Sunil Kumar vs State Of H.P on 22 April, 2024

Author: Vivek Singh Thakur

Bench: Vivek Singh Thakur

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA Cr. Appeal No. 220 of 2021 Reserved on: 27.03.2024 .

Date of Decision: 22.04.2024

Sunil Kumar ..

Versus

State of H.P. ...

Coram

Hon'ble Mr. Justice Vivek Singh Thakur, Judge. Hon'ble Mr. Justice Rakesh Kainthla, Judge.

Whether approved for reporting?1 Yes For the Appellant : Mr. Lakshay Thakur, Advocate.

For the Respondent/State : Mr. Baldev Negi, Additional Advocate General.

Rakesh Kainthla, Judge The present appeal is directed against the judgment and order dated 18.06.2021 passed by learned Additional Sessions Judge-I, Kangra at Dharamshala (learned Trial Court) vide which, the appellant (accused before learned Trial Court) was convicted for the commission of offences punishable under Sections 452, 302, 382 and 201 of the Indian Penal Code (in short 'IPC') and was sentenced as under:

Whether reporters of Local Papers may be allowed to see the judgment? Yes.

Sr. No.	Section	Sentence	In default

1. 452 of IPC Rigorous imprisonment for three years Six months and a fine of 3,000/-

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2. 302 of IPC Rigorous imprisonment for life and a fine One year of 10,000/-

3. 382 of IPC Rigorous imprisonment for three years Six months and a fine of 3,000/-

4. 201 of IPC Rigorous imprisonment for three years Six months and to pay a fine of 3,000/-

(Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

2. Briefly stated, the facts giving rise to the present appeal are that the police presented a challan before the learned Trial Court against the accused for the commission of offences punishable under Sections 302, 382, 449 and 201 of IPC. It was asserted that one Deepak informed the police telephonically on 19.04.2017 that Kamal Kaur residing as a tenant near Hanuman Mandir, Niazpur was crying for help and it was found after visiting her home that she was murdered by someone. The information was reduced into writing. An entry No.4 dated 19.04.2017 (Ext. PW22/H) was recorded in the Police Station. Gian Chand Thakur (PW29), HC-Kuldeep Singh (PW27), HHC-Kirpal Singh (PW7), and LC-Babli Devi (PW23), went to the spot to verify the correctness of the information. Sanjay Kumar (PW1) made a statement (Ext.PW1/A) stating that he was residing adjacent to the house of Ashok Kumar. Kamal Kaur, wife of late .

Praveen Kumar, was residing as a tenant in the house of Ashok Kumar. The informant-Sanjay Kumar went to sleep on 18.04.2017. His aunt-Krishana Devi (PW5) called him on 19.04.2017 at about 4-4:15 am and told him that Kamal Kaur was shouting in her room for help. The informant came out of his home and found that the residents of the area were calling Kamal Kaur. The informant and Vishal Kumar (PW6) went near the gate of Kamal Kaur and found that the gate was locked from inside.

The informant and Vishal Kumar climbed up the corner of the house and found that the wire gauze door was shut and the light was switched off. Informant and Vishal opened the door and went inside the room. They switched on the lights and found Kamal Kaur lying dead. The blood was scattered on the bed and floor. Some unknown person had entered the room of Kamal Kaur and murdered her with a sharp-edged weapon. Gian Chand made the endorsement on the statement made by the informant and sent it to the Police Station, where FIR (Ext PW22/J) was registered. Gian Chand conducted the investigation. He prepared the site plan (Ext PW29/A). The photographs (Ext. PW15/A-1 to Ext. PW15/A-10) were taken. A blood-stained knife (Ext. P3) was found on the spot, which was lifted and preserved. It was put on a .

cotton (Ext. P4) and kept inside the cardboard box (Ext P2) after preparing its sketch (Ext. PW2/A). The box was sealed in a cloth parcel (Ext. P1) with six impressions of seal 'A'. The seal impression (Ext. PW2/B) was taken on a separate piece of cloth.

The parcel was seized vide memo (Ext. PW2/C). RFSL team was called. The inquest report (Ext. PW29/B) was prepared. RFSL team preserved the sample of blood lifted from different places from the spot with the help of thread (Ext. P27/A1 to P27/A12).

These were wrapped in different wrappers (Ext. P26/A1 to P26/A12). One twig (Ext. P29) was put in a wrapper (Ext. P28).

Wrapped papers were put in a carton (Ext. PW25). These were put in a cloth parcel (Ext. P24) and the parcel was sealed with six impressions of seal 'T'. The seal impression (Ext. PW29/C) was taken on a separate piece of cloth. Inspector Gian Chand wrote an application (Ext. PW27/A) and handed it over to HC-Kuldeep (PW27) and LC-Babli (PW23) with a direction to get the post-

mortem examination of the deceased conducted. Dr Sushil Sharma (PW31) conducted the post-mortem examination of the deceased and found multiple antemortem injuries. As per his opinion, the cause of death was stab wound injury. He preserved the viscera to rule out any intoxication. He handed over the .

viscera and other articles to the police. He issued the report (Ext.

PW31/B). Inspector-Gian Chand found blood stains on the bed sheet and pillow. He removed the pillow cover. He found a gold nose pin (Ext. P10) on the bed. He put the blood-stained bed sheet (Ext. P12) and pillow cover (Ext. P13) in a parcel. He also put the gold nose pin (Ext. P10) in a matchbox (Ext. P9). The matchbox was put in a cloth parcel (Ext. P8). The parcel was sealed with six impressions of seal 'P'. The seal impression (Ext.

PW4/A) was taken on a separate piece of cloth. The parcels were seized vide memo (Ext. PW4/B). Two mobile phones -- one of Mark Sony containing two sims (Ext. P6) and one of Mark Nokia (Ext. P7) were recovered. These were put in a cloth parcel (Ext.

P5). The parcel was sealed with six seal impressions of seal 'P'.

Seal Impression (Ext. PW2/D) was taken on a separate piece of cloth and the parcel was seized vide memo (Ext. PW2/A). It was found during the investigation that the accused and his wife used to visit the house of the deceased. The accused had visited the house of the deceased on 18.04.2017 and he was found missing from his home on 20.04.2017. The police tried to contact the accused but his mobile phone was found switched off. Anil Kumar (PW12) brother of the accused revealed on 24.04.2017 that .

he had received a telephone call from the accused stating that he (the accused) had committed a mistake. Anil Kumar advised the accused to return. The Police apprehended the accused on

25.04.2017 at 2:30 am at Niazpur. The accused was arrested at 10:30 am after an inquiry. The accused made a disclosure statement that he could show the room, where he had committed the murder of Kamal Kaur and the place where he had kept the knife after the murder. The disclosure statement (Ext. PW3/A) was reduced into writing. The accused identified the room where he had murdered the deceased and the boundary wall where he had kept the knife. Site plan (Ext. PW29/C) and memo of identification (Ext. PW3/B) were prepared. The photographs (Ext.

PW15/B-1 to PW15/B-14) were taken. Inspector Gian Chand filed an application (Ext. PW26/A) for conducting the medical examination of the accused. Dr. Richa Mehrotra (PW26) conducted the medical examination of the accused and found that he had suffered multiple injuries, most of which were caused within five to seven days. One injury was caused within 48 hours of examination. She preserved the blood sample on the FTA Card (Ext. PX1). The card was sealed in a parcel (Ext. PX). She issued the MLC (Ext. PW26/B). The accused made a disclosure .

statement that he had cut the sleeves of his shirt with the help of a stone and threw the sleeves in the khad which could be recovered by him. The accused further disclosed that he had stolen the gold chain of the deceased and sold it in Pathankot. He could identify the various places. The disclosure statement (Ext.

PW15/C) was reduced to writing. The accused led the police party to Jabaar Khad and recovered the sleeves (Ext. PW19 and P20).

These were put in a cardboard box (Ext. P18) and the box was sealed in a parcel (Ext. P17). The spot identification memo (Ext.

PW15/D) and a site plan (Ext. PW29/E) were prepared. The accused led the police party to the shop of Anil Verma and identified it as the shop where he had sold the gold chain. Anil Verma produced the gold chain (Ext. P16), which was put in a wrapper (Ext. P15). The wrapper was put in a transparent envelope (Ext. P14). These were sealed in a parcel (Ext. P8) and the parcel was sealed with three seal impressions of Seal 'A'. Seal Impression (Ext. PW8/B) was taken on a separate piece of cloth.

The parcel was seized vide memo (Ext. PW8/A). The accused also identified the shop where he had purchased the clothes. The photographs of the proceedings (Ext. PW15/F1 to 15/F17) were taken. The parcel was seized vide memo (Ext PW15/E). The .

accused produced blue pants (Ext. P22) and white shirts (Ext.

P23), which were put in a parcel (Ext. P21) and the parcel was sealed with six impressions of seal 'A'. The seal impression (Ext.

PW29/G) was taken on a separate piece of cloth. All the articles were handed over to HC-Ravinder (PW22) who sent them to FSL, Junga for analysis. The results of analysis (Ext. 'PA' to 'PD') were received showing that no poison/alcohol was detected in the viscera and the DNA profile obtained

from the shirt arm of Sunil Kumar was found consistent with the DNA profile obtained from the blood of the deceased Kamal Kaur. Gian Chand applied to the Nodal Officer to obtain the call details record. Devender Verma (PW30) issued a call details record (Ext. PW28/A) and the certificate under Section 65-B of the Indian Evidence Act (Ext.

PW28/B). An application (Ext. PW32/A) was filed to obtain the revenue record of the spot. Anil Kumar (PW28) conducted further investigation. He recorded the statements of the remaining witnesses. After the completion of the investigation, the challan was prepared and it was presented in the Court of learned ACJM Nurpur, who committed it to the Court of learned Sessions Judge, Dharamshala from where it was assigned to the learned Additional Sessions Judge-I, Kangra at Dharamshala.

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3. Learned Additional Sessions Judge-I, Kangra at Dharamshala charged the accused-Sunil Kumar with the commission of offences punishable under Sections 449, 302, 382 and 201 of IPC and accused Anil Verma with the commission of an offence punishable under Section 411 of IPC. They pleaded not guilty and claimed to be tried.

4. The prosecution examined 33 witnesses to prove its case. Sanjay (PW1), Kishore Kumar (PW3), Krishna Devi (PW5) and Vishal (PW6) went to the room of the deceased Kamal Kaur and found her dead. Ashwani Kumar (PW2) is the witness to the recovery of the knife and mobile phone from the room of the deceased. Mohinder Singh (PW4) is the witness to the recovery of a gold nose pin, blood-stained pillow cover and bed sheet. Kirpal Singh (PW7) accompanied the police party to the spot and brought the informant's statement to the police station for the registration of the FIR. Sunny (PW8) is the son and Shalini (PW11) is the daughter of the deceased Kamal Kaur. Sanjay Kumar (PW9) was working as an MHC with whom, the blood-

stained knife was deposited. HHC-Tarlok Chand (PW10) carried the blood-stained knife to the Fingerprint Bureau, Bharari. Anil Kumar (PW12) is the brother of the deceased, who has not .

supported the prosecution version. Narender Kumar (PW13) was working in the shop of Pawan Kumar from where the accused had purchased two pants and two shirts on 19.04.2017. Swaran Singh (PW14) proved that the accused came to him with a torn and sold a necklace to the goldsmith. Rajinder Soga (PW15) is the photographer and the witness to the disclosure statements and consequent recoveries. Puran Singh (Pw16) is the witness to the recovery of the clothes of the accused. Rakesh Kumar (PW17) proved that the accused came to him and made a call from his mobile phone. Anil Kumar (PW18) and Vikas (PW19) did not support the prosecution case. Subhash Chand (PW20) issued the tatima and jamabandi of the spot. Rajesh Kumar (PW21) carried the case property to RFSL, Dharamshala. Ravinder Singh (PW22) was working as MHC with whom the case property was deposited and who sent it to RFSL, Dharamshala. LC Babli (PW23) carried the case property to RFSL, Dharamshala. HHG Jarnail Singh brought the report of analysis and the case property from RFSL, Dharamshala. Nardev (PW25) is the witness to the disclosure statement and consequent recoveries. Richa Mehrotra (PW26) conducted the medical examination of the accused.

HC Kuldeep (PW27) accompanied the police party to the spot and carried the .

dead body for conducting the post-mortem examination. SI-Anil Kumar (PW28) proved the disclosure statements and the consequent recoveries. He also carried out further investigation.

Gian Chand Thakur (PW29) conducted the initial investigation.

Devender Verma (PW30) is the Nodal Officer of Bharti Airtel, who issued the call details record. Sushil Sharma (PW31) conducted the post-mortem examination of the deceased. Inspector Sandeep Sharma (PW32) conducted the partial investigation and prepared the supplementary challan. HHC Vikram Singh (PW33) carried the case property to FSL, Junga.

5. The accused in his statement recorded under Section 313 of Cr. P.C. denied the prosecution case except that the informant was the neighbour of the deceased. He stated that he was falsely implicated. He had not committed any offence. Police took him forcibly to different places. He was working in Ladakh.

No defence was sought to be adduced by the accused.

