

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. Appeal No. 406/2008**

% *Judgment reserved on: January 09, 2009*
Judgment delivered on: May 11, 2009

CHINTU MALHOTRA @ CHIRAG Appellant
Through : Mr. Anupam S. Sharma, Adv.

VERSUS

THE STATE Respondent
Through : Mr. Pawan Sharma, APP

+ **Crl. Appeal No. 435/2008**

GYAN CHAND KASHYAP @ KALU Appellant
Through : Mr. Pankaj Kumar, Adv.

VERSUS

THE STATE Respondent
Through : Mr. Pawan Sharma, APP

+ **Crl. Appeal No. 603/2008**

DHARMINDER SINGH @ VIJAY Appellant
Through : Ms. Anu Narula, Adv.

VERSUS

THE STATE Respondent
Through : Mr. Pawan Sharma, APP

+ **Crl. Appeal No. 1009/2008**

MOHD. TAYYAB ALAM Appellant
Through : Mr. V.K. Raini, Adv.

VERSUS

THE STATE

.....Respondent

Through : Mr. Pawan Sharma, APP

CORAM :-

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

ARUNA SURESH, J.

1. The above captioned appeals have been filed by the four appellants assailing the judgment and order dated 24.3.2008 passed by the learned Additional Sessions Judge whereby they were convicted for offence under Sections 364/302/34 IPC and order on sentence dated 31.3.2008 whereby they were sentenced to undergo rigorous imprisonment for 10 years and fine of Rs.2000/- each, in default of payment of fine to undergo a rigorous imprisonment for one month for the offence under Section 364/34 IPC. They were further sentenced to undergo life imprisonment and fine of Rs.2000/- each, in default of payment of fine rigorous imprisonment for one month for the offence under Section 302/34. Both the sentences were ordered to run concurrently. Benefit of Section 428 Cr.P.C.

was also given to the appellants.

2. Broad features of the prosecution case are that deceased Krishan Kumar was driver of Maruti Van No. DL-3C R 1271 which was registered in the name of his son Anirudh Kumar (PW-8). On 26.8.2000 Jitender (PW-4) son of Krishan Kumar was telephoned by the deceased to bring his clothes to Kaushik Travels, informing him that the vehicle had been hired and he was to go to Hardwar. At Kaushik Travels Jitender came to know the names of the appellants as Kalu, Dharminder, Chintu and Tayyab, all residents of Hastal, Delhi. Deceased Krishan Kumar with the appellants in the vehicle left Delhi on 26.8.2000 at about 4.30 PM in the presence of Jitender. Though Krishan Kumar was to return back to Delhi on the next following day, he did not come back. Anirudh Kumar received a telephone call on 29.8.2000 at about 12.10 PM from SHO, Bihar that driver of the vehicle had been killed and all the four persons were apprehended by him. Anirudh Kumar informed the P.C.R. Police Station Uttam Nagar was accordingly informed by the P.C.R. This information was recorded as DD No. 10A at the Police Station. SI Dal Chand on receipt of DD No. 10A along with const. Dilbagh Singh went to Kaushik Travels where he recorded the

statement of Jitender on which, he made his endorsement at about 2.15 PM and got the FIR of this case, being FIR No. 786/2000 registered under Sections 365/2000 IPC.

3. On 29.8.2000 at about 9.15 PM Maruti Van was intercepted by a patrolling party of Police Station Purnia, Bihar headed by SI Rajesh Kumar. When the vehicle did not stop on signal, instead speeded up, it was chased. All the appellants who tried to flee away after getting down from the vehicle were overpowered and apprehended. They were arrested in FIR No. 330/2000 under Section 413/414 IPC, Police Station Kehat, Bihar, when they could not give any satisfactory reply regarding their possession of the vehicle. SI Rajesh Kumar found a slip of paper of Kaushik Travels containing a telephone number lying in the van and he accordingly made a phone call on the said telephone number at Delhi.

4. The dead body of Krishan Kumar was recovered at Jawalapur, Hardwar on 27.8.2000 at about 10.30 AM on an information received from Paramjeet by Inspector Kuldeep Singh in the presence of Hazara Singh, watchman, and other police officials of police station Jawalapur. A panchnama was

prepared. The inquest papers were prepared by SI Rajesh Kumar. The dead body was got photographed. The dead body was got post-mortemed from H.M.G. District Hospital, Hardwar. After post-mortem, the dead body was got cremated.

5. On 31.8.2000 PW Govind Singh Bakuni, Upender Singh Dixit, Chander Kishore Dwivedi and few other persons went to Police Station Jawalapur and made inquiries about the dead body. From the photographs they identified the dead body of Krishan Kumar. DD No. 7 dated 31.8.2000 at 6.30 AM was recorded at Police Station Jawalapur regarding the visit of these persons and also the factum of identification of the dead body.

6. SI Dal Chand went to Purnia on 29.8.2000 and reached there on 31.8.2000. From Police Station Kehat he came to know of the arrest of the appellants and the recovery of the maruti van and also registration of a case under Sections 413/414 IPC being FIR No. 330/2000. The appellants had already been sent to judicial custody. He moved an application for production warrants of all the appellants. The appellants in this case were formally arrested on 3.11.2000.

7. Finding sufficient evidence against the appellants namely; the deceased was last seen in the company of the appellants by Jitender, recovery of the dead body of deceased Krishan Kumar from Hardwar, recovery and seizure of maruti van from Purnia Bihar, arrest of the appellants by police of Police Station Kehat, Purnia and registration of a case against them for being found in possession of suspected to be stolen property and the post-mortem report showing homicidal death of the deceased, a chargesheet was filed against the appellants for having abducted and murdered Krishan kumar with a motive to rob him of his vehicle.

8. The trial court framed following charge against all the appellants:

“That on 26.8.00 at about 4.30 p.m. near Kaushik Travels, main Najafgarh Road within the jurisdiction of PS Uttam Nagar all of you in furtherance of your common intention deceitfully abducted Sh. Krishan Kumar in order that the said Krishan Kumar might be murdered and thus committed an offence punishable u/s 364/34 IPC.

Secondly, on the night intervening 26/27/8.00 all of you in furtherance of your common intention committed

murder of said Krishan Kumar when all of you had abducted deceitfully the said Krishan Kumar from Delhi to Hardwar and thereafter disposed of his body and thus committed an offence punishable u/s 302/34 IPC and within cognizance of this court."

9. Since three independent investigating agencies are involved in this case and the crime continued to be committed from Delhi to Hardwar and finally to Purnia, it is appropriate to segregate the evidence of the prosecution in three different parts for just and proper assessment and appreciation of the prosecution evidence and the incriminating circumstance as adduced on the record.

10. The relevant witnesses who joined the investigation at Delhi on receipt of an information from PW-8 Anirudh Kumar son of deceased Krishan Kumar recorded in DD No.10A on 29.8.2000 at about 12.10 PM and consequent registration of FIR No. 786/2000 under Sections 365/34 IPC Ex.PW-9/A on the basis of endorsement Ex.PW-24/A SI Dal Chand on the statement of PW-4 Jitender son of deceased Krishan Kumar are:

(1) **PW-9 ASI Pushpal Kaur.** She recorded FIR No.

786/2000 under Sections 365/34 IPC Ex. PW-9/A on receipt of rukka with endorsement Ex.PW-24/A of SI Dal Chand on 29.8.2000 at 2.25 PM.

(2) **PW-4 Jitender Kumar** is the complainant. He made the complaint Ex.PW-4/A which was recorded by SI Dal Chand. In his statement he recorded that his father Krishan Kumar was plying his Maruti Van No.DL 3C R 1271 from Kaushik Travels, Main Najafgarh Road. On 26.8.2000 he was present in the house when at about 4.00 PM his father telephoned that he was carrying some passengers with him to Hardwar and he should deliver his clothes. He (jitender) went to Kaushik Travels office to hand over the clothes of his father, where, he found his father standing with four boys. He handed over the clothes to his father. He came to know the names of those boys on inquiry as Chintu Malhotra, Kallu Kashyap, Dharmender and Md. Tayyab, resident of LIG Flats, Hastal. The said four boys sat in the vehicle and he was told by his father that he would come back on the next following day but when he did not return back home they were worried and started searching for him. He suspected that the above said four boys had kidnapped his father. He identified the appellants on 4.11.2000 after their arrest near Kaushik Travels at the time when, the appellants pointed the place,

from where they had hired the maruti van. He also identified all the appellants in the court.

