at the instance of the accused persons and recovery of knife with which the neck of the body was cut by the accused Vikas Verma.
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> 4. Corpus delicti and involvement of the accused persons.

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10. On analysing the evidence in the backdrop of the aforesaid circumstances, the learned trial Court found all the circumstances having been proved and finally concluded that all the circumstances found a chain of events leading to the hypothesis that the appellants have committed the crime.

11. The cardinal principle of criminal jurisprudence has remained impassive. The prosecution has to prove its case beyond all reasonable doubts. Appearance of serious doubt in the prosecution case

only helps the case of accused. More serious the offence, more arduous is the duty cast upon prosecution to discharge its burden strictly in accordance with law. In absence of direct evidence, circumstances relied upon by the prosecution have to satisfy the same standard of proof i.e. beyond all reasonable doubts. Once this barrier is successfully crossed, it is to be shown that all the circumstances form a complete chain of facts suggesting only one hypothesis i.e. the guilt of the accused.

12. In Anjan Kumar Sarma v. State of Assam, (2017) 14 SCC 359 Hon'ble Supreme Court held as under:-

> "14. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not .
>
> "may be" established;
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (3) the circumstances should be of a conclusive nature and tendency;
>
> (4) they should exclude every possible hypothesis except the one to be proved; and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

13. In Ramanand @ Nandlal Bharti Vs State of Uttar Pradesh reported in 2022 SCC Online SC 1396, the legal position has further been reiterated as under:-

> PRINCIPLES OF LAW RELATING TO APPRECIATION OF CIR- CUMSTANTIAL EVIDENCE
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> 45. In 'A Treatise on Judicial Evidence', Jeremy Bentham, an English Philosopher included a whole chapter upon what lies next when the direct evidence does not lead to any special infer-

ence. It is called Circumstantial Evidence. According to him, in every case, of circumstantial evidence, there are always at least two facts to be considered:

a) The Factum probandum, or say, the principal fact (the fact the existence of which is supposed or proposed to be proved; &

b) The Factum probans or the evidentiary fact (the fact from the existence of which that of the factum probandu-

mis inferred).

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46. Although there can be no straight jacket formula for appreciation of circumstantial evidence, yet to convict an accused on the basis of circumstantial evidence, the Court must follow certain tests which are broadly as fol- lows:

1. Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly estab-

lished;

2. Those circumstances must be of a definite tendency unerringly pointing towards guilt of the accused and must be conclusive in nature;

3. The circumstances, if taken cumulatively, should form a chain so complete that there is no escape from the con-

clusion that within all human probability the crime was committed by the accused and none else; and

4. The circumstantial evidence in order to sustain convic-

tion must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused but should be inconsistent with his innocence. In other words, the circumstances should exclude every possible hypothesis except the one to be proved.

50. Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evi- dence, the judgment remains essentially inferential. The inference is drawn from the established facts as the cir- cumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime in question. All the circum-

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stances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

14. It will also be gainful to reproduce following extract from the judgment passed by the Hon'ble Supreme Court in case titled as Ramesh Bahi and another vs. State of Rajashtan (2009) 12 SCC 603:-

> "7. In support of the appeal learned counsel for the appellants submitted that the circumstances highlighted do not establish the accusations. Learned counsel for the respondent-State on the other hand supported the judgment.
>
> 8. "10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence .
>
> of the accused and bring the offences home beyond any reasonable doubt.
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> 11. We may also make a reference to a decision of this Court in C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193, wherein it has been observed thus:
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> 21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive r in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence'.
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> 12. In Padala Veera Reddy v. State of A.P. and Ors. (AIR 1990 SC 79), it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:
>
> (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other .

hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.'

13. In State of U.P. v. Ashok Kumar Srivastava, (1992)2 SCC 86, it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

14. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

(3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

15. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid .

down by the this Court as far back as in 1952.

16. In Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh, (AIR 1952 SC 343), wherein it was observed thus:

> '10. ....It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should r be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable

> ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.'

17. A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra, (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned `must' or `should' and .

not `may be' established;

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

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

(4) they should exclude every possible hypothesis r except the one to be proved; and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These aspects were highlighted in State of Rajasthan v. Rajaram (2003 (8) SCC 180), State of Haryana v. Jagbir Singh and Anr. (2003 (11) SCC 261) and in State of U.P. v. Ram Balak & Anr. [2008 (13) SCALE"

> 15. We are governed by rule of law. No conviction can be recorded on assumption. Prosecution has to discharge its burden by proving the guilt of accused beyond all reasonable doubts and for such purposes, it has to prove the fact in issue on the basis of relevant and admissible evidence. Merely, because police get knowledge about the culprit either from illegal confession extracted from him or from any other source will not absolve the prosecution from its duty to prove the guilt of the accused in accordance with law.
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> 16. In the instant case, the prosecution has also failed to attribute and prove any motive to the appellant for commission of crime in question. In Babu vs. State of Kerala (2010) 9 SCC 189, the Hon'ble Supreme Court has held as under:

> "25. In State of U.P. vs. Kishanpal and others (2008) 16 SCC 73, this Court examined the importance of motive in cases of circumstantial evidence and observed: (SCC pp.87-88, paras 38-39).
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> "38..... the motive is a thing which is primarily r known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.
>
> 39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

26. This Court has also held that the absence of motive in a case depending on circumstantial evidence is a .

factor that weighs in favour of the accused."

17. In light of the aforesaid, we now proceed to examine the entire evidence on record for making an assessment whereof on the touchstone of a well settled legal principles, some of which have been noted above.

The accused Vikas Verma alongwith deceased Harish Kumar used to go for hunting towards Sunni/Basantpur side and on 18.12.2014, the deceased was telephonically called by accused Vikas Verma for hunting towards Basantpur/ Shakrodi Jungle side.

18. Learned Trial Court in order to conclude that Circumstance No. 1 has duly been proved relied upon the testimony of Smt. Hem Lata wife of late Shri Harish Kumar Sharma as PW-24, who has stated that on 18.12.2024 her husband received a telephonic call on his mobile and when she asked him about the call, he disclosed that appellant Vikas Verma called him for the purpose of hunting and they were also have some financial transactions. Prior to it, she heard about the quarrel having taken place between her husband and Vikas Verma. According to her, her husband went on hunting alongwith Indigo Car bearing No. HP-62C-0309, which was registered on her name. At about 1:15 pm, her husband made a telephonic call and asked her whether anything was required in the house. On that day, her husband did not come back and she thought that .

her husband might have stayed in the house of appellant Yog Raj alias Kaku.

19. Learned Trial Court thereafter relied upon the testimony of PW18 Sh. Mohal Lal Hirwal, who provided CDRs and billing address of mobile No. 94181-67313 w.e.f. 01.11.2014 till date. He further supplied CAS on Mobile No. 94185-52608 and 94181-67313 w.e.f. 17.12.2014 till date. According to him, Mobile No. 94181-67313 was registered in the name of the appellant Vikas Verma and the same number was also mentioned in the gun licence Ext.P-20. Mobile No. 94185-52608 was in the name of Rakesh Kumar son of Sh. Tulsi Ram, resident of village Bhatoa, Tehsil Pachhad, District Sirmour. As per him, on the basis of the aforesaid request he supplied call details of Mobile No. 94181-67313 of the appellant Vikas Verma through e-

mail vide Ext. PW-18/A. He also supplied the consumer application form of Vikas Verma vide Ext. PW-18/B and also proved on record driving licence Ext. PW-18/C of the appellant Vikas Verma. He further stated that on 29.12.2014, the police had made another request to supply the CDRs and CAF pertaining to Mobile No. 94181-52608 and the same was supplied through e-mail vide Ext. PW-18/D.

20. Deceased Harish Kumar Sharma was having Mobile No. 98161-48380 of Air Tel and the Nodal Officer of the Company .

Devinder Verma was examined as PW-19 and proved the application made by the prosecution vide Ext. PW-19/A and also produced driving licence Ext. PW-19/B and CDR Ext. PW-19/C. He also stated that the same was issued in the name of the appellant Yog Raj of Mobile No. 96168-04919. At the time of obtaining the SIM, the appellant had supplied the copy of election card. His CAF is Ext. PW-19/D and copy of the election identity card is Ext.PW-19/E and its call detail is Ext. PW-19/F.

21. According to the learned Trial Court, the first circumstance stood proved in view of the statement of PW-18, as the perusal of the CDR Ext. PW-18/A of the appellant Vikas Verma showed that he had made a telephonic call on 18.12.2014 at about 12:44 pm to deceased Harish Kumar Sharma and the tower location of the mobile of the appellant Vikas Verma was Banoona C. and this was duly corroborated by the statement of PW-24 Hem Lata. Likewise, the perusal of the call details of the deceased Harish Kumar Sharma showed that he had received the aforesaid call. Thereafter another call was made by the appellant Vikas Verma from his mobile on the mobile of the deceased on 18.12.2014 at 13:41 pm and tower location of the appellant Vikas Verma was Pirloo. Another call was made by the appellant Vikas Verma on 18.12.2014 at 14:28 pm and his tower location was Basantpur and this fact was also evident from the .

perusal of CDR of deceased Harish Kumar Sharma Ext. PW-19/J.

