Vicky Rana vs State Of H.P on 25 July, 2024

Author: Vivek Singh Thakur

Bench: Vivek Singh Thakur

Neutral Citation No. (2024:HHC:5775) IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA .

Cr. Appeal No.392 of 2022 & 396 of 2023 Reserved on: 14.05.2024 Date of Decision: 25.07.2024

1. Cr. Appeal No.392 of 2022 Vicky Rana ....Appellant Versus State of H.P. ....Respondent

2. Cr. Appeal No.396 of 2023 Raju Singh Bahadur ....Appellant Versus State of H.P. ....Respondent Coram Hon'ble Mr Justice Vivek Singh Thakur, Judge. Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting? Yes

1. Cr. Appeal No.392 of 2022 For the Appellant : Mr. George, Advocate.

For the Respondent : Ms. Seema Sharma, Deputy Advocate General.

For the Appellant : Ms. Shradha Karol, Legal Aid Counsel.

For the Respondent : Ms. Seema Sharma, Deputy Advocate General.

Page |2 Rakesh Kainthla, Judge The present appeals are directed against the judgment .

dated 18.12.2021 passed by learned Additional Sessions Judge-II, Solan, vide which the appellants (accused before learned Trial Court) were convicted of the commission of offences punishable under Section 396 & 120-B(I) of Indian Penal Code (IPC) and order dated 30.12.2021, vide which they were sentenced as under::-

> Under Section 120-B(1) of To suffer imprisonment for life and to IPC pay a fine of 20,000/- (twenty thousand) each and in default of payment of fine to further undergo rigorous imprisonment for six months.
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> Under Section 396 of IPC To suffer rigorous imprisonment for life and to pay a fine of 20,000/-
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> (twenty thousand) each and in default of payment of fine to further suffer rigorous imprisonment for six months.

(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 appeals are that the Police presented a challan before the learned Trial Court against the accused for the commission of offences punishable under Sections 396 and 120-B (1) of IPC. It was asserted that Hardev Singh Page |3 (PW-19) had purchased a truck bearing registration No. HP-64-A-

9419 in the name of his son Sachin Kumar. This truck was attached to .

a cement company at Bagga for transportation of the cement and clinkers. Tek Chand Bahadur (since deceased) was the driver of the truck. He loaded 200 cement bags in the truck on 24.10.2013 to Panjhera (Nalagarh); however, the truck never reached the destination. The driver also did not call the owner. His phone was found to be switched off. The owner suspected that the driver had absconded after selling 200 bags of cement. The informant searched for the truck but could not locate it; hence he filed a written application (Ext.PW19/A) before the police. FIR (Ext. PW20/A) was registered in the Police Station. HC-Suresh Kumar (PW-14) conducted the investigation. He obtained the documents regarding the transportation of the cement, which showed that Tek Chand Bahadur had left with the cement on 24.10.2013 in the truck bearing Registration No. HP-64A-9419, however, the truck had not reached its destination till 31.10.2013. The mobile phone of the driver was switched off. HC-Suresh Kumar obtained the call details record of the driver and recorded the statement of the Conductor-Deepak Kanwar (PW-12), who revealed that he and the driver had gone to Kharsi Chowk on 24.10.2013 after taking their dinner, where they met Prem Page |4 Bahadur and another person. Tek Chand Bahadur went with Prem Bahadur and another person towards Malokhar. It was found from the .

call details record that Tek Chand Bahadur was in contact with two other mobile numbers. The location of Tek Chand Bahadur was found at Karara Ghat on 24.10.2013 at 09:22 pm. The mobile phone was found switched off thereafter. The other mobile was found to be belonging to Prem Bahadur. The call detail record of the mobile phone was obtained and it was found that the mobile phone of Prem Bahadur and driver Tek Chand Bahadur were located at Kharsi. The location of the mobile of Prem Bahadur was found at Dhami, Sunni, Rampur etc. on the night of 24.10.2013. The Police searched for the truck and recovered it at Neerth on 02.11.2013. 200 cement bags were found missing. The Police found that five Nepalese were arrested by the Police at the Police Station, Rampur, out of whom, one was Prem Bahadur. Inspector SHO-Deva Nand (PW21) conducted the investigation. He interrogated the five arrested persons and ascertained their mobile numbers. He obtained custody of the five arrested persons from learned Judicial Magistrate First Class, Rampur on 28.11.2013 and arrested them at 10:30 pm. The accused disclosed during the investigation that they had prepared a plan to accompany Tek Chand Bahadur, kill him on the way and sell the cement. When Page |5 Tek Chand Bahadur reached Kharsi Chowk with the Conductor on 24.10.2013, he met Prem Bahadur and Raju Singh. They went towards .

Malokhar, where the truck was already parked. The other accused namely Vicky Rana, Anil Bahadur and Amit Bahadur reached the spot.

Prem Bahadur told Tek Bahadur that the road to Nalagarh was shorter by Piplughat and Ramshahr and they had to go via Darla. Tek Bahadur agreed to take the truck to Darla. The accused killed Tek Chand Bahadur near Nabgaon with Parna. They concealed the dead body of Tek Chand Bahadur in the cabin. They drove the truck towards Dhami and Sunni. Raju was driving the truck. Amit Bahadur threw the Parna with which, Tek Bahadur was killed. They concealed the dead body of Tek Bahadur on Dhami Kingal Road in a culvert near Dadhyog. Prem Bahadur concealed the driving license near the same culvert. They carried the truck towards Sainj and sold the cement to Jeet Ram (PW-

3) at the rate of 300/- per bag. Jeet Ram sold the bags to four other persons in village Prasin and kept five bags for himself. The accused parked the truck near Neerth and shared the money obtained by selling the cement. The accused made a disclosure statement (Ext.PW1/B) and led the Police to the place, where they had concealed the dead body. An identification memo (Ext.PW2/E) was prepared.

The Police found some hairs at the spot, which were sealed in a parcel Page |6 with Seal 'X'. These were seized vide memo (Ext.PW1/C). Sample Seal (Ext.PW19/B) was prepared on a separate piece of cloth. Prem .

Bahadur got recovered a driving license (Ex. P1) of Tek Bahadur, which was seized vide memo (Ext.PW2/F). The spot map of the place (Ext.PW21/B) was prepared. Photographs (Ext.PW11/A1 to Ext.PW11/A13, & Ext.PW21/C1 to Ext.PW21/C3) were taken. Jeet Ram was called to the spot. He produced 60,000/-, which were seized vide memo (Ext.PW2/G). The currency notes were sealed in a parcel with Seal 'H'. The sample seal (Ext.PW3/A) was taken on a separate piece of cloth. Jeet Ram and other purchasers identified the accused as the persons, who had sold the cement bags to them. An identification memo (Ext.PW1/D) was prepared. ASI-Vijay Kumar (PW-11) of Police Post Sunni had found a dead body on 13.11.2013. Entry in the daily diary (Ext.PW8/A) was recorded. He took photographs of the dead body (Ext.PW11/A1 to Ext.PW11/A13). The dead body was brought from the culvert. Dead-body was searched. A bunch of keys (Ext.P4) was found in the pocket of the trouser. Currency notes of 20/- (Ext.P5) were also found in the pocket. These were seized vide memo (Ext.PW2/A). ASI-Vijay Kumar prepared the inquest report (Ext.PW2/B to Ext.PW2/D). He filed an application (Ext.PW11/B) for conducting the postmortem examination of the deceased. Dr Tarun Page |7 Shastri (PW-24) conducted the postmortem examination and found that the body was putrefied with maggots present over the face. He .

could not find the cause of death due to the total decomposition and putrefaction of the body. He issued the postmortem report (Ext.PW24/B) and handed over the viscera, a sealed envelope and the clothes to ASI Vijay Kumar, who deposited them in the Police post. He handed over all these articles to Inspector Devanand, who seized them vide memo (Ext.PW6/A). A copy of the FIR registered in the Police Station Rampur was seized vide memo (Ext.PW14/E). Inspector Deva Nand videographed the proceedings of the spot and transferred them to CDs (Ext.P12 to Ext.P14). The case property was

sent to the Forensic Science Laboratory (FSL), Junga and a report (Ext. PX) was issued showing that no alcohol/poison was detected in the viscera of the deceased. The statements of the remaining witnesses were recorded as per their version and after the completion of the investigation, the Challan was prepared and presented before the Court of the learned Judicial Magistrate First Class, Arki, who committed it for trial to learned Sessions Judge, Solan, who assigned it to the learned Additional Sessions Judge-II, Solan for disposal as per the law. Learned Additional Sessions Judge-II, Solan found that Prem Bahadur, Anil Bahadur and Amit Bahadur were juveniles in Page |8 conflict with the law; hence, they were ordered to be tried by the Juvenile Justice Board.

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3. The accused-Vicky Rana and Raju Singh Bahadur were charged with the commission of offences punishable under Sections 120B(1) and 396 of IPC. They pleaded not guilty and claimed to be tried.

4. The prosecution examined 24 witnesses to prove its case.

Rakesh Kumar (PW1) is the witness to the recovery of the truck, the disclosure statement made by the accused and the consequent recovery. Meera Verma (PW2) witnessed the recovery of the dead body, pointing out the place by the accused and the identification of the accused by the purchasers. Jeet Ram (PW3) and Suresh Kumar (PW4) purchased the cement from the accused and the other persons.

Hans Raj (PW5) proved the permission granted by the Executive Magistrate for the cremation of the unclaimed body. ASI-Dillu Ram (PW6) was posted in the Police Post, Sunni and handed over the articles of the deceased and other papers to the Police. HHC-Tek Chand (PW7) carried the viscera to MHC Police Station Dhalli. LC Ramavati (PW8) proved the entries in the daily diary. Paramjit Singh (PW9) proved the record regarding the loading of the cement in the Page |9 truck. HC-Om Parkash (PW10) was working as MHC, with whom the case property was deposited and who sent it to FSL Junga for analysis.

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ASI-Vijay Kumar (PW11) found the dead body of an unclaimed person.