6. Learned Trial Court held that the disclosure statements and consequent recoveries were proved. The plea of the accused that he was tortured in police custody and compelled to make the statement was not believable. The gold chain was duly identified by the son of the deceased. The accused had .

sustained multiple injuries for which no proper explanation was provided by him. He was required to furnish an explanation under Section 106 of the Indian Evidence Act and failure to do so would go adversely against him. The chain of circumstances was complete and led to the only inference that the accused had entered into the house of the deceased, murdered her, and taken her gold chain with him. Hence, the accused was convicted and sentenced as aforesaid.

7. Being aggrieved from the judgment and the order passed by the learned Trial Court, the accused filed the present appeal asserting that the judgment is against the law and the facts. It is based upon conjectures and surmises and is not sustainable. There is no evidence on record to connect the accused with the commission of the crime and the conclusion drawn by the learned Trial Court that he had murdered Kamal Kaur is based upon misappreciation of the evidence. The evidence led before the learned Trial Court was not credible and trustworthy to prove the involvement of the accused in the commission of the crime. The testimonies of the witnesses are full of material contradictions, improvements, and omissions.

The witnesses changed their stand at every stage and their .

testimonies could not have been relied upon. The prosecution failed to prove the intention and the motive and the prosecution case is suspect. The chain of circumstances is incomplete. The prosecution failed to connect the accused with the weapon of offence. No report of the theft of the gold chain was made by the children of the deceased even though they were present on 19.04.2017.

This fact was introduced after 4 days by the investigating officer. The investigating officer deposed about the marks of snatching, in the neck of the deceased, which is incorrect as no such marks were found during the post-mortem examination of the dead body. Sanjay, Vishal and Deepak were not interrogated as suspects even though, they were present at the scene of crime at the earliest point of time. The height of the retaining wall surrounding the house of the deceased was not mentioned. The lock was not taken into possession. Therefore, it was prayed that the present appeal be allowed and the judgment and order passed by the learned Trial Court be set aside.

8. We have heard Mr. Lakshay Thakur, learned counsel for the appellant/accused and Mr. Baldev Negi, learned Additional Advocate General, for the respondent/State.

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9. Mr Lakshay Thakur, learned counsel for the appellant/accused submitted that the learned Trial Court erred in convicting and sentencing the accused. There is no satisfactory evidence to connect the accused with the commission of crime.

The prosecution case is based upon the circumstantial evidence and all the circumstances leading to the guilt of the accused were not established by the prosecution. The investigating officer had not seized the lock stated to have been put on the gate of the house of the deceased. The weapon of offence was not connected to the accused. The evidence regarding the disclosure statement and consequent recovery is not satisfactory as independent witnesses were not joined during the investigation at the time of making of the disclosure statement and the consequent recovery.

One of the witnesses to the disclosure statement and consequent recovery was associated by the police in earlier cases and his testimony could not have been relied upon. The possibility of tampering with the physical evidence could not be ruled out. No test identification parade was conducted to test the power of identification of the witnesses. Therefore, he prayed that the present appeal be allowed and the judgment and order passed by the learned Trial Court be set aside.

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10. Mr. Baldev Negi, learned Additional Advocate General, for the respondent/State supported the judgment and order passed by the learned Trial Court and submitted that no interference is required with the same. He further submitted that the chain of circumstances was complete. The recovery of the stolen gold chain proves the motive for the commission of a crime. Therefore, he prayed that the present appeal be dismissed.

11. We have given considerable thought to the submissions and have gone through the records carefully.

12. The fact that the death of Kamal Kaur was caused by homicide is duly proved by the report of post-mortem examination. Dr Sushil Sharma (PW31) conducted the post-

mortem examination of the deceased and found the following ante-mortem injuries:

> 1. A stab, 3x0.3 cm x muscle deep, linear, oblique present at 2 cm forward to right eat at face associated with hematoma, both angles are acute.
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> 2. An abrasion of reddish brown 3.5 x 0.2 cm present at the left aspect bridge of nose, linear and oblique shape.
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> 3. Abrasion 2 x 1 cm reddish brown at left aspect upper lip.
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> 4. A stab 3.2 x 1.5 cm gaping, muscle deep present at left shoulder region at back, track is directed downwards .

- inwards and forward.

5. A stab wound 4 x 1.5 cm gaping x cavity deep, horizontally placed at mid sternal region, in irregular spindle shape. On dissection associated with mid sternal perforation, and underlying hematoma. A blood stain track associated with wound through, midsternal 4 cm perforation through pericardial sac, and terminates into the right ventricle cavity associated with hematoma and clots in pericardial cavity and heart. Track is directed backward and inward.

6. A stab wound 4 x 1 cm gaping x cavity deep, linear- oblique present at left outer upper aspect of abdominal wall, upper end 29 cm leftward to midline, and lower end 25 cm leftward to midline, inner lower end broad, outer-upper end angle acute; A blood- stained track established directed upward-inward and backward through wound, lateral chest wall, 9th left rib and terminate in left lung lower lobe associated with clotted and fluid blood in left pleural cavity.

7. A stab wound 4 x 1 cm gaping, muscle deep, present at left flank, 22 cm leftward to midline, linear vertical placed, lower end 2 cm below and right to injury no.6 and 103 cm above to left heel, lower end acute, upper end broad, track directed upward-inward.

13. As per the medical officer's opinion, the cause of death was a stab wound. Injury No. 5 and 6 individually and collectively were sufficient to cause death in the ordinary course of nature caused by a long-pointed weapon. He was shown the knife recovered from the spot and as per his opinion, injuries No. 1, 4, 5, 6 and 7 were possible with the knife, which was shown to him in the Court. According to him, injuries No.2 and 3 were .

abrasions, which were possible during the scuffle.

14. The Medical Officer's testimony that he had noticed the ante-mortem injuries on the body of Kamal Kaur was not challenged in the cross-examination as no question was asked regarding the same. He was cross-examined regarding the presence of earrings and four gold bangles on the body of the deceased, the presence of skin tissues and nail clippings of the deceased, abrasion or scratch on the neck of the deceased and not showing the knife during the investigation. Thus, his testimony

that he had noticed ante-mortem injuries on the person of the deceased has gone unrebutted and has to be accepted as correct.

His testimony proves that the death of Kamal Kaur was caused by homicide.

15. Krishna Devi (PW5) stated that she heard the cries of Kamal Kaur on 19.04.2017 at 4:00-4:15 am. Kamal Kaur was shouting "Bachao Bachao". Krishana woke up her family members--Kishore Kumar, Sanjay and Vishal. They all went to the house of Kamal Kaur. They knocked at the gate of her house but found it to be locked. Nobody responded to the knocks.

Sanjay and Vishal entered the house of Kamal Kaur from the backside and opened the gate. They went inside. The inner door .

was not locked and when they opened the door, they found the dead body of Kamal Kaur lying on the bed in a pool of blood.

Injuries were noticed on the abdomen and chest of Kamal Kaur.

The pillow cover and bed sheet were also stained with blood.

Deepak also came to the spot and informed the police. The police reached the spot within 5-10 minutes and inspected the spot. She stated in her cross-examination that the distance between her house and the house of Kamal Kaur was about one and a half feet.

Kamal Kaur was residing in the tenanted premises of Ashok Kumar. While yelling, Kamal Kaur did not name anyone. The gate was not locked but the lock was hanging. She did not see any injury marks on the neck of Kamal Kaur as she was in the pool of blood. She admitted that the house of Kamal Kaur was located in a thickly populated locality and there was streetlight near the house of Kamal Kaur. She never saw anyone quarrelling with Kamal Kaur. Kamal Kaur had no enmity with the accused Sunil or his family.

16. Her version is corroborated by Sanjay who stated that his aunt Krishna Devi woke him up and informed him that Kamal Kaur was crying for help. He, Krishna Devi and Kishore knocked .

at the gate of the house of Kamal Kaur but nobody responded.

Vishal and Deepak came to the spot. They tried to open the gate but it was locked from inside. He and Vishal entered the house from its backside and switched on the light. They opened the lock and found the gate bolted. They also opened the door of the house of Kamal Kaur and found Kamal Kaur lying on the bed in the pool of blood. It was found that Kamal Kaur had died. She had sustained injuries on her abdomen. Deepak Kumar informed the Police and the police reached the spot within 10-15 minutes.

Police recorded his statement. He stated in his cross-

examination that the distance between his house and the house of Ashok is about 2 meters. Similar is the distance between the house of Krishna Devi and the house of Ashok. Kamal Kaur was a tenant of Ashok for many years. He had cordial relations with Kamal Kaur. Many persons used to visit the house of Kamal Kaur out of whom, no one was present on the spot. The house of Kamal Kaur was situated in a thickly populated area and there were many houses in the vicinity. They went above the bedroom, got down the stairs and thereafter opened the door. There was a streetlight in the vicinity.

17. Kishore Kumar (PW3) also corroborated the .

testimonies of these witnesses. He stated that on 19.04.2017 at about 3:45 - 4:00 am, he heard the noise coming from the house of Kamal Kaur for help. She was yelling "Bachao Bachao". He woke up and came out with his wife Krishna Devi. Sanjay and Vishal were present outside the house. They knocked at the gate of Kamal Kaur but did not receive any response. They tried to open the gate but it was locked from inside. Sanjay and Vishal entered the gate from the backside of the house and switched on the light near the gate. They opened the lock and the gate. They entered the gate and saw Kamal Kaur lying on the bed in a pool of blood. She had died. The blood had spilled on the pillow, bed and floor. Kamal Kaur had sustained injuries on her abdomen and chest. Deepak informed the police and the police reached within 10-15 minutes. He stated in his cross-examination that his house is situated at a distance of about 2 meters from the house of Ashok Kumar. Kamal Kaur resided in the tenanted premises for 20-22 years. His family members and other people used to visit the house of Kamal Kaur. 20-25 persons were present on the spot. The windows of Kamal Kaur's room were locked. A lock was hanging on the gate but the gate was not locked. The lock was taken out by Sanjay and Vishal. There was one streetlight at a .

considerable distance. The place is located in a thickly populated area and a bazaar is located in the vicinity.

18. Vishal (PW6) supported the testimonies of these witnesses. He stated that Sanjay Kumar woke him at about 4:00- 4:15 am and told him that something had happened to Kamal Kaur. He, Kishore Kumar, Sanjay and Krishna went to the house of Kamal Kaur. They knocked at the gate of the house but it was locked and no one responded. He and Sanjay entered the house of the Kamal Kaur from its backside and switched on the light. They opened the gate. The persons present outside entered the house and found that the door of Kamal Kaur's room was not locked.

The door was opened and the light was switched on. The dead body of Kamal Kaur was found lying on the bed in a pool of blood.

Kamal Kaur had sustained injuries on her abdomen and chest.

The pillow cover and bed sheet were also stained with blood.

Blood was lying on the floor. Deepak also reached the spot, who informed the police and the police reached the spot within 5-10 minutes. He stated in his cross-examination that many persons were present at the time of the arrival of the police. All the people who were standing outside came inside.

There were about 10-15 persons. He admitted that the locality was thickly populated. He .

stated that he and other persons also used to visit the house of Kamal Kaur.

19. It was submitted that the non-examination of Deepak Kumar who had reported the matter to the police is fatal. He was also present on the spot and should have been examined. This submission cannot be accepted. It was held in Hukam Singh vs. State of Rajasthan 2000 (7) SCC 490 that the Public Prosecutor is under no obligation to examine all the witnesses. If the statement of a witness is repetitive, the public prosecutor can give him up. It was observed:

> "13.....If there are too many witnesses on the same point, the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the court can be saved from repetitious depositions on the same factual aspects. That principle applies when there are too many witnesses cited if they all had sustained injuries at the occurrence. The Public Prosecutor in such cases is not obliged to examine all the injured witnesses. If he is satisfied by examining any two or three of them, it is open to him to inform the court that he does not propose to examine the remaining persons in that category. This will help not only the prosecution for relieving itself of the strain of adducing repetitive evidence on the same point but also help the court considerably in lessening the workload. The time has come to make every effort possible to lessen the workload, particularly those courts crammed with cases, but without impairing the .
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> cause of justice.

20. This position was reiterated in Rohtash vs. State of Haryana 2013 (14) SCC 434 and it was held that the prosecution is not bound to examine all the cited witnesses and it can drop witnesses to avoid multiplicity or plurality of witnesses. It was observed:

> 14. A common issue that may arise in such cases where some of the witnesses have not been examined, though the same may be material witnesses is, whether the prosecution is bound to examine all the listed/cited witnesses. This Court, in Abdul Gani &Ors. v. State of Madhya Pradesh, AIR 1954 SC 31, has examined the aforesaid issue and held, that as a general rule, all witnesses must be called upon to testify in the course of the hearing of the prosecution, but that there is no obligation compelling the public prosecutor to call upon all the witnesses available who can depose regarding the facts that the prosecution desires to prove. Ultimately, it is a matter left to the discretion of the public prosecutor, and though a court ought to and no doubt would take into consideration the absence of witnesses whose testimony would reasonably be expected, it must adjudge the evidence as a whole and arrive at its conclusion accordingly, taking into consideration the persuasiveness of the testimony given in the light of such criticism, as may be levelled at the absence of possible material witnesses.