22. Similarly, the appellant Yog Raj alias Kaku, who was having Mobile No. 98168-04919 received call from the appellant Vikas Verma on 18.12.2014 at 12:53 pm and another call was made on the same day at 14:42 pm. At that time, the tower location of the appellant Vikas Verma was Basantpur. Thereafter, third call was made by the appellant Vikas Verma on the mobile of the appellant Yog Raj at 17:35 pm and fourth call was made at 17:39 pm and the tower location found at Jassal B. On 18.12.2014, most of the tower locations of the appellant Vikas Verma was found in the Basantpur area. Both the appellants had remained in touch with each other on 19.12.2024 and the appellant

Vikas Verma had made these calls to Yog Raj alias Kaku. On 19.12.2024, at about 10:23 pm, the location of appellant Vikas Verma was found in Cemetery area Sanjauli as is evident from the perusal of CDR of both the appellants.

23. The learned Trial Court further relied upon the statement of PW 14 Budhi Ram Sharma, Shopkeeper, who had probabilised the plea of prosecution by stating the the appellant Yog Raj alias Kaku at about 8:00 pm and demanded disposable glasses and namkeen. No explanation had come from the appellant Yog Raj alias Kaku regarding the other person who was accompanying him on the said date.

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24. Apart from the above, the learned Trial Court relied upon the CDR entries established that the appellant Vikas Verma on 18.12.2014 was in Basantpur area as is evident from Ext. PW-

18/A and the appellant had not offered any explanation as to why they were found there, when the appellant Vikas Verma was a permanent resident of village Kevkali, P.O. Kayar Kandru, Tehsil Theog and was residing in rented accommodation in Sanjauli.

25. However, it needs to be noticed that the version put-

forth that the story coined by the prosecution is clearly an after thought and appears to have been a concocted with family members in connivance with the police officers to involve the appellants in the present case. It is clearly evident from the fact that it was never the case of the prosecution prior to 27.12.2014 that the appellants alongwith the deceased Harish Kumar Sharma used to go for hunting and on the relevant date also he was called by appellant Vikas Verma.

26. Record reveals that all the witnesses either related witnesses or official witnesses had categorically deposed that on 19.12.2014, when the police came to the spot after being informed by PW1 Kanshi Ram regarding the involvement of the car of the deceased in the accident, it was PW-12 Hitesh Sharma (complainant and brother of the deceased) alongwith his .

relatives came to the spot and having in one voice stated that they had been tracing the deceased from 19.12.2014 up-till 27.12.2014 and even the police officials were looking for the whereabouts of the Harish Kumar Sharma.

27. In such circumstances, had there been any truth in the claim of the brother of the deceased and other relations including the wife of the deceased that the deceased used to go for hunting alongwith the appellant and on that day also, the deceased had been called by the appellant Vikas Verma for hunting, they would have disclosed this fact at the very first day and not waited up till 27.12.2024, when admittedly the appellants were detained in illegal custody from 25.12.2014 as has been categorically admitted by PW-22 Tilak Chand , when he stated that ASI Om Prakash had interrogated the appellants on 25/26.12.2014 and feigned ignorance regarding ASI Om Praksh having not allowed the appellants to go to their respective homes on both these dates.

28. In this background, the testimony of PW-4 Sanjay Sharma, who is the cousin of the deceased Harish Kumar Sharma, becomes relevant when he admits in his cross-

examination, there were about 50 persons on the spot apart from him and the police officials and all were searching for the body of the deceased and also admitted that he had not seen .

the appellants going together for hunting on any of the occasions.

29. Likewise, PW12 Hitesh Sharma, who was brother of the deceased has admitted this fact that the facts which were disclosed by him on 27.12.2014 was well within his knowledge on 19.12.2014 and it is highly improbable that when these facts were well within his knowledge then why he would go to the spot with the police and not disclosed these facts at the first instance and waited for more than a week and disclosed the same on 27.12.2014.

30. In the given circumstances, the version put-forth by the wife of the deceased PW-4 Hem Lata also becomes highly doubtful when she not only admits that she knew about all these facts on 19.12.2014 but further stated that all the facts had in fact been disclosed to all the male relatives of the deceased with regard to both the appellants and deceased having gone for hunting and as also the financial transaction involved between the deceased and the appellant Vikas Verma.

31. Noticeably, the prosecution examined PW-10 Vijay Kanwar to prove the fact that the appellant Vikas Verma alongwith the deceased and other appellant Yog Raj were together on 18.12.2014, but he did not support the case of the prosecution.

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32. Likewise, the prosecution examined PW-14 Budhi Ram Sharma to prove that both the appellants were together on 18.12.2014 but he too did not support the case of the prosecution.

33. Now, adverting to the testimony of PW-18 Mohan Lal, no doubt he proved CDRs and billing address of Mobile Nos.

94181-67313 (Vikas) Ext. PW18/A, 9418594185-52608 (Rakesh Kumar), on his cross-examination clearly admitted that Ext.

PW18/A and Ext. PW-18/D, the call records of Rakesh Kumar were never brought before him for verification or to obtain certificate under Section 65B of the Indian Evidence Act. He further admitted the same to be in Excel format and lastly admitted that these could be tampered with.

34. That apart, CAF was not available and now the photographs of Vikas Verma were available and even though CAF was taken but was not shown.

35. As regards PW-19 Devinder Verma, who established the CDR of Yog Raj but he too admitted that these CDRs were in Excel format and further admitted that the same could be tampered with.

36. Thus, what stands admitted on record is that all the call records though have been produced but were without any .

certificate under Section 65 B of the Indian Evidence Act and the CAF of Mobile No. 94181-67313 was not even on record the call details are in Excel format where addition can be done, therefore, no reliance can be placed on the same.

37. It shall be apt to reproduce Section 65B of the Evidence Act in its entirety, which reads as under:-

> 65B. Admissibility of electronic records.- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.
>
> (2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:--
>
> (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
>
> (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
>
> (c) throughout the material part of the said period, the .

computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities. (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause

(a) of sub-section (2) was regularly performed by computers, whether--

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,--

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions .

mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,--

(a) infomation shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Explanation.--For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

38. In Anvar P.V. vs. P. K. Basheer & Ors. 2014 (10) SCC 473, the Hon'ble Court over-ruled its earlier decision rendered in State (NCT of Delhi) vs. Navjot Sandhu 2005 (11) SCC 600, wherein it had been held that Section 65 (b) was only one of the provisions through which secondary evidence by way of electronic record could be admitted and there was no bar .

on admitting evidence through other provisions and held as under:-

> 22. The evidence relating to electronic record, as noted here-in-before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-

A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

39. Accordingly, the aforesaid decision for admitting any electronic evidence by way of secondary evidence, such as CDR, the requirement of Section 65(b) would be necessary to be satisfied and no other route under the Indian Evidence Act can be adopted for the admission of such evidence.

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40. This legal position has been reiterated by three Judges Bench of the Hon'ble Supreme Court in Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal 2020 (7) SCC 1 and it shall be apt to reproduce the relevant observations, which read as under:-

> 22. It will first be noticed that the subject matter of Sections 65A and 65B of the Evidence Act is proof of information contained in electronic records. The marginal note to Section 65A indicates that "special provisions" as to evidence relating to electronic records are laid down in this provision.

The marginal note to Section 65B then refers to "admissibility of electronic records".

23. Section 65B(1) opens with a non-obstante clause, and makes it clear that any information that is contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document, and shall be admissible in any proceedings without further proof of production of the original, as evidence of the

contents of the original or of any facts stated therein of which direct evidence would be admissible. The deeming fiction is for the reason that "document" as defined by Section 3 of the Evidence Act does not include electronic records.

24. Section 65B(2) then refers to the conditions that must be satisfied in respect of a computer output, and states that the test for being included in conditions 65B(2(a)) to 65(2(d)) is that the computer be regularly used to store or process information for purposes of activities regularly carried on in the period in question. The conditions mentioned in sub-sections 2(a) to 2(d) must be satisfied cumulatively.

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25. Under Sub-section (4), a certificate is to be produced that identifies the electronic record containing the statement and describes the manner in which it is produced, or gives particulars of the device involved in the production of the electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of "relevant activities" - whichever is appropriate. What is also of importance is that it shall be sufficient for such matter to be stated to the "best of the knowledge and belief of the person stating it". Here, "doing any of the following things..." must be read as doing all of the following things, it being well settled that the expression "any" can mean "all" given the context (see, for example, this Court's judgments in Bansilal Agarwalla v. State of Bihar (1962) 1 SCR 331 and 1 "3. The first contention is based on an assumption that the word "any one" in Section 76 means only "one of the directors, and only one of the shareholders". This question as regards the interpretation of the word "any one" in Section 76 was raised in Criminal Appeals Nos. 98 to 106 of 1959 (Chief Inspector of Mines, etc.) and it has been decided there that the word "any one"

> should be interpreted there as "every one". Thus under Section 76 every one of the shareholders of a private company owning the mine, and every one of the directors of a public Om Parkash v. Union of India (2010) 4 SCC 172). This being the case, the conditions mentioned in sub-section (4) must also be interpreted as being cumulative.
>
> 32. Coming back to Section 65B of the Indian Evidence Act, sub-section (1) needs to be analysed. The sub-section begins with a non-obstante clause, and then goes on to .
>
> mention information contained in an electronic record produced by a computer, which is, by a deeming fiction, then made a "document". This deeming fiction only takes effect if the further conditions mentioned in the Section are satisfied in relation to both the information and the computer in question; and if such conditions are met, the "document" shall then be admissible in any proceedings.
>
> The words "...without further proof or production of the original..." make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned

> in the Section, the "deemed document" now becomes admissible in evidence without further proof or production of the original as evidence of any contents of the original, or of any fact stated therein of which direct evidence would be admissible.
>
> 33. The non-obstante clause in sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of Section 65B, which is a special provision in this behalf - Sections 62 to 65 being irrelevant for this purpose. However, Section 65B(1) clearly differentiates between the "original" document - which would be the original "electronic record" contained in the "computer" in which the original information is first stored -and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65B differentiates between the original information contained in the "computer" itself and copies made therefrom - the former being primary evidence, and the latter being secondary evidence.
>
> 34. Quite obviously, the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop .

computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where "the computer", as defined, happens to be a part of a "computer system" or "computer network" (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). This being the case, it is necessary to clarify what is contained in the last sentence in paragraph 24 of Anvar P.V. (supra) which reads as "...if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act...". This may more appropriately be read without the words "under Section 62 of the Evidence Act,...". With this minor clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.