(3) **PW-8 Anirudh Kumar** is the son of the deceased. He has deposed that on 26.8.2000 when he reached home from his office he was told by PW-9 Jitender that his father had gone to Hardwar and had carried four passengers with him and would come back on the next day. Jitender had also disclosed the names of the said four passengers, one of whom; Dharmender happened to be his class fellow. He received a telephone call on 29.8.2000 from Bihar about recovery of maruti van and apprehension of four boys who had informed the police that they had killed the driver of the vehicle. He found the voice similar to the one as that of Dharmender, that he told the caller that he appeared to be Dharmender on which the phone was disconnected. He made a call at 100 number and a DD No.10A was recorded at Police Station Uttam Nagar. He named the appellants as the suspects before the police. He along with his brother PW-9 Jitender had identified the photographs of his father shown to him at the Police Station Uttam Nagar received by the police from Jawalapur, Hardwar.

(4) **PW-11 Govind Singh Bhatuni** is the neighbour of the deceased. He has deposed that on 31st day, of the year

2000 Jitender and wife of deceased came to him around 5.00 AM and told him that some untoward incident had taken place. He along with PW-12 Chander Kishore and 3-4 other persons went to Hardwar. From Police Station Jawalapur he and other persons came to know that on 27.8.2000 a dead body of an unknown person had been recovered which had been cremated. He identified deceased Krishan Kumar from the photographs shown to him by the police officers of Police Station Jawalapur. (He had also filed a written application before the duty officer, Police Station Jawalapur which was recorded as report No.7 at 6.30 AM dated 31.8.2000 Ex.PW-21/A.)

(5) **PW-12 Chander Kishore** is the son in law of the brother of the deceased. He has deposed that he was called on 29.8.2000 by wife of the deceased. On 29.8.2000 he along with PW-11 Govind Singh and 4-5 other persons went to Hardwar to enquire about Krishan Kumar. While corroborating the testimony of PW-11 Govind Singh, he has deposed that he was told by SI Rajesh Kumar that the deceased was cremated after post-mortem. He had also identified the dead boy of Krishan Kumar from the photographs shown to him.

(6) **PW-16 Sunil Kaushik** is the proprietor of Kaushik

Travels. He has deposed that deceased Krishan Kumar used to park his maruti van in front of his office and he used to deal with the passengers independently. He deposed that he came to know that maruti van was hired by some persons for Hardwar and later on that Krishan Kumar had died.

(7) **PW-10 Tirath Raj Singh** is the draftsman. He prepared scaled site plan Ex.PW-10/A on 4.11.2000 after inspection of the spot at the instance of SI Rajesh Kumar, Police Station Jawalapur, Hardwar.

(8) **PW-24 SI Dal Chand** joined the initial investigation of this case. He also went to Purnia on the night of 29.8.2000 where he came to know of the arrest of the appellants and recovery of the maruti van. He deposed that he moved an application before the concerned court at Purnia seeking production of the appellants before the concerned MM at Delhi. Later on he went to Purnia again on 1.11.2000 and with the permission of the court took the transit remand of the appellants and produced them in the court of the Metropolitan Magistrate, Delhi, on 3.11.2000, where appellants were formally arrested.

(9) **PW-25 Insp. T.P.S.Tomar** took over the investigation of this case on 18.10.2000. He formally arrested the appellants. He obtained their three days' police custodial

remand and got them medically examined from DDU hospital, recorded the disclosure statements of the appellants. Appellants pointed the place of occurrence on 4.11.2000 from where the dead body was recovered and they also pointed out the place from where the vehicle was hired i.e. Kaushik Travels on 5.11.2000 vide pointing out memo Ex.PW-3/B.

11. **PW-1 HC Ashok Kumar, PW-2 const. Dilbagh Singh, PW-3 SI Gurnam Singh and PW-15 HC Deep Kumar** are formal witnesses.

12. The relevant witnesses examined by the prosecution, who are witness to the recovery of the vehicle and the proceedings conducted at Police Station Purnia, Bihar after maruti van's interception are:

a. **PW-5 SI Rajesh Kumar Dubey.** He has deposed that on 29.8.2000 he along with SI Ajit Kumar, SI Ram Vikash Choudhary, HC Tarkeshwar, HC Ashok Kumar and const. Sushil Kumar were on patrolling duty at Madhopara Road. At about 9.15 PM when he saw one maruti van plying on the road, he signalled the maruti van to stop but the car speeded up, he and the police party chased the said maruti van. Four persons got down from the car and started running away. He

along with his police party apprehended the said four boys in the presence of Surender Kumar (PW-7) and Mahadev Kesri (PW-6). He has given the registration number of the said maruti van as DL 3C R 1271. On interrogation he suspected that the vehicle had been stolen. He got registered FIR No. 330/2000 at Police Station Purnia and arrested all the four persons. However, he failed to identify the appellants as the four persons whom he had arrested and from whom the maruti van was seized by him. He identified the maruti van Ex.P-1 which he had recovered.

b. **PW-6 Mahadev Kesri**, witness to the recovery of the vehicle and arrest of the appellants, is completely hostile. Though he has admitted his signatures on the seizure memo mark X prepared by SI Rajesh Kumar Dubey.

c. **PW-7 Surender Kumar** another witness to the recovery of the vehicle and arrest of the appellants is also hostile. He admitted his signatures on the seizure memo mark X but deposed that his signatures were obtained on a blank paper.

d. **PW-14 SI Ajit Kumar** was a member of the patrolling party. In his testimony while corroborating the statement of SI Rajesh Kumar Dubey that he was a member of the patrolling party on 29.8.2000 and was present near

Madhopara at about 9.15 PM when, a white colour maruti van was intercepted and was signalled to stop but, it speeded up and was chased. He has deposed that the van stopped after going a little ahead and out of the maruti van four persons got down and started running. They all chased them and overpowered them. He has deposed that they came to know the names of those boys as Chintu Malhotra@ Chirag Malhotra, Kalu Kashyap, Dharmender Singh@ Vijay Singh and Mohd. Tayyab. He identified all the appellants who were present in the court as the persons who were apprehended by them. He testified that the vehicle bearing no. DL 3C R 1271 was seized and FIR No. 330/2000 was registered against the appellants. He has further deposed that from the dickey of the van a slip of KK Travel and Tour Agency on which a telephone number was written was recovered and on the said number a phone call was made at Delhi and they came to know that the said van was hired for Hardwar. He further deposed that, after two days the police party along with public persons came there and took a copy of the FIR. By the order of learned Chief Judicial Magistrate (C.J.M.) the van was released. Subsequently Delhi police also took away the accused persons with them.

As regards the identity of the vehicle, he deposed

that the registration number of the maruti van shown to him was the same. But sticker of KK Tour and Travel agency was not on the car when shown to him in the court, whereas the board bearing words 'Zila Adhyaksh Samajwadi Party' was not on the vehicle at the time of the seizure. However, on seeing the vehicle in the court he could not exactly say if it was the same maruti van which was seized by them at Purnia though the number and the colour of the vehicle was same.