> 15. In Sardul Singh v. State of Bombay, AIR 1957 SC 747, a similar view has been reiterated, observing that a court cannot normally compel the prosecution to examine a witness which the prosecution does not choose to examine and that the duty of a fair prosecutor extends only to the extent of examination of such witnesses, who are necessary for the purpose of disclosing the story of the prosecution with all its essentials.

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16. In Masalti v. the State of U.P., AIR 1965 SC 202, this Court held that it would be unsound to lay down as a general rule, that every witness must be examined, even though, the evidence provided by such witness may not be very material, or even if it is a known fact that the said witness has either been won over or terrorised.

In such cases, it is always open to the defence to examine such witnesses as their own witnesses, and the court itself may also call upon such a witness in the interests of justice under Section 540 Cr.P.C.

(See also: Bir Singh &Ors. vs. State of U.P., (1977 (4) SCC

420)

17. In Darya Singh &Ors. v. State of Punjab, AIR 1965 SC 328, this Court reiterated a similar view and held that if the eye-witness(s) is deliberately kept back, the Court may draw an inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case.

18. In Raghubir Singh v. State of U.P., AIR 1971 SC 2156, this Court held as under:

> "10. ... Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need to be produced without unnecessary and redundant multiplication of witnesses. The appellant's counsel has not shown how the prosecution story is rendered less trustworthy as a result of the non-production of the witnesses mentioned by him. No material and important witness was deliberately kept back by the prosecution. Incidentally, we may point out that the accused too have not considered it proper to produce those persons as witnesses for controverting the prosecution version....."

19. In Harpal Singh v. Devinder Singh & Ann, AIR 1997 SC 2914], this Court reiterated a similar view and further .

observed:

> "24. ... Illustration (g) in Section 114 of the Evidence Act is only a permissible inference and not a necessary inference. Unless there are other circumstances also to

facilitate the drawing of an adverse inference, it should not be a mechanical process to draw the adverse inference merely on the strength of non-examination of a witness even if it is a material witness....."

20. In Mohanlal Shamji Soni v. Union of India &Anr., AIR 1991 SC 1346, this Court held:

"10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless, if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act.

.. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or another proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and .

speculative presentation of facts, the ends of justice would be defeated."

21. In Banti @ Guddu v. State of M.P. AIR 2004 SC 261, this Court held:

"12. In trials before a Court of Session the prosecution "shall be conducted by a Public Prosecutor". Section 226 of the Code of Criminal Procedure, 1973 enjoins on him to open up his case by describing the charge brought against the accused. He has to state what evidence he proposes to adduce for proving the guilt of the accused.....If that version is not in support of the prosecution case it would be unreasonable to insist on the Public Prosecutor to examine those persons as witnesses for the prosecution.

13. When the case reaches the stage envisaged in Section 231 of the Code the Sessions Judge is obliged "to take all such evidence as may be produced in support of the prosecution". It is clear from the said section that the Public Prosecutor is expected to produce evidence "in support of the prosecution"

and not in derogation of the prosecution case. At the said stage the Public Prosecutor would be in a position to take a decision as to which among the presence cited are to be examined. If there are too many witnesses on the same point the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects.....This will help not only the prosecution in relieving itself of the strain of adducing repetitive evidence on the same point but also help the Court considerably in lessening the workload. The time has come to make every effort possible to lessen the workload, particularly those courts crammed with cases, but without impairing the cause of justice.

14. It is open to the defence to cite him and examine him as a defence witness."

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22. The said issue was also considered by this Court in R. Shaji (supra), and the Court, after placing reliance upon its judgments in Vadivelu Thevar v. State of Madras; AIR 1957 SC 614; and Kishan Chand v. State of Haryana JT 2013 (1) SC 222, held as under:

> "22. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses, but the quality of their evidence, which is important, as there is no requirement in the law of evidence stating that a particular number of witnesses must be examined in order to prove/disprove a fact. It is a time-honoured principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise. The legal system has laid emphasis on the value provided by each witness, as opposed to the multiplicity or plurality of witnesses. It is thus, the quality and not quantity, which determines the adequacy of evidence, as has been provided by Section 134 of the Evidence Act. Where the law requires the examination of at least one attesting witness, it has been held that the number of witnesses produced over and above this, does not carry any weight."

23. Thus, the prosecution is not bound to examine all the cited witnesses, and it can drop witnesses to avoid multiplicity or plurality of witnesses. The accused can also examine the cited, but not examined witnesses, if he so desires, in his defence. It is the discretion of the prosecutor to tender the witnesses to prove the case of the prosecution and "the court will not interfere with the exercise of that discretion unless, perhaps, it can be shown that the prosecution has been influenced by some oblique motive." In an extraordinary situation, if the court comes to the conclusion that a material witness has been withheld, it can draw an adverse inference against the prosecution, as has been provided under Section 114 of the Evidence Act. Undoubtedly, the public prosecutor must not take the liberty to "pick and choose" his witnesses, as he must be fair to the court, and therefore, to the truth. In a .

given case, the Court can always examine a witness as a court witness, if it is so warranted in the interests of justice. In fact, the evidence of the witnesses must be tested on the touchstone of reliability, credibility and trustworthiness. If the court finds the same to be untruthful, there is no

legal bar for it to discard the same.

21. This position was reiterated in Rajesh Yadav & Anr versus State of U P, 2022 (2) RCR (Criminal) 132, wherein it was held:-

> "[31] A mere non-examination of the witness per se will not vitiate the case of the prosecution. It depends upon the quality and not the quantity of the witnesses and their importance. If the court is satisfied with the explanation given by the prosecution along with the adequacy of the materials sufficient enough to proceed with the trial and convict the accused, there cannot be any prejudice.
>
> Similarly, if the court is of the view that the evidence is not screened and could well be produced by the other side in support of its case, no adverse inference can be drawn. The onus is on the part of the party who alleges that a witness has not been produced deliberately to prove it. The aforesaid settled principle of law has been laid down in Sarwan Singh v. State of Punjab, 1976 4 SCC 369:
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> "13. Another circumstance which appears to have weighed heavily with the Additional Sessions Judge was that no independent witness of Salabatpura had been examined by the prosecution to prove the prosecution case of assault on the deceased, although the evidence shows that there were some persons living in that locality like the 'pakodewalla', hotelwalla, shopkeeper and some of the passengers who had alighted at Salabatpura with the deceased. The Additional Sessions Judge has drawn an adverse inference against the prosecution for its failure to examine any of those witnesses. Mr Hardy has adopted this argument. In our opinion, the .
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> comments of the Additional Sessions Judge are based on a serious misconception of the correct legal position. The onus of proving the prosecution case rests entirely on the prosecution and it follows as a logical corollary that the prosecution has complete liberty to choose its witnesses if it is to prove its case. The court cannot compel the prosecution to examine one witness or the other as its witness. At the most, if a material witness is withheld, the court may draw an adverse inference against the prosecution. But it is not the law that the omission to examine any and every witness even on minor points would undoubtedly lead to rejection of the prosecution case or drawing of an adverse inference against the prosecution. The law is well- settled that the prosecution is bound to produce only such witnesses as are essential for the unfolding of the prosecution narrative. In other words, before an adverse inference against the prosecution can be drawn it must be proved to the satisfaction of the court that the witnesses who had been withheld were eyewitnesses who had actually seen the occurrence and were therefore material to prove the case. It is not necessary for the prosecution to multiply witnesses after witnesses on the same point; it is the quality rather than the quantity of the evidence that matters. In the instant case, the evidence of the eyewitnesses does not suffer from any infirmity or any manifest defect on its intrinsic merit. Secondly, there is nothing to show that at the time when the

deceased was assaulted a large crowd had gathered and some of the members of the crowd had actually seen the occurrence and were cited as witnesses for the prosecution and then withheld. We must not forget that in our country there is a general tendency amongst the witnesses in mofussil to shun giving evidence in courts because of the cumbersome and dilatory procedure of our courts, the harassment to which they are subjected by the police and the .

searching cross-examination which they have to face before the courts. Therefore nobody wants to be a witness in a murder or any serious offence if he can avoid it. Although the evidence does show that four or five persons had alighted from the bus at the time when the deceased and his companions got down from the bus, yet there is no suggestion that any of those persons stayed on to witness the occurrence. They may have proceeded to their village homes " (Emphasis supplied) [32] This Court has reiterated the aforesaid principle in Gulam Sarbar v. State of Bihar, 2014 3 SCC 401:

"19. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but the quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time- honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on the value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in probate cases, where the law requires the examination of at least one attesting witness, it has been held that the production of more witnesses does not carry any weight. Thus, a conviction can even be based on the testimony of a sole eyewitness, if the same inspires confidence. (Vide Vadivelu Thevar v. State of Madras, 1957 AIR(SC) 614: 1957 Cri LJ 1000], Kunju v. State of T.N., 2008 2 SCC 151: (2008) 1 SCC (Cri) 331], Bipin Kumar Mondal v. State of W.B., 2010 12 SCC 91: (2011) 2 SCC (Cri) 150: AIR 2010 SC 3638], Mahesh v. State of M.P., 2011 9 SCC 626: (2011) 3 SCC (Cri) 783], Prithipal Singh v. State of Punjab, 2012 1 SCC 10: (2012) 1 SCC (Cri) 1] and Kishan Chand v. State of .

Haryana, 2013 2 SCC 502: (2013) 2 SCC (Cri) 807: JT (2013) 1 SC 222].)"

22. Therefore, the prosecution case cannot be discarded due to the non-examination of Deepak.

23. The testimonies of these witnesses are consistent.

They have categorically stated that Kamal Kaur was shouting for help after which they went to the house of Kamal Kaur. The gate was locked from the inside which was opened. Vishal and Sanjay entered the house. They switched on the light and found the dead body of Kamal Kaur lying on the bed in a pool of blood. The pillow cover, bed sheet and floor were stained with the blood. This is

consistent with the post-mortem examination, where multiple stab wounds were found on the dead body of Kamal Kaur. There is nothing in their cross-examination to show that they are deposing falsely or they have any motive to depose about the death of Kamal Kaur. Therefore, the learned Trial Court had rightly accepted their testimonies and held that the dead body of Kamal Kaur was found on 19.04.2017 at about 4:00-4:15 am in a pool of blood.

24. Mr. Lakshay Thakur, learned counsel for the appellant/accused vehemently submitted that Vishal and Sanjay could not have entered the house of Kamal Kaur as the gate was .

locked. However, he ignored the further explanation provided by Krishna Devi (PW5) and Kishore Kumar (PW3) that the lock was merely hanging on the gate and the gate was not properly locked.

This shows that any person could have removed the lock from the gate and opened the same; thus, there is nothing unnatural in the testimonies of these witnesses.

25. It was further submitted that the investigating officer had not seized the lock and an adverse inference should be drawn against the prosecution. This submission cannot be accepted.

There was no necessity to seize the lock as the lock was not connected to the commission of crime. It was not the weapon of the offence. Therefore, the mere fact that the police had not seized the lock will not make the prosecution case suspect.

26. The accused admitted in his statement recorded under Section 313 of Cr.P.C. that the house of Sanjay is located adjacent to the house of Ashok Kumar. He also admitted that the house of Ashok Kumar was occupied by Kamal Kaur as a tenant.

This shows that the accused has not disputed the fact that the informant Sanjay was residing in the vicinity. Hence, the testimony of Sanjay that he went to the house of Kamal Kaur after being informed that she (Kamal Kaur) was shouting for .

help appears to be natural as being a neighbour, Sanjay would try to find out why Kamal Kaur was shouting for help. Further, all the persons consistently stated that they were the neighbours of Kamal Kaur and they went to enquire about the reason for shouting at Kamal Kaur. Thus, their presence on the spot was natural and their testimonies were rightly accepted by the learned Trial Court.

27. Swaran Singh (PW14) stated that he was running a shop of denting and painting at Mamoon, Dalhousie Road Pathankot. He knew the accused as the accused used to work as an Electrician near his shop in the year 1997-98. Thereafter, the accused left the shop to work somewhere else. The accused came to his shop on 19.04.2017 at about 12:00 - 12:30 pm. The accused was wearing a white half-sleeve shirt and blue jean pant. The shirt of the accused was torn from the sleeves and his clothes were wet. The accused had injury marks over his face. He (Swaran Singh) asked the accused about the injuries. The accused disclosed that somebody had given him an intoxicant during the previous night and threw him near Chakki Barrier. His money was also snatched and he was only

left with the gold chain, which he wanted to sell to a goldsmith to fetch some money. Swaran .

Singh took the accused on a scooter to a goldsmith shop at Patel Chowk. The accused went inside the shop and sold the chain. He (Swarn Singh) took the accused to Gandhi Chowk (Pathankot) on his request as he (the accused) had to purchase new clothes. The accused changed his old clothes with new ones, packed his old clothes in a polythene bag and threw the bag in the garbage. The accused alighted from the scooter at Simbal Chowk (Pathankot) by saying that he had to go to Kargil in connection with his work.