60. It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a 'responsible official position' in relation to the operation of the relevant device, as also the person who may otherwise be in the 'management of relevant activities' spoken of in Sub-section (4) of Section 65B. Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, Section 65B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the "best of his knowledge and belief" (Obviously, the word "and"

between knowledge and belief in Section 65B(4) must be read as "or", as a person cannot testify to the best of his knowledge and belief at the same time).

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61. We may reiterate, therefore, that the certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. (supra), and incorrectly "clarified" in Shafhi Mohammed (supra). Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor (1876) 1 Ch.D 426, which has been followed in a number of the judgments of this Court, can also be applied. Section 65B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) otiose.

41. Obviously in such circumstances, the CDRs could not have been relied upon by the learned Trial Court and such exercise was in the teeth of the judgment rendered by the Hon'ble Supreme Court in Anvar P.V. case (supra).

ii). First information report, recovery of car bearing No. HP-62B-0309. R.C., Insurance and shoe of the deceased from the right bank of Satluj river on 19/20.12.2014.

42. In support of its reason to conclude that Circumstance No. (ii) stood proved, the learned Trial Court relied upon the testimony of PW1 Kansi Ram, who is resident of Moongna, P.O. Shakra, Tehsil Karsog, District Mandi, H.P., and has stated that on 19.12.2014 during the morning time at about .

7:45 a.m. when he was on morning walk he noticed that one vehicle white in colour was lying in the Satluj river on the right bank in Shimla District but no person alive or dead was seen by him. He accordingly informed one Yoginder, resident of Shakra, who was residing nearer to the Sunni Police Station. Shri Yoginder informed the police as well as 108 ambulance.

Thereafter the police as well as ambulance came on the spot but no dead body was found. After inspecting the spot, PW-25 ASI Prem Lal sent a Rukka to Police Station, Sunni for the commission of an offence punishable under Section 279 of the IPC. During the course of investigation, it was found that the vehicle was registered in the name of PW-24 Hem Lata wife of the deceased.

43. On 19.12.2014, the brother of the deceased Hitesh Kumar telephonically informed PW-4 Sanjay Sharma that the car of the deceased met with an accident at Moongna Dhank.

Thereafter on 19.12.2014, PW-4 alongwith Yogesh Chandel and Sanjay Sharma went to Moongna Dhank and during search one shoe of 'Adidas' Company Ext. P-2 was recovered. Shoe was identified by Yogesh Chandel as that of deceased Harish Kumar Sharma. The same was packed in a parcel Ext.P-1 and sealed with seal impression 'T' at five places. The specimen of seal impressions 'T' Ext. PW-4/B was separately taken on piece of .

cloth.

44. PW-26A ASI Om Parkash had deposited the parcel Ext. P-1 containing the shoe Ext. P-2 with PW-20 MHC Shiv Kumar.

45. It needs to be noticed that even though in the memo of recovery Ext. PW-14/A, it has been mentioned that shoe so recovered appears to be containing blood stains but no efforts whatsoever were made by the prosecution to associate the experts from the Forensic Department at the relevant time and it is beyond comprehension why the shoe would then be packed in a cloth parcel in case it was containing blood stains as there was every likelihood of these blood stains being completely wiped out while handling the sample.

46. Furthermore, the recovery of shoe, its deposit and identification have not been proved beyond the shadow of doubt, .

as the prosecution has failed to prove that the shoe recovered at Moongna Dhank belonged to the deceased and even PW4 Sanjay Sharma has not uttered a single word in his statement that there were blood stains on the said shoe. There is no explanation placed on record that where the shoe was kept from its alleged date of recovery i.e. 20.12.2014 upto 28.12.2014 on which dated it was eventually deposited with the MHC.

47. It is here that statement of PW26 C. Kapil becomes relevant who while being re-examined on this point on 16.03.2020 admitted the fact that in the statements of Yogesh Chander and Sanjay Kumar, there was no mention that the shoe Ext. P-2 was having any blood stain. To similar effect is the version put-forth by the I.O. PW-22 Inspector Tilak Raj.

48. All these facts assume importance as admittedly the prosecution has failed to place on record any evidence of the blood sample of the parents of Harish Kumar Sharma, when the case was initially argued and when these facts were highlighted during the course of the arguments, it was then that the prosecution filed the supplementary challan that too on the date when the case was fixed for pronouncement of judgment. It was thereafter the permission was sought to examine Smt. Gaura Sharma and Sh. Bhoop Ram and the doctor who allegedly withdrew the blood. The supplementary challan was straightway .

filed without seeking any permission of the court. The statements of these witnesses, examined as PW-29 Bhoop Ram, PW-30 Smt. Gaura Sharma and PW-32 Dr. Girish Kumar were recorded after five years and in such circumstances much reliance cannot be placed on the report of the DNA. Thus, even this circumstance cannot be said to have been conclusively proved beyond reasonable doubt.

49. In such circumstances, the report of DNA placed on record is also of no help to the case of the prosecution given the fact that the prosecution has failed to place on record the link evidence. The prosecution has failed to place on record any evidence of blood sample of the parents of Harish Kumar Sharma when the case was argued. It was during the course of arguments that the prosecution has filed supplementary challan on the date fixed for pronouncement of judgment to examine Smt. Gaura Sharma, Sh. Bhoop Ram and Dr. Girish Kumar, who allegedly withdrew blood, that too, as observed above, without any permission of the Court. It is thereafter the statement of these witnesses were recorded as PW-29 Sh. Bhoop Ram, PW-30 Smt. Guara Sharma and PW-32 Dr. Girish Kumar that too after five years. In such circumstances, the only question which remains

to be decided by this Court is whether the conviction can be based upon the DNA report only.

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50. The legislature, in its wisdom, has inserted Section 53A and Section 164A of the Cr.P.C by the Act 25 of 2005 w.e.f.

23.06.2006. Sections 53A and Section 164A of the Cr.P.C are reproduced as under:-

> "[53A. Examination of a person accused of rape by medical practitioner.- (1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.
>
> (2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;-
>
> (i) the name and address of the accused and of the person by whom he was brought,
>
> (ii) the age of the accused,
>
> (iii) marks of injury, if any, on the person of the accused,
>
> (iv) the description of material taken from the person of the accused for DNA profiling, and".

(v) other material particulars in reasonable detail.

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(3) The report shall state precisely the reasons for each con- clusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall for- ward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section.]"

> "[164A. Medical examination of the victim of rape.-(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practi- tioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.
>
> (2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her person and prepare a report of his examination giving the following par-

ticulars, namely:-

> (i) the name and address of the woman and of the person by whom she was brought;
>
> (ii) the age of the woman;
>
> (iii) the description of material taken from the person of the woman for DNA profiling;
>
> (iv) marks of injury, if any, on the person of the .

woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail, (3) The report shall state precisely the reasons for each con- clusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent, to give such con- sent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigating officer who shall for- ward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her be- half."

51. Apart from collecting the other physical evidence, as referred above, the police, during the course of investigation had also collected the blood samples for DNA profiling. The DNA report is Ext. P-Y.

52. The scope of DNA test has elaborately been discussed by the Hon'ble Apex Court in case titled as Anil alias Anthony Arikswamy Joseph vs. State of Maharashtra (2014) 4 SCC 69. The relevant paragraph 18 of the same is reproduced as under:-

> "18. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological .
>
> material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory. (self emphasis supplied)

53. The procedure, which is to be adopted for collecting the samples as well as the precautions, which are to be taken for conducting the DNA test has elaborately been discussed by the Hon'ble Apex Court in case titled as Mukesh and another vs. State (NCT of Delhi) and others, (2017) 6 SCC 1. The relevant paragraphs No. 211 to 228 of the same are reproduced as under:-

> "211. DNA is the abbreviation of Deoxyribo Nucleic Acid. It is the basic genetic material in all human body cells. It is not contained in red blood corpuscles. It is, however, present in white corpuscles. It carries the genetic code. DNA structure determines human character, behaviour and body characteristics. DNA profiles are encrypted sets of numbers that reflect a person's DNA makeup which, in forensics, is used to identify human beings. DNA is a complex molecule. It has a double helix structure which can be compared with a twisted rope 'ladder'.
>
> 212. The nature and characteristics of DNA had been succinctly explained by Lord Justice Phillips in Regina v. Alan James Doheny & Gary Adams[83]. In the above case, the accused were convicted relying on results obtained by comparing DNA profiles obtained from a stain left at the scene of the crime with DNA profiles obtained from a sample of blood provided by the appellant. In the above context, with

regard to DNA, the following was stated by Lord Justice Phillips:

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"Deoxyribonucleic acid, or DNA, consists of long ribbon-

like molecules, the chromosomes, 46 of which lie tightly coiled in nearly every cell of the body. These chromosomes - 23 provided from the mother and 23 from the father at conception, form the genetic blueprint of the body. Different sections of DNA have different identifiable and discrete characteristics. When a criminal leaves a stain of blood or semen at the scene of the crime it may prove possible to extract from that crime stain sufficient sections of DNA to enable a comparison to be made with the same sections extracted from a sample of blood provided by the suspect. This process is complex and we could not hope to describe it more clearly or succintly than did Lord Taylor C.J. in the case of Deen (transcript: December 21, 1993), so we shall gratefully adopt his description.

