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IN THE HIGH COURT OF DELHI

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Judgment reserved on : 30.01.2009

Judgment delivered on: 09.04.2009

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CRL.A. No.274/2007

ASHOK KUMAR @GOVIND ...Appellant
Through : Mr. Abhinav Bajaj, Advocate.

versus

STATE ...Respondent
Through :Ms. Richa Kapoor, Advocate.

CRL.A. No.275/2007

SUNIL KUMAR @KALU ...Appellant
Through : Mr. Tarun Sharma, Advocate.

versus

STATE ...Respondent
Through :Ms. Richa Kapoor, Advocate.

CRL.A. No.397/2007

DHARAM SINGH ...Appellant
Through : Mr. Ajay Chaddha, Advocate.

versus

STATE ...Respondent
Through :Ms. Richa Kapoor, Advocate.

CRL.A. 398/2007

JAIPAL SINGH ...Appellant
Through : Mr.Deepak Manmohan Bhalla,
Advocate.

versus

STATE ...Respondent
Through :Ms. Richa Kapoor, Advocate.

CRL.A. 410/2007

MADAN

...Appellant

Through : Mr. Deepak Manmohan Bhalla,
Advocate.

versus

STATE

...Respondent

Through : Ms. Richa Kapoor, Advocate.

CRL.A. 601/2007

JAI BHAGWAN

...Appellant

Through : Mr. Deepak Manmohan Bhalla,
Advocate.

versus

STATE

...Respondent

Through : Ms. Richa Kapoor, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: PRADEEP NANDRAJOG, J.

1. Case of the prosecution is that the appellants and co-accused Jeet Kaur (who has been acquitted after the trial) hatched a conspiracy on 16.9.2001 to kidnap for ransom Master Rishabh and Master Shubham, twins aged 4 ½ years and in furtherance thereof on 17.9.2001 kidnapped Master Rishabh and Master Shubham as also abducted the driver

Sunil, employed by Shri Rajiv Aggarwal father of Master Rishabh and Master Shubham. That, in furtherance of the conspiracy, to eliminate they being identified, since appellant Ashok was also employed as a driver by Shri Rajiv Aggarwal and hence driver Sunil knew appellant Ashok, driver Sunil was murdered and body hidden in a cane field next to a canal in village Silarpur and as per the conspiracy ransom in sum of Rupees One Crore for each child was demanded. As per the prosecution, the conspirators gave effect to the conspiracy inasmuch as on 17.9.2001 kidnapped the two children and abducted the driver and thereafter murdered the driver as also demanded ransom but their mission failed because they were apprehended.

2. It is not in dispute that Master Rishabh and Master Shubham were students of Bal Bharti School, Sector-14, Rohini, studying in Nursery Section-A. As proved by their class teacher Ms.Anjana Baweja PW-1, who we note has not been cross-examined, Master Rishabh and Master Shubham sons of Shri Rajiv Aggarwal were dropped at the school in the morning by the driver of Rajiv Aggarwal and at 12.45 noon the same day the children were entrusted to driver Sunil after school hours were over.

3. Neither the two young boys nor their driver returned to their house. Their father Rajiv Aggarwal went to the local police station i.e. PS Prashant Vihar at around 6:00 PM on 17.9.2001 and informed HC Khushi Ram PW-5, the officer on duty, that his children as also the driver were missing. HC Khushi Ram noted the statement Ex.PW-5/B in the daily diary register vide DD No.13A and informed the police control room. He registered the FIR Ex.PW-5/A on the basis of the statement Ex.PW-5/B under Section 363 IPC. Soon thereafter Shri Rajiv Aggarwal received a telephone call demanding ransom of Rupees One Crore per child, which information he dutifully passed on to ASI Chander Pal Singh PW-29 to whom the case was entrusted for investigation after FIR Ex.PW-5/A was registered. ASI Chander Pal Singh recorded a supplementary statement of Shri Rajiv Aggarwal under Section 161 Cr.P.C. and added the offence under Section 364-A IPC for further investigation in the FIR.

4. The employees of Shri Rajiv Aggarwal were kept under observation and search teams were constituted to look for clues and in particular to search and find out the Maruti Zen bearing registration No.DL-8CV-5369, the car in which driver Sunil had picked up the children from the school.

5. Information was received on 18.9.2001 that the car was seen on the service street at Wazirpur Industrial Area. ASI Chander Pal Singh PW-29 accompanied by Const. Sohan Lal PW-15 immediately left for the spot and seized the car vide seizure memo Ex.PW-15/B. Crime team was summoned. Shri P.K.Gautam PW-18, Senior Scientific Officer, CFSL accompanied by Shri A.D. Sahay, Senior Scientific Assistant came to the spot and lifted chance finger prints from the car.

6. At the laboratory Shri S.K. Chadha PW-20, Senior Scientific Officer was able to successfully develop ten chance prints of the finger prints which were lifted from the car.