13. The relevant witnesses of the prosecution to the recovery of the dead body of Krishan Kumar at Jawalapur, Hardwar on 27.8.2000 at 10.30 AM are:

i. **PW-20 Inspector Kuldeep Singh** was posted at Jawalapur, Hardwar. He has deposed that on 27.8.2000 at about 10.30 AM one person by the name of Paramjit Singh came to the police station and informed him that a dead body of a male person was lying beneath the bridge, Rani Pur Nehar. He along with SI Rajesh, const. Sohail Ahmed and const. Ramesh Chand reached the spot. He further deposed that SI Rajesh Kumar called a photographer who took the photographs of the dead body which was having injuries on its person. He gave the description of the dead body as wearing white kurta pyajama having six fingers in the right

hand. On his instructions SI Rajesh conducted the panchnama. On 28.8.2000 he got the dead body post-mortemed and handed over the dead body to Sewa Samiti, Hardwar, for cremation because, the dead body could not be identified. He deposed that on 31.8.2000 Chander Kishore and Govind Singh along with 3-4 persons came to the police station. He showed them the photograph of the deceased and also gave the description of the clothes of the deceased on the basis of which, they identified the dead body of Krishan Kumar. He testified that the above named persons had also informed him that four persons had hired maruti van for Hardwar from Delhi on 26.8.2000. He sent his report Ex.PW-20/A to Delhi on 6.9.2000.

ii. **PW-23 SI Rajesh Kumar** while corroborating the statement of inspector Kuldeep Singh has deposed that he tried to get the dead body identified but failed, then he called the photographer who took the photographs of the deceased. He deposed that he conducted inquest proceedings Ex.PW-23/A. He got the dead body post-mortemed from government hospital Hardwar on 28.8.2000. He further deposed that on 31.8.2000 3-4 persons came to the police station who identified the dead body as of Krishan Kumar from the photographs shown to them and they also told him that on

26.8.2000 four persons had hired maruti van for Hardwar.

iii. **PW-18 const. Ramesh Chander** corroborated the testimony of Insp. Kuldeep Singh and SI Rajesh Kumar.

iv. **PW-22 const. Sohail Ahmed** also corroborated the statement of Insp. Kuldeep Singh and SI Rajesh Kumar.

v. **PW-17 Hajara Singh** was a watchman and had gone to Sukhi Nahar, Rani Pur on 27.8.2000 where he found some persons gathered and he saw a dead body of one male person lying in the canal. He has testified that there were injuries on the body of the deceased and also blood was oozing out from the nose and mouth of that person. At about 11.30 AM police staff from police station Jawalapur reached there and Investigating Officer conducted the panchnama Ex.PW-17/A. he signed the panchnama as one of the witnesses. Later on he came to know the name of the deceased as Krishan Kumar, resident of Delhi.

vi. **PW-19 Surender Kumar** had taken the photographs Ex.PW-19/B1 to Ex.PW-19/B4 of the deceased at the spot (Rani Pur Nehar, Hardwar) on 27.8.2000 at the instance of SI Rajesh Kumar.

vii. **PW-13 Dr.Rajeev Verma** had conducted the post-mortem of the deceased on 28.8.2000. As per the post-mortem report Ex.PW-13/A, he found following injuries on the

body of the deceased:-

“External injuries:

1. Lacerated wound 4x2 c.m. on right side of head, 5 c.m. above right ear.
2. Lacerated wound in front of right chin size 2x1 c.m.
3. Traumatic swelling 12x10 c.m. on right side of face.
4. Swelling on right side of chest 15x10 c.m.

Internal injuries:

1. Pelvis fracture
2. Anterior middle cranial fossa fractured.

I gave my opinion with regard to the cause of death as shock and haemorrhage due to ante mortem injuries. And the time since death has been given as 1-2 days prior to the date of post-mortem.

viii. **PW-21 const. Narender Singh** was working as DD writer at police station Jawalapur. He deposed that he recorded DD No. 19 Ex.PW-21/A on receipt of information from Paramajit Singh about a dead body lying in Rani Pur Nehar. He also recorded DD No.7 Ex.PW-21/B on 31.8.2000 pertaining to the arrival of Chander Kishore, and Govind Singh along with other 3-4 persons at police station Jawalapur.

14. We have heard Mr.Anupam S. Sharma, Adv. for appellant Chintu Malhotra @ Chirag, Mr.Pankaj Kumar, Adv. for appellant Gyan Chand Kashyap @ Kalu, Ms.Anu Narula, Adv. for appellant Dharminder Singh @ Vijay, Mr.V.K. Raina,

Adv. for appellant Mohd. Tayyab Alam and Mr.Pawan Sharma,
APP for the State.

15. It is argued by the learned counsel for the appellants that the van was seized in Purnia, Bihar on 29.8.2000 at about 9.15 PM, surprisingly enough PW-8 Anirudh Kumar claimed to have received a phone call from SHO, Purnia, Bihar on 29.8.2000 at around 12 noon informing murder of the driver of the vehicle, apprehension of four persons and seizure of the maruti van.

16. As per PW-8 the voice of the caller from Bihar sounded familiar; meaning thereby, he knew the caller. Counsel urged that when the complaint was lodged with the Delhi Police, it assumes significance that PW-8 did not inform that he knew one of the persons i.e. Dharmender as the one who had hired the van.

17. The last seen evidence was doubtful because PW-4 did not know Dharmender and he wrongly deposed to said fact. In any case he did not know the other accused and since he possibly could not have seen them properly when the van was allegedly booked and PW-4, as claimed by him, went to

give clothes to his father, their identification by PW-4 is extremely suspicious.

18. PW-16, owner of Kaushik Tours has disclaimed any knowledge and this shows that the van was not booked from Delhi as claimed by the prosecution.

19. A dead body was recovered on 27.8.2000 from Ranipur canal within the jurisdiction of Police Station Jawalapur, Hardwar. How did said information get transmitted to the police at Delhi is a mystery. Different witnesses have spoken about going to Jawalapur and having identified the deceased. Different dates have been disclosed by them.

20. Counsel urged that the various witnesses who have deposed of going to Jawalapur have materially contradicted each other with respect to the time of leaving Delhi and reaching Jawalapur as also pertaining to the identification of the dead body; therefrom, counsel urged that it is apparent that information pertaining to the dead body being recovered in Jawalapur was known to the police at Delhi from some other source and not as claimed by them and this shows that the entire investigation has been manipulated.

21. PW-14 appears to have spoken some truth with respect to the seizure of the van in Bihar and his testimony shows that the police at Bihar had seized the van much before 9.15 PM the time recorded by the poice at Bihar pertaining to the seizure of the van.

22. Counsel urged that the FIR registered in Bihar was post dated and post timed and the real culprits were allowed to go scot free and the appellants were falsely implicated.

23. Counsel urged that Mohd. Tayyab was a resident of Purnia and the other accused were his friends and this explains their presence in Purnia.

24. It is submitted by the learned counsel for the appellants that the case is based on circumstantial evidence and the evidence adduced on the record has failed to pass the test of principles of circumstantial evidence as laid down in ***Padala Veera Reddy v. State of A.P. & Ors. - AIR 190 SC 79*** to bring home the guilt of the appellants and the evidence adduced by the prosecution but, rather is consistent with the innocence of the appellants as they had gone to

Purnia because appellant Mohd. Tayyab was permanent resident of Purnia and they were falsely implicated by Police Station Kehat, Purnia in FIR No. 330/2000 under Sections 413/414 IPC.

25. While refuting the arguments of the learned counsel for the appellants, learned APP for the State has submitted that despite some contradictions in the statements of public witnesses, the following circumstances have been proved:

i. PW-4 is the most important witness. He had gone to Kaushik Travels to deliver the clothes to his father where he had seen the appellants on 26.8.2000 at about 4.00 PM and also saw the appellants who had hired the van leaving with his father in the maruti van for Hardwar. Krishan Kumar thereafter did not come back home. He correctly identified the appellants in the court. At the time when he made his statement to the police (complaint) he had no knowledge that the appellants were caught in Bihar.

ii. The dead body of an unknown person was recovered by the police of Police Station Jawalapur on 27.8.2000 at 10.30 AM and also that post-mortem was got conducted and doctor found several injuries on the person of

the deceased which were homicidal in nature.

iii. The dead body of Krishan Kumar was identified by Govind Singh (PW-11) and Chander Kishore (PW-12) on the basis of photographs shown to them by the police at Jawalapur, Hardwar.

iv. All the four appellants were apprehended by PW-5 SI Rajesh Kumar Dubey and PW-14 SI Ajit Kumar, Police Station Kehat, Purnia and the maruti van was also seized from their possession.

v. As the appellants were found absconding from the day of incident till they were apprehended at Purnia, Bihar on 29.8.2000 along with the maruti van, the presumption under Section 114 of the Evidence Act is clearly attracted against the appellants.

26. Learned counsel has argued that since the chain of circumstances is complete from the prosecution evidence, the trial court, therefore, rightly convicted the appellants for the offences under Sections 364/302/34 IPC.

27. Undoubtedly, the case of the prosecution is completely based on circumstantial evidence. It has been consistently laid down in its various judgments by the Apex

Court that, where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. These incriminating facts and circumstances have to be proved beyond reasonable doubt and it is also required to be proved that there is close proximity with the principal fact sought to be inferred from those circumstances. In ***State of U.P. Vs. Desh Raj - 2006 (3) SCALE 194***, it was observed :

“16. By now, it is well settled principle that in order to sustain a conviction of circumstantial evidence, the prosecution must establish that the chain of circumstances only consistently point to the guilt of the accused and inconsistency with his innocence.”