"The process of DNA profiling starts with DNA being extracted from the crime stain and also from a sample taken from the suspect. In each case the DNA is cut into smaller lengths by specific enzymes. The fragments produced are sorted according to size by a process of electrophoresis. This involves placing the fragments in a gel and drawing them electromagnetically along a track through the gel. The fragments with smaller molecular weight travel further than the heavier ones. The pattern thus created is transferred from the gel onto a membrane. Radioactive DNA probes, taken from elsewhere, which bind with the sequences of most interest in the sample DNA are then applied. After the excess of the DNA probe is washed off, an X-ray film is placed over the membrane to record the band pattern. This produces an auto radiograph which can be photographed. When the crime stain DNA and the sample DNA from the suspect have been run in separate tracks through the gel, the resultant auto- radiographs can be compared. The two DNA profiles can then be said either to match or not.""

213. In the United States, in an early case Frye v. United States[84], it was laid down that scientific evidence is admissible only if the principle on which it is based is substantially established to have general acceptance in the field to which it belonged. The US Supreme Court reversed the above formulation in Daubert v. Merrell Dow Pharmaceuticals, Inc.[85] stating thus:

"Although the Frye decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, well-

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> established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed.Rule Evid. 201.
>
> This is not to say that judicial interpretation, as opposed to adjudicative fact finding, does not share basic characteristics of the scientific endeavor: "The work of a judge is in one sense enduring and in another ephemeral... In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." B.Cardozo, The nature of the Judicial Process 178, 179 (1921)."

214. The principle was summarized by Blackmun, J., as follows: "To summarize: "general acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence--especially Rule 702--do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

The inquiries of the District Court and the Court of Appeals focused almost exclusively on "general acceptance," as gauged by publication and the decisions of other courts. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion."

After the above judgment, the DNA Test has been frequently applied in the United States of America.

215. In District Attorney's Office for the Third Judicial District et al. v. William G. Osborne[86], Chief Justice Roberts of the Supreme Court of United States, while referring to the DNA Test, stated as follows:

> "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be .
>
> effectively incorporated into established criminal procedure-usually but not always through legislation.
>
> Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid- 1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with

> near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue."

216. DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals. The recent advancement in modern biological research has regularized Forensic Science resulting in radical help in the administration of justice. In our country also like several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the amendment in the Criminal Procedure Code by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner.

217. Similarly, under Section 164A inserted by Act 25 of 2005, for medical examination of the victim of rape, the description of material taken from the person of the woman for DNA profiling is must. Section 53A sub-section (2) as well as Section 164(A) sub-section (2) are to the following effect:

> "Section 53A. Examination of person accused of rape by Medical Practitioner.-(1) ... ...
>
> (2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:-
>
> (i) the name and address of the accused and of the person by whom he was brought,
>
> (ii) the age of the accused,
>
> (iii) marks of injury, if any, on the person of the accused, .
>
> (iv) the description of material taken from the person of the accused for DNA profiling, and
>
> (v) other material particulars in reasonable detail.

Section 164A. Medical Examination of the victim of rape.-

(1) ... ...

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:-

> (i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail."

218. This Court had the occasion to consider various aspects of DNA profiling and DNA reports. K.T. Thomas, J. in Kamti Devi (Smt.) and another v. Poshi Ram[87], observed:

"10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. ..."

219. In Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh[88], a two-Judge Bench had explained as to what is DNA in the following manner:

"41. Submission of Mr Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means:

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"Deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine." There cannot be any doubt whatsoever that there is a need of quality control.

Precautions are required to be taken to ensure preparation of high molecular weight DNA, complete digestion of the samples with appropriate enzymes, and perfect transfer and hybridization of the blot to obtain distinct bands with appropriate control. (See article of Lalji Singh, Centre for Cellular and Molecular Biology, Hyderabad in DNA profiling and its applications.) But in this case there is nothing to show that such precautions were not taken.

42. Indisputably, the evidence of the experts is admissible in evidence in terms of Section 45 of the Evidence Act, 1872. In cross-examination, PW 46 had stated as

under:

> "If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population."

220. In Santosh Kumar Singh v. State Through CBI[89], which was a case of a young girl who was raped and murdered, the DNA reports were relied upon by the High Court which were approved by this Court and it was held thus:

> "71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in Kamti Devi v. Poshi Ram (supra). In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, .
>
> endorse the conclusions of the High Court on Circumstance 9."

221. In Inspector of Police, Tamil Nadu v. John David[90], a young boy studying in MBBS Course was brutally murdered by his senior. The torso and head were recovered from different places which were identified by the father of the deceased. For confirming the said facts, the blood samples of the father and mother of the deceased were taken which were subject to DNA test. From the DNA, the identification of the deceased was proved. Paragraph 60 of the decision is reproduced below:

> "60. ... The said fact was also proved from the DNA test conducted by PW 77. PW 77 had compared the tissues taken from the severed head, torso and limbs and on scientific analysis he has found that the same gene found in the blood of PW1 and Baby Ponnusamy was found in the recovered parts of the body and that therefore they should belong to the only missing son of PW1."

222. In Krishan Kumar Malik v. State of Haryana[91], in a gang rape case when the prosecution did not conduct DNA test or analysis and matching of semen of the appellant- accused with that found on the undergarments of the prosecutrix, this Court held that after the incorporation of Section 53-A in CrPC, it has become necessary for the prosecution to go in for DNA test in such type of cases. The relevant paragraph is reproduced below:

> "44. Now, after the incorporation of Section 53-A in the Cr.P.C w.e.f 23.06.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the

> aforesaid specific provision in CrPC the prosecution could have still restored to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences."

223. In Surendra Koli v. State of Uttar Pradesh and others[92], the appellant, a serial killer, was awarded death sentence which was confirmed by the High Court. While confirming the death sentence, this Court relied on the result of the DNA test conducted on the part of the body of the deceased girl. Para 12 is reproduced below:-

> .
>
> "12. The DNA test of Rimpa by CDFD, a pioneer institute in Hyderabad matched with that of blood of her parents and brother. The doctors at AIIMS have put the parts of the deceased girls which have been recovered by the doctors of AIIMS together. These bodies have been recovered in the presence of the doctors of AIIMS at the pointing out by the accused Surendra Koli. Thus, recovery is admissible under Section 27 of the Evidence Act."

224. In Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v. State of Maharashtra[93], the accused was awarded death sentence on charges of killing large number of innocent persons on 26th November, 2008 at Bombay.

The accused with others had come from Pakistan using a boat 'Kuber' and several articles were recovered from 'Kuber'. The stains of sweat, saliva and other bodily secretions on those articles were subjected to DNA test and the DNA test matched with several accused. The Court observed:

> "333. It is seen above that among the articles recovered from Kuber were a number of blankets, shawls and many other items of clothing. The stains of sweat, saliva and other bodily secretions on those articles were subjected to DNA profiling and, excepting Imran Babar (deceased Accused 2), Abdul Rahman Bada (deceased Accused 5), Fahadullah (deceased Accused 7) and Shoaib (deceased Accused 9), the rest of six accused were connected with various articles found and recovered from the Kuber. The appellant's DNA matched the DNA profile from a sweat stain detected on one of the jackets. A chart showing the matching of the DNA of the different accused with DNA profiles from stains on different articles found and recovered from the Kuber is annexed at the end of the judgment as Schedule III."

225. In Sandeep v. State of Uttar Pradesh[94], the facts related to the murder of pregnant paramour/girlfriend and unborn child of the accused. The DNA report confirmed that the appellant was the father of the unborn child. The Court, relying on the DNA report, stated as follows:

> "67. In the light of the said expert evidence of the Junior Scientific Officer it is too late in the day for the appellant Sandeep to contend that improper preservation of the

> foetus would have resulted in a wrong report to the effect that the accused Sandeep was found to be the biological father of the foetus received from the .
>
> deceased Jyoti. As the said submission is not supported by any relevant material on record and as the appellant was not able to substantiate the said argument with any other supporting material, we do not find any substance in the said submission. The circumstance, namely, the report of DNA in having concluded that accused Sandeep was the biological father of the recovered foetus of Jyoti was one other relevant circumstance to prove the guilt of the said accused."

226. In Rajkumar v. State of Madhya Pradesh[95], the Court was dealing with a case of rape and murder of a 14 year old girl. The DNA report established the presence of semen of the appellant in the vaginal swab of the prosecutrix. The conviction was recorded relying on the DNA report. In the said context, the following was stated:

> "8. The deceased was 14 years of age and a student in VIth standard which was proved from the school register and the statement of her father Iknis Jojo (PW1). Her age has also been mentioned in the FIR as 14 years. So far as medical evidence is concerned, it was mentioned that the deceased prosecutrix was about 16 years of age. So far as the analysis report of the material sent and the DNA report is concerned, it revealed that semen of the appellant was found on the vaginal swab of the deceased. The clothes of the deceased were also found having appellant's semen spots. The hair which were found near the place of occurrence were found to be that of the appellant."