He stated in his cross-examination that he had not noticed any blood stains over the clothes worn by the accused. He had disclosed to the police about the shop of the goldsmith at Patel Chowk. He was confronted with his previous statement marked 'S', where this fact was not recorded. He had also disclosed to the police about the intoxicant given to the accused by someone. He did not meet the accused after 19.04.2017. He did not remember the exact place, where the accused had thrown his clothes in the garbage. He admitted that the places where the clothes were thrown and new clothes were purchased were very busy. He denied that the accused did not visit his shop or he was making a false statement.

28. Significantly, his testimony that he knew the accused .

because the accused was working as an Electrician near his shop was not challenged in the cross-examination. Hence, the same is deemed to have been accepted. It was laid down by the Hon'ble Supreme Court in State of Uttar Pradesh Versus Nahar Singh 1998 (3) SCC 561 that where the testimony of a witness is not challenged in the cross-examination, the same cannot be challenged during the arguments. This position was reiterated in Arvind Singh Versus State of Maharashtra AIR 2020 (SC) 2451 and it was held:

> [57] The House of Lords in a judgment reported as Browne v. Dunn 1894 6 Reports 67 (HL) considered the principles of appreciation of evidence. Lord Chancellor Herschell, held that it is absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness if not speaking the truth on a particular point, direct his attention to the fact by some questions put in cross- examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged. It was held as under:
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> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances .

> which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue, but it seems to me that cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards, to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling."

[58] Lord Halsbury, in a separate but concurring opinion, held as under:

> "My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind, nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."

[59] This Court in a judgment reported as State of U.P. v. Nahar Singh, 1998 3 SCC 561, quoted from Browne to hold .

that in the absence of cross-examination on the explanation of the delay, the evidence of PW-1 remained unchallenged and ought to have been believed by the High Court. Section 146 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. This Court held as under:-

> "13. It may be noted here that part of the statement of PW 1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of the delay, the evidence of PW 1 remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned:
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> (1) to test his veracity, (2) to discover who he is and what is his position in life, or (3) to shake his credit by injuring his character, although the answer to such questions

might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."

[60] This Court in a judgment reported as Muddasani Venkata Narsaiah (Dead) through LRs. v. Muddasani Sarojana, 2016 (12) SCC 288 laid down that the party is obliged to put his case in cross-examination of witnesses of the opposite party. The rule of putting one's version in cross-examination is one of essential justice and not merely a technical one. It was held as under:

"15. Moreover, there was no effective cross- examination made on the plaintiff's witnesses concerning the factum of execution of the sale deed, PW 1 and PW 2 have not been cross-examined as to the factum of execution of the sale deed. The cross-examination is a matter of substance not of procedure one is required to put one's version in the cross- examination of the opponent. The effect of non-

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cross-examination is that the statement of the witness has not been disputed. The effect of not cross-examining the witnesses has been considered by this Court in Bhoju Mandal v. Debnath Bhagat [Bhoju Mandal v. Debnath Bhagat, 1963 AIR(SC) 1906]. This Court repelled a submission on the ground that the same was not put either to the witnesses or suggested before the courts below. A party is required to put his version to the witness. If no such questions are put the Court would presume that the witness account has been accepted as held in Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd. 1958 AIR(P&H) 440.

16. In Maroti Bansi Teli v. Radhabai [Maroti Bansi Teli v. Radhabai, 1945 AIR(Nag) 60, it has been laid down that the matters sworn to by one party in the pleadings not challenged either in pleadings or cross- examination by another party must be accepted as fully established. The High Court of Calcutta in A.E.G. Carapiet v. A.Y. Derderian 1961 AIR(Cal) 359 has laid down that the party is obliged to put his case in cross-

examination of witnesses of the opposite party. The rule of putting one's version in cross-examination is one of essential justice and not merely a technical one. A Division Bench of the Nagpur High Court in Kuwarlal Amritlal v. Rekhlal Koduram 1950 AIR(Nag) 83 has laid down that when attestation is not specifically challenged and the witness is not cross- examined regarding details of attestation, it is sufficient for him to say that the document was attested. If the other side wants to challenge that statement, it is their duty, quite apart from raising it in the pleadings, to cross-examine the witness along those lines. A Division Bench of the Patna High Court in Karnidan Sarda v. Sailaja Kanta Mitra 1940 AIR(Pat) 683 has laid down that it cannot be too strongly emphasised that the system of administration of justice allows of cross-examination of opposite party's witnesses for the purpose of testing their evidence, and it must be assumed that when the .

> witnesses were not tested in that way, their evidence is to be ordinarily accepted. In the aforesaid circumstances, the High Court has gravely erred in law in reversing the findings of the first appellate court as to the factum of execution of the sale deed in favour of the plaintiff."

29. Thus, his testimony that he knew the accused has to be accepted as correct. Being the acquaintance of the accused, it was quite natural for the accused to visit him for seeking help.

30. It was submitted that his testimony is not reliable as he has been confronted with his previous statement. Before, appreciating this submission, it is necessary to look into the legal provisions.

31. Proviso to Section 162 of Cr.P.C. permits the use of the statement recorded by the police to contradict a witness. It reads:

> Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872) and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

32. Thus, it is apparent that the defence can use the statement to contradict a witness if the statement is proved. It .

was laid down by the Hon'ble Bombay High Court about a century ago in Emperor vs. Vithu Balu Kharat (1924) 26 Bom. L.R. 965 that the previous statement has to be proved before it can be used. It was observed:

r to "The words "if duly proved" in my opinion, clearly show that the record of the statement cannot be admitted in evidence straightaway but that the officer before whom the statement was made should ordinarily be examined as to any alleged statement or omitted statement that is relied upon by the accused for the purpose of contradicting the witness; and the provisions of Section 67 of the Indian Evidence Act apply to this case, as well as to any other similar ease. Of course, I do not mean to say that, if the particular police officer who recorded the statement is not available, other means of proving the statement may not be availed of, e.g., evidence that the statement is in the handwriting of that particular officer."

33. It was laid down by Hon'ble Supreme Court in Muthu Naicker and others etc. Versus State of T.N. (1978) 4 SCC 385, that if the witness affirms the previous statement, no proof is necessary, but if the witness denies or says that he did not remember the previous statement, the investigating officer should be asked about the same. It was observed:-

"52. This is the most objectionable manner of using the police statement and we must record our emphatic disapproval of the same. The question should have been framed in a manner to point out that from amongst those accused mentioned in examination-in-chief there were .

some whose names were not mentioned in the police statement and if the witness affirms this no further proof is necessary and if the witness denies or says that she does not remember, the investigation officer should have been questioned about it."

34. The Hon'ble Guwahati High Court held in Md.

Badaruddin Ahmed versus State of Assam, 1989 Cri. L.J. 1876 that if the witness denies having made the statement, the portion marked by the defence should be put to the investigating officer and his version should be elicited regarding the same. It was observed:-

"13. The learned defence counsel has drawn our attention to the above statement of the Investigating Officer and submits that P.W. 4 never made his above statement before the police and that the same being his improved version cannot be relied upon. With the utmost respect to the learned defence counsel, we are unable to accept his above contention. Because, unless the particular matter or point in the previous statement sought to be contradicted is placed before the witness for an explanation, the previous statement cannot be used in evidence. In other words, drawing the attention of the witness to his previous statement sought to be contradicted and giving all opportunities to him for explanation are compulsory. If any authority is to be cited on this point we may conveniently refer to the case of Pangi Jogi Naik v. State reported in AIR 1965 Orissa 205 : (1965 (2) Cri LJ 661). Further in the case of Tahsildar Singh v. State of U.P., reported in AIR 1959 SC 1012 : (1959 Cri LJ 1231) it was also held that the statement not reduced to writing cannot be contradicted and, therefore, in order to show that the statement sought to be contradicted was recorded by the police, it should be marked and exhibited. However, in the case at hand, there is nothing on the record to show that the previous .

statement of the witness was placed before him and that the witness was given the chance to explain. Again, his previous statement was not marked and exhibited. Therefore, his previous statement before the police cannot be used. Hence, his evidence that when he turned back he saw the accused Badaruddin lowering the gun from the chest is to be taken as his correct version.

14. The learned defence counsel has attempted to persuade us not to rely on the evidence of this witness on the ground that his evidence before the trial Court is contradicted by his previous statement made before the police. However, in view of the decisions made in the said cases we have been persuaded irresistibly to hold that the correct procedure to be followed which would be in conformity with S.145 of the

> Evidence Act to contradict the evidence given by the prosecution witness at the trial with a statement made by him before the police during the investigation will be to draw the attention of the witness to that part of the contradictory statement which he made before the police and questioned him whether he did in fact made that statement. If the witness admits having made the particular statement to the police, that admission will go into evidence and will be recorded as part of the evidence of the witness and can be relied on by the accused as establishing the contradiction. However, if, on the other hand, the witness denies to have made such a statement before the police, the particular portions of the statement recorded should be provisionally marked for identification as B-1 to B-1, B-2 to B-2 etc., (any identification mark) and when the investigating officer who had actually recorded the statements in question comes into the witness box, he should be questioned as to whether these particular statements had been made to him during the investigation by the particular witness, and obviously, after refreshing his memory from the case diary the investigating officer would make his answer in the affirmative. The answer of the Investigating Officer would prove the statements B-1 to B-1, B-2 to B-2 which are then exhibited as Ext. D. 1, Ext. D. 2 etc. (exhibition mark) in the case and will go into evidence, and may, thereafter, be relied on by the accused .
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> as contradictions. In the case in hand, as was discussed above, the above procedure was not followed while cross- examining the witness to his previous statements, and, therefore, we have no alternative but to accept the statement given by this witness before the trial Court that he saw the accused Badaruddin lowering the fun from his chest to be his correct version.

35. Hon'ble Andhra Pradesh High Court held in Shaik Subhani alias Bombay Subhani and another Versus State of Andhra Pradesh, 2000 Cri. L.J. 321 that putting a suggestion to the witness and the witness denying the same does not amount to putting the contradiction to the witness. The attention of the witness has to be drawn to the previous statement and if he denies the same, the same is to be proved by the investigating officer. It was observed:-

> "24. As far as contradictions put by the defence is concerned, we would like to say that the defence counsel did not put the contradictions in the manner in which they ought to have been put. By putting suggestions to the witness and the witness denying the same will not amount to putting contradiction to the witness. The contradiction has to be put to the witness as contemplated under S. 145 of the Evidence Act. If a contradiction is put to the witness and it is denied by him, then his attention has to be drawn to the statement made by a such witness before the police or any other previous statement and he must be given a reasonable opportunity to explain as to why such contradiction appears and he may give any answer if the statement made by him is shown to him and if he confronted with such a statement and thereafter the said contradiction must be proved through the investigation officer. Then only it amounts to putting the contradiction .

to the witness and getting it proved through the investigation officer.

36. The Hon'ble Calcutta High Court took a similar view in Anjan Ganguly & Ors. Versus State of West Bengal, 2013 (3) DMC 760 and held: -

> "22. It was held in State of Karnataka v. Bhaskar Kushali Kothakar & Ors., (2004) 7 SCC 487 that if any statement of the witness is contrary to the previous statement recorded under Section 161, Cr.P.C. or suffers from the omission of certain material particulars, then the previous statement can be proved by examining the Investigating Officer who had recorded the same. Thus, there is no doubt that for proving the previous statement Investigating Officer ought to be examined, and the statement of the witness recorded by him, can only be proved by him and he has to depose to the extent that he had correctly recorded the statement, without adding or omitting, as to what was stated by the witness.
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> xxxxx
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> 24. Proviso to Section 162(1), Cr.P.C. states in clear terms that the statement of the witness ought to be duly proved. The words if duly proved, cast a duty upon the accused who wants to highlight the contradictions by confronting the witness to prove the previous statement of a witness through the police officer who has recorded the same in an ordinary way. If the witness in the cross-examination admits contradictions then there is no need to prove the statement. But if the witness denies a contradiction and the police officer who had recorded the statement is called by the prosecution, the previous statement of the witness on this point may be proved by the police officer. In case the prosecution fails to call the police officer in a given situation Court can call this witness or the accused can call the police officer to give evidence in defence. There is no doubt that unless the statement as per proviso to sub- section (1) of Section 162, Cr.P.C. is duly proved, a .
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> contradiction in terms of Section 145 of the Indian Evidence Act cannot be taken into consideration by the Court.
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> 25. To elaborate on this further, it will be necessary to reproduce Section 145 of the Indian Evidence Act. "S. 145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

26. Therefore, it is appropriate that before the previous statement or statement under Section, 161, Cr.P.C. is proved, the attention of the witness must be drawn to the portion in the statement recorded by the Investigating Officer to bring to light the contradiction, a process called

confrontation.

27. Let us first understand what is proper procedure. A witness may have stated in the statement under Section 161, Cr.P.C. that 'X murdered Y'. In the Court witness stated, 'Z murdered Y'. This is a contradiction. Defence Counsel or Court and even prosecution if the witness is declared hostile having resiled from the previous statement, is to be confronted to bring contradiction on record. The attention of the witness must be drawn to the previous statement or statement under Section 161, Cr. P.C., where it was stated that 'X murdered Y'. Since Section 145 of the Indian Evidence Act uses the word being proved, therefore, in the course of the examination of the witness, previous statement or statement under Section 161, Cr.P.C. will not be exhibited but shall be assigned a mark, and the portion contradicted will be specified. The trial Court in the event of contradiction has to record it as under.