Deepak Kanwar (PW12) was posted as Conductor, who proved that accused Raju and other persons had met the deceased on 24.10.2013.

HHC Bhupinder Raj (PW13) carried the articles to FSL Junga. HC Suresh Kumar (PW14) conducted the initial investigation. SI-Tilak Chand (PW15) handed over the record of FIR and other documents lying in Police Station Rampur Bushahr. Devender Verma (PW16) and Amit Dogra (PW17) proved the call detail records. HHC-Beli Ram (PW-18) is the witness to the recovery. Hardev Singh (PW-19) is the informant. HC-Jagdish Chand (PW20) proved the entries in the daily diary. Inspector Devanand (PW21) conducted the investigation. Negi Ram (PW22) proved the FIR registered in Police Station Rampur Bushahr. Manish Chauhan (PW23) was posted as SHO in Police Station

Rampur Bushahr and arrested the accused. Dr Tarun Shashtri (PW24) conducted the postmortem examination of the deceased.

5. The accused in their statements recorded under Section 313 of Cr.P.C. denied the prosecution case in its entirety. They claimed that they were innocent and were falsely implicated. The witnesses P a g e | 10 deposed against them falsely. No defence was sought to be adduced by the accused persons.

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6. The learned Trial Court held that the prosecution had proved the motive for the commission of a crime. It was also proved that the accused were last seen with the deceased. They made disclosure statements leading to the recovery of the hair and the driving licence. It was duly proved that the accused had sold the cement and had shared the money amongst themselves. This was the reason for the commission of crime; hence, learned Trial Court convicted and sentenced the accused as aforesaid.

7. Being aggrieved from the judgment and order of sentence passed by the learned Trial Court, the accused persons filed separate appeals. Accused Vicky Rana stated in his appeal that there is no material to connect him with the commission of a crime. The evidence of identification made by the witnesses violates the law. The judgment is based upon conjectures and surmises. Inadmissible evidence was brought on record. There is no evidence to show that the accused had sold the cement bags to the witnesses. The prosecution failed to recover empty cement bags from the possession of the witnesses. There were major contradictions in the testimonies P a g e | 11 of the witnesses and learned trial Court erred in holding that the contradictions were minor. The case was based upon circumstantial .

evidence and the circumstances were not conclusively established.

The joint statement of the accused was inadmissible. The dead body was already recovered by the police. The chain of circumstances was not complete. Correct conclusions were not drawn. A test identification parade was not conducted. Therefore, it was prayed that the present appeal be allowed and the accused be acquitted.

8. In an appeal filed by Raju Singh Bahadur, it was asserted that the learned Sessions Judge failed to appreciate that the ingredients of Section 396 and 120B of IPC were not established. The prosecution's evidence was contradictory and should not have been believed. The case was not proved beyond a reasonable doubt. The circumstances from which, the inference of the guilt was to be drawn were not established. There were major contradictions, improvements, and omissions in the testimonies of the witnesses. A joint disclosure statement creates doubt regarding the prosecution case. Therefore, it was prayed that the present appeal be allowed and the judgment passed by the learned Additional Sessions Judge be set aside.

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9. We have heard Mr George, learned counsel for the accused Vicky Rana, Ms Shradha Karol, learned Legal Aid Counsel for the .

accused Raju Singh Bahadur and Ms Seema Sharma, learned Deputy Advocate General, for the respondent/State in both the appeals.

10. Mr George, learned counsel for the accused-Vicky Rana submitted that the learned Trial Court erred in convicting and sentencing the accused. The chain of circumstances was not completed, which is essential. He relied upon the judgments of the Hon'ble Supreme Court in Ramesh Bhai & another Vs. State of Rajasthan, 2009 (12) SSC 603, Raja Naykar v. State of Chhattisgarh, (2024) 3 SCC 481: 2024 SCC OnLine SC 67, Boby Vs. State of Kerala, Cr.

Appeal No.1439 of 2009 decided on 12.01.2023, Navaneetha Krishnan Vs. The State, AIR 2018 SC (Criminal) 642 and Partap Singh Vs. State of U.P., Cr. Appeal No.1932 of 2010 decided on 27.07.2022. He further submitted that the witnesses were not known to the accused and test identification parade was essential. The witnesses identified the accused in the police presence and such an identification is inadmissible. He relied upon the judgments of the Hon'ble Supreme Court in Chunthu Ram Vs. State of Chhattisgarh, 2020 (10) SCC 733, Mohd. Rizwan Vs. State of Haryana, 2023 SCC Online SC 1329. He submitted that the learned Trial Court relied upon the last seen theory P a g e | 13 but the same does not apply to the present case because the time gap between the accused and the deceased having been last seen together .

and the discovery of dead-body is quite large, which will take away the effect of last seen theory. He relied upon the judgments of Ramesh Bhai (supra), Boby (supra) and Pratap Singh (supra). He submitted that the Police had also relied upon the call details record but the same is not admissible in the absence of the certificate required under Section 65-B of the Indian Evidence Act. He relied upon the judgments of the Hon'ble Supreme Court in Partap Singh (supra), Anvar P.V. Vs. P.K. Basheer, 2014 (10) SCC 473, Arjun Pandit Rao Khotkar Vs. K.K. Gorantyal, AIR 2020 SC 4908. He submitted that the testimonies of Jeet Ram and Suresh Kumar were not sufficient as they had purchased the stolen articles from the accused. He relied upon the judgment of the Hon'ble Supreme Court in Mohd. Abdul Hafeez Vs. State of A.P. AIR 1983 SC 367.

He further submitted that the joint disclosure statement made by the accused is not admissible under Section 27 of the Indian Evidence Act.

He relied upon the judgment of the Hon'ble Supreme Court in Mohd.

Abdul Hafeez (supra), Manoj Kumar Soni Vs. State of M.P. 2023 SCC Online SC 984, and State Vs. Harpreet Singh decided on 25.05.2007. He submitted that the disclosure statement under Section 27 of the Indian Evidence Act was not properly recorded and proved. He cited P a g e | 14 the judgments in Babu Sahebagouda Rudragoudar Vs. State of Karnataka, 2024 INSC 320, Shahaja @ Shahajan Ismile Mohd. Sheikh Vs. .

State of Maharashtra in Cr. Appeal No.739 of 2017 decided on 14.07.2022.

Hans Raj Vs. State of M.P., 2024 INSC 318, Boby (supra) and Ravi Shankar Tandon and Others Vs. State of Chhattisgarh SLP (Criminal) No.1174 of 2024. He submitted that the statement made by the co-accused is not admissible against others. He relied upon the judgments of Surender Kumar Khanna Vs. Intelligence Officer, Directorate AIR 2018 SC 3574, Dipakbhai Jagdish Chandra Patel Vs. State of Gujarat AIR 2019 SC 3363 and Sohan Singh Vs. State of Himachal Pradesh 2023 (2) HLJ 1520, Sheikh Umar Ahmad Sheikh and Another Vs. State of Maharashtra AIR 198 SC 1922, Shivaji Chintappa Patel Vs. State of Maharashtra AIR 2021 SC 1249. He submitted that the first-time identification in the Court is not admissible and relied upon the judgment of Sheikh Umar Ahmad Sheikh (supra). He submitted that the statement of the Conductor was recorded after a considerable gap, which is fatal. He relied upon the judgment in Aarif Vs. State of Rajasthan in Cr. Appeal No.3172 of 2023 was decided on 19.10.2023. He lastly submitted that when two views are possible, the view in favour of the accused should be accepted rather than the one in favour of the prosecution. He relied upon the judgment in Nagender Shah Vs. State of Bihar in Cr. Appeal No.1903 of P a g e | 15 2019 decided on 14.09.2021 and Shivaji (supra). He prayed that the accused be acquitted.

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11. Ms Shradha Karol, learned Legal Aid Counsel for the accused Raju Singh Bahadur adopted these submissions and submitted that the accused be acquitted.

12. Ms. Seema Sharma, learned Deputy Advocate General for the respondent/State submitted that there is no prohibition in recording the joint statement. She relied upon the judgment of Mohd.

Abdul Hafeez (supra), State (N.C.T. Of Delhi) vs Navjot Sandhu@ Afsan Guru, (2005) 11 SCC 600. She submitted that the disclosure statement shows the mental status of the accused persons. She relied upon the judgment of the Judicial Committee of the judicial committee of Privy Council in Pullukuri Kotaya vs. Emperor Air 1947 PC 67. She submitted that even though the dead body was recovered earlier, it was an unclaimed body and the Police came to know after the disclosure statement that the dead body belonged to Tek Chand Bahadur. Such a disclosure statement is admissible under Section 27 of the Indian Evidence Act. She relied upon the judgment of the Hon'ble Supreme Court in Charandas Swami vs State of Gujarat & Another, 2017 (7) SCC 177 in support of her submission. She submitted that the information P a g e | 16 regarding the other accused disclosed by the accused is relevant under Section 27 of the Indian Evidence Act. She relied upon the judgment in .

Mehboob Ali & Another vs State of Rajasthan 2016 (14) SCC 640. She submitted that the call details record is admissible in evidence and relied upon the judgment of the Hon'ble Supreme Court in Sonu @ Amar vs State of Haryana, 2017 (8) SCC 570. She submitted that the learned Trial Court had rightly relied upon the last-seen theory. When no explanation was provided by the accused, the same can be used against them. She relied upon the judgment in Surajdeo Mahto and another Vs. State of Bihar 2022 (11) SCC 800. She submitted that the circumstances, from which the inference of the guilt is to be drawn, were duly established and they led towards the guilt of the accused.