227. In Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and another[96], the appellant, father of the child born to his wife, questioned the paternity of the child on the ground that she did not stay with him for the last two years. The Court directed for DNA test. The DNA result opined that the appellant was not the biological father of the child. The Court also had the occasion to consider Section 112 of the Evidence Act which raises a presumption that birth during marriage is conclusive proof of legitimacy. The Court relied on the DNA test holding the DNA test to be scientifically accurate. The pertinent observations are extracted below:

> "19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and .
>
> father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice.

> 20. As regards the authority of this Court in Kamti Devi, this Court on appreciation of evidence came to the conclusion that the husband had no opportunity whatsoever to have liaison with the wife. There was no DNA test held in the case. In the said background i.e. non-access of the husband to the wife, this Court held that the result of DNA test "is not enough to escape from the conclusiveness of Section 112 of the Act." The judgment has to be understood in the factual scenario of the said case. The said judgment has not held that DNA test is to be ignored. In fact, this Court has taken note of the fact that DNA test is scientifically accurate. We hasten to add that in none of the cases referred to above, this Court confronted with a situation in which a DNA test report, in fact, was available and was in conflict with the presumption of conclusive proof of legitimacy of the child under Section 112 of the Evidence Act. In view of what we have observed above, these judgments in no way advance the case of the respondents."

228. From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non- acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted."

(self emphasis supplied)

54. The Hon'ble Apex Court, in a recent decision in case titled as Pattu Rajan vs. State of Tamilnadu (2019) 4 SCC 771 has again discussed the evidentiary value of the DNA report, in light of the provisions of Section 45 of the Evidence Act. The relevant paragraphs No. 49 to 52 of the same are reproduced as under:-

> "49. One cannot lose sight of the fact that DNA evidence is also in the nature of opinion evidence as envisaged in Sec- tion 45 of the Indian Evidence Act. Undoubtedly, an expert giving evidence before the Court plays a crucial role, espe-
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> .
>
> cially since the entire purpose and object of opinion evi-
>
> dence is to aid the Court in forming its opinion on questions concerning foreign law, science, art, etc., on which the Court might not have the technical expertise to form an opinion on its own. In criminal cases, such questions may pertain to as-
>
> pects such as ballistics, fingerprint matching, handwriting comparison, and even DNA testing or superimposition tech- niques, as seen in the instant case.
>
> 50. The role of an expert witness rendering opinion evi- dence before the Court may be explained by referring to the following observations of this Court in Ramesh Chandra Agrawal v. Regency Hospital Limited & Ors:

"16. The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost re-

quirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person. Thus, there is a need to hear an ex- pert opinion where there is a medical issue to be settled.

The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the sci- ence involved, is highly specialized and perhaps even es- oteric, the central role of an expert cannot be disputed..." (emphasis supplied)

51. Undoubtedly, it is the duty of an expert witness to assist the Court effectively by furnishing it with the relevant report based on his expertise along with his reasons, so that the Court may form its independent judgment by assessing such materials and reasons furnished by the expert for coming to an appropriate conclusion. Be that as it may, it cannot be forgotten that opinion evidence is advisory in nature, and the Court is not bound by the evidence of the experts. (See The State (Delhi Adminstration) v. Pali Ram, (1979) 2 SCC 158; State of H.P. v. Jai Lal & Ors., (1999) 7 SCC 280; Baso Prasad & Ors. v. State of Bihar, (2006) 13 SCC 65; Ramesh Chandra Agrawal v. Regency Hospital Ltd. & Ors. (supra); Malay Kumar Ganguly v. Dr. Sukumar Mukherjee & Ors., (2010) 2 SCC (Cri) 299).

52. Like all other opinion evidence, the probative value ac -

corded to DNA evidence also varies from case to case, de- pending on facts and circumstances and the weight ac- corded to other evidence on record, whether contrary or cor-

roborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technol- ogy with every passing day, thereby making it more and .

more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse in- ference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party."

(self emphasis supplied)

55. The Hon'ble Apex Court in case titled as Manoj and others vs. State of Madhya Pradesh 2023 (2) SCC 353 has elaborately discussed the evidentiary value of the DNA report and the procedure for collecting the samples. The relevant paragraphs No. 134 to 141 of the same are reproduced as under:-

134. During the hearing, an article published by the Central Forensic Science Laboratory, Kolkata40 was relied upon. The relevant extracts of the article are reproduced below:

"Deoxyribonucleic acid (DNA} is genetic material present in the nuclei of cells of living organisms. An average hu-

man body is composed of about 100 trillion of cells. DNA is present in the nucleus of cell as double helix, super- coiled to form chromosomes along with Intercalated proteins. Twenty- three pairs of chromosomes present In each nucleated cells and an individual Inherits 23 chro- mosomes from mother and 23 from father transmitted through the ova and sperm respectively. At the time of each cell division, chromosomes replicate and one set goes to each daughter cell. All Information about Internal organisation, physical characteristics, and physiological functions of the body is encoded in DNA molecules in a language (sequence) of alphabets of four nucleotides or bases: Adenine (A), Guanine (G}, Thymine (T} and Cyto- sine (C) along with sugar- phosphate backbone. A human haploid cell contains 3 billion bases approx. All cells of the body have exactly same DNA but it varies from indi- vidual to Individual in the sequence of nucleotides. Mito- chondrial DNA (mtDNA} found in large number of copies in the mitochondria is circular, double stranded, 16,569 base pair in length and shows maternal inheritance. It is particularly useful in the study of people related through the maternal line. Also being in large number of copies .

than nuclear DNA, it can be used in the analysis of de-

graded samples. Similarly, the Y chromosome shows pa- ternal inheritance and is employed to trace the male lin- eage and resolve DNA from males in sexual assault mix- tures. Only 0.1 % of DNA (about 3 million bases} differs from one person to another. Forensic DNA Scientists ana- lyse only few variable regions to generate a DNA profile of an individual to compare with biological clue materials or control samples.

.....

DNA Profiling Methodology DNA profile is generated from the body fluids, stains, and other biological specimen recovered from evidence and the results are compared with the results obtained from reference samples. Thus, a link among victim(s) and/or suspect(s) with one another or with crime scene can be established. DNA Profiling Is a complex process of analy- ses of some highly variable regions of DNA. The variable areas of DNA are termed Genetic Markers. The current genetic markers of choice for forensic purposes are Short Tandem Repeats (STRs). Analysis of a set of 15 STRs em- ploying Automated DNA Sequencer gives a DNA Profile unique to an Individual (except monozygotic twin). Simi- larly, STRs present on Y chromosome (Y- STR) can also be used in sexual assault cases or determining paternal lineage. In

cases of sexual assaults, Y-STRs are helpful in detection of male profile even in the presence of high level of female portion or in case of azoo11permic or va-

sectomized" male. Cases In which DNA had undergone 40 DNA profiling in Justice Delivery System, Central Forensic Science Laboratory, Directorate of Forensic Science, Kolkata (2007). environmental stress and biochem- ical degradation, min lSTRs can be used for over routine STR because of shorter amplicon size.

DNA Profiling is a complicated process and each sequen- tial step involved in generating a profile can vary de- pending on the facilities available In the laboratory. The analysis principles, however, remain similar, which in- clude:

1. isolation, purification & quantitation of DNA

2. amplification of selected genetic markers

3. visualising the fragments and genotyping .

4. statistical analysis & interpretation.

In mt DNA analysis, variations in Hypervariable Re- gion I & II (HVR I & II) are detected by sequencing and comparing results with control samples:....

Statistical Analysis Atypical DNA case involves comparison of evidence samples, such as semen from a rape, and known or reference samples, such as a blood sample from a suspect. Generally, there are three possible out- comes of profile comparison:

1) Match: If the DNA profiles obtained from the r two samples are indistinguishable, they are said to have matched.

2) Exclusion: If the comparison of profiles shows differences, it can only be explained by the two samples originating from different sources.

3) Inconclusive: The data does not support a con-

clusion Of the three possible outcomes, only the "match" between samples needs to be sup-

ported by statistical calculation. Statistics at- tempt to provide meaning to the match. The match statistics are usually provided as an esti-

mate of the Random Match Probability (RMP) or in other words, the frequency of the particular DNA profile in a population.

In case of paternity/maternity testing, exclusion at more than two loci is considered exclusion. An allowance of 1 or 2 loci possible mutations should be taken Into consideration while report- ing a match. Paternity of Maternity Indices and Likelihood Ratios are calculated further to sup- port the match.

Collection and Preservation of Evidence If DNA evidence is not properly documented, collected, packaged, and preserved, It will not meet the legal and scientific requirements for admissibility in. a court of law. Because ex-

tremely small samples of DNA can be used as evidence, greater attention to contamination is- sues is necessary while locating, collecting, and preserving DNA evidence can be contaminated .

when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evi- dence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be Identified, pre- served, packed and sent for DNA Profiling."

(self emphasis supplied)

135. In an earlier judgment, R v Dohoney & Adams 41 the UK Court of Appeal laid down the following guidelines con- cerning the procedure for introducing DNA evidence in trials:

> (1) the scientist should adduce the evidence of the DNA 41 1997 (1) Crl App Rep 369 comparisons together with his cal-

culations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the Crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.

136. The Law Commission of India in its report42, observed as follows:

> "DNA evidence involves comparison between genetic material thought to come from the person whose iden- tity is in issue and a sample of genetic material from a known person. If the samples do not 'match', then this will prove a lack of identity between the known person and the person from whom the unknown sample origi- nated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an ap- proximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for exam- ple, that the relevant profile is found in 1 person in ev- ery 100,000: This is described as the 'random occur- rence ratio' (Phipson 1999).

> Thus, DNA may be more useful for purposes of investi- gation but not for raising any presumption of identity in a court of law."