28. Attention of the witness has been drawn to portions A to A of the statement marked as 1, and confronted with the .

portion where it is recorded that 'X murdered Y'. In this manner by way of confrontation contradiction is brought on record. Later, when the Investigating Officer is examined, the prosecution or defence may prove the statement, after the Investigating Officer testifies that the statement assigned mark was correctly recorded by him at that stage statement will be exhibited by the Court. Then contradiction will be proved by the Investigating Officer by stating that the witness had informed or told him that 'X murdered Y' and he had correctly recorded this fact.

29. Now a reference to the explanation to Section 162, Cr.P.C. which says that an omission to state a fact or circumstance may amount to contradiction. Say for instance if a witness omits to state in Court that 'X murdered Y', what he had stated in a statement under Section 161, Cr.P.C. will be a material contradiction, for the Public Prosecutor, as the witness has resiled from the previous statement, or if 'W' has been sent for trial for a charge of murder, omission to state 'X murdered Y' will be a material omission, and amount to contradiction so far defence of 'W' is concerned. At that stage also the attention of the witness will be drawn to a significant portion of the statement recorded under Section 161, Cr.P.C. which the witness had omitted to state and note shall be given that attention of the witness was drawn to the portion A to A wherein it is recorded that 'X murdered Y'. In this way, the omission is brought on record. The rest of the procedure stated earlier qua confrontation shall be followed to prove the statement of the witness and the fact stated by the witness.

30. Therefore, to prove the statement for the purpose of contradiction it is necessary that the contradiction or omission must be brought to the notice of the witness. His or her attention must be drawn to the portion of the previous statement (in the present case statement under Section 161, Cr.P.C.)

37. In the present case, the investigating officer was not asked about the contradiction and the same has not been proved .

as per the law. Hence, no advantage can be derived from the same.

38. The statement of Swaran Singh is duly corroborated by Narender Kumar (PW13). He stated that he was working as a servant in the garment shop of Pawan Kumar for the last 10 years. He was present in his shop on 19.04.2017 at about 3:00- 4:00 pm, when the accused came to the shop. The accused was wearing a half-sleeved white shirt and blue pant. The accused had injury marks over his hand and arm. The accused purchased two shirts and two pants from his shop for 2,100/-. He stated in his cross-examination that about 15-20 customers visited his shop on 19.04.2017. He had not given any bill regarding the purchase. He admitted that he used to see his customers very carefully but did not remember the details of other customers on that day. Many shops were adjoining to his shop and it was a busy place. He denied that the accused did not purchase the clothes from his shop on the said date.

39. It was submitted that the testimony of this witness is not reliable. The police did not conduct the test identification parade to test his power of identification and his testimony .

regarding the identification in the Court cannot be relied upon.

Reliance was placed upon the judgment of the Hon'ble Supreme Court in Kanan and others versus State of Kerala, 1979 (3) SCC 319 and Mohammad Iqbal (M) Sheikh versus State of Maharashtra 1998 (4) SCC 494 in support of this submission. This submission cannot be accepted. It was laid down by the Hon'ble Supreme Court in Matru alias Girish Chandra Versus State of UP (1971) 2 SCC 75 that the test identification parade does not constitute a substantive piece of evidence. It is meant for the investigating agency to lend an assurance that the investigation is proceeding along the right lines. This position was reiterated in Rameshwar Singh Versus State AIR 1972 SC 102 and it was held that the substantive piece of evidence is identification in the Court and there is no requirement of its corroboration from a previous identification parade. It was observed:

> 6. Before dealing with the evidence relating to the identification of the appellant it may be remembered that the substantive evidence of a witness is his evidence in court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing a corroboration of the evidence to be given by the witness later in court at the trial.

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From this point of view, it is a matter of great importance both for the investigation agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards are effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned who was a stranger to the accused because in that event the chances of his memory fading are reduced and he

is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is thus and thus alone that justice and fair play can be assured both to the accused and the prosecution. The identification during police investigation, it may be recalled, is no substantive evidence in law and it can only be used for corroborating or contradicting evidence of the witness concerned as given in court. The identification proceedings, therefore, must be so conducted that evidence with regard to them when given at the trial, enables the court safely to form an appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicting the statement in a court of the identifying witness.

40. Similar is the judgment in State of Maharashtra Versus Suresh (2000) 1 SCC 471, wherein it was observed:

> "We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is the one who was seen by them in connection with the commission of the crime. The second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence.
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> .

41. This question was considered exhaustively in Munshi Singh Gautam Versus State (2005) 9 SCC 631 wherein it was held that failure to hold a test identification parade will not make the evidence of test identification in the Court inadmissible and the Court may accept the evidence of the identification made in the Court or it may reject the same. It was observed:

> 16. As was observed by this Court in Matru v. State of U.P. (1971 (2) SCC 75) identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding along the right lines. The identification can only be used as corroborative of the statement in court. (See Santokh Singh v. Izhar Hussain (1973 (2) SCC 406). The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon the first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to

> eliminate the possibility of the accused being shown to the witnesses .

prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of the investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad .

v. Delhi Administration (AIR 1958 SC 350), VaikuntamChandrappa and others v. State of Andhra Pradesh (AIR 1960 SC 1340), Budhsen and another v. State of U.P. (AIR 1970 SC 1321) and Rameshwar Singh v.

State of Jammu and Kashmir (AIR 1972 SC 102).

18. In Jadunath Singh and another v. The State of Uttar Pradesh (1970) 3 SCC 518), the submission that absence of test identification parade in all cases is fatal, was repelled by this Court after exhaustive considerations of the authorities on the subject. That was a case where the witnesses had seen the accused over a period of time. The High Court had found that the witnesses were independent witnesses having no affinity with the deceased and entertained no animosity towards the appellant. They had claimed to have known the appellants for the last 6-7 years as they had been frequently visiting the town of Bewar. This Court noticed the observations in an earlier unreported decision of this Court in Parkash Chand Sogani v. The State of Rajasthan (Criminal Appeal No. 92 of 1956 decided on January 15, 1957), wherein it was observed:-

> "It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of P.W. 7, it seems to us clear that Shiv Lal knew the appellant by sight. Though he made a mistake about his name by referring to him as Kailash

> Chandra, it was within the knowledge of Shiv Lal that the appellant was a brother of Manak Chand and he identified him as such. These circumstances are quite enough to show that the absence of the identification parade would not vitiate the evidence. A person who is well-known by sight as the brother of Manak Chand, even before the commission of the occurrence, need not be put before an identification parade in order to be marked out. We do not think that there is any justification for the contention that the absence of the identification parade or a mistake made as to his name, would be necessarily fatal to the prosecution case in the circumstances."

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The Court concluded:

> "It seems to us that it has been clearly laid down by this Court, in Parkash Chand Sogani v. The State of Rajasthan (supra) that the absence of test identification in all cases is not fatal and if the accused person is well-known by sightit would be waste of time to put him up for identification. Of course, if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case."

19. In Harbhajan Singh v. State of Jammu and Kashmir (1975) 4 SCC 480), though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in Court corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll call and when they were arrested on the night of 16th December, 1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held:-

> "In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the Investigating Officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in Jadunath Singh v. State of U.P. (AIR 1971 SC 363) absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villages only shows that the accused were not previously known to him
> .
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> and the story that the accused referred to each other by their respective names during the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant."

42. Therefore, it is apparent from the binding precedents of the Hon'ble Supreme Court that test identification is not necessary in every case and where the witness had a chance to see the accused and a reason to remember him, the failure to conduct the test identification parade is not fatal.

43. In the present case, this witness specifically stated that the accused had sustained injuries. His shirt was torn. It is quite unusual for a shopkeeper to see an injured person wearing torn clothes; therefore, he had a reason to remember the accused and his testimony cannot be discarded in the absence of the previous test identification parade. Further, his testimony is in accordance with the statement of Swaran Singh (PW14), who was known to the accused and has deposed that the accused had visited the shop to purchase new clothes.

44. Dr. Richa Mehrotra (PW26) conducted the medical examination of accused Sunil Kumar on 25.04.2017 and found 13 injuries on his person. According to her, most of the injuries were .

caused within 5 to 7 days except injury No.11, which was caused within 48 hours. She examined the accused on 25.04.2017 and as per her testimony, the accused had sustained injuries between 18.04.2017 to 20.04.2017. Her statement corroborates the statements of Swaran Singh and Narender Kumar that the accused had sustained injuries on 19.04.2017. In these circumstances, the learned Trial Court had rightly relied upon the statement of these witnesses.

45. The Police arrested the accused on 25.04.2017 at 10:30 am. The accused made a disclosure statement (Ext. PW15/C) that he could get the sleeves and gold chain recovered. He led the police party and the witnesses to Jabbar Khad from where sleeves were recovered. He also led the police party and witnesses to the shop of Anil Verma, a goldsmith and recovered a gold chain.

These facts were proved by the statements of Gian Chand Thakur (PW29), Anil Kumar (PW28), HHC Nardev Singh (PW25), Rajinder Soga (PW15), and Sunny (PW8).

46. It was submitted that statement (Ext. PW15/C) recorded under Section 27 of the Indian Evidence Act is witnessed by Rajinder Prasad Soga and HHC Nardev Singh. The .

statement cannot be relied upon as it was not witnessed by two independent witnesses. HHC-Nardev is a police official and Rajinder Soga (PW15) admitted in his cross-examination that he used to attend the police investigation on being called by the police. He also admitted that the police had called him in a number of cases for investigation. These admissions show that he is known to the police and is a stock witness; hence, no reliance can be placed on the disclosure statement and the consequent recoveries. This submission cannot be accepted. The question regarding the association of independent witnesses during the disclosure statement was considered by the Hon'ble Supreme Court in State Versus Sunil 2001 (1) SCC 652. In the said case the recovery was discarded by the High Court on the ground that no independent witness had signed the memo and it was signed only by the highly interested person. It was held by the Hon'ble Supreme Court that there is no requirement under Section 27 of the Indian Evidence Act or Section 161 of Cr.P.C. to obtain the signatures of independent witnesses. The requirement of independent witnesses is when the recovery is effected under Section 100(4) of Cr.PC and not when the recovery is effected pursuant to

the disclosure statement. It was further .

observed that statements of police officials cannot be doubted on the grounds that they are official witnesses. It was observed: -

> "17. Recovery of the nicker is evidenced by the seizure memo Ext. PW-10/G. It was signed by PWlO-Sharda beside its author PW17-Investigating Officer. The Division Bench of the High Court declined to place any weight on the said circumstance purely on the ground that no other independent witness had signed the memo but it was signed only by "highly interested persons".

The observation of the Division Bench in that regard is extracted below:

> "It need hardly be said that in order to lend assurance that the investigation has been proceeding in a fair and honest manner, it would be necessary for the Investigating Officer to take independent witnesses to the discovery under Section 27 of the Indian Evidence Act; and without taking independent witnesses and taking highly interested persons and the police officers as the witnesses to the discovery would render the discovery, at least, not free from doubt."

18. In this context we may point out that there is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain the signature of independent witnesses on the record in which the statement of an accused is written. The legal obligation to call Independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. Section 100(5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or another person "and signed by such witnesses". It must be remembered that a search is made to find out a thing or document which the .

searching officer has no prior idea where the thing or document is kept. He prowls for it either on reasonable suspicion or some guesswork that it could possibly be ferreted out in such prowling. It is a stark reality that during searches the team which conducts the search would have to meddle with lots of other articles and documents also and in such a process, many such articles or documents are likely to be displaced or even strewn helter-skelter. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. But the recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. This Court has indicated the difference between the two processes in the Transport Commissioner, Andhra Pradesh, Hyderabad & Anr. v. S. Sardar Ali & Ors.1.

Following observations of Chlnnappa Reddy, J. can be used to support the said legal proposition :

> "Section 100 of the Criminal Procedure Code to which reference was made by the counsel deals with searches and not seizures. In the very nature of things when the property is seized and not recovered during a search, it is not possible to comply with the provisions of subsection (4) and (5) of Section 100 of the Criminal Procedure Code. In the case of a seizure (under the Motor Vehicles Act), there is no provision for preparing a list of the things seized in the course of the seizure for the obvious reason that all those things are seized not separately but as part of the vehicle itself."

19. Hence it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the Investigating Officer contemporaneous with such recovery must necessarily be attested by independent witnesses. Of .

course, if any such statement leads to the recovery of any article it is open to the Investigating Officer to take the signature of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the Investigating Officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.

20. We feel that it is an archaic notion that the actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hangover persisted during post- independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law, the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the .

reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions."