There is no requirement to hold the test identification parade in all cases, especially when the witnesses have sufficient time and opportunity to see the accused. She relied upon the judgment of the Hon'ble Supreme Court in Malkhan Singh Vs. State of M.P. 2003 (5) SCC

746. Hence, she prayed that the appeals be dismissed.

13. We have given considerable thought to the submissions at the bar and have gone through the records carefully.

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14. The prosecution case is based upon the circumstantial evidence. The law relating to circumstantial evidence is well settled .

and was explained by the Hon'ble Supreme Court in Raja Naykar (supra) as under:

> "16. Undoubtedly, the prosecution case rests on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has very well been crystalised in the judgment of this Court in Sharad Birdhichand Sarda v. State of Maharashtra [Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116: 1984 SCC (Cri) 487: 1984 INSC 121], wherein this Court held thus : (SCC pp. 184-85, paras 152-54) "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 M.P. [Hanumant v. State of M.P., (1952) 2 SCC 71: AIR 1952 SC 343: 1952 SCR 1091] 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 v. State of U.P. [Tufail v. State of U.P., (1969) 3 SCC 198:
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> 1970 SCC (Cri) 55] and Ram Gopal v. State of Maharashtra [Ram Gopal v. State of Maharashtra, (1972) 4 SCC 625]. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [Hanumant v. State of M.P., (1952) 2 SCC 71:
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> AIR 1952 SC 343: 1952 SCR 1091]: (Hanumant case [Hanumant v. State of M.P., (1952) 2 SCC 71: AIR 1952 SC 343: 1952 SCR 1091], SCC pp. 76-77, para 12) '12. It is well to remember that in cases where the evidence is circumstantial, 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 P a g e | 18 should be conclusive 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.'
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> 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:
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> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "maybe"

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 [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793: 1973 SCC (Cri) 1033] where the observations were made: (SCC p. 807, para 19) '19. ... 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 "maybe" 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 P a g e | 19 (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." (emphasis in original)

17. 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.

18. 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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15. A similar view was taken in the judgments cited at bar in Ramesh Bhai (supra), Boby (supra), Navaneetha Krishnan (supra) and .

Partap Singh (supra).

16. In the present case, the learned Trial Court relied upon the last seen theory, the sale by the accused of the cement loaded in the vehicle of Hem Raj and Suresh and the joint confession statement leading to the discovery of the hair and the driving licence.

17. Deepak Kanwar (PW12) stated that he was working as a Conductor on the truck bearing registration No. HP-11-4805. Dinesh Kumar was the driver. He used to stay with Dinesh. Tek Chand was a driver on the truck bearing registration No. HP-64A-9419. Tek Chand was the Guru of Dinesh Kumar and he used to meet Dinesh and talk to him on the phone. Deepak was present in the tenanted premises of Dinesh on 24.10.2013 when Tek Chand came at about 5 - 5:30 pm. Dinesh was also present. Tek Chand said that he was going to Punjera with the cement bags in the truck. He took a meal. Dinesh sent him (Deepak) along with Tek Chand to bring the pen drive from his truck.

When Tek Chand and he arrived at Kharsi Chowk, Tek Chand called someone. Two Nepali boys came. He identified Raju as one of those boys. Tek Chand sent him (Deepak) back and said that he would hand P a g e | 21 over the pen drive on the next tour. Tek Chand, Raju and another person went with Tek Chand towards the truck of Tek Chand. He .

(Deepak) returned. He also identified the trousers (Ext.P7 and Ext.P8), which the deceased was wearing on the date of the incident. He stated in his cross-examination that he had studied up to 7 th class. He was working as a Driver on a truck belonging to Babu Ram but had not obtained the proper driving licence. He was engaged as a Cleaner by Dinesh Kumar. The rented accommodation of Dinesh was at a distance of 500 meters from Kharsi Chowk. He knew Tek Chand for 4- 5 months. He knew Raju and the other person before 24.10.2013 because he had seen them in the company of Tek Chand. He had seen Prem Bahadur driving the truck and he knew his name before the incident. He denied that he had not seen Raju and Prem Bahadur with Tek Chand. He did not know where the truck bearing Registration No. HP-64A-9419 was parked. He had not told the Police that the deceased was wearing blue trousers and a shirt on 24.10.2013. He denied that he had not seen Raju and Prem Bahadur and had not identified them.

18. It was submitted that the statement of this witness was recorded after a considerable delay, which will make it difficult to place reliance on his testimony. This submission is not acceptable. It P a g e | 22 was laid down by Hon'ble Supreme Court in Krishna Pal (Dr) v. State of U.P., (1996) 7 SCC

194: 1996 SCC (Cri) 249 that the prosecution case .

cannot be rejected due to the late examination of eyewitnesses. It was observed:

> "In the instant case, no explanation has been given by the prosecution as to why eyewitnesses had not been examined shortly after the incident and from the materials on record it appears that there had been inordinate delay in examining the eyewitnesses. But simply on that account, the convincing and reliable evidence adduced in this case should not be discarded. The Investigating Officer in his deposition has also admitted that through mistake he omitted to mention the crime number in the inquest report. It appears to us that the Investigating Officer had not been diligent enough but for that reason, we do not feel that reliable and clinching evidence adduced in this case by the eyewitnesses, particularly by Dr Rajveer Singh should be discarded. In this connection, we may refer to a recent decision of this Court in Karnel Singh v. State of M.P. [(1995) 5 SCC 518:
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> 1995 SCC (Cri) 977: JT (1995) 6 SC 437] In the said decision, it has been indicated by this Court that in a case of defective investigation, it would not be proper to acquit the accused if the case is otherwise established conclusively because in that event it would tantamount to be falling in the hands of an erring Investigating Officer. As we do not find any reason to disbelieve the testimonies given by eyewitnesses of this case, we do not find any reason to take a contrary view and to interfere with the impugned judgment. These appeals, therefore, are dismissed."

19. This position was reiterated in State of U.P. v. Sikandar Ali, (1998) 4 SCC 298: 1998 SCC (Cri) 926 wherein it was observed:

> "11. Failure of the police officer to examine PW 2 Harnam Singh for twenty-four days should not have been used to drop his evidence out. The Investigating Officer said that he was unable P a g e | 23 to question PW 2 earlier as he was very much involved in other duties relating to the upkeep of law and order. This Court has repeatedly cautioned that lapse of the investigation should not .
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> prevent the Court from accepting the eyewitnesses' evidence if it is otherwise truthful.
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> 12. It has been observed in Ranbir v. State of Punjab [(1973) 2 SCC 444: 1973 SCC (Cri) 858: AIR 1973 SC 1409] that: (SCC p. 447, para
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> 7) "The question of delay in examining a witness during the investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a got-up witness to falsely support the prosecution case."

In Ganesh Bhavan Patel v. State of Maharashtra [(1978) 4 SCC 371:

> 1979 SCC (Cri) 1: AIR 1979 SC 135] a three-judge Bench of this Court observed that delay in questioning a witness by itself cannot amount to any serious infirmity in the prosecution case:
>
> (SCC p. 376, para 15) "But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to deciding about the shape to be given to the case and the eyewitness to be introduced."

20. It was held in State of U.P. v. Satish, (2005) 3 SCC 114: 2005 SCC (Cri) 642: 2005 SCC OnLine SC 251 that delay in the examination of the witnesses does not make the prosecution case suspect and the defence cannot take advantage of the delayed examination of the witnesses unless it asks the Investigating Officer categorically as to why there was a delay. It was observed:

> "18. As regards the delayed examination of certain witnesses, this Court in several decisions has held that unless the P a g e | 24 investigating officer is categorically asked as to why there was a delay in the examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule .
>
> of universal application that if there is any delay in the examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion. (See Ranbir v. State of Punjab [(1973) 2 SCC 444: 1973 SCC (Cri) 858: AIR 1973 SC 1409], Bodhraj v. State of J&K [(2002) 8 SCC 45: 2003 SCC (Cri) 201] and Banti v. State of M.P. [(2004) 1 SCC 414: 2004 SCC (Cri) 294])
>
> 19. The High Court has placed reliance on a decision of this Court in Ganesh Bhavan Patel v. State of Maharashtra [(1978) 4 SCC 371: 1979 SCC (Cri) 1]. A bare reading of the fact situation of that case shows that the delayed examination by IO was not the only factor which was considered to be determinative. On the contrary, it was held that there were a catena of factors which when taken together with the delayed examination provided a basis for acquittal.
>
> 20. It is to be noted that the explanation when offered by the IO on being questioned on the aspect of delayed examination by the accused has to be tested by the court on the touchstone of credibility. If the explanation is plausible then no adverse inference can be drawn. On the other hand, if the explanation is found to be implausible, certainly the court can consider it to be one of the factors to affect the credibility of the witnesses who were examined belatedly. It may not have any effect on the credibility of the prosecution's evidence tendered by the other witnesses."

21. A similar view was taken in Banti v. State of M.P., (2004) 1 SCC 414: 2004 SCC (Cri) 294: 2003 SCC OnLine SC 1206 wherein it was .

observed:

> "17. As regards the delayed examination of certain witnesses, this Court in several decisions has held that unless the investigating officer is categorically asked as to why there was a delay in the examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in the examination of a particular witness, the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion (See Ranbir v. State of Punjab [(1973) 2 SCC 444: 1973 SCC (Cri) 858: AIR 1973 SC 1409] and Bodhraj v. State of J&K [(2002) 8 SCC 45: 2003 SCC (Cri) 201]). Consequently, we find no justifying reason or ground substantiated on behalf of the appellants to interfere with the concurrent findings recorded by both the courts based on relevant, cogent and trustworthy evidence adduced by the prosecution to prove the guilt of the appellants beyond reasonable doubt."

22. In the present case, no question was asked from the Investigating Officer-Devanand regarding the delay. Thus, no advantage can be derived from the delay in the examination of the witness. The judgment of Arif (supra) will not help the defence because in that case, the eyewitnesses had not reported the incident to the Police, even though the deceased was related to him. In the present case, the Police had recorded the statement of this witness P a g e | 26 twice; once on 08.11.2013 and another on 02.02.2014. The FIR was recorded on 01.11.2013 and the investigations were proceeding on the .

line that the Driver had absconded after selling the cement bags.

Therefore, the recording of the statement of the witness on 08.11.2013 cannot be said to be unduly delayed. The police had not recovered the dead body on 08.11.2013 when the statement of this witness was recorded; therefore, the police had no reason to ask this witness about the clothes worn by the deceased or for this witness to disclose the clothes worn by him. The necessity to inquire about the clothes arose after the discovery of the dead body; hence, there is a plausible explanation for the witness not making the statement regarding the clothes worn by the deceased and the non-mentioning of the clothes of the deceased will not help the defence.