7. Since the employees of Rajiv Aggarwal were kept under surveillance, probably for the reason the police officers thought that possible leads could emerge from suspicious conduct of some employee, conduct of appellant Ashok, also employed as a driver by Rajiv Aggarwal, was found to be suspicious as it was noticed that he was making unnecessary visits to the house, probably to familiarize himself as to what Rajiv Aggarwal and the police were doing. SI Ramesh PW-30, joined the investigation of the case on 20.9.2001. He, along with HC Ramesh, Const. Dayanand and Const. Amit went to House No.269, J.J. Colony, Shakarpuri, where Ashok used to reside. He was interrogated and during interrogation broke

down and vide disclosure statement Ex.PW-23/B recorded by SI Ramesh PW-30 and witnessed by Const. Dayanand PW-23, disclosed that with the desire of making money all accused persons had discussed on different dates as to how they would give effect to a plan to kidnap the children of Rajiv Aggarwal and that final shape to the conspiracy was given in the house of Jaipal on 16.9.2001 when all accused were present and that as per the plan the children were kidnapped on 17.9.2001 and removed to village Balwapur and driver Sunil was murdered near Balwapur by Jai Bhagwan, Madan, Dharam and Jaipal. Appellant Ashok was arrested at 2:15 PM on 20.9.2001.

9. Appellant Ashok thereafter led SI Ramesh Singh and Const. Dayanand as also Const. Amit to House No.B-291, Jahangir Puri, Delhi and pointed out the same informing the police officers that this was the residence of accused Jaipal. At around 2:15 PM when the police team, accompanied by Ashok reached the house and it was pointed out as being the residence of Jaipal, on entry into the house, the police team found not only Jaipal but even Sunil present in the house. Both were arrested at 2:15 PM on 20.9.2001.

10. Jaipal and Sunil were interrogated. Jaipal made a disclosure statement Ex.PW-23/E and Sunil made a disclosure statement Ex.PW-23/F, both of which were recorded by SI

Ramesh PW-30 and were witnessed by Const. Dayanand PW-23.

11. In his disclosure statement Jaipal disclosed the facts already told by Ashok Kumar to the police pertaining to the conspiracy. Additionally, he gave details as to how the children were kidnapped. In his disclosure statement he disclosed that the children were kept in village Balwapur and he could lead the police to the said place. He disclosed that driver Sunil was strangled with a rope and his body was dumped.

12. In his disclosure statement Sunil disclosed same facts as were already known to the police and as disclosed by Ashok pertaining to the conspiracy. He additionally stated that after the children were kidnapped he was informed by Jai Bhagwan and Jaipal that the body of driver Sunil has been dumped in a sugarcane field in village Balwapur, U.P.

13. It was but logical that the investigating officer would form a raiding team and leave for village Balwapur, for this was the village in which, as per the disclosure statements of Ashok, Jaipal and Sunil, the two children were kept in confinement and also the dead body of the deceased driver Sunil was dumped.

14. But before the police party could leave for village Balwapur an information was received that the two children would be brought to Delhi by a conspirator who would disembark from a public transport bus at Anand Vihar Inter State bus terminal.

15. SI Chander Pal Singh PW-29, Inspector Ravinder, SI Ramesh Singh PW-30 and Inspector Subhash Chander formed the raiding party and took along with them Rajiv Aggarwal to facilitate the children being identified, if the secret information received was correct.

16. Appellant Madan was seen with the two children disembarking from a bus. Rajiv Aggarwal recognized his children and pointed them out to the raiding party. Madan was apprehended at 7:00 PM as recorded in the arrest memo. The children were recovered and handed over to the father vide memo Ex.PW-12/C.

17. Madan was interrogated and made a disclosure statement Ex.PW-29/B which was recorded by SI Chander Pal Singh PW-29 and was witnessed by SI Ramesh Singh PW-30. In his statement, Madan disclosed the facts pertaining to the conspiracy as were already known to the police and as disclosed by Ashok. The additional information given was that the dead body of driver Sunil could be got recovered by him

from the spot where the same was dumped. Further additional information given by him was that after being kidnapped the children were confined in the house of Dharam Singh in village Balwapur and that he could take the police to the said house.

18. The police team consisting of SI Chander Pal Singh, Inspector Ravinder Singh, SI Subhash Tandon and SI Ramesh Singh left for village Balwapur and reported first at the police post Brij Ghat under jurisdiction of PS Garh Mukteshwar informing the local police the purpose of their visit i.e. to apprehend accused Dharam Singh as also be led to the place where the dead body of driver Sunil was stated to be dumped so that the dead body could be recovered. SI Shri Ram PW-26 the chowki incharge of the police post at Brij Ghat recorded the visit by the police officers of Delhi in the daily diary and accompanied the police team.

19. Since appellant Madan and Jaipal, in their disclosure statements had stated that they could lead the police to the house where the children were confined i.e. the house of Dharam Singh. Both led the police to a house in village Balwapur and pointed out the same to be the house of Dharam Singh who was found present in the house and was arrested at 3:00 AM on 21.9.2001 i.e. the intervening night of 20th and 21st September 2001. He was interrogated by SI Chander Pal Singh

PW-29 who recorded his disclosure statement Ex.PW-29/A in which he disclosed the facts already known to the police pertaining to the conspiracy and that he knew the place where the dead body of Sunil was thrown. He disclosed that the two children were kept in his house and Madan had taken them away. That while in his house he had changed the school dress of the children. That the school dress, the school bag with the books, lunch boxes and belts of the children were hidden by him and that he can get recovered the same. Pursuant thereto Dharam Singh got recovered two school bags containing diaries of Bal Bharti Public School, books and lunch box. He also got recovered two caps, two shirts, two shorts and two belts of the children which were seized vide seizure memo Ex.PW-26/A.