28. In ***Sharad Birdhichand Sarda Vs. State of Maharashtra - AIR 1984 SC 1622***, while dealing with the circumstantial evidence, it was held that onus is for the prosecution to prove that the chain is complete and the infirmity or lacuna in the prosecution cannot be cured by a false defence or a plea. The court formulated the five golden principles constituting the *Panchsheel* of the proof of a case based on circumstantial evidence as follows:

1. The circumstance from which the conclusion of guilt is drawn should be fully established,

It may be noted here that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved'... ..

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

3. The circumstances should be of a conclusive nature and tendency,

4. they should exclude every possible hypothesis except the one to be proved, and

5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

29. While laying down the above stated five conditions which must be fulfilled before the guilt of an accused can be said to have been established in a case based on circumstantial evidence, the Supreme Court referred to and relied upon ***Hanumant v. State of Madhya Pradesh - 1952 SCR 1091 = AIR 1952 SC 343.***

30. These principles have been followed in ***Padala Veera Reddy v. State of A.P. & Ors. (supra)*** as referred to by the learned counsel for the appellants and recently in ***State of U.P. v. Satish – (2005) 3 SCC 114***, ***Karihai Mishra alias Kanhaiya Mishra v. State of Bihar - JT 2001 (3) SC 191*** and ***Chattar Singh & Another v. State of Haryana – 2009 (1) Crimes 11 (SC)***.

31. Similarly in ***Pawan Kumar V. State of Haryana, MANU /SC/0167/2001*** while considering the evidentiary value of the circumstantial evidence, it was recorded:

“Incidentally, success of the prosecution on the basis of circumstantial evidence will however depend on the availability of a complete chain of events so as not to leave any doubt for the conclusion that the act must have been done by the accused person. While, however it is true that there should be no missing links, in the chain of events so far as the prosecution is concerned, but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts. Circumstances of strong suspicion without, however, any conclusive evidence are not sufficient to justify the conviction and it is on this score that great care must be taken in evaluating the circumstantial evidence. In any event, on the

availability of two inferences, the one in favour of the accused must be accepted and the law is well settled on this score, as such we need not dilate much in that regard excepting, however, noting the observations of this Court in the case of State of U.P. v. Ashok Kumar Srivastava wherein this Court in para 9 of the report observed:

“9. The Court has, time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negated on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.”

32. Keeping in mind the above said principles of law as culled out by the Supreme Court in the above said decisions,

we shall now scrutinize scrupulously and examine carefully the circumstances appearing in this case against the appellants.

33. Jitender Kumar (PW-4), son of the deceased; Krishan Kumar had lastly seen his father in the company of four boys at Kaushik Travels on 26.8.2000 when he went there to deliver the clothes of his father as the deceased was to go to Hardwar along with the said four boys being driver of maruti van No. DL 3C R 1271. The said four boys who went with Krishan Kumar are the appellants who were identified by Jitender Kumar in the court. Jitender Kumar as PW-4 has testified on oath as follows:

“The name of my father is Sh. Krishan Kumar and he was a driver and was driving Maruti Van No. DL3C-R1271. On 26.8.00 I was present in my house and at about 4.00 p.m. one telephone call and it was the call of my father who asked me to come with his clothes in front of Kaushik Travels as he was to go to Hardwar. I took Kurta Payajama of my father behind Mini Bus stand in front of Kaushik Travels. Where I found my father and 4 other young persons were standing. I handed over the clothes to my father and he changed his clothes and the four persons who were standing there are Chintu Malhotra, Kallu Kashyap, Dharmender and Md. Tayyab who are present in the court today. I enquired

from accused persons as to where they were going and they told that they were resident of Hastal, Uttam Nagar. Thereafter they boarded the van and my father told me that he would be coming back the next day. When on the next day he did not return we started searching our father but we did not find any clue thereafter I lodged the report to police which is Ex.PW4/A. and bears my signature at point A. On 2nd or 3rd day my Jeeja-ji and some nearby persons went to Hardwar to enquire the whereabouts of my father. ASI Dal Chand came to my house with the photographs of my father and I identified as the photo of my deceased father. Perhaps by the end of October or in the beginning of November 2000 I was called near Mini Bus stand where the four accused persons were present and they were identified by me.”

34. In his cross-examination to a suggestion put by the counsel for accused Chintu Malhotra and Kalu Kashyap (appellants), he replied *‘it is correct that on 26.8.00 my father had firstly gone with passengers to Hardwar and they were the accused persons’*. To another question put to him in the cross examination on behalf of the said two accused persons (appellants), he replied *‘when I was standing with my father at the place I had asked the accused Dharmender who is friend of my brother that where they are going on which he*

replied that they are going to Hardwar as those boys were on holiday'. To another suggestion put to him in the cross-examination, he replied 'it is correct that I had seen the accused persons namely Chintu Malhotra and Kalu Kashyap on 26.8.00 when they were going to Hardwar'. He denied the suggestion that on 26.8.2000 Chintu Malhotra and Kalu Kashyap had not gone with his deceased father to Hardwar in the vehicle in question.

35. When asked by the learned counsel for appellant, Dharmender in the cross-examination, he replied *'it is correct that I came to know about the names of accused persons on making the inquiry on 26.8.00'*. Appellant Mohd. Tayyab has not questioned Jitender regarding his identity and Jitender coming to know of his name on 26.8.2000 itself at Kaushik Travels. Therefore, the testimony of Jitender qua him regarding his identity remains undisputed.

36. Learned counsel for the appellants has submitted that DD No.10A dated 29.8.2000 was recorded on an information through Anirudh Kumar PW-8. The said DD does not find mention the place from where the vehicle was hired and also the names of any of the persons who had hired the

vehicle or, were detained by Bihar police for the simple reason that till then no one knew the names of any of the persons who had hired the vehicle. The names were given by Jitender in his complaint Ex.PW-4/A only after the receipt of information from Bihar. Had he known Dharmender earlier he would have stated so in the statement Ex.PW-4/A the fact, that he knew Dharmender from before. It is also argued that apparently the names were disclosed in the complaint after receipt of the information from Bihar as is clear from the deliberate attempt made by Jitender PW-4 to conceal knowledge of phone call received from Bihar although, prior to that, as per his own admission, Delhi police was informed regarding the commission of offence after receiving message from Bihar.

37. These submissions do not lead us anywhere. DD No.10A was never proved in evidence by the prosecution, though much reliance has been placed on DD No.10A by the learned defence counsel while pleading innocence of the appellants. DD No.10A was recorded on an information received from PCR by the duty officer, Police Station Uttam Nagar. DD No.10A is nothing but an information which is recorded at the police station regarding some untoward

incident or crime having taken place. It is not required to contain all the details as is submitted by the learned counsel for the appellants. The purpose of registration of a daily diary is to swing into action the investigation agency to enquire into the information so received. As discussed above, DD No.10A was recorded on the basis of an information received from PCR. No information was received by police station Uttam Nagar directly from Purnia, Bihar. Details if any regarding the names and addresses of the persons who had been apprehended by them could have only been provided by police officers of Purnia. There is every possibility that Anirudh Kumar was not informed about the names of the persons who had been apprehended by police officers of Police Station Purnia. Under the circumstances, non-mentioning of names of the persons who had hired the vehicle and had left Delhi with deceased Krishan Kumar for Hardwar in the DD No. 10A in no manner is fatal to the prosecution case.