47. This question was also considered by Hon'ble Supreme Court in Praveen Kumar Versus State of Karnataka (2003) 12 SCC 199 in which a contention was raised that the r to statement recorded by the police under Section 27 of the Indian Evidence Act was not witnessed by any independent witness and the same should be rejected. It was held that there is no requirement to associate

independent witnesses at the time of the disclosure statement. It was observed: -

> "20. The learned counsel for the appellant, however, contended that the alleged statement, Ext. P-35 was made to PW 33, not in the presence of any independent witness hence the same should be rejected. He also contended that the said statement was made on 2-3- 1994 but the recovery was made only on 3-3-1994, therefore, the said recovery cannot be correlated to the statement, if any, made by the accused on 2-3-1994. He also challenged the fact of recovery stating that the panch witnesses for the said recovery cannot be believed.
>
> 21. Section 27 does not lay down that the statement made to a police officer should always be in the presence of independent witnesses. Normally, in cases where the evidence led by the prosecution as to a fact depends solely on the police witnesses, the courts seek corroboration as a matter of caution and not as a matter of rule. Thus, it is only a rule of prudence which makes the court to seek corroboration from an independent source, in such cases while assessing the evidence of the police. But in cases where the court is satisfied that the .
>
> evidence of the police can be independently relied upon then in such cases, there is no prohibition in law that the same cannot be accepted without independent corroboration. In the instant case, nothing is brought on record to show why the evidence of PW 33 10 should be disbelieved in regard to the statement made by the accused as per Ext. P-35. Therefore, the argument that the statement of the appellant as per Ext. P-35 should be rejected because the same is not made in the presence of an independent witness has to be rejected."

48. The Full Bench of Hon'ble Rajasthan High Court has also considered this question in State of Rajasthan vs. Mangal Singh AIR 2017 Raj. 68 and gave the following reasons for not insisting upon the presence of independent witnesses during the disclosure statements:

> 22. We are of the firm opinion that the insistence to keep attesting witnesses present when the Investigating Officer records the information supplied by the accused under Section 27 of the Evidence Act is absolutely unwarranted and rather amounts to a direct infringement in the confidentiality of the investigation.

There are strong reasons behind this conclusion. We summarize a few illustrations in order to fortify the same:

> (a) Investigation commences the moment an F.I.R. is registered for a cognizable offence. An Investigating Officer, having custody of the accused cannot predict in advance the precise moment when the accused would decide to reveal the information, which could lead to the discovery of an incriminating fact. Thus, if attestation of the information by an independent witness is persisted upon, as a direct corollary thereto, the Investigating Officer would be required to keep the

witnesses in attendance right from the moment, the accused is arrested till the information .

is elicited. This would lead to an absolutely absurd situation and is likely to frustrate the investigation. The very sanctity of investigation and the privilege available to the Investigating Officer to keep the investigation secluded from prying eyes would be compromised.

(b) Another possible situation may be that the accused might divulge the information under Section 27 of the Evidence Act to the Investigating Officer at a particular point of time when independent witnesses are not available. For adhering to the procedure of seeking attestation by independent witnesses, the Investigating Officer would then be required to summon independent witnesses and request the accused to repeat the information in their presence. At this point of time, the accused may either refuse to divulge the information given earlier or may oblige the Investigating Officer with the information which would then be taken down in writing in the presence of the independent attesting witnesses. However, there is a fundamental glitch in adopting this procedure, which would certainly make the information, if any received the second time around in the presence of the witnesses inadmissible in evidence. Law is well settled by a catena of decisions of the Hon'ble Supreme Court including the judgment in the case of Aher Raja Khima v. The State of Saurashtra, reported in AIR 1956 SC 217 that information of a fact already known to the Investigating Officer is inadmissible in evidence. Thus, in case the Investigating Officer, while making an investigation from the accused in his custody is provided information under Section 27 of the Evidence Act and soon thereafter, calls the Panchas and records the same in their presence, then he would be recording the memorandum of information already known to him. Such information would be inadmissible at the outset and thus, the entire endeavour would become nothing .

short of an exercise in futility.

(c) There is yet another risk involved, which could severely prejudice the accused if the information provided by the accused under Section 27 is recorded in the presence of independent witnesses. The information under Section 27 of the Evidence Act often comprises of two parts; one being confessional which has to be excluded and the other which leads to the discovery of an incriminating fact and is admissible in evidence to the extent of the discovery made in pursuance thereof. In case, independent witnesses are kept present when the information is given by the accused, the prosecution may make an endeavour to prove even the confessional part of the information as being an extra-judicial confession made in the presence of independent witnesses.

There may even arise a situation where the independent witness present to attest to the memorandum prepared under Section 27 of the Evidence Act is a Magistrate. In such a case, the confessional part of the information under Section 27 of the Evidence Act would almost assume the character of a confession under Section 26 of the Evidence Act thereby condemning the accused to face severe consequences. There is a high probability of this situation arising in cases involving the recovery of narcotics where the Investigating Officer gives an option to the accused that can be searched in the presence of a Magistrate or a Gazetted Officer. Contemplating that option to be searched in the presence of a Magistrate is given and a search of the accused is conducted and

during the process, he is also questioned in the presence of the Magistrate. At this time, the accused may provide information under Section 27 of the Evidence Act to the Investigating Officer which is partly confessional in nature and is taken down in writing and got witnessed by the Magistrate by adhering to the requirement of attestation. In such a situation, the accused would be faced with severe consequences .

because the prosecution would then, by lifting the prohibition contained in Section 26 of the Evidence Act insist to prove the whole of the information as amounting to a confession made in the presence of a Magistrate. Thus, the requirement seeking attestation of the memorandum prepared under Section 27 of the Evidence Act does not have any logic or rationale behind it."

49. Therefore, the disclosure statement discarded on the ground that independent witnesses were not r cannot be associated.

50. Rajinder Soga (PW15) stated that he has been running a photography and videography shop at Jasoor for 42 years. This part of his statement shows that he is a professional photographer. Being a photographer, it is natural for the police to call him in various cases. In the present case, he had also taken the photographs of the spot. Thus, he was being associated by the police in his professional capacity and he cannot be called under the influence of the police. It was laid down by the Hon'ble Supreme Court in State of Uttar Pradesh versus Zakaullah 1998 (1) SCC 557, that acquaintance with the police will not destroy a man's independent outlook. Every person is to be presumed to be an independent person unless it is proved to be otherwise. It was observed: -

> "[10] The necessity for "independent witness" in cases .
>
> involving police raid or police search is incorporated in the statute, not for the purpose of helping the indicted person to bypass the evidence of those panch witnesses who have had some acquaintance with the police or officers conducting the search at some time or the other. Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon, many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or any other matter, it cannot be said that they are not independent persons. If the police in order to carry out official duties have sought the help of any other person he would not forfeit his independent character by giving help to police action. The requirement to have an independent witness to corroborate the evidence of the police is to be viewed from a realistic angle. Every citizen of India must be presumed to be an independent person until it is proved that he was dependent on the police or other officials for any purpose whatsoever. Hazari Lal v. Delhi Administration, (1980) 2 SCR 1033: (AIR 1980 SC 873)."

51. Hence, the submission that the statement of Rajinder Soga is to be discarded as he was known to the police or the whole of the disclosure statement and the consequent recovery is to be rejected in the absence of independent witnesses is not acceptable.

52. Gian Chand Thakur (PW29) stated that the accused made a disclosure statement (PW15/C) that on 19.04.2017, he had worn a white shirt, blue jean., He went to Jabbar Khad after murdering Kamal Kaur. He cut the sleeves of the shirt with the stone at Jaabbar Khad and threw the sleeves in the khad. He .

washed his clothes and wore the wet clothes. He went to Pathankot. He further disclosed that he had stolen the gold chain of the deceased, which was sold by him at Pathankot. He purchased the clothes at Pathankot and changed the clothes to new ones. He had thrown the old clothes on the roadside and he could identify all the places.

53. The statement made by the accused is sought to be proved under Section 27 of the Indian Evidence Act. Section 27 of the Indian Evidence Act reads:

> "27. How much of information received from the accused may be proved.
>
> Provided 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."

54. It is apparent from the bare perusal of the section that the whole of the statement made by the accused is not admissible but only so much of the information that leads to the discovery of the fact can be admitted. This provision fell for consideration before the Judicial Committee of the Privy Council in Pulukari Kotayya vs. King Emperor AIR 1947 P.C. 67. This judgment is a locus classicus and it settled much of the controversy about the .

interpretation of Section 27. Lord Beaumont J. who spoke on behalf of the Judicial Committee, said:

> "Normally, the Section is brought into operation when a person in police custody produces from some place of concealment, some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is the accused".

55. The statement made in the said case by the accused was:

> "...About 14 days ago, I, Kotayya and the people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kotayya and Narayana ran away.
>
> Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show you if you come. We did all this at the instigation of Pulukuri Kotayya."

56. It was contended before the Judicial Committee on behalf of the crown that the information given by the person that the weapon produced is the one used by him in the commission of the murder would be admissible. This contention was rejected and it was said:

> "If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure.
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> .
>
> But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion and that in practice the ban will lose its effect"

57. The meaning of the term 'fact discovered' was explained as follows:

> "In their Lordships' view, it is fallacious to treat the 'fact discovered' 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 distinctly 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 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." (Emphasis supplied).

58. Ultimately, it was held that the whole of the statement made by the accused in that case except the passage "'I hid it' (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible. It was held:

> "The whole of that statement except the passage I hid it [a .
>
> spear] and my stick in the rick of Venkatanarasu in the village. I will show if you come is inadmissible. In the evidence of the witness Potla China Mattayya proving the document the statement that accused 6 said I Mattayya and others went to the corner of the tank-land. We killed Sivayya and Subayya must be omitted. A confession of accused 3 was deposed to by the police sub-inspector, who said that

> accused 3 said to him: "I stabbed Sivayya with a spear, I hid the spear in a yard in my village. I will show you the place." The first sentence must be omitted. This was followed by a Mediatornama, Exhibit Q.1, which is unobjectionable except for a sentence in the middle. He said that it was with that spear that he had stabbed Boddupati Sivayya, which must be omitted."

59. In Mohammed Inayatullah vs. State of Maharashtra 1976 (1) SCC 828 the accused made the following statement:

> "I will tell the place of deposit of the three Chemical drums which I took out from the Haji Bunder on 1st August."

60. It was held that only the statement that the accused will tell the place of deposit of three chemical drums is admissible and the latter part of the statement has to be excluded. It was observed:

> "Having cleared the ground, we will now consider, in the light of the principles clarified above, the application of Section 27 to this statement of the accused. The first step in the process was to pinpoint the fact discovered in a consequence of this statement. Obviously, in the present case, the threefold fact discovered was: (a) the chemical drums in question, (b) the place i. e. the Musafirkhana, Crawford Market, wherein they lay deposited and (c) the accused's knowledge of such deposit. The next step would be to split up the statement into its components and to separate the admissible from the inadmissible portion or .
>
> portions. Only those components or portions which were the immediate cause of the discovery would be legal evidence and not the rest which must be excised and rejected. Thus processed, in the instant case, only the first part of the statement, viz., "I will tell the place of deposit of the three Chemical drums" was the immediate and direct cause of the fact discovered. Therefore, this portion only was admissible under Section 27. The rest of the statement, namely, "which I took out from the Haji Bunder on first August", constituted only the past history of the drums or their theft by the accused; it was not the distinct and proximate cause of the discovery and had to be ruled out of evidence altogether."

61. Similarly, it was held in Aloke Nath Datta vs. State of West Bengal 2007 (12) SCC 230 that the whole of the statement of the accused cannot be brought on record and only the portion, that leads to the discovery of the fact, can be brought on record.

It was observed:

> 53. It is, however, disturbing to note that a confession has not been brought on records in a manner contemplated by law. The law does not envisage taking on record the entire confession by marking it an exhibit incorporating both the admissible and

> inadmissible parts thereof together. We intend to point out that only that part of the confession which is admissible would be leading to the recovery of the dead body and/or recovery of articles of Biswanath, the purported confession proceeded to state even the mode and manner in which Biswanath was allegedly killed. It should not have been done. It may influence the mind of the court. [See State of Maharashtra v. Damu S/o Gopinath Shinde & Others (2000) 6 SCC 269 at p. 282 para 35]
>
> 54. In Anter Singh v. State of Rajasthan (2004) 10 SCC 657, it was stated :
>
> "11. The scope and ambit of Section 27 of the .
>
> Evidence Act were illuminatingly stated in Pulukuri Kottaya v. Emperor in the following words, which have become locus classicus: (AIR p. 70, para 10) "It is fallacious to treat the fact discovered 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 distinctly to this fact. Information as to the 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."

[But see Dhananjoy Chatterjee @ Dhana v.

State of West Bengal (1994) 2 SCC 220 at p.234-235

55. Therefore, we would take note of only that portion of the confession which is admissible in evidence.

62. This position was reiterated in Krishan v. State of Haryana, 2024 SCC OnLine SC 70, wherein it was observed:

> 10. According to the prosecution case, on 09th February 2004, the appellant led the police party to a place where he had thrown the dead bodies. However, dead bodies were already recovered on 05th January 2004. Therefore, the place from which dead bodies were recovered was known .

to the police long before the 09th of February 2004.

Consequently, it cannot be said that there was a discovery by the appellant of the place where dead bodies were kept. Therefore, that part of the statement of the accused, which records that he would show the place where he had thrown the dead bodies, is not admissible in evidence under Section 27 of the Indian Evidence Act, 1872.