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137. In Dharam Deo Yadav v. State of UP this court dis-

cussed the reliability of DNA evidence in a criminal trial, and held as follows:

> "The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and gua-
>
> nine, purines and thymine and cytosine pyrimidines.....DNA usually can be obtained from any bi- ological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is be-
>
> ing used extensively in the investigation of crimes and the Court often accepts the views of the experts, espe-
>
> cially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court.
>
> DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the labora- tory." 42 185th Report, on Review of the Indian Evi-
>
> dence Act, 2003 43 (2015) 5 SCC 509.

138. The US Supreme Court, in District Attorney's Office for the Third Judicial District v. Osborne, 44 dealt with a post-conviction claim to access evidence, at the behest of the convict, who wished to prove his innocence, through new DNA techniques. It was observed, in the context of the facts, that "Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminat- ing in STR technology. It is now often possible to deter- mine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue. DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others."

139. Several decisions of this court - Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh45, Santosh Kumar Singh v. State Through CBI 46, Inspector of Police, Tamil Nadu v. John David 47, Krishan Kumar Malik v. State .

of Haryana48, Surendra Koli v. State of Uttar Pradesh & Ors 49, and Sandeep v. State of Uttar Pradesh50, Rajku- mar v. State of Madhya Pradesh51 and Mukesh & Ors. v. State for NCT of Delhi & Ors. 52 have dealt with the in- creasing importance of DNA evidence. This court has also emphasized the need for assuring quality control, about the samples, as well as the technique for testing- in Anil v. State of Maharashtra53 "7. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, 44 557 U.S. 52 (2009) 45 (2009) 14 SCC 607 46 (2010) 9 SCC 747 47 (2011) 5 SCC 509 48 (2011) 7 SCC 130 49 (2011) 4 SCC 80 50 (2012) 6 SCC 107 51 (2014) 5 SCC 353 52 (2017) 6 SCC 1 53 (2014) 4 SCC 69 but variance in a par- ticular result depends on the quality control and quality procedure in the laboratory."

140. This court, in one of its recent decisions - Pattu Rajan v. The State of Tamil Nadu54, considered the value and weight to be attached to a DNA report:

> "33. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to re- member, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evi- dence would lead to an adverse inference against a party, especially in the presence of other cogent and re- liable evidence on record in favour of such party."

141. This court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. Notably, the reliance, was to corroborate. This court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case." (Self emphasis supplied).

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56. It is the basic principle of criminal jurisprudence that the accused is presumed to be innocent until and unless his guilt is proved by the prosecution by leading the cogent and convincing evidence. The prosecution is duty bound to prove the guilt of the accused beyond any shadow of

doubt. In other words, it can be said that the onus to prove the guilt of the accused beyond any shadow of doubt is always upon the prosecution.

57. In view of the decision of the Hon'ble Apex Court as referred above, it was for the prosecution to prove by leading the cogent, convincing and positive evidence, that all the precautions, as referred above, were taken by it. This fact is necessary for the prosecution as the entire process of collecting the blood samples for DNA profiling is controlled and done by the human agencies i.e. doctors and the Investigating officers. Every step to preserve the sample from manipulation/contamination has to be proved as absence of those steps may cause prejudice to the accused.

58. The report of the DNA Ext.PW-22/A has simply been tendered by the Investigating Officer PW-22 Tilak Chand in evidence and therefore, in terms of the Judgment of the Hon'ble Supreme Court in Pattu Rajan's case (supra), para-29, it is in the nature of opinion evidence as per Section 45 of the Indian .

Evidence Act. The evidence in the shape of DNA report is thus only an opinion and the probable value of such evidence is to vary from case to case. Since the science of DNA is at a developing stage, as such it will not be advisable rather risky to rely upon solely on the DNA report Ext. PW-22/N in absence of any other substantive piece of evidence.

59. The evidence regarding the fact that all the precautions have been taken by the doctor as well as the police officials regarding the preservation of DNA sample has not been established on record, therefore, much reliance in such circumstances cannot be placed on such DNA report.

iii). Arrest of accused persons on 27.12.2014 and recovery of gun, eight live cartridges, gun licence and jacket of the accused Vikas Verma and recovery of mobile Ex.P-10 of deceased at the instance of accused persons, recovery of blood stained soil, leaves and empty cartridge from Shakrodi jungle at the instance of the accused persons and recovery of knife with which the neck of the body was cut by the accused Vikas Verma.

60. The learned Trial Court has held this circumstance to be duly proved by relying upon the disclosure statement made by the appellant Vikas Verma vide Ext. P-11/A with regard to fire a gunshot in Shakrodi jungle upon the deceased, concealment of gun and his jacket which was worn by him at the time of occurrence. It was observed that on the basis of the disclosure .

statement, gun Ext.P-14 alongwith its cover recovered from the Prem Jia Niwas, Sanjauli at the instance of the appellant Vikas Verma, who had been staying there. PW-26A ASI Om Parkash had also recovered eight live cartridge, four red in colour Ext. P-

16 and four Khakhi in colour Ext. P-17. The learned trial Court further relied upon the testimony of Vikas Verma in his statement under Section 313 Cr.P.C. wherein while answering questions No. 24 to 31, he denied the disclosure statement, recovery of gun and licence and eight live cartridges and while answering question No. 147, this appellant had not claimed the gun Ext. P-14 whereas the same was issued in his name by the competent authority. The learned trial Court further invoked the

provisions of Section 106 of the Evidence Act and held that it was for the appellant Vikas Verma to offer some explanation how his licence and gun came into the possession of the police, whereas the appellant had not even claimed his gun.

61. The learned trial Court further held that the recovery of the mobile phone of the deceased that too on the identification of the spot given by the appellants vide memo Ext.PW-8/C and the empty cartridge that too at the instance of the disclosure statement made by the appellants was sufficient to convict the appellants particularly when the recovery of knife and jacket containing blood stains have been duly recovered at .

the instance of the disclosure statement made by the appellants, more particularly, there is no explanation offered by them as to how the blood stains appeared on the jacket as well as on the knife.

62. As observed above, the prosecution has relied upon the so-called disclosure statement dated 28.12.2014 Ex. PW11/A, which is alleged to have been made in the presence of PW-11 Bhinder Singh and Ganesh Sharma, who has not been examined and pursuant to this disclosure statement, recovery of jacket and double barrel gun vide memo Ext. PW11/D has been stated to be effected. However, a bare perusal of the statement PW-11 goes to show that no such statement had been made at any point of time as his version is contrary to the contents written in Ext. PW-

11/A. It has been specifically written in Ext. PW-11/A that the disclosure statement was given at Kasumpti whereas PW-11 claimed to have given the same at Chotta Shimla. Moreover, the statement of PW-11 is in contradiction to what has been stated by the I.O. Om Prakash Ext. PW26/A.

63. Going by the peculiar facts and circumstances of the case, the timing in the instant case is very relevant because as per PW11 Binder Singh, the police party met him and Ganesh at 9:30 am at Chotta Shimla, Bus Stop near H.P. Secretariat and remained with the police till 12:00 noon. As per PW26/A, no .

statement was recorded at Chotta Shimla and he left Kasumpati at 10:00 am. If that be so, then it is beyond comprehension that if he had left Kausmpti at 10:00 am then how could he had been at Chotta Shimla, at 9:30 am more particularly, when he claimed to have remained at Sanjauli up to 12:30 pm. Further, if this version is seen alongwith the statement of PW-8 Dev Raj and PW-9 Yash Raj, the same would render it impossible as PW8 Dev Raj and PW-9 Yash Raj have specifically claimed that at 11:00 am on 28.12.2014, the appellants alongwith the police were already present in the police station Sunni. PW8 Dev Raj has specifically stated that from 11:00 am to 2:00 pm the other proceedings had been conducted whereas PW9 Yashpal also stated in examination-in-chief and cross-examination that the appellants were already there in the police station at 11:00 am.

64. PW-8 Dev Raj in his opening line of cross-

examination has stated that "I remained with the police on 28.12.2014 after 11 am to 2 pm. All the proceedings were conducted during the aforesaid period." PW-9 Yashpal in his examination in chief

has stated that "I was called by the police at Police Station Sunni and reached there at 11 am. Shri Dev Raj and photographer Jagdish were already present in the police station. Accused Vikas Verma has narrated the whole story....."

He further stated that he remained with the police and the .

accused persons from 11:00 am till 7:00 pm. However, in such circumstances, how could appellants be in Shimla and at Sunni, which is at one hour distance from Shimla at the same time.

Apart from the above, it is the admitted case of the prosecution that Sanjauli and Kasumpti are thickly populated area and there is no explanation offered by the prosecution that why it has not associated any witness from that locality and chosen to associate the convenient witnesses directly or indirectly related to the family of the deceased.

65. If this was not sufficient, then we need to advert to the statement of PW11 Binder Singh, who admitted that before recording of the statements under Section 27 of the Evidence Act, police officials had disclosed to him that accused wanted to make a statement with regard to the gun, jacket and cartridges.

Obviously, in such circumstances, the statements do not fall within the ambit of Section 27 of the Evidence Act, as the fact was already within the knowledge of the police officials coupled with the fact that this PW admits that he had not gone inside the room where the alleged recovery was effected.

66. Section 25 of the Evidence Act absolutely excludes from evidence against the accused, a confession made by him to the police officer. This provisions applies even to those confessions which are made to a police officer who may not .

otherwise be acting as such. If he is a police official and any confession was made in his presence in whatever capacity, the same becomes inadmissible in evidence.