23. It was submitted that the test identification parade of the accused was not conducted in the absence of which, the testimony of this witness 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 is not acceptable. This witness categorically stated that he knew the deceased and the accused before P a g e | 27 the incident because the deceased was the Guru of

Dinesh Kumar, with whom this witness was working as a Cleaner and Tek Bahadur .

used to be present with the accused before the incident. Thus, he had an acquaintance with the accused and it is not a case of a stranger identifying the accused for the first time in the Court.

24. 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. 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 P a g e | 28 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."

25. 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.

26. It was held in Umesh Chandra v. State of Uttarakhand, (2021) 17 SCC 616: 2021 SCC OnLine SC 689 that test identification is not a substantive piece of evidence and is required where the accused was P a g e | 29 unknown or the witness had a fleeting glance at the accused. It was observed:

> .
>
> 9. A test identification parade under Section 9 of the Evidence Act is not substantive evidence in a criminal prosecution but is only corroborative evidence. The purpose of holding a test identification parade during the stage of investigation is only to ensure that the investigating agency prima facie was proceeding in the right direction where the accused may be unknown or there was a fleeting glance of the accused. Mere identification in the test identification parade therefore cannot form the substantive basis for conviction unless there are other facts and circumstances corroborating the identification.
>
> 27. This position was reiterated in Kishore v. State of Punjab, 2024 SCC OnLine SC 110 wherein it was observed:
>
> 8. It is true that a test identification parade is not mandatory.

The test identification parade is a part of the investigation. It is useful when the eyewitnesses do not know the accused before the incident. The test identification parade is usually conducted immediately after the arrest of the accused. Perhaps, if the test identification parade is properly conducted and is proved, it gives credence to the identification of the accused by the concerned eyewitnesses before the Court. The effect of the prosecution's failure to conduct a test identification parade will depend on the facts of each case.

28. Similar is the judgment in Ronny v. State of Maharashtra, (1998) 3 SCC 625: 1998 SCC (Cri) 859 wherein it was observed:

> 18. Section 9 of the Evidence Act deals with the relevancy of facts necessary to explain or introduce relevant facts. It says, inter alia, facts which establish the identity of anything or person whose identity is relevant, insofar as they are necessary for the purpose, are relevant. So the evidence of identification is a relevant piece of evidence under Section 9 of the Evidence Act P a g e | 30 where the evidence consists of identification of the accused person at his trial. The statement of the witness made in the court, a fortiori identification by him of an accused is .

substantive evidence but from its very nature it is inherently of a weak character. The evidence of identification in the TIP is not a substantive evidence but is only corroborative evidence. It falls in

the realm of investigation. The substantive evidence is the statement of the witness made in the court. The purpose of the test identification parade is to test the observation, grasp, memory, capacity to recapitulate what he has seen earlier, strength or trustworthiness of the evidence of the identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time after a long time, the probative value of such uncorroborated evidence becomes minimal, so much so that it becomes unsafe to rely on such a piece of evidence. But if a witness has known an accused earlier in such circumstances which lend assurance to identification by him in court and if there is no inherent improbability or inconsistency, there is no reason why his statement in court about the identification of the accused should not be relied upon as any other acceptable but uncorroborated testimony.

19. In Budhsen v. State of U.P. [(1970) 2 SCC 128: 1970 SCC (Cri) 343: AIR 1970 SC 1321] the witness saw the assailants when they were running away after the alleged murder. Observing that the witness had only a mere fleeting glimpse and for identification one would certainly expect more firm and positive reference, this Court did not consider it safe to rely on the TIP evidence as corroborative evidence of identification in court by the witness. About the identification of the accused in court, it was indicated that the same did not provide safe and trustworthy evidence to sustain a conviction. This Court also explained the nature of the identification parade, its essentials and its value.

20. In Rameshwar Singh v. State of J&K [(1971) 2 SCC 715: 1971 SCC (Cri) 638: AIR 1972 SC 102: (1972) 1 SCR 627] a three-judge Bench of this Court while dealing with the question of the P a g e | 31 identification parade observed as follows: (SCC pp. 718-19, para

6) "[I]t 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 corroboration of the evidence to be given by the witness later in court at the trial. ... The identification during police investigation, it may be recalled, is not 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 appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicting the statement in court of the identifying witness."

21. Shri Lalit, learned counsel for the appellants, relied upon the observations of this Court in Kanan v. State of Kerala [(1979) 3 SCC 319: 1979 SCC (Cri) 621: AIR 1979 SC 1127] and argued that the evidence of identification of PWs 29 and 34 is valueless as they were not called to identify the appellants in the test identification parade. In that case, the charge against the accused was that they entered into a conspiracy as members of a Naxalite party to raid Police Station Kuttiadi. In the course of the raid, the police station was attacked and articles were burnt. No member of the police

station or staff was able to identify the raiders. Apart from the evidence of conspiracy, there was evidence of PW 25 who identified the appellants therein running away near the scene of occurrence after the raid took place in the police station. Firstly, his presence in the travelling bungalow was doubted and secondly, it was pointed out that he identified the appellants therein as persons who were running away near the place of occurrence and that the witness had admitted that he knew those two persons by face, yet he named P a g e | 32 them while identifying them in court. It was observed that there was a huge crowd after the police station was attacked and if those two appellants were seen running away that by itself .

would not show that they had taken part in the raid. It was on those facts, that it was observed that where a witness identified an accused in the court for the first time, who was not known to him, his evidence was absolutely valueless unless there had been a previous test identification parade to test his power of observation and that the idea of holding test identification parade was to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness might have seen only once and that if no test identification parade was held, it would be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in court. The rationale behind the observation of this Court is that as the evidence of identification of an accused in court is inherently of a weak character, as such it requires corroboration by way of test identification parade, so where the attending circumstances are such that the possibility of identifying the accused by the witness becomes bleak, as in that case, the witness only saw the appellants running away from the crowd, then such uncorroborated evidence cannot be relied upon to base a conviction. That judgment, in our view, did not lay down as a principle of law that where the accused was known to the witness from an earlier period or where the witness had a chance to interact with the accused or that in a case where the witness had an opportunity to observe the distinctive features of the accused, his evidence of identification in the court cannot be given any credence merely because the witness was not asked to identify the accused in the test identification parade.

22. In Mohd. Abdul Hafeez v. State of A.P. [(1983) 1 SCC 143: 1983 SCC (Cri) 139: AIR 1983 SC 367] The accused, along with others, was convicted under Section 392 read with Section 34 IPC. The victim did not give the name or description of the appellant therein in the first information report. This Court observed that the total absence of any such description which would have provided a yardstick to evaluate the identification of the P a g e | 33 appellant at a later date by a victim, would render his later identification weak. No test identification was conducted in that case, so it was held that the identification in court would hardly .

furnish any evidence against the appellant. Indeed, in that case, this Court observed that the witness did not give the description of the accused in the first information report or before the identification and the evidence of his identification was found to be weak, in the absence of corroboration, for being acted upon.

23. The identification of the appellants by PW 29, PW 34, PW 42 and PW 45 in court for the first time without prior identification by them in the test identification parade has been the subject matter of comment. Insofar as the identification of the appellants by PW 42 and PW 45 are

concerned, the trial court as well as the High Court had not accepted the same but the identification of the appellants by PW 29 and PW 34 had been accepted by both the trial court as well as by the High Court and in our view rightly. We have already laid down above that the identification of the accused by a witness if he had an opportunity to interact with him or to notice his distinctive features lends assurance to his testimony in court and that the absence of corroborative evidence by way of test identification parade would not be material. From the above-mentioned aspect, the evidence of PW 42 and PW 45 has been rightly rejected by the trial court and the High Court as PW 42 is a rickshaw driver who had no opportunity to see closely the appellants whom he took to Rooman Bungalow in the night. So also PW 45's identification of A-1 in court without his participation in the TIP has also no probative value inasmuch as he went to the shop of the witness as one of the customers and there was no specific reason why he should watch A-1 closely. But the same is not the position with PW 29 and PW 34. They were talking to the deceased Rohan Ohol at the time when the appellants came to Rooman Bungalow. Indeed A-1 wished the deceased Rohan who introduced A-1 as Nitin Anil Swargey. Thereafter, A-1 introduced A-2 and A-3 to Rohan Ohol and PW 29 and PW 34. They talked together for about 7-8 minutes and on Rohan Ohol's telling them to sit inside the house, they left P a g e | 34 their soiled shoes on the verandah and entered the house. It can safely be presumed that had they not given the name and description of the appellants at the earliest when their .

statement was recorded by the police on 24-7-1992, the defence in their searching and lengthy cross-examination would have brought on record omissions and contradictions with reference to their earlier statement given to the police. As such, evidence of identification of the appellants at their trial by the said witnesses even without the corroboration of the identification parade, had been rightly relied upon by the trial court as well as by the High Court. We, therefore, find no illegality in the judgment of the courts below in accepting their evidence of identification."

29. Therefore, the test identification parade is not essential in every case and where the witness knew the accused or he had a chance to see the accused, his identification in the Court cannot be doubted.

Even in Chunthu Ram (supra), the Hon'ble Supreme Court held that the test identification parade is not a substantive piece of evidence but is meant to help the Investigating Officer that the investigation is proceeding on the correct lines. Similarly, in Mohd. Rizwan (supra), it was specifically held in Para 9 that the witness did not know the accused before the incident and the test identification parade was necessary to give credence to the identification of the accused by the witness. It was further held that the failure to conduct a test identification parade is not always fatal. Thus, this judgment does not lay down the principle of law canvassed during the hearing on behalf of the accused that a test identification parade is a must in all cases P a g e | 35 and in case of failure to hold the test identification parade, the prosecution case cannot be relied upon. In Sheikh Umar (supra), the .