38. It has come in evidence that Anirudh Kumar (PW-8) had informed PCR about having received a phone call from SHO, Bihar pertaining to the recovery of maruti van No. DL 3C R 1231 hired by four persons on 26.8.2000 for going to Bihar

and also that driver of the vehicle had been murdered and all the said four persons had been apprehended. In this DD besides the residential address of deceased Krishan Kumar his address near Kaushik property dealer, 'Delhi' is also mentioned. It is on the basis of this DD that SI Dal Chand went to Kaushik Travels where he met the complainant Jitender Kumar and recorded his complaint Ex.PW-4/A. In his complaint Jitender Kumar has specifically named all the four appellants who had disclosed their names to him when he had reached Kaushik Travels to deliver clothes to his father and from whom he had enquired their names and who had also disclosed their addresses as LIG Flats, Hastal. None of the appellants were found to be residing in LIG Flats, Hastal. Jitender Kumar is categorical when he said that the appellants boarded the van and his father, deceased, drove away the van telling him that he would come back on the next following day. From the prosecution evidence, it is clear that at the time when SI Dal Chand recorded the statement of Jitender Kumar, he had no knowledge about receipt of any information regarding recovery of the van and apprehension of the appellants at Bihar, since this information was received by Anirudh (PW-8). Anirudh Kumar had not met Jitender till the complaint was lodged. From the testimony of Jitender as well

as Anirudh, it is apparent that one of the appellants Dharmender was known to them as he happened to be the class-fellow of Anirudh.

39. Thus, it is established on the record that Jitender Kumar PW-4 had come to know the names of the appellants on the day when they hired the maruti van of the deceased Krishan Kumar for going to Hardwar and he saw all the appellants leaving Delhi in the maruti van driven by Krishan Kumar for Hardwar.

40. In ***State of UP v. M.K. Anthony – 1985 SCC 505***, it has been laid down:

“While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking

sentences torn out of context here or there from the evidence attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

41. The other discrepancies as pointed out by the learned counsel for the appellants, which have crept in during the examination and cross-examination of Jitender Kumar and also in the testimonies of SI Dal Chand and Anirudh Kumar when read in context with complaint Ex.PW-4/A are minor discrepancies and are of no consequence to the defence of the appellants.

42. Dead body of Krishan Kumar was spotted at Rani

Pur Nehar beneath the bridge by Paramjeet Singh at about 9.00 AM in the morning of 27.8.2000. He informed SHO; Inspector Kuldeep Singh, Police Station Jawalapur, Hardwar about the same. The dead body was recovered by Inspector Kuldeep Singh (PW-20) in the presence of SI Rajesh Kumar (PW-23), const. Ramesh Chand (PW-18), const. Sohail Ahmed (PW-22) and independent public witness Hajara Singh, a watchman (PW-17) at about 10.30 AM. As per the post-mortem report, which was conducted on 28.8.2000 by Dr. Rajiv Verma (PW-13), the time since death was 1-2 days prior to the date of post-mortem. Deceased Krishan Kumar had left Delhi around 4.30 or 5.00 PM on 26.8.2000. They must have reached near Hardwar around 11.00 PM. The time since death as given by Dr. Rajiv Verma also clearly indicates that Krishan Kumar had succumbed to his injuries on the intervening night of 26-27.8.2000 may be early morning of 27.8.2000. The cause of death was given by Dr. Rajiv as 'from shock and haemorrhage due to ante mortem injuries'.

43. SI Rajesh Kumar (PW-23) had prepared the panchnama after the recovery of the dead body which was signed by five witnesses one of whom being Hajara Singh (PW-18). In the panchnama the description of the deceased

and the position in which his dead body was found has been given in detail. SI Rajesh Kumar got the dead body photographed at the spot. Panchnama also describes the nature of injuries which were noticed on the person of the deceased, they are:-

“lacerated wound on the right side of head,
blood oozing out from nose and mouth,
left side of the face compressed,
swelling on chest and abdomen at various places.”

44. The deceased was wearing white terricot pyajama without string and white colour kurta, white colour vest and readymade underwear. Since the dead body was of an unknown person it was cremated by Sewa Samiti, Hardwar on 28.8.2000. The deceased was identified from the photographs Ex.PW-19/B1 to B4 by Govind Singh (PW-11) and Chander Kishore (PW-12), who happened to be neighbour and son in law of the deceased, in police station Jawalapur on 31.8.2000 at 6.30 AM. The appellants have not disputed that the dead body recovered by police of police station Jawalapur, Hardwar was that of deceased Krishan Kumar. Hence the identity of the dead body recovered at Jawalapur as that of Krishan Kumar is established.

45. The last seen theory comes into play where the time gap between the point of time when the deceased and the accused were seen last alive by the witnesses and the time when the deceased was found dead eliminates the possibility of any person having committed murder other than the accused becomes impossible. Undoubtedly it would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is long gap and possibility of other person coming between existed. In such cases in the absence of any other positive evidence which come to the conclusion that the accused and the deceased were last seen together, it would not be safe for the court to come to the conclusion of guilt.

46. In ***Yuvaraj Ambar Mohite v. State of Maharashtra - 2006 (10) SCALE 369***, the theory of last seen together has been explained in the following words:

“The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.”

Reference can also be placed on ***State of U.P. v. Satish (supra)*** and ***Ramreddy Rajeshkhanna Reddy v. State of Andhra Pradesh - 2006 (3) SCALE 452.***

47. The last seen theory also becomes applicable in certain circumstances where the deceased and the accused were last seen together and the crime was committed soon thereafter, even though the corpus delicti was recovered much later. In ***Basant Singh v. State of Punjab – 1980 Supp. SCC 467*** where the corpus was found buried in a pit after about two or three days of the accused and the victims were last seen together, the Supreme Court applied the last seen together theory to uphold the conviction.

48. The last seen theory was also applied in ***Sudama Roy v. State of West Bengal -1998 SCC (Cri.) 391*** where the body of the deceased was found after about two or three months of her last seen in the house of the accused despite the huge time lag of about two-three months, the Supreme Court upheld the conviction.

49. As regards the testimony of Jitender, we find no

reason to discredit his testimony simply because in his complaint Ex.PW-4/A he did not state that he knew appellant Dharmender from before being class-fellow of his brother Anirudh (PW-8), nor we can presume that the names were given by the complainant in the complaint only after getting the full information and names of the appellants from Purnia where they were arrested. We also do not concur with the submissions of the learned counsel for the appellants to discredit the testimony of Jitender because of certain other discrepancies which have been pointed out in the DD No.10A based on the information given to the police by Anirudh Kumar PW-8 and also that how could SI Dal Chand (PW-24) reach Kaushik Travels directly when only the residential address of the deceased was noted in the DD. The reasons for disagreeing with the counsel for the appellants have already been discussed above in detail.

50. It is natural that every person who faces crises reacts differently. Therefore no standard reaction can be attributed to anyone. There is no set rule that a person must react in a particular way under a particular circumstance. Natural reaction or behaviour of a person is unpredictable. Human nature is such that every one reacts in his own way in

a given situation. Therefore such natural human behaviour becomes difficult to be proved by multiple evidence. The evidence has to be appreciated in the context and light of the facts and circumstances of each case.

51. In ***State of Uttar Pradesh v. Devendra Singh – (2004) 10 SCC 616***, the Supreme Court observed:

“Human behaviour varies from person to person. Different people behave and react differently in different situations. Human behaviour depends upon the facts and circumstances of each given case. How a person would react and behave in a particular situation can never be predicted. Every person who witnesses a serious crime reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counterattacking the assailants. Some may remain tightlipped, overawed either on account of the antecedents of the assailant or threats given by him. Each one reacts in his special way even in similar circumstances, leave alone, the varying nature depending upon variety of circumstances. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a

wholly unrealistic and unimaginative way.”

52. The appellants in this case, as discussed above, were last seen with the deceased by Jitender (PW-4) at about 26.8.2000 at 4.30 PM when he saw the appellants and the deceased leaving Delhi from Kaushik Travels for Hardwar in maruti van Ex.P1. On 27.8.2000 the dead body of Krishan Kumar was spotted and recovered from Rani Pur Nehar by police of police station Jawalapur, Hardwar. The time gap between the point of time when the appellants and the deceased were last seen alive by Jitender PW-4 and when the deceased was found dead is very small and the possibility of any person other than the appellants being the author of the crime becomes impossible. The chain of circumstance of last seen of the deceased with the appellants and recovery of dead body of Krishan Kumar soon thereafter has been successfully proved by the prosecution.

