* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 14.01.2011
PRONOUNCED ON: 28.04.2011

\+ **CRL.A. 786/2001**

SAVITA alias BABBAL ..... Appellant

Through : Ms. Rebecca. M. John, Advocate along with appellant in person.

versus

STATE OF DELHI ..... Respondent

Through : Sh. Luvkesh Sawhney, APP.

CRL.A. 795/2001

ASHUTOSH BANEERJEE alias PAPPU ..... Appellant

Through : Appellant in person.

versus

STATE ..... Respondent

Through : Sh. Luvkesh Sawhney, APP.

CRL.A. 919/2001

RAVI CHOUHAN ..... Appellant

Through : Ms. Charu Verma, Advocate along with appellant in person..

versus

STATE ..... Respondent

Through : Sh. Luvkesh Sawhney, APP.

CRL.A. 926/2001

SWAMI RAMESHWARANAND GIRI alias VI ..... Appellant

Through : Sh. Mukesh Kalia, Advocate along with appellant in person.

versus

STATE GOVT. OF NCT OF DELHI ..... Respondent

Through : Sh. Luvkesh Sawhney, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE G.P. MITTAL

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

MR. JUSTICE S.RAVINDRA BHAT

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1. The present common judgment will dispose of the above four connected appeals. All the accused/Appellants were convicted by the trial court under Sections 302 read with Section 34, IPC; the Appellant Savita, in addition, was convicted under Section 203 IPC.

2. The case of the prosecution in brief is that on receipt of DD No. 38A at about 2:24 AM on the night intervening of 02-03.12.1994, SI Sardar Singh reached at H. No.29/156, West Patel Nagar and found Manoj Girotra (the deceased) son of Jagdish Rai lying on the floor in a pool of blood in the first floor drawing room; blood was scattered on the floor, on the pillow and bed sheet. There were number of knife blows on the deceased's body. The bedroom almirahs were open, empty jewellery boxes were also lying on the ground. SI Sardar Singh recorded the statement of the wife of deceased Manoj (hereafter "Savita") who was present at the spot. She disclosed that she along with her husband was watching the film *"Burning Train"* on TV and at about 1:30 AM, after the film got over they were conversing in their room on the first floor. Someone knocked the door; Manoj opened the door and three persons armed with knives entered the premises. One of them held a knife at the deceased's neck and took him to the drawing room. Another person held the knife at her neck and demanded the almirah keys; the third man took out gold ornaments from the almirah. All of them were to leave, but the man holding the knife to her, tried to tease her; he tore her clothes. When her husband Manoj protested, he was given knife blows at many places on his

body by the intruders. As a result, Manoj fell down and all the three intruders fled from the spot. She raised alarm and her father-in-law's cousin Mahender Lal and others from the locality went upstairs.

3. It was alleged that after initial investigation, SI Sardar Singh found no clue in the case. He handed over investigation to Inspector Rajbir Singh, of Special Investigation Branch who found suspicious activities on the part of Savita and her family guru Swami Rameshwaranand Giri (hereafter "the swami"). On 13.09.1995 the swami was arrested and one letter written by him to Savita was seized from him, addressed to her as his lover and wife. After finding clues against Savita, she was arrested and on 13.09.1995. Accused Raj Kumar and Jagdish Lal were also arrested and on 17.09.1995 accused Ravi Chauhan and Ashutosh Banerjee were arrested. Accused Om Prakash @ Omi could not be arrested by the police and was declared as proclaimed offender.

4. It was alleged that the swami was interrogated; he disclosed being very close to the family of Saudagarmal Sethi, Savita's father and in the year 1994 when he was ill, he remained in their house and had a physical relationship with Savita. Savita's marriage was solemnized on 10.10.1994 with Manoj and the swami blessed the couple. After the marriage, according to the prosecution, the swami and Savita kept on meeting each other, and in one such meeting, they conspired to kill Manoj and asked for assistance from one devotee accused Raj Kumar. He arranged for the killers; the swami paid ₹40,000/- to the killers. On 15.11.1994 accused Raj Kumar took his co-accused Ravi Chauhan on his motor cycle No.DIW 1149 to Patel Nagar and according to the plan, Savita along with her husband Manoj went to Hanuman Mandir on their scooter. Accused Raj Kumar and Ravi Chauhan started chasing them. On reaching Shankar Road, near the petrol pump, Savita dropped her slipper intentionally, ensuring that the scooter stopped and alighted from it to retrieve the slipper. Raj Kumar stopped his motorcycle at some distance; accused Ravi Chauhan fired at Manoj with a country made pistol. Manoj was injured on the back of the shoulder. Accused Ravi Chauhan hid himself in the bushes and accused Raj Kumar fled on his motorcycle. The swami was in his car bearing No. DL 4C A7094 and he took Ravi Chauhan in his car.

5. It was further alleged that on 30.11.1994 the swami came to Delhi from Rishikesh in his car, which was driven by Makhan Lal, and at about 12/12:30 PM reached Patel Nagar. Leaving Makhan Lal in the car at some distance, he visited Savita's house and remained there till 2:30/3:00 AM, and they hatched another plan to kill Manoj, according to which, on the night of 02.12.1994 the swami, in his car (driven by accused Raj Kumar) reached his (Raj

Kumar's) factory at Nariana and took accused Om Prakash @ Omi and Ashutosh Banerjee @ Pappu who were armed with knives. All of them went to the Savita's house, at West Patel Nagar. Leaving Raj Kumar in the car, the swami, Omi and Pappu went to the first floor of Savita's house, the door of which had, as per previous plan, been left open, (since Savita was waiting for the other accused). Upon their reaching the premises, she switched off the bedroom light and took the co-accused to the drawing room where the deceased was sleeping on the *diwan*. All the three accused showered knife blows on the body of Manoj, and when he tried to protest. The swami caught Manoj's foot with his hands, and on receiving knife blows, he fell down from the bed and died. The swami sent accused Omi and Pappu downstairs and when he saw that Manoj was not dead, he gave another knife blow to him; after satisfying himself that Manoj had died, and in order to give the incident the shape of dacoity, he took Savita's ornaments from the almirah and scattered the empty boxes on the bed and also tore Savita's nighty. He gave some ornaments to accused Omi and Pappu and left them at Nariana.