Hon'ble Supreme Court held that the substantive evidence of the identity of the accused is his identification by the witness in the Court.

It was held that when the possibility of the accused having shown to the witnesses before the test identification parade cannot be ruled out, the identification in the Court cannot be relied upon. In the present case, since no test identification parade was conducted;

therefore, there was no question of the accused having been shown to the witnesses making their identification in the Court vulnerable.

30. The testimony of this witness shows that the accused Prem Bahadur and Raju were seen with the deceased when the deceased was last seen alive. Three of them went together.

31. Hardev Singh (PW19) stated that he had purchased the truck bearing registration No. HP-64A-1949 in the name of his son Sachin Kumar. The truck was attached to a cement company for transporting cement. Tek Bahadur was deputed as a driver in the truck. The truck was loaded with 200 bags of cement on 24.10.2013 and was consigned to Panjera but the truck never reached its destination. His statement to this effect is corroborated by Paramjit P a g e | 36 Singh (PW9), Dispatch Assistant in the cement company. He stated that as per the record brought by him and maintained in the company, .

a truck bearing registration No. HP-64A-1949 was loaded with 200 cement bags weighing 10 tons on 24.10.2013. The truck left the factory premises at 1:17 pm. The consignment was sent to Panjera, Tehsil Nalagarh. He stated in his cross-examination that the record is maintained regarding the time when the vehicle was finally cleared out from the premises. He had not brought the record as it was not requisitioned. It takes about 10 minutes for a vehicle to arrive at Kharsi Chowk from the Cement plant if the road is clear. His testimony that the truck was loaded with 200 cement bags weighing 10 tons was not challenged in the cross-examination, which means that the same is accepted as correct by the defence. Therefore, it is duly proved on record that the truck was loaded with 200 cement bags on 24.10.2013.

32. Jeet Ram (PW-3) stated that he was working as a Beldar in HPPWD at Luhri. Five Nepali boys approached him on 25.10.2013. They had come in a truck bearing registration No. HP-64A-9419 and asked him whether he intended to purchase cement rejected by the Company. He agreed to purchase the cement bag at the rate of 300/-

per bag. He also enquired from Vinay Kumar, Hukam Ram, Suresh P a g e | 37 Kumar and Suresh Kumar son of Hans Raj whether they intended to purchase the cement bags. They agreed to purchase the cement bags .

because the price was much cheaper. He purchased five cement bags.

Vinay Kumar purchased 20 bags. Hukam Ram purchased seven bags.

Suresh Kumar purchased 158 bags and another Suresh Kumar purchased 10 bags. He denied in his cross-examination that he used to sell cement and iron rods to the people and he had concocted a false story against the accused to save himself. He had not seen the documents showing the rejection

of the cement and had not asked the Nepali persons from where they had brought the cement. He had not obtained any receipt from the Nepali Boys regarding the purchase. He denied that no cement was purchased. He identified the accused present in the Court as the person amongst those Nepalese, who had sold the cement to him.

33. This witness had remained with the accused for some time.

He paid money and unloaded the bags and he would have a sufficient chance to see and identify the accused. The cement bags were sold at the rate of 300/-, which was much cheaper, as per him. Such sales are not made usually and he had a reason to remember the faces of the accused. Therefore, the identification made by this witness regarding P a g e | 38 the accused in the Court cannot be faulted in the absence of a previous test identification parade conducted before the Magistrate.

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34. Suresh Kumar (PW4) corroborated his version. He stated that on 25.10.2013 at about 7:30 am, Jeet Ram met him on the way and asked him whether he wanted to purchase cement bags stated to have been rejected by the company for which the consignment was meant.

He said that the rate was 300/- per bag. He agreed to purchase ten bags. Hukam Ram, Vinay and Suresh son of Hans Raj also purchased the cement bags. They went to Sunni-Luhri Road where they found a truck bearing registration No. HP-64A-9419 was parked. Five Nepali boys were found in the truck. Those five Nepali boys included the accused present in the Court. He stated in his cross-examination that he had purchased cement bags from Jeet Ram and handed over the cost of 300/- per bag to him. He denied that bags were kept by Jeet Ram or Jeet Ram used to deal in the business of hardware. He denied that he was making a false statement that he had purchased cement from five Nepali boys.

35. It was submitted that there are major contradictions in the statement of Jeet Ram and this witness because Jeet Ram stated that five Nepali boys approached him in his house at village Prasin, P a g e | 39 whereas this witness stated that five Nepali boys were present in the truck on Sunni-Luhri Road. First of all, it is not a major contradiction .

as rightly held by the learned Trial Court. The incident had taken place on 25.10.2013 and the witnesses made the statement on 16.06.2015, after the lapse of more than one and half years. Parrot-like testimonies are not to be expected from the witnesses and this discrepancy was bound to come with the lapse of time and is not sufficient to reject their testimonies. Secondly, Jeet Ram stated that the accused met him first, thereafter, he talked to Vinay, Hukam Ram, Suresh and Suresh son of Hans Raj, whether they intended to purchase the cement bags and they agreed. Suresh Kumar also stated that Jeet Ram had asked him about the purchase of the bags. It appears from the combined reading of the statements of these two witnesses that the accused met Jeet Ram first, Jeet Ram talked to other villagers and all of them thereafter took the cement from the truck. Therefore, there is no major contradiction in the testimonies of these witnesses.

36. The statements of these witnesses clearly show that the accused had sold the cement on 25.10.2013 the next day after they were seen with the deceased. The cement was loaded in the truck bearing registration No. HP-64A-9419, in which the deceased was P a g e | 40 employed as a Driver. The fact that the accused and the deceased were together, after which the deceased was found missing and the accused .

were selling the cement loaded in the truck would lead to a conclusion that the accused had done something to the deceased when they were with him and the burden to prove otherwise would shift upon them in view of Section 106 of Indian Evidence Act.

37. It was submitted that the testimonies of these witnesses are not reliable because they had purchased the stolen cement.

Reliance was placed upon the judgment of the Hon'ble Supreme Court in Mohammed Hafeez (supra) wherein the Hon'ble Supreme Court held on the facts that the conduct of the jeweller, who had purchased the jewellery from the accused was suspicious. It is apparent from the judgment that it is based upon the facts, where the conduct of the jeweller was not found to be proper. In the present case, there is no evidence that the witnesses knew that the cement bags were stolen. A valid explanation was provided by them that they were told that cement bags were rejected by the Company. There is no reason to doubt this explanation. Hence, there is insufficient material in the present case to show that the witnesses knew about the cement bags being stolen property and they had purchased it despite such P a g e | 41 knowledge. Thus, the judgment cited on behalf of the defence does not apply to the present case.

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38. The police had also conducted a test identification parade in which the witnesses were asked to identify the accused in the presence of the police. It was held by the Hon'ble Supreme Court in Chunthu Ram (supra) that an identification made by the witnesses in the presence of the police is inadmissible being hit by Section 162 of Cr.P.C. A similar view was taken by Mohammed Rizwan (supra). Thus, identification was not admissible and no advantage can be derived from the same. However, since the witnesses had sufficient time to interact with the accused; hence, their identification of the accused cannot be doubted.

39. It was held by the Hon'ble Supreme Court in Balvir Singh vs. State of Uttarakhand 2023 SCC Online SC 1261 that when the circumstances have been established, which would show the guilt of the accused, the burden shifts upon him to explain those circumstances especially, when they are within the knowledge of the accused. It was observed: -

> "43. Section 106 obviously refers to cases where the guilt of the accused is established on the evidence produced by the prosecution unless the accused is able to prove some other facts, especially within his knowledge which would render the P a g e | 42 evidence of the prosecution nugatory. If in such a situation, the accused gives an explanation which may be reasonably true in the proved circumstances, the accused

gets the benefit of reasonable doubt though he may not be able to prove beyond .

reasonable doubt the truth of the explanation. But if the accused in such a case does not give any explanation at all or gives a false or unacceptable explanation, this by itself is a circumstance which may well turn the scale against him. In the language of Prof. Glanville Williams:

"All that the shifting of the evidential burden does at the final stage of the case is to allow the jury (Court) to take into account the silence of the accused or the absence of satisfactory explanation appearing from his evidence."

44. To recapitulate the foregoing: What lies at the bottom of the various rules shifting the evidential burden or burden of introducing evidence in proof of one's case as opposed to the persuasive burden or burden of proof, i.e., of proving all the issues remaining with the prosecution and which never shift is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand and it is therefore for the accused to give evidence on them if he wishes to escape. Positive facts must always be proved by the prosecution. But the same rule cannot always apply to negative facts. It is not for the prosecution to anticipate and eliminate all possible defences or circumstances which may exonerate an accused. Again, when a person does not act with some intention other than that which the character and circumstances of the act suggest, it is not for the prosecution to eliminate all the other possible intentions. If the accused had a different intention that is a fact, especially within his knowledge and which he must prove (see Professor Glanville Williams--Proof of Guilt, Ch. 7, page 127 and following) and the interesting discussion--para 527 negative averments and para 528--

"require affirmative counter-evidence" at page 438 and foil, of Kenny's outlines of Criminal Law, 17thEdn. 1958.

45. But Section 106 has no application to cases where the fact in question having regard to its nature is such as to be capable of being known not only by the accused but also by others if they happened to be present when it took place. From the P a g e | 43 illustrations appended to the section, it is clear that an intention not apparent from the character and circumstances of the act must be established as especially within the knowledge .

of the person whose act is in question and the fact that a person found travelling without a ticket was possessed of a ticket at a stage prior in point of time to his being found without one, must be especially within the knowledge of the traveller himself: see Section 106 of the Indian Evidence Act, illustrations

(a) and (b).

46. A manifest distinction exists between the burden of proof and the burden of going forward with the evidence. Generally, the burden of proof upon any affirmative proposition necessary to be established as the foundation of an issue does not shift, but the burden of evidence or the burden of

explanation may shift from one side to the other according to the testimony.