63. Therefore, in view of these judgments, the whole of the statement made by the accused cannot be admitted and only the portion of the statement that the accused could get the sleeves and gold chain recovered is admissible.

64. Gian Chand Thakur (PW-29) denied in his cross-

examination that the fact regarding the cutting of the sleeves of the shirt and recovery from Jabbar Khad was falsely incorporated. He stated that he did not get the sleeves measured with the arms of the accused.

65. The statement of Gian Chand Thakur (PW-29) was corroborated by SI-Anil Kumar (PW28) who stated that the accused made a disclosure statement that he could get the sleeves of the shirt and the gold chain recovered. This statement was reduced to writing. The accused led the police party and the witnesses to Jabbar Khad and identified the place from where two sleeves of shirt stuck in the stones of Jabbar Khad were recovered. The accused also led the police to the shop of Anil Verma (Goldsmith) and got the chain recovered. Police seized .

these articles. He stated in his cross-examination that Jabbar Khad was a flowing khad. The disclosure statement was recorded on 26.04.2017 at Police Station, Nurpur. He denied that the disclosure statement was not made by the accused voluntarily and the accused was tortured. He admitted that Rajinder Soga was associated by the police in many cases as a photographer. He denied that the accused did not make any disclosure statement and did not get any recovery effected.

66. Rajinder Soga (PW15) stated that the accused made a disclosure statement that he could get the sleeves of the shirt and gold chain recovered. He led the police towards Jabbar Khad and showed the place from where two sleeves were recovered. He also led the police to the shop of Anil Kumar, from where the gold chain was recovered. He stated in his cross-examination that several shops and Abadi exist near the police station. The police conducted the proceedings at Jabaar Khad for around 20-25 minutes. He admitted that he was called by the police in a number of cases. He denied that no disclosure statement was made nor any recovery was effected.

67. HHC-Nardev Singh (PW25) stated that the accused .

made a disclosure statement that he could get the sleeves of the shirt and the gold chain recovered. He led the police towards Jabbar Khad and showed the place, from where the sleeves of the shirt were recovered. He also got a gold chain recovered from the shop of goldsmith Anil Verma. He duly identified these articles.

He stated in his cross-examination that he did not remember the time of making the statement by the accused. He and Rajinder Soga (PW-15) were present at the time of making the statement.

He did not remember the time of reaching Jabbar Khad. He admitted that there are many residential houses and shops on the way. It took about 15-20 minutes to conduct the proceedings at Jabaar Khad. He denied that there are many huts and houses near Jabbar Khad. The clothes were recovered from the water in Jabbar Khad. They conducted the proceedings at Jabbar Khad and went to the shop of Jeweler Anil Verma. Many shops were located adjacent to the shop of Anil Verma. They returned to the police station after conducting the proceedings at the shop of the jeweller. Rajinder Soga was not visible in the photograph. He stated that Rajinder Soga was a photographer and he was taking the photographs.

68. The statements of these witnesses are consistent.

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There is nothing in their cross-examination to show that they are making false statements. It was suggested that many houses/shops are located in the vicinity of the place of making the disclosure statement, as well as, the place of recovery.

However, the existence of shops and houses is not significant in view of the judgments of the Hon'ble Supreme Court laying down that there is no requirement to associate independent witnesses at the time of recording disclosure statements and consequent recovery under Section 27 of the Indian Evidence Act. Hence, their testimonies cannot be rejected on the grounds of non-

association of independent witnesses. There is nothing else to discard their testimonies and the learned Trial Court rightly relied upon these testimonies.

69. Sunny (PW8) stated that he was called by the police and was taken to the shop of Anil Verma. The shopkeeper produced the chain and he identified the same. He stated in his cross-examination that he was not visible in the photographs.

He denied that the chain did not belong to his mother.

70. Shalini (PW11) stated that she was called by the police on 23.04.2017. Police opened the sealed room. When the articles were checked, one gold chain was found missing. She knew about .

the chain as her mother used to wear it. She duly identified the chain in the Court. She stated in her cross-examination that she was never informed by her mother about any threat given by the accused or his wife. She denied that she had not identified the chain of her mother and she was making a false statement.

71. The testimonies of these witnesses duly prove that the chain recovered at the instance of the accused belonged to their deceased mother. It was submitted that there is no mark of identification

on the chain and the identification made by these witnesses cannot be accepted. While dealing with a similar argument, the Hon'ble Supreme Court held in Earabhadrappa Versus State of Karnataka (1983) 2 SCC 330 that the ladies have an uncanny sense of identifying the articles of personal use in the family and their testimonies cannot be discarded on the ground that such articles were not mixed with similar articles in a test identification parade. It was observed:

> "12. Our attention was drawn to the testimony of P. W. 13 Narayanareddy who, during his cross-examination, stated that ornaments similar to the gold rope chain and the pair of gold bangles were available everywhere and that other ornaments were also in his house. From this, it is sought to be argued that the seized ornaments cannot be treated to be stolen property as they are ordinary ornaments in common use. Nothing turns on this because P.W. 2 Smt. Bayamma, mother-in-law of the deceased, her husband P. .
>
> W. 3 Makarappa and son P. W. 4 G. M. Prakash have categorically stated that the seized ornaments belonged to the deceased Smt. Bachamma. There is no reason why the testimony of these witnesses should not be relied upon particularly when P. W. 2 Smt. Bayamma was not cross- examined at all as regards her identification of the seized ornaments and clothes as belonging to the deceased. Even if the seized ornaments could be treated to be ornaments in common use, this witness could never make a mistake in identifying the seized six silk sarees (M. Os. 10 to 15). It is a matter of common knowledge that ladies have an uncanny sense of identifying their belongings, particularly articles of personal use in the family. That apart, the description of the silk sarees in question shows that they were expensive sarees with distinctive designs. There is no merit in the contention that the testimony of these witnesses as regards the identity of the seized articles to be stolen property cannot be relied upon for want of prior test identification. There is no such legal requirement".

(Emphasis supplied)

72. Shalini specifically stated that she had noticed the chain on the person of her mother as she used to wear the same.

This part of her testimony has to be accepted as correct because being a daughter, she had a reason to notice the chain of her mother and her identification cannot be doubted.

73. It was submitted that the witnesses-Shalini and Sunny had not stated anything about the missing chain on 19.04.2017, although, they were present on the spot and had seen the dead body. A proper explanation has been provided for the same by Shalini that the room was opened on 23.04.2017 and it was earlier sealed by the investigator. Therefore, it was natural .

for her to look into the articles of her mother after the room was opened. On 19.4.2017, their mother died and it was not even certain whether the deceased was wearing the chain at the time of the incident or not; therefore, they could not have said anything about the absence of the chain without

looking into the household articles to determine whether the chain was missing or not. Thus, there is nothing unnatural in reporting on 23.04.2017 that the chain was missing after the room was opened and the testimonies of Shalini and Sunny cannot be doubted because they had not disclosed about the absence of the chain on 19.04.2017.

74. A heavy reliance was placed upon the statement of Gian Chand Thakur (PW29) in his cross-examination, wherein, he stated that he had seen the abrasion of snatching of gold chain on the neck of the deceased to submit that such abrasions were not seen in the post-mortem examination and this part of the statement is not reliable. Even if this part of the statement is discarded, the fact remains that the chain was found with the accused by Swaran Singh on 19.04.2017. The accused had asked Swaran Singh to help him to dispose of the chain because the accused was looted by some unknown person after assaulting .

him. Swaran Singh took the accused to the shop of the goldsmith.

The recovery was effected at the instance of the accused.

Therefore, the possession of the gold chain by the accused immediately after the murder was duly established on the record.

It was laid down by Hon'ble Supreme Court in Baiju v. State of M.P., (1978) 1 SCC 588: 1978 SCC (Cri) 142, that where the murder and theft were committed in the course of the same transaction, the recent possession of the stolen articles can only lead to an inference that the person who was in possession of the stolen articles had committed the murder as well. It was observed:

> "14. As has been stated, the prosecution has succeeded in proving beyond any doubt that the commission of the murders and the robbery formed part of one transaction, and the recent and unexplained possession of the stolen property by the appellant justified the presumption that it was he, and no one else, who had committed the murders and the robbery. It will be recalled that the offences were committed on the night intervening January 20 and 21, 1975, and the stolen property was recovered from the house of the appellant or at his instance on January 28, 1975. The appellant was given an opportunity to explain his possession, as well as his conduct in decoying SmtLakhpatiya and the other persons who died at his hand, but he was unable to do so. The question whether a presumption should be drawn under Illustration (a) of Section 114 of the Evidence Act is a matter which depends on the evidence and the circumstances of each case. Thus the nature of the stolen article, the manner of its acquisition by the owner, the nature of the evidence about its identification, the manner in which it was dealt with by .
>
> the appellant, the place and the circumstances of its recovery, the length of the intervening period, the ability or otherwise of the appellant to explain his possession, are factors which have to be taken into consideration in arriving at a decision. We have made a mention of the facts and circumstances bearing on these points and we

> have no doubt that there was ample justification for reaching the inevitable conclusion that it was the appellant and no one else who had committed the four murders and the robbery. In the face of the overwhelming evidence on which reliance has been placed by the High Court, it is futile to argue that the murders could not have been committed by a single person. As has been stated, there is satisfactory evidence on the record to show that the dead bodies of Ramdayal and Smt. Fulkunwar were found at two different places near the "nala" so that it cannot be said that they were murdered together. As regards Smt. Bhagwanti and Rambakas, the evidence on the record shows that they were murdered while they were asleep in the house, and there is no reason why a single person could not have committed their murders also.

75. Thus, the possession of the gold chain of the deceased could have only led to the inference that the accused had committed the murder of the deceased.

76. It was submitted that the deceased was wearing earrings and golden bangles, which were not taken. This makes the prosecution case highly suspect because if the accused had taken the gold chain, he had no reason not to take the gold earring and the bangles. This submission is not acceptable. The inquest report (Ext. PW9/K) shows that the bangles were artificial and no purpose would have been served by taking them .

away. Hence, in these circumstances, the case cannot be doubted because the bangles and earrings were not taken.

77. The accused had also got recovered the sleeves of the shirt. These were sent to FSL for examination after duly sealing them. These were analyzed in FSL and a report (Ext. PD) was issued stating that a mixed DNA profile was obtained from the shirt arm of accused Sunil Kumar. One DNA Profile could be obtained, which was consistent with the DNA profile obtained from the blood on the gauge of Kamal Kaur. This report duly establishes that the sleeves got recovered by the accused had a DNA profile consistent with the blood of the deceased Kamal Kaur. No explanation has been provided for the same and the only inference, which can be drawn, in these circumstances, is that the accused was present near the deceased at the time of her death and coupled with the recovery of the chain of the deceased, the only inference which could have been drawn is that the accused had committed the murder of the deceased.

78. It was submitted that the recovery of sleeves was effected from the open place and the same is not sufficient to implicate the accused. This submission is not acceptable. It was .

laid down by Hon'ble Supreme Court in Limbaji v. State of Maharashtra, (2001) 10 SCC 340: 2001 SCC OnLine SC 1460, that merely because the recovery was effected from an open place is not sufficient to discard the recovery and the statement that accused had hidden the articles could be relied upon to show the possession of the accused. It was observed:

"IV(b). [14] We are left with the evidence of recovery of the ornaments of the deceased on the basis of the confessional statement of the accused under Section 27 of the Evidence Act if the discoveries are to be believed --which ought to be. The next two questions are, whether the accused shall be deemed to be in possession of the articles concealed at various spots and whether such possession could be said to be recent possession. But for the decision of this Court in Trimbak v. State of M.P. [AIR 1954 SC 39: 1954 Cri LJ 335] the first question need not have engaged our attention at all. That was a case in which at the instance of the accused the stolen property was recovered at a field belonging to a third party and the accused gave no explanation about his knowledge of the place from which the ornaments were taken out. The High Court while absolving the appellant of the charge of dacoity, convicted him under Section 411 IPC for receiving the stolen property by applying the presumption that he must have kept the ornaments at that place. On appeal by the accused, this Court took the view that there was no valid reason for convicting the appellant under Section 411 IPC. The Court pointed out that one of the ingredients of Section 411, namely, that the stolen property was in the possession of the accused, was not satisfied. The Court observed thus: (AIR p. 40, para 6) "6. When the field from which the ornaments were recovered was an open one, and accessible to all and sundry, it is difficult to hold positively that the .

accused was in possession of these articles. The fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles."