20. Thereafter, the police personnel from Delhi Police accompanied by SI Shri Ram PW-26, along with Madan, Jaipal and Dharam Singh proceeded to a place between village Balwapur and village Silarpur as they were led to the said place by Madan, Jaipal and Dharam Singh.

21. Since the place where Madan, Jaipal and Dharam Singh led the police to, fell within the jurisdiction of PS Bahadur Garh (UP), SI Shri Ram PW-26 informed the duty officer of PS Bahadur Garh about the police from Delhi going to

the place in question. Said information was recorded at PS Bahadur Garh vide DD No.6, Ex.PW-27/A at 5:40 AM on 21.9.2001. On receipt of said information, SI Charan Singh PW-27 of PS Bahadur Garh also joined the police team.

22. It is apparent that dawn was breaking and it was early morning time on 21.9.2001. Madan, Jaipal and Dharam Singh led the police team to a sugarcane field in village Silarpur and from near a canal, at about a distance of 20 yards from the canal, hidden within sugarcane, pointed out a dead body stating that this was the body of driver Sunil. The pointing out by Dharam Singh stands recorded in the pointing out memo Ex.PW-26/C. The pointing out by Madan stands recorded in the pointing out memo Ex.PW-26/D. The pointing out by Jaipal stands recorded in the pointing out memo Ex.PW-26/E.

23. The body was seized vide seizure memo Ex.PW-7/A drawn up by SI Charan Singh PW-27 of PS Bahadur Garh.

24. Public persons were associated when the dead body was recovered on the pointing out of Dharam Singh, Madan and Jaipal. They are Pappi PW-3, Mangru Singh PW-4, Ramesh Chand PW-6, Manbir Singh PW-7 and Hari Singh PW-8.

25. Since the dead body was recovered within jurisdiction of PS Bahadur Garh, inquest proceedings were

conducted by SI Charan Singh of PS Bahadur Garh. The body was sent to the mortuary of Mukund Lal Municipal Hospital where Dr.Jitender Kumar PW-10 conducted the post-mortem at 4:00 PM on 21.9.2001 and prepared the post-mortem report Ex.PW-10/A recording therein that the body was 3 – 4 days old and that the cause of death was asphyxia due to strangulation. Ligature marks 33 cm long and ½ cm wide all around the neck above adam's apple was noted. It was noted that the tongue was protruding between the teeth. The skin was peeled off at places and that the scalp hair was loosened. A vest, underwear, pant, shirt and belt removed from the body as also a cord piece around the neck of the body was handed over to SI Charan Singh PW-27.

26. At the mortuary, before commencement of the post-mortem, Aabha Devi PW-11 and Sudhir Poddar PW-2, the wife and the brother respectively of deceased Sunil identified the dead body as that of Sunil.

27. After the post-mortem, the body was handed over to Aabha Devi and Sudhir Poddar. The inquest papers and the vest, underwear, pant, shirt and belt removed from the body of the deceased as also a cord piece around the neck of the body were sent by SI Charan Singh to the SHO PS Prashant Vihar under cover of his forwarding letter Ex.PW-27/E.

28. To complete the narrative of the facts as they unfolded and as claimed by the police, Jeet Kaur was apprehended on 21.9.2001 at 10:00 AM. She is the wife of appellant Jaipal.

29. On 22.9.2001, without seeking any permission from the Court and there being no identification of Jaipal, Dharam Singh and Madan, who were in detention, and as per the requirement of The Identification of Prisoners Act 1920, Const. Ravinder PW-16 took sample finger print impressions of Jaipal, Dharam Singh and Madan and handed over the same to Inspector Ravinder Kumar who in turn forwarded the same on 26.9.2001 to the Forensic Science Laboratory where S.K.Chadha PW-20, Senior Scientific Officer of the Laboratory, after comparison of the sample finger prints, gave an opinion Ex.PW-20/D to the effect that chance finger prints Q-10 was identical with the specimen left thumb impression of Jaipal marked LTS1.

30. Appellant Jai Bhagwan was arrested on 3.7.2002. He made a disclosure statement Ex.PW-28/C recorded by Inspector Sita Ram Meena PW-28 in which he disclosed the facts pertaining to the conspiracy as already disclosed to the police by Ashok as also the facts already known to the police pertaining to the acts committed to give effect to the

conspiracy. His sample finger print impressions were obtained, without any order by any Court and without the process of identification being done as required by the Identification of Prisoners Act 1920 and the same were sent to PW-20 who vide report Ex.PW-20/K gave an opinion that the chance print marked Q-6 was identical with the specimen left hand thumb impression of Jai Bhagwan marked LTS15.

31. Needless to state, save and except admissible by virtue of Section 27 of the Evidence Act, the disclosure statements made by the accused, being admissions of guilt, are inadmissible in evidence. It is for this reason, while referring to the disclosure statements of the accused, we have summarized the facts disclosed therein which are confessional of the guilt and have highlighted such facts disclosed which have relevance under Section 27 of the Evidence Act.

32. The accused were charged for the offence punishable under Section 120-B IPC pertaining to the conspiracy to kidnap for ransom Master Rishab and Master Shubham and for the conspiracy to murder Sunil. They were also charged for the offence of kidnapping for ransom as also for the charge of murder.