67. In Prabhoo vs. State of H.P., AIR 1963 SC 1113, the Hon'ble Supreme Court observed as under:-

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9. The main difficulty in the case is that the evidence regarding the recovery of blood stained axe and blood stained. shirt and dhoti is not very satisfactory and the .

courts below were wrong in admitting certain statements alleged to have been made by the appellant in connection with that recovery. According to the recovery memo the two witnesses who were present when the aforesaid articles were produced by the appellant were Lal Bahadur Singh and Wali Mohamad. Lal Bahadur Singh was examined as prosecution witness No. 4. He did give evidence about the production of blood stained articles from his house by the appellant. The witness said that the appellant produced the articles from a tub on the eastern side of the house. The witness

did not however, say that the appellant made any statements relating to the recovery. Wali Mohammad was not examined at all. One other witness Dodi Baksh Singh was examined as prosecution witness No. 3. This witness said that a little before the recovery the Sub-Inspector of Police took the appellant into custody and interrogated him ; then the a appellant gave out that the axe with which the murder had been committed and his blood stained shirt and dhoti were in the house and the appellant was prepared to produce them. These statements to which Dobi Baksh (P.W.3) deposed were not admissible in evidence.

They were incriminating statements made to a police officer and were hit by ss.25 and 26 of the Indian Evidence Act. The statement that the axe was one with which the murder had been committed was not a statement which led to any discovery within the meaning of s.27 of the Evidence Act. Nor was the alleged statement of the appellant that the blood stained shirt and dhoti belonged to him was a statement which led to any discovery within the meaning of s.27. Section 27 provides that when any fact is deposed to and discovered in consequence of information received from a person accused of any offence, in the custody of a police officer,-so much of such information,.whether it amounts to a confession or not, as, relates distinctly to the .

fact thereby discovery may be proved. In Pulukuri Kotayya v. King Emperor (1) the Privy Council considered the true interpretation of s.27 and said :

> "It is fallacious to treat the 'fact discove- red' within the section as equivalent to the object produced ; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinc- tly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife ; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A.', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

(p.77).

We are, therefore, of the opinion that the courts below were wrong in admitting in evidence the alleged statement of the appellant that the axe had been used to commit murder or the statement that the blood (1) (1947) L.R. 74 I.A 65. stained shirt and dhoti were his. If these statements are excluded and we think that they must be excluded, then the only evidence which remains is that the appellant produced from the house a blood stained axe and .

some blood stained clothes. The prosecution gave no evidence to establish whether the axe belonged to the appellant or the blood stained clothes were his.

10. Therefore, the question before us is this. Is the production of the blood stained axe and clothes read in the light of the evidence regarding motive sufficient to lead to the conclusion that the appellant must be the murderer ? It is well-settled that circumstantial evidence must be much as to lead to a conclusion which on any reasonable hypothesis in consistent only with the guilt of the accused person and not with his innocence. The motive alleged in this case would operate not only on the appellant but on his father as well. From the mere production of the blood stained articles by the appellant one cannot come to the conclusion that the appellant committed the murder. Even if somebody else had committed the murder and the blood stained articles had been kept in the house, the appellant might produce the blood stained articles when interrogated by the Sub- Inspector of Police. It cannot be said that the fact of production is consistent only with the guilt of the appellant and inconstant with his innocence. We are of the opinion that the chain of circumstantial evidence is not complete in this case and the prosecution has unfortunately left missing links, probably because the prosecution adopted the shortout of ascribing certain statements to the appellant which were clearly inadmissible.

68. In Aghnoo Nagesia vs. State of Bihar AIR 1966 SC 119, the Hon'ble Supreme Court held as under:-

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> 9. Section 25 of the Evidence Act is one of the provisions of law dealing with confessions made by an accused. The .

law relating to confessions is to be found generally in ss.

24 to 30 of the Evidence Act and ss. 162 and 164 of the Code of Criminal Procedure, 1898. Sections 17 to 31 of the Evidence Act are to he found under the heading "Admissions". Confession is a species of admission, and is dealt with in ss. 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25 provides : "No confession made to a police officer, shall be proved as against a person accused of an offence." The terms of s. 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by S. 26 relates to a confession made to a person other than a police officer. Section 26 does not qualify the absolute ban imposed by s. 25 on a confession made to a police officer. Section 27 is in the form of a proviso, and partially lifts the ban imposed by ss. 24, 25 and 26. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police

officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 162 of the Code of Criminal Procedure forbids the use of any .

statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence Order investigation, save as mentioned in the proviso and in cases falling under sub-s (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of S. 27 of the Evidence Act. The words of s. 162 are wide enough to include a confession made to a police officer in the course of an investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under s. 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by s. 27 of the Evidence Act, a confession by an accused to a police office- is absolutely protected under s. 25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by s. 162 of the Code of Criminal Procedure, and a confession to any other person made by him while in the custody of a police officer is protected by S. 26, unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy, and the fullest effect should be given to them.

69. In Indra Dalal vs. State of Haryana 2015 (11) SCC 31, wherein the Hon'ble Supreme Court observed as under:-

> 15. Mr. Sushil Kumar, learned senior counsel appearing for the appellants Indra Dalal and Bijender, argued that these confessional statements were admittedly recorded after .

the arrest of these accused and when these accused were in police custody. Therefore, such statements were inadmissible having regard to the provisions of Sections 25 and 26 of the Indian Evidence Act, 1872. Section 25 of the Evidence Act mandates so, in certain and unequivocal terms, as is clear from the language thereof. It reads as follows:

> "25. Confession to police officer not to be proved. - No confession made to a police officer shall be proved as against a person accused of any offence." Likewise, Section 26 makes any such statement inadmissible if given when in police custody. It reads:
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> "26. Confession by accused while in custody of police not to be proved against him. - No confession made by any person whilst he is in the custody of a police- officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.
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> Explanation. - In this section "Magistrate" does not include the head of a village discharging magisterial functions (in the Presidency of Fort St. George or elsewhere), unless such headman is a Magistrate exercising the powers of a Magistrate under the

> Code of Criminal Procedure, 1882."

16. The philosophy behind the aforesaid provision is acceptance of a harsh reality that confessions are extorted by the police officers by practicing oppression and torture or even inducement and, therefore, they are unworthy of any credence. The provision absolutely excludes from evidence against the accused a confession made by him to a police officer. This provision applies even to those confessions which are made to a police officer who may not otherwise be acting as such. If he is a police officer .

and confession was made in his presence, in whatever capacity, the same becomes inadmissible in evidence. This is the substantive rule of law enshrined under this provision and this strict rule has been reiterated countlessly by this Court as well as the High Courts.

17. The word 'confession' has no where been defined.

However, the courts have resorted to the dictionary meaning and explained that incriminating statements by the accused to the police suggesting the inference of the commission of the crime would amount to confession and, therefore, inadmissible under this provision. It is also defined to mean a direct acknowledgment of guilt and not the admission of any incriminating fact, however grave or conclusive. Section 26 of the Evidence Act makes all those confessions inadmissible when they are made by any person, whilst he is in the custody of a police officer, unless such a confession is made in the immediate presence of a Magistrate. Therefore, when a person is in police custody, the confession made by him even to a third person, that is other than a police officer, shall also become inadmissible.

70. The Hon'ble Supreme Court in Kala @ Chandraka vs. State through Inspector of Police, AIR 2016 SC 3912, observed as under:-

> 9. In the circumstances of the case, the confession made to Susheela, PW.4 does not inspire evidence. She was not having good relationship with accused and is not corroborated by other evidence on record, hence, it would not be safe to act upon it in the facts and circumstances of the case. The extra-judicial confession made to police is admissible only with respect to the recoveries made of the moped as well as a piece of nylon saree, pursuant to the .

information, which articles are not proved to be connected with offence.

71. In addition to the above, it needs to be noticed that PW-11 Bhinder Singh is totally silent in his entire deposition of having noticed blood stains on the jacket. PW-11, as observed above, has categorically admitted that he had not gone inside the room from where the alleged recoveries were effected. Even otherwise, we find it highly improbable that a person committing the murder will leave the blood stains on its clothes, leave alone carrying the same to home as it is already a general tendency to destroy the evidence.

72. The learned trial Court has mainly relied upon the disclosure statement dated 28.12.2014 Ext. PW-8/A of the appellant Vikas Verma and Ext. PW-8/B of the appellant Yog Raj, allegedly made in the presence of PW-8 Dev Raj and PW-9 Yashpal, pursuant to which recovery of empty cartridge vide memo Ext. PW-8/E and mobile phone Ext. PW-8/C have been effected. However, again here, as observed above, the statements contained as Ext. PW-8/A and Ext. PW-8/B are confessional in nature, which are inadmissible being hit by Section 25 of the Evidence Act. Moreover, if the statements of PW-8 Dev Raj, PW-9 Yashpal and PW-22 Tilak Chand are read co-

jointly, it would be crystal clear that neither any disclosure .

statement was made nor any recovery was effected pursuant to such disclosure statement for it is the admitted case of the prosecution that the appellants were taken to Magistrate for police remand on 28.12.2014 by PW-26/A Om Prakash, I.O. and were with him till 12:30 pm and if they were with him and once that be so then they could not have been present at 11:00 am in the police station Sunni as deposed by PW-8 Dev Raj and PW-9 Yashpal in the cross-examination. The relevant portion of PW-8 at page 40 is reproduced below:-

> "I remained with the police on 28.12.2014 after 11:00 am to 2:00 pm. All the proceedings were conducted during the aforesaid period."