If this view is accepted, there is the danger of seasoned criminals, who choose to keep the stolen property away from their places of residence or premises, escaping from the clutches of presumption whereas the less resourceful accused who choose to keep the stolen property within their house or premises would be subjected to the rigour of presumption. The purpose and efficacy of the presumption under Section 114(a) will be practically lost in such an event. We are, however, relieved of the need to invite the decision of a larger Bench on this issue in view of the confessional statement of the accused that they had hidden the articles at particular places and the accused acting further and leading the investigating officer and the panchas to the spots where they were concealed. The memoranda of Panchnama evidencing such statements are Exhibits 26, 28 and 30. If such a statement of the accused insofar as the part played by him in concealing the articles at the specified spots is admissible under Section 27 of the Evidence Act, there can be no doubt that the factum of possession of the articles by the accused stands established. We have the authority of the three-judge Bench decision of this Court in K. Chinnaswamy Reddy v. State of A.P. [AIR 1962 SC 1788: (1963) 1 Cri LJ 8] to hold that the statement relating to concealment is also admissible in evidence by virtue of Section 27. In that case, the question was formulated by Wanchoo, J. speaking for the Court, as follows: (AIR p. 1792, para 9) "9. Let us then turn to the question whether the statement of the appellant to the effect that 'he had hidden them (the ornaments)' and 'would point out the place' where they were, is wholly admissible in evidence under Section 27 or only that part of

it is .

admissible where he stated that he would point out the place but not that part where he stated that he had hidden the ornaments."

After referring to the well-known case of Pulukuri Kottaya v. Emperor [AIR 1947 PC 67: 74 IA 65] the question was answered as follows: (AIR p. 1793, para 10) "10. If we may respectfully say so, this case clearly brings out what part of the statement is admissible under Section 27. It is only that part which distinctly relates to the discovery which is admissible, but if any part of the statement distinctly relates to the discovery it will be admissible wholly and the court cannot say that it will excise one part of the statement because it is of a confessional nature. Section 27 makes that part of the statement which is distinctly related to the discovery admissible as a whole, whether it be in the nature of confession or not. Now the statement in this case is said to be that the appellant stated that he would show the place where he had hidden the ornaments. The Sessions Judge had held that part of this statement which is to the effect 'where he had hidden them' is not admissible. It is clear that if that part of the statement is excised the remaining statement (namely, that he would show the place) would be completely meaningless. The whole of this statement in our opinion relates distinctly to the discovery of ornaments and is admissible under Section 27 of the Indian Evidence Act. The words 'where he had hidden them' are not on a par with the words 'with which I stabbed the deceased' in the example given in the judgment of the Judicial Committee. These words (namely, where he had hidden them) have nothing to do with the past history of the crime and are distinctly related to the actual discovery that took place by virtue of that statement. It is however urged that in a case where the offence consists of possession even the words 'where he had hidden them' would be inadmissible .

as they would amount to an admission by the accused that he was in possession. There are in our opinion two answers to this argument. In the first place, Section 27 itself says that where the statement distinctly relates to the discovery it will be admissible whether it amounts to a confession or not. In the second place, these words by themselves *though they may show possession of the appellant would not prove the offence, for after the articles have been recovered, the prosecution has still to show that the articles recovered are rconnected with the crime, i.e., in this case, the prosecution will have to show that they are stolen property. We are therefore of the opinion that the entire statement of the appellant (as well as of the other accused who stated that he had given the ornament to Bada Sab and would have it recovered from him) would be admissible in evidence and the Sessions Judge was wrong in ruling out part of it."

*(emphasis supplied) In the light of this decision, we must hold that the accused must be deemed to be in exclusive possession of the articles concealed under the earth though the spots at which they were concealed may be accessible to the public.

It may be mentioned that in the Trimbak case [AIR 1954 SC 39: 1954 Cri LJ 335] this Court did not refer to the confessional statement, if any, made by the accused falling within the purview of Section 27 and the effect thereof on the aspect of possession.

xxxxx V(a). [16] In the light of the above discussion, in the instant case, the presumption under Section 114 Illustration (a) could be safely drawn and the circumstance of recovery of the incriminating articles within a reasonable time after the incident at the places shown by the accused unerringly points to the involvement of the accused. Be it noted that the appellants who were in a position to explain how they could lay their hands on the stolen articles or how they had the .

knowledge of concealment of the stolen property, did nothing to explain; on the other hand, they denied knowledge of recoveries which in the light of the evidence adduced by the prosecution must be considered to be false.

By omitting to explain, it must be inferred that either they intended to suppress the truth or invited the risk of presumption being drawn. Thus, the presumption as to the commission of offence envisaged by Illustration (a) of Section 114 is the minimum that could be drawn and that is what the trial court did.

79. Similarly, it was held in Perumal Raja v. State, 2024 SCC OnLine SC 12, that if the accused does not tell the Criminal Court that his knowledge of the concealment was on the basis of the possibilities that absolves him, an inference can be drawn that the accused had concealed those articles. It was observed:

> 32. In State of Maharashtra v. Suresh (2000) 1 SCC 471, this Court in the facts therein held that recovery of a dead body, which was from the place pointed out by the accused, was a formidable incriminating circumstance.

This would, the Court held, reveal that the dead body was concealed by the accused unless there is material and evidence to show that somebody else had concealed it and this fact came to the knowledge of the accused either because he had seen that person concealing the dead body or was told by someone else that the dead body was concealed at the said location. Here, if the accused declines and does not tell the criminal court that his knowledge of the concealment was on the basis of the possibilities that absolve him, the court can presume that the dead body (or physical object, as the case may be) was concealed by the accused himself. This is because the person who can offer the explanation as to how he came to know of such concealment is the accused. If the accused chooses to refrain from telling the court as to how else he came to know of it, the presumption is that the concealment was .

by the accused himself.

33. The aforesaid view has been followed subsequently and reiterated in Harivadan Babubhai Patel v. State of Gujarat(2013) 7 SCC 45, Vasanta Sampat Dupare v. State of Maharashtra (2015) 1 SCC 253, State of Maharashtra v. Damu S/o Gopinath Shinde (2000) 6 SCC 269, and Rumi Bora Dutta v. State of Assam (2013) 7 SCC

417."

80. In the present case also, the accused has not given any explanation, rather, he denied the making of the disclosure statement and consequent recovery; therefore, the only inference which can be drawn is that the accused had concealed the sleeves in the Jabbar Khad and his involvement in the commission of crime is duly established by the blood stains of the deceased on the same.

81. Thus, it was duly proved that the sleeves recovered at the instance of the accused were stained with the blood of the accused and the accused was found in recent possession of the gold chain belonging to the deceased. These two circumstances lead to an inference that the accused had murdered the deceased.

82. It was laid down by the Hon'ble Supreme Court in Raja Naykar v. State of Chhattisgarh, 2024 SCC OnLine SC 67, that in case of circumstantial evidence, the circumstances from which, the inference of the guilt is to be established should lead to only an inference that in all probability the act was done by the .

accused. It was observed:

> 14. Undoubtedly, the prosecution case rests on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has very well been crystalized in the judgment of this Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4SCC 116, wherein this Court held thus:
>
> "152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [(1952) 2 SCC 71: AIR 1952 SC 343: 1952 SCR 1091: 1953 Cri LJ 129]. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198: 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625: AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in the Hanumant case [(1952) 2 SCC 71: AIR 1952 SC 343: 1952 SCR 1091: 1953 Cri LJ 129]:
>
> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of .
>
> the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

r It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047] "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a .

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

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

15. It can thus clearly be seen that it is necessary for the prosecution that the circumstances from which the conclusion of the guilt is to be drawn should be fully established. The Court holds that it is a primary principle that the accused 'must be' and not merely 'may be' proved guilty before a court can convict the accused. It has been held that there is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved'. It has been held that the facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. It has further been held that the circumstances should be such that they exclude every possible hypothesis except the one to be proved. It has been held that 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 probabilities, the act must have been done by the accused.

16. It is settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt."

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83. It was held in Santosh v. State (NCT of Delhi), 2023 SCC OnLine SC 538, that in case of circumstantial evidence, the absence of any explanation by the accused can supply the missing link. It was observed:

> "34.... No doubt, if the prosecution succeeds in proving a chain of circumstances from which a reasonable inference can be drawn regarding one's guilt, then, in the absence of a proper explanation, the Court can always draw an appropriate conclusion with respect to his/her guilt with the aid of section 106 of the IEA, 1872. But, if the chain of circumstances is not established, the mere failure of the accused to offer an explanation is not sufficient to hold him guilty.
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> 35. Expounding the law on the scope and applicability of section 106 of the IEA, 1872, in Shambu Nath Mehra v. State of Ajmer AIR 1056 SC 404, this Court observed:
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> "9. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy .
>
> Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried."

36. In Nagendra Sah v. State of Bihar (2021) 101 SCC 725, following the decision in Shambu Nath Mehra's case (supra), the law with regard to the applicability of Section 106 of the IEA, 1872 was crystallised as under:

> "22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer a proper explanation about the existence of said other facts, the court can always draw an appropriate inference.

> 23. When a case is resting on circumstantial evidence if the accused fails to offer a reasonable explanation in the discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."

37. In Shivaji Chintappa Patil v. State of Maharashtra (2021) 5 SCC 626, it was observed that Section 106 of the IEA, 1872 does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. It was observed that Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the .

prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused. After expounding the legal principle, while rejecting the argument that the failure of the accused to offer an explanation under section 313 of the Code would complete the chain, it was observed:

> "25. ... By now it is a well-settled principle of law, that false explanation or non-explanation can only be used as an additional circumstance when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused. However, it cannot be used as a link to complete the chain."

84. In the present case, the accused has not furnished any explanation for the circumstances proved on record and the learned Trial Court had rightly relied upon the circumstances to draw the inference of the guilt of the accused.

85. The police had also relied upon the disclosure statement stating that he could get the knife recovered, however, it is an admitted case that the knife was recovered on the date of the incident, therefore, the police was already aware of the knife and this evidence was rightly discarded by learned Trial Court.

Similarly, the statement made by the accused that he could show the place where the dead body was lying did not lead to the discovery of any new fact and the same will not be admissible under Section 27 of the Indian Evidence Act. It was laid down by .

this Court in State of Himachal Pradesh versus Sanjiv Kumar Alias Sanju 2019 (3) ShimLC 1710, that there cannot be any rediscovery of a fact. When the place was known to the police, the disclosure made by the accused regarding a place without any recovery would be inadmissible under Section 27 of the Indian Evidence Act. It was observed:-

> "(j) Disclosure statement of accused Sanjay Kumar alias Sanjjan regarding the place from where the dead body was thrown: The prosecution examined Constable Narpat Ram (PW-16 in ST No.3/95) to prove the disclosure statement (Ext. PM) of accused Sanjay Kumar alias Sanjjan in ST No. 3/1995. However, the accused Sanjay Kumar is dead;

therefore, this evidence is also not going to arrive at any conclusion. Even otherwise, his testimony is also cryptic and leads to no conclusion because it points out to the place from where the accused had thrown the dead body. Whereas, the police had already recovered the dead body from that place. Therefore, in the absence of recovery, such confession does not fall within the exception of Section 27 of the Indian Evidence Act, 1872.

(k) In Aher Raja Khima v State of Saurashtra, AIR 1956 SC 217, a three-member bench of the Supreme Court holds,

20. Then we come to the recoveries. The false beard and mask were found buried in the grounds of Dewayat's house and the appellant is said to have recovered them in the presence of panchas. But those discoveries are inadmissible in evidence because the police already knew where they were hidden...

(l) In Thimma v. State of Mysore, 1970 2 SCC 105, a three- member bench of the Supreme Court holds,

10. Reliance on behalf of the prosecution was also placed on the information given by the appellant .

which led to the discovery of the dead body and other articles found at the spot. It was contended that the information received from him related distinctly to the facts discovered and, therefore, the statement conveying the information was admissible in evidence under Section 27 of the Evidence Act. This information it was argued also lends support to the appellant's guilt. It appears to us that when P. W. 4 was suspected of complicity in this offence he would in all probability have disclosed to the police the existence of the dead body and the other articles at the place where they were actually found. Once a fact is discovered from other sources there can be no fresh discovery even if relevant information is extracted from the accused and Courts have to be watchful against the ingenuity of the investigating officer in this respect so that the protection afforded by the wholesome provisions of Sections 25 and 26 of the Evidence Act is not whittled down by the mere manipulation of the record of the case diary. It would, in the circumstances be somewhat unsafe to rely on this information for proving the appellant's guilt. We are accordingly disinclined to take into consideration this statement. (Emphasis supplied)

86. In view of the above, the conclusion drawn by the learned Trial Court that it was duly proved that Sunil Kumar had trespassed into the house of Kamal Kaur after having made preparations for causing hurt, he murdered her, removed her gold chain and destroyed the clothes worn by him to screen himself were duly established. Hence, the learned Trial Court had rightly held the accused guilty of the commission of offences punishable under Sections 452, 302, 382 and 201 of IPC.

87. The Learned Trial Court had imposed a substantive .

sentence of imprisonment of three years for the commission of offences punishable under Sections 452, 382, and 201 of the IPC and life imprisonment for the commission of an offence punishable under Section 302 of the IPC. This cannot be said to be excessive because of the circumstances in which, a widow was put to death by repeatedly stabbing her after entering into her house in the middle of the night and taking away her gold chain.

Hence, no interference is required with the sentence imposed by the learned Trial Court.

88. No other point was urged.

89. In view of the above, the judgment and order passed by the learned Trial Court are fully sustainable. Consequently, the present appeal fails and is dismissed.

(Vivek Singh Thakur) Judge (Rakesh Kainthla) Judge 22nd April, 2024 (saurav pathania)