33. At the trial, the various police officers associated with the investigation and the ones who had transmitted

various exhibits to the Forensic Laboratory and had received back the same, as also the police officers of PS Garh Mukteshwar and PS Bahadur Garh were examined as the witnesses of the prosecution. They proved the facts noted hereinabove pertaining to the arrest of the accused; the disclosure statements made by the accused; the recovery of Master Rishab and Master Shubham from accused Madan; the recovery of the clothes and the school bag of the children from the house of Dharam Singh and the recovery of a dead body identified that of deceased Sunil on the joint pointing out of appellants Madan, Jaipal and Dharam Singh. The forensic experts who had lifted the chanced finger prints; the one who had developed the same and had compared the same with the specimen finger prints of Jaipal, Dharam Singh, Madan and Jai Bhagwan were examined, who proved the lifting of the chance finger prints and the report Ex.PW-20/D and Ex.PW-20/K.

34. Ms. Anjana Baweja proved that the two children had attended school on 17.9.2001 and had left with the driver Sunil at 12:45 noon. Pappi PW-3, Mangru Singh PW-4, Ramesh Chand PW-6, Manbir Singh PW-7 and Hari Singh PW-8 deposed that on being called by SI Charan Singh PW-27 they had reached a sugarcane field in village Silarpur and had witnessed the recovery of a dead body of a male person.

35. Since an argument was raised during hearing of the appeal to the truthfulness of the recovery of a dead body as alleged by the prosecution, we may note that in cross examination, Pappi PW-3 stated that Delhi Police personnel were not present when the body was seized. We further note that SI Shri Ram PW-26 of PS Garh Mukteshwar also stated that the Delhi Police had left the place where the dead body was recovered at around 6:00 AM.

36. Dr. Jitender Kumar PW-10 who had conducted the post-mortem of the deceased proved the post-mortem report. Abha Devi PW-11, the wife of the deceased and Sudhir Poddar PW-2, the brother of the deceased proved that they had identified the dead body as that of Sunil. Relevant would it be to note that on being cross examined, Abha Devi deposed that the clothes on the person of her husband were the same which he was wearing when he left the house.

37. Vide impugned judgment and order dated 28.2.2007, holding that there was no evidence against Jit Kaur save and except the statements of the co-accused implicating her, which were inadmissible in evidence, learned Trial Judge has acquitted Jit Kaur.

38. All other accused i.e. the appellants have been convicted for the offences of which they were charged for.

39. Noting that no recoveries had been made pursuant to the disclosure statement of appellant Ashok and Sunil and merely because the names of the other accused persons and the contours of the conspiracy were disclosed in said statements and that the facts pertaining to the conspiracy stood established by the fact that the crime was given effect to, it has been held that the disclosure statements of Ashok and Sunil are inadmissible in evidence with reference to Sections 25 to 27 of the Evidence Act.

40. But, in para 27 of the impugned decision, the learned Trial Judge has held as under:-

“27. I have perused the disclosure statement of the accused Ashok and that of accused Sunil Ex.PW-23/B and Ex.PW-23/E in detail. The information given to the accused Ashok by the accused Sunil and the information given to the accused Sunil by the accused Jaipal as mentioned in their respective disclosure statements can very well be admissible in evidence u/s 8 and u/s 10 of Indian Evidence Act. It is only upon the disclosure statement of the accused Ashok that led to the arrest of the accused Sunil and further the disclosure statement of the accused Sunil could make the police successful for the arrest of the accused Jaipal which ultimately led to the recovery of the incriminating material and the dead body. Admittedly, after the hatching of conspiracy, no overt or covert act was done by the accused Ashok and Sunil but they had the knowledge and participation of the conspiracy, as reflected from the statement of other co-accused. They had also knowledge about the indulgence of the other accused with whom they had hatched conspiracy in doing the illegal act, and hence, their case clearly falls within the ambit of Section 120-B IPC under the

guidelines laid down by the Hon'ble Supreme Court of India as herein after discussed."

41. In the preceding paragraphs, being paras 24 to 26, the learned Trial Judge has noted Section 3, Section 4, Section 5, Section 8, Section 10, Section 27 and Section 114 of the Evidence Act and has opined that conduct of an accused is relevant by virtue of Section 8 of the Evidence Act. The learned Trial Judge has also held that in a charge pertaining to conspiracy, anything said or done by a conspirator is admissible evidence.

42. Pertaining to accused Jaipal, Madan and Dharam the learned Trial Judge has held that the dead body of Sunil was recovered by the police pursuant to their disclosure statements and upon the three leading the police to the place which was pointed out by the three as recorded in the pointing out memos Ex.PW-26/C, Ex.PW-26/D and Ex.PW-26/E and this was incriminating evidence against the three showing their involvement in the abduction and murder of Sunil. Since the testimony of PW-1 establish that the minor children left the school with their driver Sunil, the learned Trial Judge has held that from the fact that the three were involved in the abduction and murder of Sunil an inference had to be drawn that the three had kidnapped the minor children of Rajiv

Aggarwal. The learned Trial Judge has further held that the fact that the two minor children were recovered from Dharam Singh proved his accomplicity. The fact that the accused had told that the two children were confined in Village Balwapur and that the clothes of the children were recovered from the house of Dharam Singh in Village Balwapur was also incriminating evidence against accused Dharam Singh, Jaipal and Madan. Against accused Jai Bhagwan, as also accused Jaipal the fact that their finger prints were lifted from the car was held to be incriminating evidence against the two.