6. The prosecution also alleged that after committing the murder, the swami, with his driver Makhan Lal left for Rishikesh. On reaching, the swami threw the knife in the bushes behind his Ashram. He kept the ornaments in his almirah and after washing the clothes which, he was wearing at the time of incident, hid them. He attended Manoj's cremation ceremony and lived for some days in the Ashram of his Gurubhai Devendranand Giri at Bahadurgah, Makhan Lal got introduced the swami, to the accused Jagdish Lal Sharma who introduced himself as Inspector from the CBI and he with the help of Makhan Lal started extorting the swami. After recording the telephonic conversation in audio cassettes between Makhan lal and Jagdish Lal Sharma, they both were arrested. The swami is alleged to have led to recovery of the knife used in the incident and the jewellery taken away from Savita's house. The prosecution filed charges in the Court. Subsequently, accused Om Prakash @ Omi was also arrested and the challan was filed in the Court and the case was committed to the Court of Sessions. Makhan Lal and Jagdish Lal Sharma were remanded for their trial to the Court of concerned Metropolitan Magistrate by order dated 22.12.1998, Additional Sessions Judge, Delhi as the offences alleged against them were only under section 176/202/384/419, IPC which were exclusively triable by the Metropolitan Magistrate. Charges under Section 302/120B IPC were framed against all the accused persons on 04.05.1999, to which they all pleaded not guilty and claimed a trial. Hence the trial commenced against them. The swami, and Ashutosh Banerjee were separately charged for

offence under section 404 IPC and 27/54/59 of Arms Act. Accused Ravi Chauhan was also separately charged for offence under Section 307 and 404 IPC. Similarly accused Om Prakash was also separately charged for offence under Section 404 IPC. Accused Savita was separately charged for offence under section 203 IPC. All accused entered the plea of not guilty to their separate charges and claimed a trial.

7. The prosecution relied on the evidence of 48 witnesses to establish the charges framed against the accused. Since its case was based entirely on circumstantial evidence, it was sought to be proved by evidence in that regard. Broadly, the following circumstances were sought to be made out through prosecution evidence:

(1) Proximity between Savita and the swami, for a long time, before the former's marriage to the deceased, during which they developed intimacy;

(2) Conspiracy hatched by the swami and Savita, to have Manoj murdered. The first step towards this, was the incident of 15.11.1994, when the deceased was shot at while driving a scooter, and injured at the back. The attempt was on his life, but was unsuccessful. The prosecution alleged that Savita prevailed on other family members to refrain from reporting the incident to the police.

(3) Planning, by the swami and Savita, prior to the incident, whereby the former visited the latter, on late 30th November, 1994, and hatched a conspiracy. He stayed with her till the early hours of the next morning.

(4) Involvement of other co–accused, and the swami, in the murderous attack which took place on the night of 02-03.12.1994, on Manoj, which resulted in his death, and the later cover-up by them, to give the impression of a robbery and looting of jewellery. Savita aided the co-accused, by ensuring that the first floor door was left unlocked, to facilitate the crime.

(5) Attempt by Savita to hide the previous incident, of 15.11.1994, when reporting the matter to the police. The police did not have any concrete clue, and the investigating officer changed.

(6) Interception of telephonic conversation between the swami and Jagdish, and other conversation, leading to recovery of letter from Rama Bajaj, the arrest of swami, his disclosure statement, leading to recovery of the murder weapon, and jewellery looted from the premises, on the date of incident, and the subsequent arrest of other co-accused, including Savita.

8. The trial court convicted the four appellants, holding that the prosecution was able to prove all the circumstances, which pointed to their guilt and involvement in the murder of the

deceased. It was held that Savita's conduct and role in successfully ensuring that the previous attempt at the life of the deceased, which occurred on 15.11.1994, stood established. It also found that the version given by Savita about the manner in which the incident took place, when allegedly the assailants entered the first floor, of the premises, started to rob jewellery, and upon being challenged by Manoj, when one of them sought to molest her, by raining knife blows on him, was falsified by the circumstantial evidence. In this regard, the trial court took into consideration the evidence such as to say that the couple had a strained marital relationship, the nature of injuries which led to the death of Manoj, the fact that there was no forcible entry into the house at 1:30 AM, in the morning, the statements of PW-15 about how the outside door was unlocked, the telephonic conversations which the swami had, leading to recovery of a letter, PW-37/R, the interrogation and detention of swami, the disclosure statement made by him, leading to recovery of jewellery articles, their identification by PW-3 (Manoj's father), the arrest and disclosure statements of Ravi Chauhan and Ashutosh, all proved the circumstances conclusively and unerringly to the guilt of the four appellants. The trial court accordingly recorded their conviction under Section 302 read with Section 34, and also recorded the acquittal of Ravi Chauhan, in respect of the charge under Section 307 IPC. It convicted Savita under Section 203 IPC, and acquitted the accused charged for the offence under Section 404, IPC.

Appellants' arguments

9. All the appellants argue that the first circumstance put forward in the case is the linking of the 15.11.1994 incident with Manoj's murder, and their alleged complicity in that incident. It is pointed out firstly that the accused charged with the said attempt was Ravi Chauhan; the Court recorded his acquittal. In the circumstances, the charge of conspiracy had to be established with strong and cogent evidence.

10. It is submitted, primarily by Savita's counsel, in this regard that the evidence put forward against her was her alleged reluctance in reporting the matter to the police, and convincing the other family members against such reporting. It was urged, here, that PW-1, the deceased's mother had deposed on this aspect, and her testimony was unreliable, since she contradicted herself on this issue. On the one hand, in her examination-in-chief, she clearly stated that Savita did not want the incident reported, since the couple was newly married; yet, at a later point in time, in her deposition, she clearly stated that the decision not to report the attempt was collectively taken by the family. It was submitted that the

prosecution had tried to say that Savita did not report the failed attempt, even when the murderous incident of 02.12.1994 was intimated to the police, and that this was reported by PW-15. Arguing that this was not established, it was submitted that the depositions of witnesses showed that Savita, in fact, handed over the windcheater and other articles of clothing, of the deceased Manoj, in respect of the previous attempt of 15.11.1994, when asked to do so. It is also urged that the later version on this, viz. that the entire family collectively decided not to report the incident, is plausible, since PW-15 and PW-16 have not supported PW-1's version on this aspect, and further that PW-3, the deceased's father, who was staying away from the family, at Agra, was not even aware of the whole incident of the failed attempt on the accused's life, on 15.11.1994. Counsel further argued that the trial court completely misdirected itself, in selectively appreciating the evidence of the prosecution witnesses, and applying itself to the examination-in-chief, completely ignoring the entire depositions, which included the cross-examination conducted on behalf of the accused/appellants. Learned counsel also argued that the evidence of PW-1 cannot be relied on, because her statement was recorded on three different dates, namely 11.02.1995, in August, and later, in December, 1995. Not only did she materially contradict herself in these three statements, in the form of omissions, and improvements, but later contradicted herself, as well as other witnesses during the trial. It is argued that indeed, if this witness and the other relatives of the deceased had suspected Savita and the swami, there was no reason, why this should not have been voiced by them when the police recorded the statements, on these separate dates. Furthermore, the voluntary manner in which Savita gave the deceased's articles of clothing, to facilitate investigation into the previous incident, falsified the prosecution argument that she suppressed the previous incident deliberately.

11. On this aspect, it was contended that a statement, or omission of an accused, (on any aspect relating to an offence), who was the informant reporting the crime, and recorded as part of the FIR, is inadmissible, as against the said accused, as hit by Section 162 of the Criminal Procedure Code. Here, reliance was placed on the judgment of the Supreme Court reported as *Nissar Ali v. The State of Uttar Pradesh,* AIR 1957 SC 366 to say that a First Information Report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under S. 157 of the Evidence Act or to contradict it. Reliance is also placed upon the ruling in *K.A. Vish v. State of Maharastra,* AIR 1971 SC 2256, where the Supreme Court held that an accused's previous statement can be used for contradicting him, but even that part of evidence cannot be used against him, as substantive evidence. For

the same proposition, reliance was placed on *Agnoo Nagesia v. State of Bihar,* AIR 1966 SC 119; and *Bandlamuddi Atchuta Ramaiah v. State of A.P.,* 1997 SCC (Cri) 128.