53. Maruti van No. DL3C R 1271 was intercepted by SI Rajesh Kumar Dubey on 29.8.2000 at about 9.15 PM when he was patrolling the area of Madhopara Road, Purnia along with SI Ajit Kumar, SI Ram Vikash Chaudhary and others. The

vehicle had to be chased by the police officers as, instead of stopping on signal it gained speed. As per the testimony of SI Rajesh Kumar Dubey four persons got down from the said vehicle and started running. They were overpowered and apprehended by them in the presence of public persons namely Surender Kumar and Mahadev Kesari. Since on inquiry none of those persons could give any satisfactory reply nor could produce any document relating to the van, he seized the van suspecting it to have been stolen. He got FIR No. 330/2000 under Section 413/414 IPC registered at police station Kehat, Purnia and arrested all the four persons. Unfortunately, he did not identify the appellants as the persons who were apprehended by him and from whose possession the vehicle was recovered. He did identify the maruti van Ex.P1 as the same which was seized by him. Ironically Mahadev Kesari (PW-6) and Surender Kumar (PW-7), the independent public witnesses in whose presence the appellants were apprehended and the vehicle was recovered also turned hostile. However, they did admit their signatures on the seizure memo of the maruti van. Despite being cross-examined by learned APP for the State, neither SI Rajesh Kumar nor Mahadev Kesari and Surender Kumar identified the appellants and boys who were apprehended and arrested

along with the maruti van at Madhopara Road, Purnia.

54. We note the conduct of SI Rajesh Kumar Dubey as deprecable and unworthy of a police officer. Not only that his testimony in the court in this case in not identifying the appellants is an attempt to demolish the prosecution case, but must have also come to the rescue of the appellants in FIR No. 330/2000 under Sections 413/414 IPC in which he himself is the investigating officer and a witness in the FIR.

55. SI Ajit Kumar (PW-14) another member of the patrolling party at Madhopara Road has fully supported the prosecution case. He deposed that he came to know the names of the appellants as Chintu Malhotra@ Chirag Malhotra, Kalu Kashyap, Dharmender Singh @ Vijay Singh and Mohd. Tayyab. He identified all the appellants in the court as the persons who were apprehended and arrested by SI Rajesh Kumar Dubey in his presence on 29.8.2000 at about 9.15 PM. From his testimony, it is clear that a telephone call was made at the telephone number mentioned on a slip of KK Travel and Tour Agency recovered from the dicky of the van and it was on this call that they came to know that the van was hired for Hardwar. He has also spoken about the registration of the FIR

No. 330/2000 against the appellants at Bihar. True that, he could not exactly identify the maruti van Ex.P1 but, he did confirm the registration number and colour of the vehicle which was recovered from the appellants. He was confused probably because of the sticker of KK Tours and Travel Agency not on the van when shown to him in the court. Instead, one board bearing words 'Zila Adhyaksh Samajwadi Party' was seen by him on the vehicle which according to him was not there at the time of its seizure. It is obvious that the appellants were not apprehended from inside the maruti van. They were overpowered when they got down from the maruti van and started running away from the police party. They were chased and apprehended.

56. SI Dal Chand reached Purnia on 31.8.2000. On coming to know of the arrest of the appellants in FIR No. 330/2000 and also that appellants were in judicial custody he filed an application in the court of Chief Judicial Magistrate on the same day seeking the production of the appellants in the concerned court at Delhi. The appellants remained in judicial custody in the said case registered against them at Purnia for being found in possession of stolen maruti van Ex.P1 for about two months before they were brought to Delhi by SI Dal

Chand (PW-24) on 1.11.2000 and were formally arrested in this case after they were produced in the court on 3.11.2000.

57. In their respective statements recorded under Section 313 Cr.P.C. appellant Chintu Malhotra in answer to question no.35 admitted that he was detained by police officials of police station Kehat. In reply to question no.39 though he said that he was falsely implicated, has admitted that he was arrested in this case on 3.11.2000 when he was produced in the court. However, in reply to question no. 15 he replied that he did not know driving nor holds any driving licence.

58. Similarly appellant Gyan Chand Kashyap @ Kalu Kashyap in reply to question no.19 has said that he was falsely implicated in FIR No.330/2000. Same is his reply to question no.35 when he said that he was detained by police officials of P.S. Kehat. In reply to question no.39 though he said that he was falsely implicated, has admitted that he was arrested in this case on 3.11.2000 when he was produced in the court. However, in reply to question no. 15 he replied that he did not know driving nor holds any driving licence.

59. Appellant Dharmender in tune with the other appellants in reply to question no. 19 and question no. 35 has stated that he was falsely implicated in FIR No. 330/2000 and also in this case on his arrest on 3.11.2000. In reply to question no.15 he has stated that he does not know driving or holds any driving licence.

60. Appellant Mohd. Tayyab Alam has also not denied that he was arrested in FIR No.330/2000 at Police Station Kehat though, he said that he was falsely implicated. In reply to question no.39 he said that he was falsely implicated. However he has admitted that he was arrested in this case on 3.11.2000 when he was produced in the court. In reply to question no.35 also that he has deposed that he was falsely implicated and he was detained by police officials of Kehat. Unlike other appellants in reply to question no.15 he only replied that he was falsely implicated and was not accompanying any of the accused persons in the alleged maruti van.

61. Thus, it is clear that all the appellants in their statements under Section 313 Cr.P.C. did not deny the factum of their apprehension and arrest by police officials of police

station Kehat, Purnia, Bihar in case FIR No. 330/2000.

62. Examination of an accused under Section 313 Cr.P.C. not only affords opportunity to the delinquent to explain incriminating circumstances against him but also to help the court to appreciate the entire evidence adduced before it during the trial. The answer to a question given by an accused sometimes may be a flat denial or an outright repudiation of the circumstance put to him. It is also that in certain cases accused would offer some explanations to incriminative circumstances. Possibility of accused admitting or owning incriminating circumstance adduced against him are also there, may be for the purpose of adopting legally recognised defences.

63. All the appellants in their statements have taken a defence that maruti van Ex.P1 was not recovered from them nor they were driving the said vehicle. Even if the defence of the appellants is accepted that three of the appellants did not know driving and did not possess driving licence, the fact remains Mohd. Tayyab Alam one of the appellants knew the driving and must be the person who was driving the maruti van when it was intercepted by SI Rajesh Kumar Dubey at

Madhopara Road, Kehat, Purnia. Also he being native of Purnia was fully in the geographical know how of his place.

64. The admission on the part of the appellants that they were apprehended and arrested at Purnia, is in consonance with the registration of FIR No. 330/2000 under Sections 413/414 IPC for being found in possession of stolen maruti van DL 3C R 1271, arrest of the appellants, disclosure of their names to the investigating officer, their remaining in judicial custody for two months and their arrest in this case on execution of production warrants on 3.11.2000, their identification by complainant Jitender and recovery of maruti van No. DL 3C R 1271 from their possession clearly establishes their identity as the persons who had hired maruti van Ex.P1 driven by deceased Krishan Kumar on the pretext of going to Hardwar.

65. Simply because SI Rajesh Kumar Dubey has not supported the case of the prosecution in full, his testimony cannot be completely discredited. Though Mahadev Kesri PW-6 is totally hostile but he admitted his signatures on the seizure memo Mark X of maruti van Ex.P1. Surender Kumar PW-7 while admitting his signatures on the seizure memo

Mark X deposed that he had signed the seizure memo Mark X after maruti van was seized in his presence. Therefore, he admitted the seizure of maruti van by SI Rajesh Kumar Dubey in his presence. His testimony also therefore cannot be completely ignored. It is cardinal principle of law that unless the credibility of the witness is completely shaken and he does not stand the test of cross-examination by the party who called in evidence, that part of his statement, which in the opinion of the court is creditworthy can be relied and acted upon provided it finds corroboration from the other evidence on the record.

66. In ***Sat Paul v. Delhi Administration - AIR 1976***

SC 294, it was laid down by the Supreme Court as follows:

“It emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence

of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto.”

67. Thus it is clear that trivial discrepancies are not fatal to the otherwise acceptable evidence.

68. Learned counsel for the appellants has emphasized that from the evidence of the prosecution as adduced on the record, especially the document Ex.PW-21/B it can be safely inferred that the vehicle was recovered on 28.8.2000, that a phone call was received from Bihar on 28.8.2000 and that the whereabouts of Krishan Kumar were known on 29.9.2000 before DD No.10A was recorded.

69. It is argued that report no.7 Ex.PW-21/B and DD No.10A totally demolishes the prosecution case of arrest of the appellants with maruti van at around 9.15 pm on 29.8.2000. These documents are in consistence with the plea

of the appellants of recovery of vehicle on 28.8.2000 and vehicle being planted on them the next night which is the apparent reason for the delay in recording of FIR No. 330/2000 at Police Station Kehat, Purnia at 2.00 AM on 30.8.2000.