Thus, if the prosecution has offered evidence which if believed by the court would convince them of the accused's guilt beyond a reasonable doubt, the accused is in a position where he should go forward with counter-vailing evidence if he has such evidence. When facts are peculiarly within the knowledge of the accused, the burden is on him to present evidence of such facts, whether the proposition is an affirmative or negative one. He is not required to do so even though a prima facie case has been established, for the court must still find that he is guilty beyond a reasonable doubt before it can convict. However, the accused's failure to present evidence on his behalf may be regarded by the court as confirming the conclusion indicated by the evidence presented by the prosecution or as confirming presumptions which might have been rebutted. Although not legally required to produce evidence on his own behalf, the accused may therefore as a practical matter find it essential to go forward with proof. This does not alter the burden of proof resting upon the prosecution (Wharton's Criminal Evidence, 12thEdn. 1955, Vol. 1, Ch. 2 p. 37 and foil). Leland v. State, 343 US 790 (1952): 96 L.Ed. 1302, Raffel v. U.S., 271 US 494 (1926): 70 L.Ed. 1054.

P a g e | 44

40. It was further held that the burden will shift when prima facie evidence is led by the prosecution. The meaning of prima facie .

case was explained as under:

> WHAT IS A "PRIMA FACIE CASE" IN THE CONTEXT OF SECTION 106 OF THE EVIDENCE ACT?
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> 47. The Latin expression prima facie means "at first sight", "at first view", or "based on first impression". According, to Webster's Third International Dictionary (1961 Edn.), "prima facie case" means a case established by "prima facie evidence"
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> which in turn means "evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted". In both civil and criminal law, the term is used to denote that, upon initial examination, a legal claim has sufficient evidence to proceed to trial or judgment. In most legal proceedings, one party (typically, the plaintiff or the prosecutor) has a burden of proof, which requires them to present prima facie evidence for each element of the charges against the defendant. If they cannot present prima facie evidence, or if an opposing party introduces contradictory evidence, the initial claim may be dismissed without any need for a response by other parties.
>
> 48. Section 106 of the Evidence Act would apply to cases where the prosecution could be said to have succeeded in proving facts from which a reasonable inference can be drawn regarding death.

> 49. The presumption of fact is an inference as to the existence of one fact from the existence of some other facts unless the truth of such inference is disproved.
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> 50. To explain what constitutes a prima facie case to make Section 106 of the Evidence Act applicable, we should refer to the decision of this Court in Mir Mohammad (supra), wherein this Court has observed in paras 36 and 37 respectively as under:
>
> P a g e | 45 "36. In this context, we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows: "When any fact is especially within the .
>
> knowledge of any person, the burden of proving that fact is upon him."

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

51. We should also look into the decision of this Court in the case of Ram Gulam Chaudhary v. State of Bihar, (2001) 8 SCC 311, wherein this Court made the following observations in para 24 as under:

> "24. Even otherwise, in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudhary was brutally assaulted and then a chhura blow was given on the chest. Thus chhura-blow was given after Bijoy Chaudhary had said "he is still alive and should be killed". The appellants then carried away the body. What happened thereafter to Krishnanand Chaudhary is especially within the knowledge of the appellants. The appellants have given no explanation as to what they did after they took away the body. Krishnanand Chaudhary has not been since seen alive. In the absence of an explanation, and considering the fact that the appellants were suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there was every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to P a g e | 46 prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a .
>
> reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr.

> Mishra." (Emphasis supplied)

52. In the case on hand it has been established or rather proved to the satisfaction of the court that the deceased was in the company of her husband i.e., the appellant-convict at a point in time when something went wrong with her health and therefore, in such circumstances, the appellant-convict alone knew what happened to her until she was with him.

41. In the present case, the accused and the deceased were last seen together, after which nothing was heard of the deceased; the accused were found selling the cement loaded in the truck being driven by the deceased; hence, the burden will shift upon the accused to explain as to what happened to the deceased and in case of failure to provide any explanation, the Court can conclude that the accused had killed the deceased.

42. The last seen theorywas explained by the Hon'ble Supreme Court in Nizam v. State of Rajasthan, (2016) 1 SCC 550: (2016) 1 SCC (Cri) 386: 2015 SCC OnLine SC 782 as under:

> 14. The courts below convicted the appellants on the evidence of PWs 1 and 2 that the deceased was last seen alive with the appellants on 23-1-2001. Undoubtedly, the "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last P a g e | 47 seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well settled by this Court .

that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

15. Elaborating the principle of "last seen alive" in State of Rajasthan v. Kashi Ram [(2006) 12 SCC 254: (2007) 1 SCC (Cri) 688], this Court held as under : (SCC p. 265, para 23) "23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in the discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the

chain. The principle has been succinctly stated in Naina Mohamed, In re. [1959 SCC OnLine Mad 173: AIR 1960 Mad 218]"

> P a g e | 48 The above judgment was relied upon and reiterated in Kiriti Pal v. State of W.B. [(2015) 11 SCC 178: (2015) 5 Scale 319]
>
> 43. This position was reiterated in Surajdeo Mahto v. State of .
>
> Bihar, (2022) 11 SCC 800: 2021 SCC OnLine SC 542 wherein it was observed:
>
> (i) Last seen theory
>
> 30. The case of the prosecution in the present case heavily banks upon the principle of "last seen theory". Briefly put, the last seen theory is applied where the time interval between the point of when the accused and the deceased were last seen together, and when the victim is found dead, is so small that the possibility of any other person other than the accused being the perpetrator of crime becomes impossible. Elaborating on the principle of "last seen alive", a three-judge Bench of this Court in Satpal v. State of Haryana [Satpal v. State of Haryana, (2018) 6 SCC 610, para 6] has, however, cautioned that unless the fact of last seen is corroborated by some other evidence, the fact that the deceased was last seen in the vicinity of the accused, would by itself, only be a weak kind of evidence. The Court further held: (SCC pp. 612-13, para 6) "6. ... Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly.

But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation or furnishes a wrong explanation, absconds, the motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for the guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If P a g e | 49 there be any doubt or break in the link of the chain of circumstances, the benefit of the doubt must go to the accused. Each case will therefore have to be examined on .

its own facts for invocation of the doctrine."

31. We may hasten to clarify that the fact of the last seen should not be weighed in isolation or be segregated from the other evidence led by the prosecution. The last-seen theory should rather be applied taking into account the case of the prosecution in its entirety. Hence, the courts have to not only consider the factum of last seen but also have to keep in mind the circumstances that preceded and followed from the point of the deceased being so last seen in the presence of the accused.

44. The police recovered a dead body in the culvert. ASI Vijay Kumar (PW11) stated that the information was received from the Pradhan regarding the presence of a human dead body. He went to the spot and found the highly decomposed body of a male person lying under a culvert. He conducted the inquest report and sent the dead body for the postmortem examination. He denied in his cross-

examination that he could not tell the telephone number from which the information was received. He denied that he had not visited the site or had not conducted any proceedings.

45. His statement is corroborated by Meera Verma (PW2). She stated that she was called by the Police of Police Post, Sunni on 13.11.2013, as the dead body of a male person was recovered under a culvert at Dadhyog. She visited the spot and found the dead body of a male person in a decomposed state. Nothing was recovered during P a g e | 50 the search. She volunteered to say that the key was recovered from the pocket of the trousers. The dead body had become unrecognisable.

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The police prepared a memo. She identified the key and currency note of 20/-. She stated in her cross-examination that many persons from the village had also assembled at the spot. She did not know whether the Police had recorded the statements of those persons or not. The dead body was noticed by BRO people, who had informed the Police. BRO People were also present on the spot. She denied that no dead body was recovered by the police or that no recovery was effected. She is the Pradhan of the area and has no concern with the accused or the deceased. There is nothing in her cross-examination to show that she has any motive to depose falsely. Hence, her statement and the statement of ASI-Vijay Kumar duly proved that police had recovered a dead body.

46. Dr Tarun Shastri (PW-24) conducted the postmortem examination of the dead body and issued the report (Ex.PW24/A). He handed over the viscera and the clothes to ASI-Vijay Kumar. ASI-

Vijay Kumar handed over these clothes to Inspector Dewa Nand.

Deepak Kanwar (PW12) identified the clothes as belonging to the deceased. As already stated, there is nothing in the cross-

examination of Deepak Kanwar to show that he was making a false P a g e | 51 statement. His statement clearly establishes that the dead body was that of the deceased Tek Chand Bahadur.

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47. It was submitted that in the present case, the Police had not conducted the DNA examination of the dead body to connect it with the deceased. Even the post-mortem examination on 14.11.2013 shows that the death could have been caused within less than 15 days of the post-mortem examination; therefore, the dead body cannot be connected to the deceased. This submission cannot be accepted. It is duly proved by the identification of the clothes that the dead body belonged to the

deceased. The medical officer noticed that the dead body was highly putrefied and the cause of death could not be ascertained; hence, his opinion regarding the date of death cannot be relied upon. Even if it is assumed that the dead body did not belong to the deceased as contended on behalf of the defence, it will not assist the defence because the recovery of corpus delicti is not necessary in every case. It was laid down by the Hon'ble Supreme Court in Ramjee Rai v. State of Bihar (2006) 13 SCC 229 that corpus delicti need not be proved in a case of murder and where strong circumstantial evidence exists, the conviction can be recorded even in the absence of a dead body. It was observed:

> P a g e | 52 "22. It is now a trite law that corpus delicti need not be proved.

The discovery of the dead body is a rule of caution and not of law. In the event, that there exists strong circumstantial .

evidence, a judgment of conviction can be recorded even in the absence of the dead body. (See Rama Nand v. State of H.P. [(1981) 1 SCC 511: 1981 SCC (Cri) 197])

23. In Ram Gulam Chaudhary v. State of Bihar [(2001) 8 SCC 311:

> 2001 SCC (Cri) 1546] this Court noticed the decision in Rama Nand [(1981) 1 SCC 511: 1981 SCC (Cri) 197] and opined: (SCC p. 319, para 23) "23. There can be no dispute with the proposition of law set out above. As is set out in the various authorities (referred to above), it is not at all necessary for a conviction for murder that the corpus delicti be found.