12. Savita's counsel next argued that the trial court's conclusions about the false reporting of the manner in which the attack took place, based on the theory of conspiracy, is also erroneous. It was submitted that according to PW-15, accused Savita opened the door from the inside. The prosecution version that she had kept the outer door unlocked, and the gate to the first floor, based on the sketch placed on the record, could not be believed. It was submitted in this regard that the trial court disbelieved the immediate statement or version of Savita, and drew its conclusions based on shaky facts, which were not proved. Counsel submitted that PW-15's evidence pointed to the street door being open, at the time of the incident and that the premises had a second floor tenant, who was not examined. It was also argued that the prosecution did not have any cogent evidence, or even theory to back its story about Savita having kept the first floor door open, to facilitate the intruders' entry into the premises. In this regard, it was submitted that the evidence of PW-15 also showed that the wall adjoining the gate of the first floor was only 3 feet high. It was also submitted that the reconstruction of the crime, sought to be established by Ex. 32/A sketch, could not have been relied on by the trial court, since the witnesses who prepared the document, could not have pin-pointed the exact spots where the incident occurred at different stages, since he prepared it on much later, on 05.01.1995, and as the notes on the exhibit reveal, at the instance of the accused Savita. It was submitted that to the extent a map, or sketch reflect the location of articles of furniture and other objects, and are recorded or drawn immediately after the incident, or contemporaneously, they might be admissible. However, where the map or sketch seek to recreate the scene of occurrence, and is drawn on the basis of statements of any person or witness, who narrates it, the same cannot be considered by the Court, unless such person or witness also corroborates it. Learned counsel relied on the judgments reported as *Tori Singh v. State of U.P.,* AIR 1962 SC 399, where it was held that the marking of a spot on the sketch-map, about the event or incident in question, amounts to conclusion of the draftsman on the basis of the statements made by the witnesses to him, which would be inadmissible in view of Section 162 of the Code of Criminal Procedure. Counsel also relied on *Jagdish Narain v. State of U.P.,* 1996 (8) SCC 199, for the same purpose. It was further submitted that the sketch and the narrative of PW-15, who was uncertain about whether the door was latched or not, and lack of exact description of the entire house, the various entries to it, and the various doors on the first floor, as well as the police's omission to investigate whether someone could have entered from the adjoining wall, by jumping, or whether indeed

any of the entrances leading to the first floor were open or accessible, renders the theory about Savita having conspired to keep open the entrance, or door, suspect, and the trial court ought not to have accepted the prosecution version about this.

13. It was argued that the alleged recovery of jewellery and their identification leading to the prosecution theory, readily accepted by the trial court, is untenable, and the findings on this are erroneous. Arguing that the identity of the jewellery was not established, Savita's counsel emphasized that PW-1, the deceased's mother was unaware about her jewellery. She did not reside in Delhi, and used to live with her husband in Agra. It was submitted that when she was asked to describe her jewellery, and that of Savita, the witness had no convincing answer. It was urged that even PW-3, her husband, was in fact unaware of the details of the jewellery, and relied on Savita herself – a fact admitted to by him in the cross-examination. Learned counsel submitted that the details of jewellery never saw the light of the day in the statements made by PW-3 on two dates after the incident, i.e. 25.12.1995 and 11.02.1995. It was only on 04.04.1995, after the investigating officer had changed and Inspector Rajbir (PW-45) assumed charge that the witness mentioned generally about the nature of jewellery looted. It was urged that if indeed the details were unknown, and he obtained the particulars from Savita, there was a material contradiction in the prosecution story, because Savita went away to her parents' place about a month after the incident, as per the version of PW-1. Furthermore, the prosecution witnesses, particularly PW-1 and PW-15 had stated that they suspected Savita. In these circumstances, the question of obtaining any details of the jewellery lost or stolen, from her could not have arisen. It was also argued that PW-3 had stated that he purchased jewellery from R.R. Jewellers, and was familiar with it. If indeed this were true, there was no question why he should not have been able to furnish these particulars to the prosecution in the first two statements recorded in the case; nor did anything prevent the prosecution from examining R.R. Jewllers, to prove the identity of the ornaments. It was further argued that the prosecution did not attempt to show the video-tape of the marriage ceremonies, between Savita and the deceased, which could have facilitated identification of the jewellery articles. Learned counsel stated that Savita had volunteered during the trial to wear the articles, particularly bangle or *karha,* which was not permitted. It was also argued that having regard to the normal course of conduct, and the deposition of PW-1, it was improbable that PW-3 could have identified any jewellery, and that being the father-in-law, it was natural for him not to be aware of the details of jewellery. In normal households, such details would be known by the female members; in the present case, PW-1

would have most likely been aware of these items. Her complete ignorance about the allegedly recovered jewellery, as indeed her own jewellery gave a lie to the prosecution story about recovery of jewellery. It was also argued that the prosecution was unable to establish convincingly that the jewellery articles Ex. P-1 to Ex. P-29 had been judiciously mixed with other ornaments, procured from an independent source. Counsel also argued that the TIP conducted by the prosecution, in this regard, on 15.11.1995, was clearly delayed, and furthermore that PW-3 was present without notice for this exercise. All these cast grave doubts about the prosecution version that the jewellery produced in the Court were in fact recovered at the instance of one or the other accused, and that the accused Savita owned any of them. The appellants further submitted that neither the wedding album, nor the videos of the wedding function were produced or exhibited, as surely they would have shed light on the kind of jewellery that Savita was wearing during the marriage. It was emphasized by counsel for appellants in this regard that the trial court has acquitted all the Appellants/accused of the charge framed under Section 404, IPC.