70. Govind Singh (PW-11) had given an application in writing in the police station Jawalapur disclosing the names of the persons who had visited the police station along with him. In the said application, as recorded in Ex.PW-21/B, he penned down that on Monday, 28.8.2000 a telephone call was received from police station Purnia, Bihar at the residence of Krishan Kumar Dixit informing that their maruti van along with four persons had been intercepted at Purnia. On interrogation the said boys disclosed that they had thrown away the driver of the vehicle about 20 kilometers before Hardwar beneath the bridge (pul). He also noted in the application that on seeing photograph of the deceased at the police station he and the other persons who accompanied him have identified the dead body of Krishan Kumar. He also stated the fact that on 29.8.2000 FIR No.786/2000 under Sections 365/34 IPC was got registered and that police party had already left for Purnia on 30.8.2000. Except this

document there is no evidence on the record to indicate that any telephone call was received at the residence of Krishan Kumar Dixit, the deceased, on 28.8.2000.

71. It is possible that a telephone call was received as alleged and it was on receipt of this call the search of the deceased was made by Jitender and Anirudh from the house of Dharmender who was class-fellow of Anirudh and was known to them from before. True that, some contradictions have come in the cross-examination of these two witnesses regarding the visit to the house of Dharmender, but those are minor and in no manner demolish the testimony of these two witnesses regarding their visit to Dharmender's house.

72. It is pertinent that Govind Singh was contacted by the wife and son (Jitender) of the deceased only in the early morning of 31.8.2000. While disclosing the details of the incident and the information received in the application submitted at police station Jawalapur, he noted down the dates on his memory, may be gathered impression. Be that as it may the contents of his application are based on hearsay and are therefore inadmissible in evidence.

73. It was only when Jitender and Anirudh failed in their efforts to search Krishan Kumar or to find out his whereabouts, it seems that DD No.10A was got recorded at police station Uttam Nagar. Hypothetically it is possible that the police officers of Purnia spotted the vehicle with the appellants on 28.8.2000 and after coming to know driver of the vehicle having been thrown away near Hardwar and locating a telephone number from the vehicle itself, that a telephone call was made at Krishan Kumar Dixit's house on 28.8.2000. It is also possible that a telephone call was received by Anirudh at his office.

74. Significantly, DD No.10A does not find mention of any specific place at Bihar from where the telephone call was allegedly received. As per testimony of Anirudh (PW-8) he found the voice of the caller similar to that of Dharmender. It is possible that this call was made by appellant Dharmender only with a view to inform the family members of Krishan Kumar that they (the boys travelling in the vehicle) had killed the driver of the vehicle and had gone to Bihar. Had the vehicle been intercepted or seized by police station Kehat, Purnia, before receipt of DD No.10A, by Anirudh, the caller of the telephone who described himself as SHO would have

given his name as well as the name of place where the vehicle was intercepted to Anirudh, thereby giving specific information about the seizure of the vehicle. DD No.10A does not find mention of the date of the telephone call which was received by Anirudh regarding the seizure of the vehicle and apprehension of the four persons and murder of the driver of the vehicle. Any information recorded in the Daily Diary does not assume the characteristic of an FIR for the simple reason that the information is so recorded in the DD through various channels and information so recorded might not be very accurately given under the facts and circumstances of a case. Under these circumstances, therefore, much authenticity cannot be attached to the contents of DD No.10A which, even otherwise has not been proved in evidence though, much relied upon by the counsel for the appellants.

75. The police officers of police station Kehat, Purnia, registered an FIR against the appellants probably after coming to know that the said vehicle was a stolen vehicle may be on interrogation from the appellants or after they had a conversation with Anirudh at the telephone contact number which was traced out from maruti van. There is a serious

lapse, sheer callousness on the part of the investigating officer SI Rajesh Kumar Dubey when he belatedly got registered FIR No.330/2000 against the appellants on the intervening night of 29-30/8/2000 only after informing the family members of Krishan Kumar at Delhi. This explains the discrepancies which have appeared regarding the date when the information was received at Delhi, the time of recording of the DD No.10A at 12.10 PM and the registration of FIR No.330/2000 both on 30.8.2000 which are only attributable to SI Rajesh Kumar Dubey.

76. Naturally on receipt of DD No.10A SI Dal Chand (PW-24) proceeded with the investigation of the case. He visited Kaushik Travels where he recorded the statement of Jitender and he also recorded the statement of Anirudh at his residence. As pointed out, when these two statements were recorded, Anirudh and Jitender had not conversed with each other and therefore Jitender was not in the know of any information received on telephone by Anirudh and also recording of DD No.10A at police station Uttam Nagar.

77. It is pertinent that since SI Dal Chand knew Mohd. Tayab Alam from before being resident of the ilaqa and also

the fact that he was resident of Purnia he decided to go to Purnia on coming to know of his name as one of the persons who had hired the vehicle while recording complaint Ex.PW-4/A and with the permission of the senior authorities he left Delhi on the night of 29.8.2000 itself and reached Purnia on 31.8.2000. It was only when he went to police station Kehat that he came to know of the registration of FIR no. 330/2000 under Sections 413/414 IPC against the appellants, seizure of the vehicle and also that the appellants were in judicial custody. He made every endeavour to ensure that the appellants were brought to Delhi with the permission of the CJM Purnia for further investigation of this case.

78. The manner in which the PCR was informed by Anirudh, recording of the DD No.10A and the recording of statement of Jitender Kumar and Anirudh by the investigating officer on receipt of telephone call speaks volumes of the mental condition of Jitender, the complainant, Anirudh (PW-8) and of their anxiety to find out the whereabouts of their father. In this whole process how they reacted to the situation is obvious from the record.

79. Much has been argued by the learned counsel for

the appellants that the FIR No.330/2000 is ante dated and the actual culprits were someone else who have been scot free and appellants have been falsely implicated in this case. However, we find no force in these arguments. As discussed above, SI Dal Chand (PW-24) had reached Purnia only in the morning of 31.8.2000. When he reached Police Station FIR was already registered against the appellants. Not only this, appellants had been produced before the C.J.M. Purnia and were remanded to judicial custody in the said FIR registered against them at Purnia. He had moved an application before the C.J.M. Purnia, seeking transfer of the appellants to Delhi as they were wanted in this case. C.J.M. vide his order dated 1.9.2000, had allowed the application so filed by SI Dal Chand. Therefore, under these circumstances, there was no occasion or cogent reason for SI Rajesh Kumar Dubey of Police Station Purnia to ante date the FIR and falsely implicate the appellants in this case by planting the recovery of the vehicle from them after recovering it from someone else. As discussed above, all the appellants in their statements under Section 313 Cr.P.C. did admit that they were arrested at Purnia on 30.8.2000.

80. Learned APP for the State has submitted that any

lapse in the investigation of the case and follies committed by the prosecution should not weigh in the mind of the court and should not be allowed by the court to become escape route for the criminal especially when there is sufficient evidence of guilt by broader probabilities. It is also argued that since the appellants were found absconding from the day of incident till 29.8.2000 when they were apprehended along with the maruti van of the deceased a presumption under Section 114 of the Evidence Act is clearly made out against them.

81. In ***State of West Bengal v. Mir Mohammad Omar and Ors. – 2000 SCC (Cri.) 1516***, it was held that if offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the victim. Effort should be made by courts to see that criminal justice is salvaged despite such defects in investigation. Court should bear in mind the time constraints of the police officers in the present system, ill-equipped machinery they have to cope with, and the traditional apathy of respectable persons to come forward for giving evidence in criminal cases. These defects have to be faced by police officers when they conduct investigation in almost every case.

82. In ***Visveswaran v. State = 2003 Rajdhani Law Reporter 350 (SC)*** where the victim was raped by a police official in a hostel and the case was based on circumstantial evidence, it was observed:

“Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to be borne in mind that approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity, courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved.