Undoubtedly, in the absence of the corpus delicti, there must be direct or circumstantial evidence leading to the inescapable conclusion that the person has died and that the accused are the persons who had committed the murder."

48. This position was reiterated in Sanjay Rajak v. State of Bihar, (2019) 12 SCC 552, wherein it was observed: -

> "9. It is not an invariable rule of criminal jurisprudence that the failure of the police to recover the corpus delicti will render the prosecution case doubtful entitling the accused to acquittal on the benefit of the doubt. It is only one of the relevant factors to be considered along with all other attendant facts and circumstances to arrive at a finding based on reasonability and probability based on normal human prudence and behaviour. In the facts and circumstances of the present case, the failure of the police to recover the dead body is not much of a consequence in the absence of any explanation by the appellant both with regard to the victim last being seen with him coupled with the recovery from his house of the belongings of the deceased. Rama Nand v. State of H.P. [Rama Nand v. State of H.P., (1981) 1 SCC 511: 1981 SCC (Cri) 197], was a case P a g e | 53 of circumstantial evidence where the corpus delicti was not found. This Court upholding the conviction observed: (SCC pp. 522-23, para 28) .

"28. ... But in those times when execution was the only punishment for murder, the need for adhering to this cautionary rule was greater. Discovery of the dead body of the victim bearing physical evidence of violence has never been considered as the only mode of proving the corpus delicti in murder. Indeed, very many cases are of such a nature where the discovery of the dead body is impossible.

A blind adherence to this old "body" doctrine would open the door wide open for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to destroy the body of their victim. In the context of our law, Sir Hale's enunciation has to be interpreted no more than emphasising that where the dead body of the victim in a murder case is not found, other cogent and satisfactory proof of the homicidal death of the victim must be adduced by the prosecution.

Such proof may be by the direct ocular account of an eyewitness, or by circumstantial evidence, or both. But where the fact of corpus delicti i.e. "homicidal death" is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world, and absolute certainty is a myth. That is why under Section 3 of the Evidence Act, a fact is said to be "proved", if the court considering the matters before it, considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculpating circumstances which definitely P a g e | 54 lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned."

10. Sevaka Perumal v. State of T.N. [Sevaka Perumal v. State of T.N., .

(1991) 3 SCC 471: 1991 SCC (Cri) 724], was also a case where the corpus delicti was not found yet conviction was upheld observing: (SCC pp. 476-77, para 5) "5. ... In a trial for murder, it is not an absolute necessity or an essential ingredient to establish corpus delicti. The fact of death of the deceased must be established like any other fact. Corpus delicti in some cases may not be able to be traced or recovered. Take for instance that a murder was committed and the dead body was thrown into a flowing tidal river or stream or burnt out. It is unlikely that the dead body may be recovered. If recovery of the dead body, therefore, is an absolute necessity to convict an accused, in many a case the accused would manage to see that the dead body is destroyed, etc. and would afford complete immunity to the guilty from being punished and would escape even when the offence of murder is proved. What, therefore, is required to base a conviction for an offence of murder is that there should be reliable and acceptable evidence that the offence of murder, like any other factum of death, was committed and it must be proved by direct or circumstantial evidence, although the dead body may not be traced."

49. Thus, the failure to prove corpus delicti cannot result in the acquittal of the accused. The Court has to see whether there is reliable and acceptable evidence that murder had taken place and if it is found to be so, the Court can record the conviction.

50. In the present case, the deceased was never seen alive after he was seen with the accused. His truck was found abandoned and the P a g e | 55 cement was sold by the accused and other persons immediately on the next morning of the day when he was last seen alive. Nobody has .

heard of the deceased since then. Hence, the only inference which can be drawn from these circumstances is that Tek Chand Bahadur is no longer alive. The burden would shift upon the accused in such circumstances to explain as to what happened to him and in the absence of any explanation, the learned Trial Court had drawn a reasonable inference that he had died and the accused were responsible for his death.

51. The police relied upon the joint statement made by the accused under Section 27 of the Indian Evidence Act and the recovery of some hairs from the spot. Ms. Seema Sharma, learned Deputy Advocate General also submitted that the joint disclosure statements can be used as the discovery of the fact that the dead body was of the deceased. This can be so if the joint disclosure statement is admissible in evidence.

52. The learned Trial Court held that there is no bar in admitting a joint disclosure statement made by more than one accused. Reliance was placed upon the judgment of Hon'ble Supreme P a g e | 56 Court in Navjot Sandhu (Supra) wherein, the Supreme Court had held:-

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> Joint disclosures
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> 145. Before parting with the discussion on the subject of confessions under Section 27, we may briefly refer to the legal position as regards joint disclosures. This point assumes relevance in the context of such disclosures made by the first two accused viz. Afzal and Shaukat. The admissibility of information said to have been furnished by both of them leading to the discovery of the hideouts of the deceased terrorists and the recovery of a laptop computer, a mobile phone and cash of Rs 10 lakhs from the truck in which they were found at Srinagar is in issue. Learned Senior Counsel Mr Shanti Bhushan and Mr Sushil Kumar appearing for the accused contend, as was contended before the High Court, that the disclosure and pointing out attributed to both cannot fall within the ken of Section 27, whereas it is the contention of Mr Gopal Subramanium that there is no taboo against the admission of such information as incriminating evidence against both the accused informants. Some of the High Courts have taken the view that the wording "a person" excludes the applicability of the section to more than one person. But, that is too narrow a view to be taken. Joint disclosures, to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27. "A person accused" need not necessarily be a single

> person, but it could be a plurality of the accused. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus.

At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the P a g e | 57 first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or, in rare .

cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. We do not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break, almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section 27. However, there may be practical difficulties in placing reliance on such evidence. It may be difficult for the witness (generally the police officer), to depose which accused spoke what words and in what sequence. In other words, the deposition in regard to the information given by the two accused may be exposed to criticism from the standpoint of credibility and its nexus with discovery. Admissibility and credibility are two distinct aspects, as pointed out by Mr Gopal Subramanium. Whether and to what extent such a simultaneous disclosure could be relied upon by the Court is really a matter of evaluation of evidence. With these prefatory remarks, we have to refer to two decisions of this Court which are relied upon by the learned defence counsel.

53. It is apparent from the judgment of the Hon'ble Supreme Court that a joint disclosure statement is admissible if it is proved that the statement was made by one person and confirmed by the other. A joint statement stated to have been made by the people in unison is inherently suspicious and cannot be relied upon.

54. Inspector Dewa Nand (PW21) stated that all the accused persons made a statement under Section 27 of the Indian Evidence Act. Hardev Singh (PW19) stated that all five persons stated before P a g e | 58 the Police that they had killed Tek Chand Bahadur. Rakesh Kumar (PW1) stated that five persons were in police custody and all of them .

made a joint disclosure statement that they had concealed the dead body of the driver in a culvert after killing him. The memo (Ex.PW1/B) reads that all the accused made the statement jointly. Thus, as per the prosecution case, all the accused had made a joint statement, which is inherently improbable as laid down by Hon'ble the Supreme Court in view of Navjot (supra) and no reliance can be placed upon the same.

55. Ms Seema Sharma learned Deputy Advocate General for the respondent/State relied upon the cross-examination of Rakesh Kumar (PW1), wherein he had stated that perhaps accused Prem Bahadur had made a disclosure statement first within ten minutes to submit that the statement was made by one person and was confirmed by another. No such inference can be drawn by the stray line in the cross-examination when the witnesses in their examination-in-chief have categorically stated that the statements were made jointly by all the accused and the memo also mentions that the statements were made jointly. Thus, the joint disclosure statement has to be excluded; however, this exclusion will not make much difference to the prosecution case in view of other circumstances proved on record.

P a g e | 59

56. The Police effected the recovery of hair pursuant to the disclosure statement made by the accused. Even if the discovery of .

the hairs is taken to be an indicator of the conduct of the accused, the hairs are not connected to the deceased. They were never sent for chemical examination and there is nothing to connect them with the deceased and not much advantage can be derived from their recovery.

57. The Police had also recovered a driving licence at the instance of the disclosure statement made by Prem Bahadur.

However, Prem Bahadur is not being tried before the Court and the recovery effected at his instance will not incriminate the present accused.

58. The Police have relied upon the call details record;

however, the call details record does not mention the name of the person in whose name the mobile phone was issued. The name of Vicky Rana was been written with pen and it was submitted that this was sufficient. However, in the absence of the customer application form, mere writing by pen by some person will not show that the mobile phone belonged to the accused to connect him with a commission of crime. Since, the call details record is not connected, P a g e | 60 therefore, it is not necessary to discuss the law regarding the relevance and admissibility of the call detail record.

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59. The circumstances established on record clearly show that the accused was last seen with the deceased, who was driving a truck carrying the cement and his dead body was subsequently recovered.

The accused were seen selling the cement loaded in the truck on the next morning and the truck was found abandoned on the roadside. It was laid down by the Hon'ble Supreme Court in Sunderlal v. State of M.P., (1952) 2 SCC 464: 1952 SCC OnLine SC 117 that where the accused were found in possession of the stolen property immediately after the crime, they can be held liable for

commission of crime. It was observed:

> 10. The accused no doubt maintained that the half-gold mohur and the silver churas belonged to him and he had pledged the silver churas and sold the half-gold mohur himself as his own and realised money out of the same. This allegation of his rested, however, on his mere ipse dixit whereas the evidence of the witnesses PW 4, PW 9 and PW 16 was definite that the silver churas which were produced from the custody of Bishandas Tularam were the same silver churas which used to be worn habitually by the deceased.
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> 11. These ornaments were, therefore, established to be the ornaments worn by the deceased and the accused was not in a position to give any satisfactory explanation as to how he came to be in possession of the same on the very same day on which the alleged murder was committed. The circumstantial evidence therefore was sufficient to hold the accused responsible for the P a g e | 61 murder of the deceased and even apart from the medical evidence in regard to strangulation there is not the slightest doubt that it was the accused and the accused alone who was .

responsible for bringing about the death of the deceased.