14. Learned counsel submitted next that the prosecution version of a conspiracy between the co-accused at various stages, is flawed and not established. The appellants complained, in this regard that the trial court erred in not seeing that there was no concrete allegation as to when the alleged conspiracy commenced, and that the prosecution relied on post event developments and facts, such as alleged tape recorded conversation between the swami and others. It was argued that the evidence, such as transcripts of post incident conversations, letters said to have been recovered from Savita, and one Ms. Rama Bajaj, PW-21, written by the swami, are concededly after the incident, and cannot be used as material to establish conspiracy, in view of Section 10 of the Evidence Act, and the rulings of the Supreme Court in *Sardul Singh Caveeshar v. State of Bombay,* AIR 1957 SC 747 where it was held:

> *"The limits of the admissibility of evidence in conspiracy case under S. 10 of the Evidence Act have been authoritatively laid down by the Privy Council in Mirza King v. King Emperor (supra). In that case their Lordships of the Privy Council held that Sec. 10 of the Evidence Act must be construed in accordance with the principle that the thing done, written or spoken was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. They notice that evidence receivable under S. 10 of the Evidence Act of "anything said, done or written, by any one of such persons" (i.e. conspirators) must be "in reference to their common intention". But their Lordships held that in the context (notwithstanding the amplitude of the above phrase) the words therein are not capable of being widely construed having regard to the well known principle above enunciated."*

The above ruling, submitted the appellants, was followed in other cases, *State of Gujarat v. Mohammed Atik,* AIR 1998 SC 1686 and *Saju v. State of Kerala,* 2001 (1) SCC 378. It was also urged that the theory of conspiracy, the attempt of the prosecution to prove a clandestine meeting or tryst between Savita and Swami, sought to be established through the evidence of PW-13 and PW-31 could not stand judicial scrutiny. It was submitted, in this regard, that the star witness to prove the meeting prior to the incident, on 30th November, 1994, was Krishna Budhiraja, PW-34, who did not support the prosecution version, and was declared hostile. No admission was elicited by the prosecution from her, though it sought, and was granted leave to cross-examine her.

15. It was submitted next, that the prosecution failed to prove the tape recordings, which led to the alleged seizures, and that such recordings were indeed that of the accused. It was submitted, in this context, that no authorization of the competent authority or court was obtained; the transcript sought to be produced and relied upon did not show that it was recorded in a manner, which could eliminate any doubt about tampering. It was urged that the transcript made available to the Court, and on record the judicial file, does not indicate or demarcate the conversations of various individuals. Learned counsel also urged that the prosecution attempt to prove that the Appellant Savita had spoken to the swami, did not establish such allegation, because Ms. Porus, PW-44 could not identify the lady who allegedly made the phone calls from her centre; no telephone numbers linking the Appellant Savita with any calls was shown. The documents relied, if at all could at best show that two calls were booked to some number in Rishikesh. Such evidence was tenuous to establish any connection between the Appellant Savita and the Swami.

16. Learned counsel argued that the trial court committed a serious error in not seeing that the recovery memo PW-21/A was spoken to by PW-21 Rama Bajaj; it related only to an envelope allegedly recovered from her (the witnesses') premises, addressed to Savita. The letter was allegedly written by the swami. Yet, neither the receiver (PW-21, who according to the prosecution had to deliver it to Savita) nor the courier, i.e. a disciple of the swami, spoke about it. It is alleged that the witness to the alleged recovery only spoke about the seizure of an envelope; she did not depose anything regarding a letter found in that envelope, which was sought to be proved as Ex. PW-37/R. The only person who could have spoken about it, was PW-21; she did not depose about it; the prosecution did not cross-examine her on this, if it felt that her deposition differed with its version. PW-45 deposed that the letter was recovered from the premises of PW-21; however, this version differed from what was said by the

witness herself. More importantly, submitted learned counsel, the trial court did not put the letter to the Appellant Savita, in Section 313 of the Code of Criminal Procedure. It was pointed out that the trial court queried the recovery of PW-37/R, as if it had been recovered from her (the Appellant Savita's) possession, which was fatal to the whole theory of conspiracy. It was argued that not asking Savita about the recovery of PW-37/R from her, in the statement under Section 313 was fatal to the prosecution story. In this regard, the counsel relied on the decision reported as *Sharad Birdichand Sarda v. State of Maharastra,* 1984 (4) SCC 116. Counsel submitted that in these circumstances, it would be hazardous for the court to rely on the testimony of PW-45, Rajbir, who was known as the "encounter specialist" notorious for foisting false evidence, and creating "encounter" situations to kill suspected criminals. It was argued (in reply to the prosecution rebuttal of the argument regarding Section 313, Cr. PC) that even if the court were to for a moment go by the prosecution suggestion, and question the Appellant, PW-45 cannot be cross examined, or confronted with any other evidence, since he has died during the pendency of these appeals.

17. It was argued that the conspiracy and premeditation angle was ruled out in this case, because Savita had always co-operated with the police, and given statements. The prosecution's attempt to implicate her in the previous attack, it was urged, was untenable, because she handed over Manoj's clothes, voluntarily. She did not deny the previous 15.11.1994 incident involving an attempt on Manoj's life. Furthermore, submitted learned counsel, the recovery and identification of jewellery was shrouded with too many question marks. It was emphasized that the attempt to have the jewellery articles identified would have been authentic, if the police had seized the marriage video tapes, which were admittedly available. A visual comparison of the jewellery in the video with what was allegedly recovered would have confirmed if indeed, they were looted from the deceased's premises. Further, submitted counsel for the appellant, it was improbable that the jewellery could be recovered from the swami's ashram, in Haridwar, after nearly 10 *months* of the date of incident. It was also submitted that the other incriminating evidence, in the form of two letters, Ex. PW-37/E1 to E-28, as well as Ex. PW-37/F1 to F3, in fact contained nothing inculpatory, which could have led the trial court to conclude the guilt of the accused.

18. It was submitted that the main prosecution witnesses' depositions could not have been taken into consideration. Both of them, i.e. the parents of the deceased, did not state the complete facts, and kept improving various versions in statements recorded under Section 161 Cr PC. At different points in time statements were made, which were inconsistent and at

variance with each other. Particularly, submitted counsel, PW-1's evidence and further that of PW-3, are unreliable, and could not have been the basis for convicting the accused.

19. Counsel submitted that the Trial court's approach in not considering the evidence of prosecution witnesses who were declared as hostile, is contrary to law, and that the court should take that into consideration the deposition if the witness is otherwise credible. For this purpose, reliance was placed on the decision reported as *Sat Paul v. Delhi Administration,* AIR 1976 SC 294. Counsel next submitted that selective appreciation of depositions of witnesses, by considering only their examination-in-chief, and not taking into account the cross-examination, is legally indefensible. It was argued that the procedure, as laid down under the Evidence Act, is clear and unambiguous. Under the Evidence Act, evidence means the examination-in-chief and cross-examination and that such statement alone will form evidence. In this regard, the judgment reported as *Ripen Kumar v. Department of Customs,* 2001 (107) Cr. LJ 1288 has been relied on.

20. It was urged that in cases involving circumstantial evidence, it is imperative for the prosecution to prove motive, as an important link or element, which led to the crime. In this case, urged the counsel, apart from urging the existence of an illicit relationship between the Swami and Savita, there was no shred of legally permissible evidence, which could remotely prove that allegation, let alone permit the Court to harbor a reasonable suspicion. In this context, Ms. John argued that the deposition of PW-1 showed that in her statement recorded at the earliest point in time, i.e. 11.02.1995, no suspicion about the alleged estrangement of the couple (i.e. Savita and Manoj); their returning from the honeymoon early, their allegedly sleeping separately, frequent telephone calls by the swami, were deposed. These elements were deliberately introduced as afterthoughts, much later, after due reflection. The witnesses who could have deposed, did not say anything in regard to the meetings between the two accused, i.e. Savita and the swami. The letter most strongly relied on by the prosecution was doubly inadmissible, by reason of its not having been put to the concerned accused; moreover it was admittedly a post conspiracy event, or material, which could not have permitted speculation of conspiracy at a prior point in time.