43. In view of the fact that Rajiv Aggarwal PW-12 had categorically deposed of having received a ransom call, the learned Trial Judge has concluded that the appellants are proved guilty of having entered into the conspiracy as alleged and it being executed.

44. We shall be dealing with the arguments raised in during arguments of the appeals after noting the same i.e. would note the argument and thereafter deal with the same immediately thereafter.

45. A very forceful argument was raised by Sh.Deepak Manmohan Bhalla, learned counsel for appellants Jaipal, Madan and Jai Bhagwan that the dead body recovered by the police was not that of Sunil. Thus, counsel argued that there was no

discovery of a fact pursuant to the disclosure statements of Madan, Jaipal and Dharam Singh. Learned counsel urged that if this be so, the linkage between the recovery of the dead body as that of Sunil the driver who went missing with the children does not get linked to the conspiracy.

46. The factual basis of the argument was the condition of the body noted in the post-mortem report Ex.PW-10/A, to the effect that the skin was peeled off at places and that the scalp hair was loosen. Also the fact that it was recorded in the post-mortem report that the body was 3-4 days old. It was urged that putrefaction or decomposition of a body commences soon after the death and is a slow process. With reference to Medical Jurisprudence it was urged that only after 8 to 10 days of the death, the skin starts peeling and nails and hair become loose. It was urged that under the circumstances the dead body could not be that of Sunil the driver for the reason as per the prosecution the driver went missing in the late afternoon of 17.9.2001. Counsel further urged that from the cross examination of the wife of the deceased it was apparent that she had identified the dead body of her husband with reference to the clothes of the deceased.

47. In Modi's Medical Jurisprudence, putrefactive changes have been listed as under:-

Putrefactive Changes	Time after death
1. Greenish coloration over the iliac fossae. The eyeballs, soft and yielding.	1 to 3 days
2. Green coloration spreading over the whole abdomen, external genitals and other parts of the body. Frothy blood from mouth and nostrils.	3 to 5 days
3. Abdomen distended with gas. Cornea fallen in an concave. Purplish red streaks of veins prominent on the extremities. Sphincters relaxed. Nail firm	8 to 10 days
4. Body greenish brown. Blisters forming all over the body. Skin peels off. Features unrecognizable. Scrotum distended. Body swollen up owing to distension. Maggots on the body. Nails and hair loose and easily detached.	14 to 20 days
5. Soft parts changed into a thick, semifluid, black mass. Skull, abdomen and thorax burst. Bones exposed. Orbits empty.	2 to 5 months

48. Now, the doctor did not find any maggots in the body. Ex facie, the body could not be of category 4 above. No doubt, the scalp hair were found to be loose, but the nails were not found to be loose. In any case, it has not been recorded in the post-mortem report that the nails were found to be loose.

49. It has to be noted that PW-10 has not been subjected to any cross examination on this aspect and no questions had been put to him with reference to the physical condition of the body noted by him and on the issue how could the body be of a person who died 3-4 days back. Further, the wife and the brother of the deceased had deposed

categorically that they had identified the dead body and that it was of Sunil. Whereas Sudhir Poddar, the brother of the deceased has not been cross examined on the issue of identification of the dead body, the wife has been subjected to a cross examination, but not fully. A question has been put to her during cross examination to which she has responded that the clothes on the dead body of her husband was the same which he was wearing when he left the house.

50. The clothes of the deceased are not only his undergarments but consist of his pant and a shirt as also a belt. Who, other than a wife would be familiar with the clothes and a belt of a man, more so, when both come from a humble background and are not well to do. The reason is that the number of personal clothing of such man would presumably be few, and in all probability the wife would be washing and ironing the clothes. Women have an instinctive uncanny eye to identify personal household goods, jewellery and clothes etc.

51. In our opinion, without subjecting PW-2, PW-10 and PW-11 to any cross examination on the point of identity of the dead body, the arguments advanced in appeal are nothing but surmises and conjectures.

52. We thus hold that the dead body recovered on 21.9.2001 as per the recovery memo Ex.PW-7/A was that of the driver Sunil.

53. Pertaining to the recovery of the dead body we note that not only two police officers, one each from PS Garh Mukteshwar and PS Bahadur Garh were associated but even a team of police personnel from Delhi was associated and as many as 5 public witnesses i.e. local villagers were associated. It is no doubt true that Pappi PW-3 has stated that Delhi Police Personnel were not present when the body was seized and SI Shri Ram PW-26 of PS Garh Muktheshwar stated that Delhi Police had left the place where the dead body was recovered at 6:00 AM, but from said facts introduced by the two witnesses it cannot be said that the other witnesses were lying.

54. It has to be noted that when the Delhi Police reached Balwapur they reported the purpose of their visit to the police post at Brij Ghat under jurisdiction of PS Garh Mukteshwar and SI Shri Ram PW-26 joined the police team. After the recoveries were effected from the house of Dharam Singh, Madan, Jaipal and Dharam Singh led the police to a place between village Balwapur and Village Silarpur and since said place fell within the jurisdiction of PS Bahadur Garh, at the

asking of SI Shri Ram the police team reported their presence at PS Bahadur Garh where vide DD No.6, Ex.PW-27/A entry was made at 5:40 AM of said fact and SI Charan Singh PW-27 of PS Bahadur Garh also joined the police team. We note that SI Chandarpal Singh PW-29 from the Delhi Police has also deposed to the recovery of the dead body of the deceased from the field in his presence. This part of his testimony has gone rebutted. We note that there are general suggestions at the end of the cross examination that he was deposing falsely.