73. PW-9 Yashapl at page 46 states that "I remained with the police and accused persons from 11:00 am till about 7:00 .

pm." It is here that the statement of PW12 Hitesh Sharma, who was complainant in the instant case, becomes relevant and rather falsify the case of the prosecution when he states that "the accused persons were interrogated by the police on 27.12.2014 in my presence. On 27.12.2014, the accused persons had given demarcation of different places where gun shot was fired, dead body was kept, put in a car and the car was pushed down in Satluj river."

74. It needs to be noticed that both PW-8 Dev Raj and PW-9 Yashpal have not at all stated in the examination-in-chief that the appellants had suffered disclosure statement that they could get effected the recovery of mobile and cartridges, rather both these witnesses have admitted that the empty cartridges and mobile were not recovered in their presence.

75. PW-8 at page 37 stated as under:-

> "The empty cartridge (khol) was not recovered in my presence. Self stated I was disclosed later on that the .
>
> empty cartridge has been recovered. I do not remember that whom of the accused picked up the mobile phone from the bush. I was standing near the pump house. The bush was on the upper side at a distance of about 3-4 meters from the pump house. When I noticed the mobile was in the hands of one of the accused, but I cannot tell in whose hand it was."

76. Likewise PW9 Yashapal stated that "The articles which are shown to have been effected vide seizure memo referred above were not got recovered by the accused in our presence but were shown to me by the police."

77. Thus, the statement cannot be said to be the disclosure statement as both these witnesses and I.O. have admitted that before recording the statement of facts, referred to in the statements were already within the knowledge of the I.O. and both the witnesses were disclosed about this fact at the time of their alleged joining as witnesses and were further informed that the accused will give the statement.

78. PW-8 Dev Raj has stated that "At the time when we went to the police station, we were told by the police that .

accused will give statement qua the fact that from where the fire was made, where the dead body was concealed, where the head was cut off and where the mobile and vehicle was thrown and for which purpose our presence is required."

79. Similarly PW-9 stated as under:-

> "When I reached the police station, I was disclosed by the police that the accused will narrate the manner in which the death of deceased has been caused. It was also disclosed that the accused will get the articles recovered on that day. Further this witness admit that no interrogation was conducted in my presence."

80. Likewise, PW-22 Tilak Chand stated that "I interrogated the accused persons prior to arrival of Yashpal and Dev Raj." He contradicts PW-8 Dev Raj and PW-9 Yashpal by stating that Ext. PW8/A was recorded at 3:45 pm and Ext. PW-8/B was recorded at 3:55 pm and PW-8 and PW-9 had come at 3:35 pm which is in total contradiction to what was stated by PW-8 and PW-9 and the version put-forth has already been referred to hereinabove and need not be reproduced.

81. As regards the recovery of knife, as per the prosecution case there was a disclosure statement dated 05.01.2015 Ext. PW-13A of the appellant Vikas Verma allegedly made in the presence of PW-13 Arun Kumar and Lalit Kumar (not examined) which led to the recovery of knife vide memo Ext.

PW13/D. However, it needs to be noticed that there was no .

explanation whatsoever on record as to why both the cousins of the deceased, namely, Arun Kumar and Lalit Kumar were associated for the purpose of disclosure statement and recovery of knife despite the fact that Sunni area is thickly populated. This assumes importance because as per the admitted case, the police remand of the appellants was going to expire on 05.01.2015 on which date the alleged recovery was shown to have been effected. In the given facts, the recovery of knife could have been conveniently planted taking into consideration the following factors:-

(a) Both witnesses are cousins of alleged deceased Harish.

(b) PW-22 Tilak Chand (I.O.) has admitted that no interrogation of the appellants was done in the presence of witnesses and he had told them that the appellants would make such statement.

(c) timing part of the witness PW-13 Arun Kumar and PW-22 I.O. Tilak Chand, as referred to above, is contrary.

(d) PW-22 has made a vital admission which reads as follows: - "It is correct to suggest that at the time of recovery of knife there was no blood stains and this fact was lastly inserted in the memo Ext. PW-13/B."

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(e) As per the prosecution case, the knife which was shown to have been recovered was having blood stains but PW-13 Arun Kumar, PW-22 Tilak Chand (I.O.) are silent in their depositions that the knife was having blood stains. Therefore, in such circumstances, much reliance cannot be even placed on the DNA report.

(f) The disclosure statement is again in the nature of confessional statement which is inadmissible.

(g) The version of recovery of knife on 05.01.2015 is falsified by PW-2 Jagdish Kumar, Photographer, who claimed to have photographed the recovery of knife on 28.12.2014 as against the case of the prosecution that the same was recovered on 05.01.2015.

(h) Statement of PW-13 Arun Kumar is in total contradiction to the statement, as observed above, to the statement of PW-22 Tilak Chand (I.O.).

(I) The cross-examination of PW-13 clearly goes to show that neither any disclosure statement was given nor any recovery got effected in his presence.

82. Once again, it needs to be reiterated that it has not been proved that any jacket was recovered and secondly when .

the I.O. PW-26/A ASI Om Prakash Thakur was re-examined on 16.03.2020, he has categorically admitted that in the statement of PW-11 Bhinder Singh, Mark DD2, statement of Ganesh Mark DD3 and memo Ext. PW-11/B, there is no mention that jacket was having any blood stains.

83. As regards the recovery of knife, PW-13 Arun Kumar in whose presence the alleged knife was recovered, is silent qua its having blood stain and even PW-22 Tilak Chand (I.O.) in his deposition is also silent about the blood stains on the knife.

Therefore, from where the blood stains had appeared on the knife have not been explained by the prosecution. This aspect further assumes importance because the seal within which the knife was allegedly sealed has not been produced in the Court.

The evidence on record suggests that knife was recovered on 28.12.2014 but no explanation on record has been offered by the prosecution about the recovery of said knife and the same could have, therefore, conveniently be planted.

84. Even the identification of the shoe is in doubt because it was got identified from PW-4 Sanjay Sharma, who was one of the cousins of the deceased Harish Kumar Sharma and was residing at the distance of about 100 kms. from the house of the deceased Harish Kumar Sharma and was not even aware of the fact that as and when they last met with each other coupled .

with the fact that he has not stated in his deposition that he had seen the deceased Harish Kumar Sharma wearing the shoe.

These suspicious circumstances are in addition to what has already been observed above. Thus, even the third circumstance cannot be said to have been proved.

Corpus delicti and involvement of the accused persons.

85. The learned Trial Court has held that despite best efforts made by the police the relatives of the deceased and NDRF, the police could not recover the dead body of the deceased and has relied upon the various judicial precedents on the law relating to corpus delicti. It is thereafter that the learned Court below has placed reliance upon the report of the DNA obtained from the shoe of the deceased Harish Kumar Sharma and blood stained knife and jacket of the appellant Vikas Verma to conclude that the same belonged to the biological offspring of Smt. Gaura Sharma and Sh. Bhoop Ram (parents of the deceased). Such findings of the learned Court below appear to be totally unsustainable.

86. We have already held that prosecution has miserably failed to prove the recoveries alleged to have been effected that too on the disclosure statement of the appellants. We have also held that the disclosure statement and certain evidences like .

CDR and others are inadmissible in evidence. The learned Trial Court further held that since there were some financial transactions between the deceased and the appellant Vikas Verma, as such this could be a motive not sine qua non for the conviction of the appellants for the offence of murder .

87. As regards the motive, it is more than settled that even though it is not sine qua non in the instant case, however, the prosecution has tried to prove that there were seven financial transactions between the appellant Vikas Verma and deceased Harish Kumar Sharma, which could have been a motive to eliminate the deceased Harish Kumar Verma.

However, it needs to be noticed that it was never the case of the prosecution that there was any financial transaction between the appellant Vikas Verma and deceased Harish Kumar Sharma.

88. PW-22 I.O. Tilak Chand has admitted in his cross-

examination "I have not collected any evidence with regard to the financial transactions between Harish and Vikas." It is only PW-24, wife of deceased Harish Kumar Sharma, Smt. Hel Lata Sharma, who claimed this fact, but has not substantiated it by leading evidence on record. However, she would claim that she had disclosed this fact to male relatives on 19.12.2014, but then the male relatives, that have been examined in this case, have not supported her version in any respect and rather have .

falsified this fact as is evident from the testimony of PW-12 Hitesh Sharma. Noticeably, even though the prosecution later on examined the mother and father of the alleged deceased as PW-

29 Bhoop Ram and PW-30 Smt. Gaura Sharma, however, they also did not state anything regarding the alleged financial transactions between the appellant Vikas Verma and deceased Harish Kumar Sharma.

89. In view of the aforesaid discussion, even the four circumstances cannot be held to have been proved beyond reasonable doubt.

90. In view of the aforesaid discussion and for the reasons stated above, we find merit in both the appeals and the same are accordingly allowed. The judgment of conviction and sentence as passed by the learned Additional Sessions Judge (II), Shimla, District Shimla, H.P. is accordingly set aside. The appellants Vikas Verma and Yog Raj alias Kaku are ordered to be set free forthwith, if not required in any other case.

91. The Registry is directed to prepare release warrant of the appellants. In view of the provisions of Section 437A Cr.P.C., each of the appellants is directed to furnish personal bond in the sum of Rs.25,000/- with one surety of the like amount to the satisfaction of the learned trial court, which shall be effective for a period of six months with a stipulation that in an event of an .

SLP being filed against this judgment or on grant of the leave, the appellants on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

(Tarlok Singh Chauhan)
Judge

27th June, 2024
(Sanjeev)

r to (Sushil Kukreja)

Judge