21. Mr. Mukesh Kalia, learned counsel for the swami, in addition to adopting the arguments of Ms. Rebecca John, also urged that the three circumstances, which were sought to be put forward as incriminating him (the swami) were not proved at all. It was submitted that there was a long delay in recording the testimony of PW-1; her first Section 161 statement did not implicate the swami, nor did it attribute any role or voice any suspicion. The second statement was recorded almost 9 months after the incident, and for the first time,

she claimed that the swami had been suspected by members of the family all along. It was submitted that the alleged conversations, said to have taken place between the two, i.e. Savita and the swami, were not proved; similarly the letters written by the swami, Ex. PW-37/E1 to E-28 contained no inculpatory matter or hint of conspiracy or objectionable relationship. It was submitted that in fact Ex. PW-37/R was not even put to the swami, in questioning, under Section 313, Cr. PC.

22. Learned counsel argued that the so called telephonic conversations, the transcripts of which were relied on by the prosecution, are inadmissible. In this respect, it was submitted that there was no proof, or connecting material to establish that Telephone Number 31925 was installed at the Ashram of the swami. The transcripts nowhere reveal any role of the swami or Savita, in the crime. Importantly , submitted the counsel, no one from the telephone exchange, at Rishikesh was examined, in the trial to prove that the recording in fact took place, as alleged in this case. Lastly, submitted the counsel, the transcripts cannot be co-related with the voice of any one accused. Arguing about admissibility of such telephone recordings, their cassettes, or transcripts, the appellants' counsel submitted that the decision in *Mahavir Prasad Verma v. Surinder Kaur,* AIR 1982 SC 1043 and of a Division Bench of this Court, in *State v. Ravi,* 2000 (1) AD (Del) 222 have ruled that tape recorded conversations can be relied upon as corroborative evidence of conversation deposed to by parties to the conversation and in the absence of evidence (of such conversation) the tape recording is not proper evidence, and cannot be relied on. Similarly, the judgments reported as *R.M. Malkani v. State of Maharastra,* AIR 1973 SC 417; *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra,* AIR 1975 SC 1788 and *Ram Singh v. Col. Ram Singh,* AIR 1986 SC 3 have been relied on to show what are the material tests for a tape recording to be admissible, as evidence. The Court had indicated that the fulfillment of the following preconditions was essential for a tape recording to be admissible in a trial:

> a) the voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. Where the maker has denied the voice it will require very strict proof to determine whether or not it was really the voice of the speaker.
> b) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.
> c) Every possibility of tempering with or erasure of a part of a tape recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

d) The statement must be relevant according to the rules of Evidence Act.

e) The recorded cassette must be carefully sealed and kept in safe or official custody.

f) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbance.

23. Dealing next with the alleged recovery of ornaments, learned counsel reiterated the submissions made by Savita's counsel, and also argued that Manoj's mother could not prove the ornaments, including her own ornaments. Furthermore, submitted the counsel the alleged recovery of eight gold bangles, 2 gold karas, one gold necklace, one gold mangal sutra and one gold chain, were utterly improbable, since no one involved in a crime, as the present one, would continue to keep such allegedly stolen property for such a long time, and would dispose it of at the earliest available opportunity. It was also submitted that there were no members of the public involved as a witness for the recoveries; all the recoveries were allegedly witnessed by PW-39, PW-37, and PW-45, who were policemen. It was further submitted that the depositions of these witnesses were supposed to have recorded that the swami led them to the place where the articles were hidden. In this context, argued Mr. Kalia, the so called disciple who had the key to the place where the articles were kept, was not produced, even though the prosecution alleged that they had to wait for the room in the ashram to be opened. It was emphasized that the exoneration and acquittal recorded under Section 404, IPC falsified the entire story about the accused Swami having been a witness to the crime, and also a co-conspirator, who is supposed to have kept jewellery articles found at the scene of crime. It was argued here that once the trial court recorded acquittal under Section 404, IPC, there was no question of holding that the swami was involved in a conspiracy, to murder, on the same facts.

24. Mr. Kalia also argued that the prosecution could not establish that the swami had any prior meeting with Savita, as to lead the Court to consider the possibility of a conspiracy. In this regard, he argued that the so called tryst alleged by the prosecution, which is supposed to have been held on 30.11.1994, was not proved. Similarly, the swami's role, either as a participant, or in the background as a conspirator to murder had not been established. Similarly, submitted the counsel, the recovery of a dagger, alleged against the swami, was unbelievable, because no one committing a murder in his senses, would hide the weapon of offence near his place (as in the present case the weapon allegedly thrown by the swami in the bushes behind his ashram), when the opportunity of conveniently disposing it off, i.e. throwing it in the river, is available to him. Further, it was submitted that the prosecution case

about use of a dagger, for killing Manoj, is falsified by the FSL report, which revealed that the blood stain on the dagger did not show any reaction, on its testing.

25. Learned counsel for the Appellant Asutosh argued that the prosecution has not been able to prove any role played by him. It is submitted that the said Appellant was supposedly arrested due to the statement recorded by the swami; however, no public witness was associated with his arrest. Counsel argued that similarly, PW-4 had not stated in his statement recorded under Section 161, Cr. P.C. about depositing the jewellery items. Learned counsel also pointed out that the evidence on record showed that the IO and the police party, which is alleged to have gone to Haridwar for investigation, did not use any official police vehicle; no authorization too was proved to have been given by any superior officer, for the said investigation. It is submitted that in fact no record or document, stating that they requested permission, or intimated about the visit to Hardwar is on record; this is significant, because the investigating team was not in hot chase, as the crime had occurred over 10 months prior to the visit. Counsel submitted that the entries in the malkhana register too were manipulated.

26. Arguing that the entire story about Asutosh's arrest and so called confessional statements were concocted, learned counsel submitted that the deposition of PW-29 showed that the said appellant was allegedly arrested pursuant to Ravi Chauhan's statement. However, submitted learned counsel, none of its witnesses were able to give any details of particulars about the factory such as its name proprietor and so on. In these circumstances the vague allegation of the witnesses that the arrest was made at a particular address in a *gatta* (cardboard) factory could not be believed. He further stated that the alleged recovery of jewellery from the place of arrest is falsified by PW-29 admitting that his previous statement nowhere reflected that such articles were sealed – a fact which he sought to improve upon, and introduce for the first time in the prosecution testimony. Similarly, submitted the counsel, the description of articles – particularly the alleged weight of jewellery recovered from Ashutosh's premises were not even mentioned in the recovery memo, (PW-26/E) even though PW-26 specifically stated it to be 46 grams.