55. The fact that the police personnel from Delhi were present when the dead body was recovered is established not only from the testimony of PW-26 and PW-27, the two police officers of U.P. Police, but also from the entries made in the DD registers of the police post Brij Ghat under jurisdiction of PS Garh Mukteshwar and PS Bahadur Garh.

56. We thus hold that the prosecution has successfully proved that the dead body recovered from the field on 21.9.2001 was that of deceased Sunil.

57. The controversy pertaining to disclosure statements and joint pointing out of places wherefrom recoveries are effected, stands concluded by the Supreme Court in the decision reported as 2005 (11) SCC 600 State Vs. Navjot Sandhu. In para 145 the Supreme Court held that disclosure

statements of accused made to the police followed by both accused jointly taking the police to a place and getting recovered an object pursuant to the disclosure statement would not take out the disclosure statements from outside the purview of Section 27 of the Evidence Act.

58. The making of the disclosure statements by Madan, Jaipal and Dharam Singh has been proved by the testimony of SI Chanderpal PW-29, SI Ramesh Singh PW-30 and Const. Dayanand PW-23. The pointing out memos Ex.PW-26/C, Ex.PW-26/D and Ex.PW-26/E have been proved by means of the testimony of SI Chanderpal PW-29 as also the testimony of SI Shri Ram Singh PW-26. It thus stand established that the dead body of Sunil was recovered from a place not within the knowledge of the police and a fact was discovered by the police namely that Madan, Jaipal and Dharam Singh had knowledge about the dead body being in the sugarcane field, at a distance of about 15 meters from a canal, hidden by sugarcane, in village Silarpur i.e. the place wherefrom the dead body was actually recovered.

59. Thus, it stands proved that appellants Jaipal, Madan and Dharam Singh had knowledge about Sunil (deceased) being murdered and his dead body being hidden in the sugarcane field in village Silarpur and that the aforesaid

evidence pertaining to their disclosure statements and the recovery of the dead body at their instance and the identification thereof as that of deceased Sunil is incriminating evidence against the three since they have not been able to explain said evidence against them.

60. It is not in dispute that while taking the finger prints of Madan, Dharam Singh and Jaipal on 22.9.2001 and while taking the finger prints of appellant Jai Bhagwan after he was arrested on 3.7.2002, no permission was obtained from the Court and as required by the Identification of Prisoners Act 1920, neither was got properly identified.

61. It was urged by learned counsel for said accused that under the circumstance the reports of the finger print experts Ex.PW-20/D and Ex.PW-20/K were inadmissible in evidence.

62. Ms.Richa Kapoor, learned counsel for the State urged that a Constitution Bench of 11 Judges of the Supreme Court had held that taking specimen handwriting, specimen finger prints or anything which revealed the personal attributes of an accused was permissible and was not violative of Article 20(3) of the Constitution of India.

63. We need not note the various authorities on the subject inasmuch as the same were considered by us in our Crl. A.274, 275, 397, 398, 410 & 601 OF 2007

decision dated 5.3.2009 in CrI.A.No.682/2008 Santosh @ Bhure Vs. The State. In paras 19 to 24 thereof we had held as under:-

“19. Learned counsel for the State urges that a Constitution Bench of 11 Judges of the Supreme Court, in the decision reported as 1962 (3) SCR 10 State of Bombay vs. Kathi Kalu Oghad & Ors. has upheld the constitutional validity of compelling an accused to give specimen handwritings. It has been held that the same does not contravene Article 20(3) of the Constitution of India and thus the fact that the police obtained the specimen handwriting of Neeraj when he was in their custody does not invalidate the said act. Learned counsel was at pains to point out that the Constitution Bench of the Supreme Court was considering three references pertaining to three views taken by the High Court of Bombay, Punjab and West Bengal pertaining to compelling an accused to give his specimen handwriting, fingerprints and specimen signatures respectively and that in the latter two cases the palm and finger print impressions as also the specimen signatures were obtained with the permission of the magistrate concerned but in the first case pertaining to the Bombay High Court the specimen handwritings were taken when the accused was in police custody. Thus, learned counsel urged that the Constitution Bench upheld the action of taking specimen handwriting by the police when the accused was in police custody.

20. It may be noted that the Constitution Bench of the Supreme Court was dealing with the issue whether to compel an accused to give his blood sample, palm and fingerprints impressions, signatures and handwriting etc. would or would not be violative of Article 20(3) of the Constitution of India which made it unconstitutional for a person to be a witness against himself. The Constitution Bench held that to be a witness means to give evidence. It was held that giving handwriting samples or fingerprints or palm impressions did not tantamount to giving evidence and that when a handwriting sample or a fingerprint or

a palm impression was obtained by the police it did not amount to compelling an accused to be a witness against himself.