83. In the present scenario the conduct of SI Rajesh Kumar Dubey has already been highlighted and deplored by us. It seems that either he tried to save the appellants and in that endeavour committed serious follies after apprehending the appellants till the time he thought the necessity of taking a legal action against them. Even otherwise, the appellants were detained and vehicle was seized by SI Rajesh Kumar Dubey on suspicion and he thought of registration of a case against the appellants only when it was revealed on investigation that the vehicle was stolen one. These serious lapses in the investigation of the case and the follies committed by the prosecution do not weigh in our mind nor can the appellants be allowed to highlight these discrepancies to make an escape route for themselves especially when there is sufficient evidence adduced on record by the prosecution and proved against the appellants of their guilt of having kidnapped Krishan Kumar and murdered him with an intention to steal away maruti van from his possession. To execute their plans in furtherance of their common intention, they hired the vehicle for Hardwar on 26.8.2000 from Krishan Kumar who also happened to be the driver of the vehicle. Significantly one of the appellants Dharmender who was

known to the sons of Krishan Kumar must be also known to him. Absence of appellants since the evening of 26.8.2000 till their arrest by SI Rajesh Kumar Dubey at Purnia is also an aggravating circumstance against them. Therefore, lapses in the investigation of the case and mistakes committed by SI Rajesh Kumar Dubey in no manner can be considered fatal to the prosecution case in view of the prosecution having succeeded in bringing home the guilt of the appellants.

84. From the circumstances established by the prosecution this Court has every power to presume the existence of certain facts like the vehicle being driven by one of the appellants from Hardwar to Purnia after having disposed of the body of the driver, interception of the vehicle at Purnia, the efforts of the appellants to abscond but their apprehension by local police at Purnia and their arrest in a case of having found in possession of stolen property. There are the circumstances which raise adverse inference against the innocence of the appellants. We therefore legitimately draw presumption not only to the fact that the appellants from whose possession the stolen vehicle was recovered, committed robbery but also to the fact that they committed the murder of Krishan Kumar.

85. In ***State of West Bengal v. Mir Mohammad Omar and Ors. (supra)*** where a person was abducted and was taken out of the sight witnesses and was wearing a particular colour of shirt and within couple of hours the murdered body of such person was found in a hospital without the shirt and the said shirt was concealed by one of the appellants and the abductors failed to give any explanation as to what happened to the deceased after he was abducted by them, it was observed that when the prosecution succeeded in establishing such circumstances the court has to presume the existence of certain facts as presumption is a course recognised by the law for the court to rely on the conditions such as this. It was observed:

“33. 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. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the

court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.”

Accordingly, the appeal of the State was allowed and the appeals of the convicted persons were dismissed. Conviction was maintained under Section 364 and 302 read with Section 34 IPC.

86. In this case the chain of incriminating circumstances proved against the appellants are:

a. Appellants hired maruti van No. DL 3C R 1271 Ex.-P1 at 4.00 PM on 26.8.2000 at Kaushik Travels for going to Hardwar.

b. Victim Krishan Kumar was the driver of the said maruti van.

c. Complainant Jitender last saw the appellants along with deceased Krishan Kumar leaving Delhi in the said maruti van at about 4.30 PM for Hardwar.

d. Krishan Kumar did not come back on 27.8.2000 as informed by him to Jitender on 26.8.2000 while leaving for Hardwar with the appellants.

e. Dead body of an unknown person (later on identified as Krishan Kumar) was recovered from Rani Pur Nehar, Jawalapur, Hardwar, at about 10.30 AM on 27.8.2000 by Inspector Kuldeep Singh (PW-20) and SI Rajesh Kumar (PW-23) in the presence of other police officials and independent public witness Hajara Singh (PW-17).

f. The dead body was got photographed by SI Rajesh Kumar (PW-23) at the spot from photographer Surender Kumar (PW-19). He prepared panchnama which was signed by five witnesses, including Hajara Singh.

g. The dead body was post-mortemed by Dr. Rajiv Verma (PW-13), H.M.G. District Hospital, Hardwar on 28.8.2000.

h. The doctor found various injuries on the person of the deceased. He opined the cause of death as shock and haemorrhage due to ante mortem injuries.

i. The dead body was identified as that of Krishan Kumar by Chander Kishore (PW-12) and Govind Singh (PW-11) from the photographs Ex.PW-19/B1 to B4 shown to them at police station Jawalapur and also by Jitender (PW-4) and Anirudh (PW-8) when shown to them by SI Dal Chand at police station Uttam Nagar.

j. The maruti van was intercepted at

Madhopara Road, Kehat, Police Station Purnia by SI Rajesh Kumar Dubey in the presence of SI Ajit Kumar and other witnesses.

k. The appellants were apprehended and the vehicle was recovered from them by SI Rajesh Kumar Dubey and other police officials.

l. Appellants were arrested in FIR No. 330/2000 for being found in possession of suspected to be stolen property i.e. the vehicle and were sent to judicial custody.

m. They remained in judicial custody in the said case for two months and were arrested in this case only on 3.11.2000 after they were brought to Delhi by SI Dal Chand in execution of production warrants.

n. The appellants have been identified as the persons who had left Delhi with Krishan Kumar in the evening of 26.8.2000 and the persons who were apprehended at Purnia along with the vehicle.

87. From the proved circumstances as above we are satisfied that appellants had abducted Krishan Kumar with a motive to rob him away of his vehicle after murdering him. The appellants are the only persons who knew what happened to Krishan Kumar till he was with them. The dead

body of Krishan Kumar was found soon after the abduction, the recovery of the vehicle from their possession and their apprehension after 2-3 days of the abduction of Krishan Kumar clearly draws the presumption that appellants had murdered Krishan Kumar specially when the appellants have not disclosed as to what happened to Krishan Kumar till he was with them. Therefore, the presumption of fact that appellants had murdered Krishan Kumar in the intervening night of 26-27.8.2000 at Jawalapur, Hardwar can be inferred under the existing facts and circumstances of this case, specially, when the truth of such inference has not been disproved by the appellants.

88. Principles embodied in Section 106 of the Evidence Act that when any fact is within the knowledge of any person, the burden of proving that fact is upon him, also becomes applicable in the circumstances of this case. This section in no manner relieves the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt but, this section does apply to cases of the like nature where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts and circumstances, 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.

89. Section 106 of the Evidence Act is so designed as to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are especially within the knowledge of the accused and which he could prove without difficulty or inconvenience.

90. In a case of circumstantial evidence, an accused offers an explanation which is found to be untrue then the same offers an additional link in the chain of circumstances to complete the chain. As discussed above, the explanation given by the appellants in their statement is found to be untrue and therefore, their untrue statement and explanation also finds an additional link to the chain of circumstances to complete the chain.

91. In ***Trimukh Maroti Kirkan v. State of Maharashtra – JT 2006 (9) SC 50***, it was observed:

“If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecution* 1944 AC 315 quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* MANU/SC/0585/2003). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case

would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

It was further observed that : -

"In a case based on circumstantial evidence where no eye-witness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete."

92. In the present case none of the appellants have disputed that they were present at Purnia when they were

apprehended by the patrolling party of police station Kehat. The recovery of the vehicle from them also stands proved on the record. They took false defence in their respective statements under Section 313 Cr.P.C. that they did not know driving. As already discussed above, one of the appellants Mohd. Tayyab Alam has not stated that he does not know driving or was not having any driving licence. Therefore, one of the appellants did know driving and was the person who drove vehicle to Purnia where it was intercepted and seized. For the theft of the vehicle the appellants have already been arrested in case FIR no. 330/2000 by police authorities of police station Kehat for which the appellants faced trial and also remained in custody for substantial period. It was in their knowledge as to what happened to Krishan Kumar till he remained in their company upto Hardwar. However no such explanation has been offered by any of the appellants, except their total denial of having hired the vehicle for going to Hardwar and recovery of the vehicle from them. The various links in the chain, when taken in isolation, might not connect the appellants with the commission of the crime but when taken together they unmistakably point out the guilt of the appellants.

93. From the evidence of the prosecution as successfully adduced on the record, we find the chain of circumstances leading to the abduction of Krishan Kumar and his murder by the appellants and recovery of vehicle Ex.P1 from their possession is complete. Consequently, we reach to an irresistible conclusion that appellants had abducted Krishan Kumar with an intention to murder him and also that they had murdered him and disposed of his body and robbed him of his maruti van. They have been rightly convicted and sentenced for offences under Sections 364/302/34 IPC by the trial court.

94. We find no merits in these appeals. These are accordingly dismissed.

ARUNA SURESH, J.

PRADEEP NANDRAJOG, J.

May 11, 2009
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