27. It was submitted that the entire conviction of Ashutosh rested on the recoveries allegedly made by the prosecution pursuant to his disclosure statement, and the identification of jewellery. The dagger allegedly seized from him could not be linked with the offence, according to the serological report. In the circumstances, there was nothing to link him with any alleged conspiracy, the origin of which was not proved. To cap it all, the use by the Trial Court, of the statement of co-accused, which was inadmissible, for implicating him, resulted

in serious error. It was also argued that the impugned judgment itself acquitted Ashutosh of the offence under Section 404, IPC. In the circumstances, the recovery of articles, and their linkage with the crime had not been proved. Therefore, the prosecution, without filing an appeal, could not rely on the said alleged circumstances relating to the discovery of jewellery articles that were allegedly looted. The counsel submitted that significantly, no one claimed the articles – not even the prosecution witnesses such as PW-1 or PW-3. This meant that the jewellery was unconnected with the crime; the trial court directed its confiscation to the state.

28. Ms. Charu Verma, learned counsel for the appellant Ravi Chauhan, argued that the prosecution version about the arrest of the accused/appellant is not credible. PW-29 also deposed that the building from where the arrest was made, consisted of several tenements, where families resided. Despite availability of members of the public, the police did not involve anyone other than official witnesses to the arrest and subsequent alleged recoveries. It is further argued that the plan pertaining to the crime scene in the incident had not been proved contrary to the findings of the trial court. In this regard, learned counsel reiterated the submissions made by the appellant swami's counsel. Speaking about this aspect, it was urged that the mere "pointing out" of the alleged crime scene, or place of occurrence was an impermissible evidence, which could not be used to convict an accused.

29. Ravi Chauhan's counsel next argued that the confessional statement of the swami could not have been used as a valid piece of evidence against him to prove anything, or even a conspiracy. It was pointed out also, that Ex. PW-26/C which describes the recoveries made at the behest of Ravi Chauhan states that they comprised of six ladies', and two gents rings; however, PW-1 did not mention about the loss of any ring.

30. Relying on the decision reported as *Sanwat Khan v. State of Rajasthan,* AIR 1956 SC 54, it was argued that any conviction based on recoveries alone should not be rendered, unless corroborated by other reliable evidence. Citing *S. Arul Raja v. State of Tamil Nadu,* 2010 (7) SCALE 10, it was submitted that to punish one for the actions of another, on the ground that he was a conspirator, there should be acceptable and credible evidence of such agreement, before the Court. It was argued that in this case, there is no evidence linking the swami with Ravi Chauhan, save and except the former's statement, which is inadmissible.

Prosecution arguments

31. Mr. Lovkesh Sawhney, the learned APP, submitted that though the prosecution case was based on circumstantial evidence, all the circumstances here were proved – as well as the link between each of them – beyond reasonable doubt. It was submitted that Savita and the

swami knew each other before the former's marriage, and were on intimate terms, the relationship being more than a guru and his disciple. The evidence on record, particularly of the deceased's family members, showed that this association continued even after marriage, as Savita used to hold long telephonic conversations with the swami. The evidence, of PW-1 also established that the newly-wed couple returned earlier than scheduled from the honeymoon; they were also not having a conjugal relationship and Manoj used to sleep on the *diwan* and not with Savita. It was argued that the swami, Savita, and other conspirators hatched a plan to murder Manoj. The first attempt was abortive, since the plan misfired, and Manoj was injured, though not fatally, due to the gun shot fired at him on 15.11.1994, when on motorcycle (from which Savita got down, on the pretext of retrieving her chappal, affording the attacker to shoot him). Savita was instrumental in seeing that the matter was not reported to the police, as was testified by other members of Manoj's family. Thereafter, Savita and the swami met clandestinely, on 30th November, 1994, in Patel Nagar, at night, when the plan that ultimately led to the attack took place. In the intervening night of 2/3rd December, 1994, according to plan, Savita had kept the outer entry door of the first floor open, to facilitate easy access to the assailants, who were let in by her. The evidence pointed to there being no forcible entry; the assailants, including the swami, walked to where Manoj was sleeping, and mercilessly stabbed him, at various places, mostly in the neck, resulting in fatal injuries. To cover up, a false bogey of attempt to molest Savita was raised and also the case of alleged looting, made out. Savita tried to suppress the previous attempted murder, by not mentioning the incident of 15.11.1994. During the investigation, the police recorded the statements of the parents of Manoj, i.e. PW-1 and PW-3, as well as his uncle and aunt, i.e. PW-15 and PW-16. The statement of his cousin, PW-18, too was recorded. For quite sometime, no headway could be made in the investigation. In the meanwhile, the IO in-charge of the case, changed; PW-45 took over. The police received a tip off about attempted extortion of the swami, due to his involvement in the crime, and acting upon it, started to tap his telephonic conversations. Three telephonic conversations, of early September, 1995, led to needle of suspicion being pointed at him. The police, therefore, visited him at Rishikesh; after his interrogation, statements were recorded. This led to recoveries, as well as the search and seizure of letters, etc. from the house of PW-21 and the appellant Savita; she too was arrested. The other conspirators were arrested later, and recoveries were effected pursuant to their statements.

32. It was submitted that the entire circumstances surrounding the attack and the subsequent events, which emerged during the investigation, clearly and unerringly pointed to

the involvement of the accused Savita, as an active conspirator without whose facilitation Manoj could not have been killed. Elaborating, the learned APP submitted that PW-1 had mentioned in the statement recorded on 11th February, 1995 about Savita's involvement in the offence. She had also deposed about Savita not willing to have cohabit with Manoj and further her testifying that the couple slept separately, since Savita used to frequently give the pretext of ill health. The learned APP submitted that in her statement to the Police, as the first informant, as well as the statement recorded under Section 313 Cr. P.C. Savita stated that on the fateful night, three persons had entered the house and on the door being opened by Manoj, dragged him to the inner room, looted the jewellery and tried to molest her, on which he (deceased Manoj) resisted, which resulted in his murderous attack and his subsequent death.The learned APP submitted that entire circumstances emerging from the evidence falsify this story because PW-35 in his deposition mentioned that there was no sign of forcible entry. Furthermore, the description of facts leading to the attack is improbable because before anyone could enter the apartment on the first floor on which the deceased and accused Savita live, he had or they had to cross two barriers in the form of wooden gate and a grilled door. The Savita's story was completely false because there was no forcible entry and the entrance had been opened in a pre-planned manner to facilitate the entry of intruders to commit the crime.

33. It was submitted that the Court could always look into the information given by the accused particularly when the sequence of the events was not denied by him or her in the course of statement made under Section 313 Cr. P.C. It was submitted that since Savita did not deny the description of the attack and admitted the facts put to her to be correct, there is no question of prejudice being caused to her. A comparison between the information provided by her in the statement under Section 313, as an involvement and circumstances emerging against her falsify that version. Therefore stated the APP, rule *Agnoo Nagesia* (supra) is not attracted and the statements could be used as a circumstance against her.

34. The learned APP next submitted that the omission by Savita to mention the previous attack upon Manoj on 15.11.1994 in the first statement recorded by her was crucial because that pointed to her state of mind and desire to suppress that fact. It was argued that no reasonable person would have forgotten that previous incident, which would have been afresh in the memory of a near and dear one, especially a wife who had witnessed both the attacks, i.e. the 15.11.1994 and the crime which occurred in the intervening night 02/03.12.1994. That Savita did not deny the attack of 15.11.1994 in a subsequent course of trial would not in

any manner diminish the importance of that omission because it constitutes a mental circumstance, which the Court would take into consideration while adjudging her involvement in the crime.