21. In the decision reported as AIR 1980 SC 791 State of UP vs. Rambabu Mishra, with reference to the decision of the Constitution Bench in Kathi Kalu Oghad's case (supra) in para 7 it was observed as under:-

“7. S.73 of the Evidence Act was considered by us in State (Delhi Administration) v. Pali Ram, AIR 1979 SC 14 where we held that a Court holding an enquiry under the Criminal Procedure Code was entitled under S.73 of the Evidence Act to direct an accused person appearing before it to give his specimen handwriting to enable the Court by which he may be tried to compare it with disputed writings. The present question whether such a direction, under S.73 of the Evidence Act, can be given when the matter is still under investigation and there is no proceeding before the Court was expressly left open. The question was also not considered in State of Bombay vs. Kathi Kalu Oghad, AIR 1961 SC 1808, where the question which was actually decided was that no testimonial compulsion under Article 20(3) of the Constitution was involved in a direction to give specimen signature and handwriting for the purpose of comparison.”

22. In para 3 to 6 and para 8 of the decision in Rambabu Mishra's case (supra) it was observed as under:-

“3. Section [73](#) of the Evidence Act is as follows:

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications to finger-impressions.

4. The second paragraph of Section 73 enables the Court to direct any person present in Court to give specimen writings "for the purpose of enabling the Court to compare" such writings with writings alleged to have been written by such person. The clear implication of the words "for the purpose of enabling the Court to compare" is that there is some proceeding before the Court in which or as a consequence of which it might be necessary for the Court to compare such writings. The direction is to be given for the purpose of 'enabling the Court to compare' and not for the purpose of enabling the investigating or other agency 'to compare'. If the case is still under investigation there is no present proceeding before the Court in which or as a consequence of which it might be necessary to compare the writings. The language of Section 73 does not permit a Court to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the Court. Further Section 73 of the Evidence Act makes no distinction between a Civil Court and a Criminal Court. Would it be open to a person to seek the assistance of the Civil Court for a direction to some other person to give sample writing under Section 73 of the Evidence Act on the plea that it would help him to decide whether to institute a civil suit in which the question would be whether certain alleged writings are those of the other person or not? Obviously not. If not, why should it make any difference if the investigating agency seeks the assistance of the Court under Section 73 of the Evidence Act on the plea that a case might be instituted before the Court where it would be necessary to compare the writings?

5. We may also refer here to Section 5 of the Identification of Prisoners Act, 1920, which provides:

5. If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the CrPC, 1898, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:

Provided that no order shall be made directing any person to be photographed except by a Magistrate of the first class:

Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

Section 2(a) of the Act defines "measurements" as including "finger impressions and foot print impressions".

6. There are two things to be noticed here. First, signature and writing are excluded from the range of Section 5 of the Identification of Prisoners Act and, second, 'finger impressions' are included in both Section 73 of the Evidence Act and Section 5 of the Identification of Prisoners Act. A possible view is that it was thought that Section 73 of the Evidence Act would not take in the stage of investigation and so Section 5 of the Identification of Prisoners Act made special provision for that stage and even while making such provision, signature and writings were deliberately excluded. As we said, this is a possible view but not one on which we desire to rest our conclusion. Our conclusion rests on the language of Section 73 of the Evidence Act.

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8. The view expressed by us in the earlier paragraphs, on the construction of Section 73, Evidence Act was the view taken by the Madras High Court in T. Subbiah v. S.K.D. Ramaswamy Nadar AIR 1970 Mad. 85, the Calcutta High Court in Farid Ahmed v. the State AIR 1960 Cal 32 (Mitter J., at page 32). and Priti Ranjan Ghosh and Ors. v. The State (1973) 77 Cal WN 865,

the High Court of Punjab and Haryana in *Dharamvir Singh v. State* 1975 CrL. L. J. 884, the High Court of Madhya Pradesh in *Brij Bhushan Raghunandan Prasad v. The State* AIR 1957 Madhya Pradesh 106, the Orissa High Court in *Srikant Rout v. State of Orissa* 1972 (2) Cuttack Weekly Reporter 1332 and the Allahabad High Court in the judgment under appeal. A contrary view was taken by the Patna High Court in *Gulzar Khan and Ors. v. State* AIR 1962 Patna 255 and the High Court of Andhra Pradesh in *B. Rami Reddy and Ors. v. State of Andhra Pradesh*, 1971 CrL. L.J. 1519 (A.P.). We do not agree with the latter view. We accordingly dismiss the appeal and while doing so we would suggest that suitable legislation may be made on the analogy of Section 5 of the Identification of Prisoners Act and provide for the investiture of Magistrates with the power to issue directions to any person, including an accused person, to give specimen signatures and writings.”

23. In the decision reported as 1994 (5) SCC 152 *Sukhvinder Singh & Ors. Vs. State of Punjab*, noting that the specimen writing of Sukhvinder Singh was obtained by the police when he was in police custody, notwithstanding the fact that Sukhvinder Singh had admitted in his statement under Section 313 Cr.P.C. that he gave the specimen handwriting it was held that the opinion of the handwriting expert had to be excluded while considering the evidence against Sukhvinder Singh. We note that the said evidence brought on record inculpatory evidence against Sukhvinder Singh in respect of ransom letters Ex.P-A and Ex.P-C alleged by the prosecution to be in the handwriting of Sukhvinder Singh.

24. Thus, excluding the opinion of the handwriting expert pertaining to the letter recovered by the police from the left pocket of the deceased, we are left with only one piece of evidence against Neeraj. The same is the recovery of a knife at his instance.”