12. Under these circumstances we are of the opinion that the conclusion reached by the High Court in regard to the accused having committed the offence under Section 302 was correct and the accused was rightly convicted of the same.

60. It was held in Baiju v. State of M.P., (1978) 1 SCC 588: 1978 SCC (Cri) 142 that when the accused was found in possession of the articles belonging to the deceased, an inference can be drawn that he had committed the murder. 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 Smt Lakhpatiya 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 P a g e | 62 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.

11. The possession of the fruits of the crime, recently after it has been committed, affords a strong and reasonable ground for the presumption that the party in whose possession they are found is the real offender unless he can account for such possession in some way consistent with his innocence. It is founded on the obvious principle that if such possession had been lawfully acquired, that party would be able to give an account of the manner in which it was obtained. His unwillingness or inability to afford any reasonable explanation is regarded as amounting to strong, self-inculpatory evidence. If the party gives a reasonable explanation as to how he obtained it, the courts will be justified in not drawing the presumption of guilt. The force of this rule of presumption depends upon the recency of the possession as related to the crime and that if the interval of time be considerable, the presumption is weakened and more especially if the goods are of such kind as in the ordinary course of such things frequently change hands. It is not possible to fix any precise period. This Court has drawn similar presumption of murder and robbery in a series of decisions especially when the accused was found in possession of these incriminating articles and was not in a position to give any reasonable explanation. Earabhadrappa v. State of Karnataka [(1983) 2 SCC P a g e | 63 330: 1983 SCC (Cri) 447] was a case where the deceased Bachamma was throttled to death and the appellant was taken into custody and gold ornaments and other articles were .

recovered at his instance. This Court observed: (SCC p. 340, para

13) "13. This is a case where murder and robbery are proved to have been integral parts of one and the same transaction and therefore the presumption arising under Illustration (a) to Section 114 of the Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her gold ornaments which form part of the same transaction."

12. In another case reported in Mukund v. State of M.P. [(1997) 10 SCC 130: 1997 SCC (Cri) 799] the prosecution case was that in the night intervening 17-1-1994 and 18-1-1994, the appellants

trespassed into the residential house of one Anuj Prasad Dubey, committed murders of his wife and their two children and looted their ornaments and other valuable articles. On the next night, the appellants were arrested and interrogated. Pursuant to the statement made by one of the accused, gold and silver ornaments and other articles were recovered. This Court, relying on an earlier decision reported in Gulab Chand v. State of M.P. [(1995) 3 SCC 574: 1995 SCC (Cri) 552] observed: (SCC p. 134, para 9) "If in a given case -- as the present one -- the prosecution can successfully prove that the offences of robbery and murder were committed in one and the same transaction and soon thereafter the stolen properties were recovered, a court may legitimately draw a presumption not only of the fact that the person in whose possession the stolen articles were found committed the robbery but also that he committed the murder."

13. In the instant case, the appellant could not give an explanation as to how he came into possession of various gold ornaments and other articles belonging to Shiv Pratap and the members of his family. The appellant also could not give any reasonable explanation how he sustained injuries on his body P a g e | 64 and how his shirt became bloodstained. In the facts and circumstances, it is a fit case where the presumption under Illustration (a) to Section 114 of the Evidence Act could be drawn .

that the appellant committed the murders and the robbery. The courts below have rightly held the appellant guilty of the offences charged against him."

61. This position was reiterated in Ronny (supra) wherein it was observed:

> 30. Apropos the recovery of articles belonging to the Ohol family from the possession of the appellants soon after the robbery and the murder of the deceased (Mr Mohan Ohol, Mrs Ruhi Ohol and Mr Rohan Ohol) which possession has remained unexplained by the appellants, the presumption under Illustration (a) of Section 114 of the Evidence Act will be attracted. It needs no discussion to conclude that the murder and the robbery of the articles were found to be part of the same transaction. The irresistible conclusion would, therefore, be that the appellants and no one else had committed the three murders and the robbery.
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> 31. In Baiju v. State of M.P. [(1978) 1 SCC 588: 1978 SCC (Cri) 142] the appellant gained access to the house of the deceased who was childless on the pretext that by sorcery, he would remove the evil effect which would enable him to beget children. On 20-

1-1975, he took the deceased to a nearby Nala on the pretext of performing some religious rites, killed him there and threw his dead body in the nala. In the same way, he killed another lady of the family, named Smt Fulkunwar, one of the wives of the deceased. He then went to the house of the deceased and killed his mother Smt Bhagwanti and his nephew Mr Rambakas while they were sleeping there. He ransacked the house, broke open the boxes, and took away a number of articles including the transistor, watch, torch, clothes, ornaments etc. On the next day, the neighbour of the deceased and his nephew finding unusual calm in the house peeped inside the house and found the

dead bodies of Smt Bhagwanti and Mr Rambakas. On 28-1- 1975 the appellant was arrested and at his instance, the stolen P a g e | 65 articles were recovered from him. They were put for identification and were identified by the surviving wife of the deceased. On those facts, the learned Sessions Judge convicted .

the appellant for an offence under Sections 302 and 394 IPC.

The High Court confirmed the conviction and sentence, on appeal. On further appeal to the Supreme Court, by special leave, it was held that the offences were committed on the night intervening January 20 and 21 and the stolen property was recovered from the house of the appellant or at his instance on 28-1-1975. The accused did not explain about the possession of those articles. It is observed that 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 circumstances of each case and that the nature of the stolen articles, manner of their acquisition, nature of evidence about its identity, the manner in which they were dealt with by the appellant, the place and circumstances of their recovery, the length of intervening period, the ability or otherwise of the appellant to explain his possession are factors which should be taken into consideration in arriving at a decision and held that there was ample justification for reaching the inevitable conclusion that it was the appellant and no one else who had committed four murders and the robbery and that the presumption under Illustration (a) of Section 114 was attracted.

32. In Gulab Chand v. State of M.P. [(1995) 3 SCC 574: 1995 SCC (Cri) 552: AIR 1995 SC 1598] the question which fell for consideration of this Court was whether presumption under Illustration (a) of Section 114 of the Evidence Act as to commission of murder and robbery by the accused would be attracted. The appellant was charged under Sections 302, 394 and 396 IPC for having committed the murder of Kapuriyabai on the intervening night of 23-4-1979 and 24-4-1979. The trial court acquitted him of the said offences but convicted him under Section 380 IPC. The High Court allowed the appeal of the State against the said judgment of the learned Sessions Judge. There the appellant was arrested after four days of the occurrence. On the search of his house, the stolen articles were P a g e | 66 recovered. In the test identification parade of the articles, the ornaments were identified as belonging to the deceased by the witnesses. Relying on the judgment of this Court in Tulsiram .

Kanu v. State [1951 SCC 92: AIR 1954 SC 1: 1954 Cri LJ 225] it was held that the presumption under Illustration (a) of Section 114 of the Evidence Act had to be read along with the important time factor and if the ornaments of the deceased were found in possession of a person soon after the murder, the presumption of guilt in respect of murder by the possessor of the stolen goods also might be permitted. But if several months have expired, the presumption could not be permitted to be drawn.

As in that case, some of the ornaments of the deceased were sold by the appellant within 3-4 days and some others were recovered from his house, such close proximity of the recovery was held to be an important time factor. It was held on the facts of that case, that murder and robbery had been proved to be the integral parts of the same transaction and, therefore, the presumption would arise

under Illustration (a) of Section 114 of the Evidence Act that not only the appellant committed the robbery but also the murder of the deceased. Here the decision of this Court in Union Territory of Goa v. Beaventura D'Souza [1993 Supp (3) SCC 305: 1993 SCC (Cri) 999: AIR 1993 SC 1199] may be noticed. The facts of that case were that the respondents were tried for offences under Sections 463, 307, and 397 read with Section 34 IPC. The allegation was that on the intervening nights of 3-9-1980 and 4-9-1980, the respondent murdered two ladies and committed robbery by stealing articles belonging to them. There was also an injured witness. The case rested on circumstantial evidence. The circumstance relied upon was the recovery of articles at the instance of the accused person. The trial court raised the presumption under Illustration (a) of Section 114 of the Evidence Act and convicted them but the High Court acquitted them. On appeal by special leave, this Court pointed out that the third person who was injured did not implicate any one of the accused in murder. This Court took note of the fact that the High Court had doubted the overnight stay of the accused in the house of the victims; the recovery of articles, in that case, was effected after one month of the occurrence and noticing the distinguishing features of P a g e | 67 that case, namely that there was no proximity of time and that the injured witness did not implicate them, it was held that there were no such circumstances to connect the accused with .

the murder. Therefore, the presumption under Illustration (a) of Section 114 of the Evidence Act would be only to the extent of holding the accused guilty under Section 411 IPC. The distinguishing factors of this case, as noted above, speak for themselves.

62. Thus, an inference can be drawn from these circumstances that the accused had stolen the cement and murdered the deceased.

63. to It was submitted that when two versions appear on the record, the version in favour of the accused has to be preferred. There can be no dispute with this proposition of law; however, in the present case, there is only one version, which suggests the inference of the guilt. No other version suggests the innocence; hence this proposition will not apply to the present case.

64. The fact that a total of five persons were in possession of the cement on the next day would show their involvement in the commission of crime and the learned Trial Court had rightly convicted the accused of the commission of offences punishable under Sections 396 and 120B of IPC.

65. Learned Trial Court sentenced the accused-Vicky Rana and Raju Singh Bahadur to undergo imprisonment for life and to pay a P a g e | 68 fine of 20,000/- each for the commission of an offence punishable under Section 120-B and in default of payment fine to further undergo .

rigorous imprisonment for six months each. Keeping in view the circumstance, in which, the crime was committed, the sentence is not excessive and no interference is required with the same.

66. Therefore, there are no reasons to interfere with the judgment and sentence passed by the learned Trial Court. Hence, the present appeals fail and the same are dismissed.

(Vivek Singh Thakur) Judge (Rakesh Kainthla) Judge 25th July, 2024 (Saurav pathania)