35. It was submitted that the information provided by Savita in regard to the attack could be divided into two parts, i.e. the attack dates and the facts immediately surrounding that event. As far as the latter were concerned, the facts emerging from the depositions of PW-15, who was called out from the ground floor by Savita and who corroborated that what was told to him by her, is material.

36. It was further submitted that the conspiracy hatched by Savita with the Swami was proved by the reading of the depositions of PW-1, PW-3, PW-15, PW-16 and PW-18, which brought out the following sequence:

i) That the Swami was known to Savita and her family before her marriage was solemnized with Manoj.
ii) That even after the marriage, Savita used to frequently receive and attend to calls made by the Swami.
iii) Savita and Manoj had gone to honeymoon after the marriage to Simla but returned earlier than the schedule.
iv) The deceased and Savita used to live on the first floor of the premises. PW-1 the deceased's mother and her husband PW-3 also used to reside there, however since PW-3 was posted in Agra, she (PW-1) had joined him there and was also not in the premises on the first floor on the day when the crime occurred.
v) PW-1 had left her jewellery in the first floor of the premises; they were in the almirah with Savita's jewellery.
vi) The conjugal relationship between Savita and the deceased was not a happy one; the husband and wife used to frequently sleep away from each other despite being newly married couple.
vii) The family started suspecting Savita a few days after the death of Manoj; the Swami had participated in some of the Manoj's death ceremonies. Soon thereafter he was not welcome in the house of Savita. She too left her in-laws place sometime in January 1995.
viii) The members of the deceased family voiced their suspicion of the involvement of Savita during the early investigation.
ix) It was stated that a complaint was also addressed to the higher authorities alleging that Savita and the Swami's involvement was not being investigated and statements to that effect were not recorded by the concerned Policeman.

37. The learned APP submitted that the prosecution also established during the evidence of PW-16 that Savita had sometime used to come home late claiming that she was visiting her colleague Ms. Neeta Kohli whereas in reality she was planning the attack with her co-conspirator the Swami. It was further stated that at 8:30 PM on the fateful evening of

02.12.1994 itself PW-18 had clearly heard the appellant Savita stating on telephone "*Aaj Raat ko kam ho jana chahiye".*

38. It was argued that photographs Ex. PW-17/A and Ex. PW-17/B clearly showed that the stab wounds and the manner in which Manoj's body was lying pointed to a pre-planned attack. If this was compared with Ex. PW-35/C the un-scaled map and if one kept in mind that the cuts in the towel, which was seized, corresponded with the stab wounds even on the deceased's neck and shoulders, there were strong and irrefutable circumstantial evidence pointing out to pre-mediated and calculated attack upon Manoj and not an assault at the spur of moment by alleging robbery, as stated by the appellant Savita. Furthermore, stated learned APP that a *khase* (thick covering used while sleeping) entangled between the legs of the deceased was an additional factor that pointed out to a homicidal attack on a sleeping Manoj and not to his being dragged to the outer room and then attack, as alleged by Savita.

39. It was next argued that pursuant to the statements of the swami, Savita's premises were searched, and seizure of Ex. PW-37/E-1 to E-28 and Ex. PW-39/B, letters addressed by him (the swami) to her, were made. These letters did not show an ordinary *guru- shishya* relationship, but that the swami had a deep and earthly emotional attachment and love for Savita, which he used to express unrestrainedly. This illicit relationship could not under any circumstance be allowed to become public knowledge, as it would have pointed the needle of suspicion on the two, i.e. Savita and the swami. Therefore, the two of them went through the outward pretence of having a spiritual teacher- disciple relationship, while really nurturing an intimacy of a different kind, which afforded them the strong motive to commit the crime, after duly planning it. It was argued that the Court would be within its rights to consider and take into account the most incriminating letter, Ex. PW-37/R, which was recovered from PW-21, after the swami's disclosure. The testimony of PW-31 established that the said letter was handed over to him, by the swami, with specific instructions to deliver it to PW-21 (from whose premises ultimately the letter was recovered). Although PW-21 spoke about recovery and seizure of the envelope, she clearly mentioned about a letter; PW-45 deposed that PW-37/R was recovered from that envelop. Therefore, all the material, connecting PW-37/R with the swami, had, in substance been put to the Appellant Savita; the error in posing a wrong query that the letter had been recovered from her premises, in no manner caused her prejudice.

40. The learned APP relied on the decision of the Supreme Court, reported as *Shivaji Sahabrao Bobade and Anr. v. State of Maharashtra and Anr.,* AIR 1973 SC 2622, and *Basavraj R. Patil v. State of Karnataka,* (2000) 8 SCC 740 and *Santosh Kumar Singh v. State,* 2010 (9) SCC 776, to say that it is not enough for an accused to say that an incriminating circumstance was not put to him, by the Court during his examination under Section 313 Cr. P.C.; he also has to show that the omission actually and materially prejudiced him (or her) and resulted in failure of justice. In the event of any inadvertent error by the Court, in questioning the accused (under Section 313 Cr. P.C.) through an omission, that would *ipso facto* not result in acquittal, and it would be open for the appellate Court to put the said incriminating circumstance to the accused or his counsel. Such defect, it was argued, is curable, and the Court can always take remedial action even in an appeal, if it were to hold that there was an irregularity in the course of the trial. Therefore, submitted the learned APP, Ex. PW-37/R could not be eschewed from evidence, particularly, in view of PW-45's deposition. It was a highly incriminating piece of evidence, pointing to the guilt of accused Savita, and her conspiracy with the swami.

41. It was argued that so far as the swami was concerned, the evidence, of PW-1, PW-3 and PW-15 showed that he was on close – even intimate terms with Savita. The evidence of PW-13 revealed that the swami had asked him to visit his ashram at Rishikesh, which he did on 07.09.1995. The swami, then, had asked him to tell the police (in the event of his – i.e. PW-13) being questioned, that the swami visited his house, in 26/14, East Patel Nagar, Delhi on 30th November, 1994, even though that was not true. It was submitted by the APP that this, according to the swami, was necessary because one of his drivers, Makhan Singh was blackmailing his follower. Mr. Sawhney stated that there was further corroborative evidence of such clandestine meetings, in the form of testimony of PW-33, a sadhvi and another disciple of the swami, who mentioned about Savita's trysts with the swami, alone on different occasions, in her statements, but which were resiled in Court; those statements were put to her after permission to cross-examine her, was sought. The learned APP submitted that there was intrinsic support to the veracity of the statements made to the police, because PW-33 admitted to complaints made against the swami, to the police, by her father, and also that she used to be fearful of him. It was also urged that though PW-34, Krishna Budhiraja, retracted from the statement made by her previously, there was no doubt that in it (Ex. PW-34/A) she had categorically mentioned about over a decade long association with the swami, existence of a room on the third floor of her premises, visits by the swami to her premises, her family's

association with the swami, her acquaintanceship with Savita, and most importantly that Savita used to meet him (the swami) occasionally, alone, in that room (on the third floor) which was meant for his use. It was submitted that a cumulative reading of these testimonies established that Savita and the swami used to frequently meet alone, even after the former's marriage; she had met him twice, before the day of the incident, once even on the same afternoon/evening, on the pretext of visiting Nita Kohli. Relying on *Gura Singh v. State of Rajasthan,* 2001 (2) SCC 205, *Bhagwan Singh v. State of Haryana*, AIR 1976 SC 202 and *Rabindra Kumar Dey v. State of Orissa*, AIR 1977 SC 170 it was argued that merely because the Court permitted the prosecution to cross-examine its witness(es) describing some of them as hostile witness does not completely efface such deposition(s). The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness. The witness does not become *ipso facto* unreliable only by his being declared as hostile. On this ground the entire testimony of such class of witnesses cannot be excluded from consideration.