64. Thus, unfortunately for the prosecution, the incriminating evidence against Jaipal and Jai Bhagwan pertaining to their finger prints being lifted from the car bearing registration No.DL 8C B 5369 from which the children were kidnapped on the way to the house from the school cannot be admitted in evidence and hence the same has to be excluded while considering the incriminating evidence against the two.

65. No serious attempt was made by learned counsel for Dharam Singh to challenge the recoveries of the school bag containing the books of the children as also the recovery of the school dress of the children and their tiffin boxes from his house. The said recoveries prove that the two children were confined in the house of Dharam Singh after they were kidnapped.

66. Pertaining to the recovery of the children from Madan we note that while deposing in Court on 1.6.2004 SI Shri Ram PW-26 stated that the two children were recovered from the house of Dharam Singh in village Balwapur but went on to correct himself the very next day i.e. on 2.6.2004 that he had said so by mistake and that no children were recovered from the house of Dharam Singh.

67. The submission by learned counsel for Madan that the name of the secret informer who informed the SHO of PS Prashant Vihar that a man would be disembarking at Anand Vihar Interstate Bus Terminal has not been disclosed by any police officer, requiring this Court to disbelieve the testimony of the police officers and the father of the children, has hardly impressed us. The reason is obvious. Inasmuch as criminals have their own network, the police has a network of secret informers and if their names are disclosed, the network of informers created by the police would be breached and the informants life or limb may be endangered.

68. The submission that the two children were neither examined as witnesses of the prosecution nor their statements were recorded under Section 164 Cr.P.C. has to be noted and rejected for the reason it has come on record that the two children were aged 4½ years. It is obvious that both were infants and could have hardly told anything meaningful.

69. The discussion by the learned Trial Judge on the scope and applicability of Section 8 and Section 10 of the Evidence Act is totally misplaced and the conclusions drawn by the learned Judge in para 27 of the impugned decision are wholly erroneous.

70. A criminal trial is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In that connection, that piece of conduct of the accused can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material. Pertaining to Section 10 of the Evidence Act, suffice would it be to state that Section 10 can be divided into two parts. Part 1 refers to the existence of reasonable grounds to form a belief that two or more persons have conspired and the second part would come into operation when the condition of the first part is satisfied and makes relevant anything said, done or written by the conspirators as a relevant fact against the co-conspirators. In the decision reported as AIR 1965 SC 682 Sardar Sardul Singh Kavaesher Vs. State of Maharashtra it was held that the evidentiary value of the act, deed or writing referred to in Section 10 of the Evidence Act is limited by two circumstances; namely, that the acts shall be in reference to the common intention, and in respect of a period after such intention was entertained by anyone of them.

71. Needless to state, once a conspiracy is given effect to, the individual acts of the conspirators thereafter do not brush the others with the same taint for the reason once a

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common intention is given effect to the theory of constructiveness no longer remains in operation.

72. Thus, the reasoning of the learned Trial Judge pertaining to appellant Ashok and Sunil as recorded in para 27 of the impugned decision is completely faulty.

73. The result of our aforementioned reasoning may be summarized.

74. As against appellants Ashok and Sunil there is no admissible incriminating evidence against them. Their inculpatory disclosure statements are totally inadmissible in evidence as nothing has been recovered or discovered by the police pursuant thereto and cannot even be read as evidence against them under Section 8 or Section 10 of the Evidence Act.

75. Against appellants Jaipal, Madan and Dharam Singh the incriminating evidence is their disclosure statements, joint pointing out memos and recovery of the dead body of Sunil from the place identified by them. Against appellant Madan there is further incriminating evidence i.e. the two children being recovered from his possession. Against appellant Dharam Singh there is further incriminating evidence of the recoveries of the school dress and the school bag etc. of the children from his house. Against appellant Jai Bhagwan there

is no incriminating evidence for the reason the facts which he disclosed to the police in his disclosure statement were already within the knowledge of the police and nothing incriminating was recovered by the police pursuant to his disclosure statement. Fortunately for him and unfortunately for the prosecution the evidence pertaining to his finger prints being lifted from the car in which the children were abducted is inadmissible in evidence.

76. From the evidence against Jaipal, Dharam Singh and Madan any reasonable person with a logical mind would reach the irresistible conclusion that the three had participated in taking deceased Sunil to the place where his dead body was found and after strangulating him to death, dumped the body in sugarcane fields. Since Sunil had left the school taking along with him the two abducted children it is apparent that said three persons had a role in abducting the two children. The further evidence against Dharam Singh and Madan pertaining to the recovery of the personal belongings of the children from one and the recovery of the children from another, further strengthens the chain of circumstances against Dharam Singh and Madan wherefrom an inference of their guilt pertaining to the conspiracy and the execution thereof can be inferred.

77. Crl.A.No.274/2007, Crl.A.No.275/2007 and Crl.A.No.601/2007 filed by Ashok Kumar, Sunil Kumar and Jai Bhagwan are allowed. The impugned judgment and order dated 28.2.2007 convicting them of the charges framed against them is set aside. They are acquitted of the charges framed against them. They are directed to be set free if not required in custody in any other case.

78. Crl.A.No.397/2007, Crl.A.No.398/2007 and Crl.A.No.410/2007 filed by Dharam Singh, Jaipal and Madan are dismissed.

79. Copy of this order be sent to the Superintendent Central Jail Tihar for compliance.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

April 09, 2009

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