42. Arguing about the recoveries effected in this case, particularly from the swami, where jewellery items and a weapon of offence were seized, it was submitted that the Court cannot reject such evidence, since the eyewitnesses to the disclosure statements, and the recoveries had deposed about it, on the ground that they were police officers. It was submitted that the decision in *State Govt. of NCT of Delhi v. Sunil & Anr.,* 2000 (1) SCC 748 is an authority on the point that there is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Cr. P.C., to obtain signature of independent witnesses on the record in which statement of an accused was written. For these reasons, the arguments in this regard by the swami, Ravi Chauhan, and Asutosh Banerjee were meritless.

43. It was next submitted that the tape recording of conversations, and the transcripts prepared, which were exhibited without demur during the trial, are legally admissible evidence. In this context, it was submitted that the reference to provisions of the Identification of Prisoners Act, by the appellants, for the argument that no sample of handwriting or voice, could be obtained without the permission of the magistrate, is misconceived. In this regard, the prosecution relied on Section 4, which is an independent power vested in the police, to secure such samples for comparison, and expert advice, which could be produced in Court. It was argued that the decisions reported as *Mohd. Aman v. State of Rajasthan,* 1997 (10) SCC 44, and *Shankaria v. State of Rajasthan,* 1978 (3) SCC 435

have ruled that under Section 4 of the Identification of Prisoners Act, the police is competent to take finger prints of the accused.

44. The learned APP submitted that the tape recording and the transcript version were proved to be that of the accused's conversations. He stated that drawing of the swami's voice samples were not objected to by him, during the trial; the recordings were proved by the testimony of PW-26, PW-28, PW-38 and PW-43. The expert, who was given the voice sample (PW-41) identified them with that of the voice in the recorded conversation, in his report Ex. PW-41/B. The transcripts had been placed on record, as Ex. PW-45/C, Ex. PW-45/D, and Ex. PW-45/E. The appellant swami did not challenge to the genuineness of the samples, the report or transcripts- the latter's copies being provided to him. In this background, the prosecution had proved this circumstance about the swami's conversations, and his attempt to handle a possible blackmail threat, on account of his involvement in the crime, beyond reasonable doubt.

45. It was submitted that so far as jewellery identified by PW-3 was concerned, there was nothing illegal or incorrect to persuade the Court to reject his testimony. It was submitted that the TIP was conducted in November, 1995, about six weeks or so, after the seizure of the articles was made. This itself could not be a factor to persuade the Court to discard the TIP proceeding, particularly when the articles were kept sealed in a pulanda, which was opened during the proceeding. The APP relied on the TIP proceeding, marked as Ex. PW-36/C to say that the seal on the articles was removed in the presence of the Magistrate, and the other articles were suitably mixed with the seized exhibits. From this collection, PW-3 was able to correctly identify the missing jewellery. It was also submitted that the mere circumstance that PW-3, rather than PW-1 knew about the details of the jewellery cannot be a ground to persuade the Court to reject his deposition, and the identification of the relevant articles.

46. Mr. Sawhney lastly argued that the prosecution had sufficiently discharged its burden in proving all the relevant circumstances, as well as the link between each of them, beyond all reasonable doubt as to establish that they led only to the hypothesis of the Appellants' guilt, and every possibility of their innocence was ruled out. Reliance was placed on the ruling reported as *Vikramjit Singh v. State of Punjab,* (2006) 12 SCC 306, for the submission that in these circumstances, such facts which were within the special knowledge of the accused, had to be explained and proved by them, and the onus to do so shifted to them. The accused appellants not only did not avail the opportunity, to explain these facts, but also did not

mention anything worthwhile in their statements to the Court, under Section 313, Cr. PC. In these circumstances, the Court, he submitted, should affirm the findings and sentence of the trial court, and reject the appeals.

Analysis & Conclusions

47. Now, in this case, it is apparent that there is no direct or ocular evidence. The prosecution was unable to make any headway. It apparently secured a breakthrough in the latter part of 1995, on a tip off that the swami was being blackmailed on telephone. By then, the investigating officer too had changed; PW-45 had taken charge of the investigation into the offence. On the basis of these leads, the swami was questioned, later arrested, the recoveries made pursuant to his disclosure, which led to the arrest and implication of other co-accused. Thus, the case hinges on appreciation of the circumstances. Here a word about the approach of the Court, in respect of circumstantial evidence is necessary. The phrase "men may lie, but circumstances do not" is well worn. At the same time, to get to the truth, the essential requirement of proving the prosecution allegations, beyond reasonable doubt, does not change; the standard or threshold of proof remains constant, in cases involving circumstantial evidence. To place the matter in proper perspective, since the mind has a tendency to boggle, a few tests have been mandated in a string of judicial decisions. Thus, in *Hanumant v. State of Madhya Pradesh,* AIR 1953 SC 343, the Supreme Court indicated the correct approach of the Courts, in the following words:

> *"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."*

This approach has been consistently followed and applied in several other judgments, notable among them being *Tufail v. State of Uttar Pradesh,* (1969) 3 SCC 198; *Ramgopal v. State of Maharashtra,* AIR 1972 SC 656 and in *Sharad Birdhichand Sarda v. State of Maharastra,* 1984 (4) SCC 116. *Sarda* an authority on this and other important aspects of criminal justice/law, put the matter in a lucid terms:

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra 1973CriLJ1783 where the following observations were made:

> *"certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*

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

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

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

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

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

48. In a previous portion of this judgment, the Court had outlined the various circumstances which the prosecution had relied on – and that were accepted as proved by the trial court – to establish the guilt of the four appellants. This Court proposes to discuss the nature of each circumstance, and determine, whether each of them were proved, and if so, the prosecution also proved the link between each of them to satisfy the test of proof beyond reasonable doubt, in line with the existing law pertaining to proof of guilt in cases involving circumstantial evidence, in criminal cases.

I. The incident of 15.11.1994

49. The first circumstance put forward by the prosecution in this case was the incident of 15.11.1994 in which an attempt was made on the life of Manoj. The prosecution had alleged that Manoj, while on the way to Connaught Place, was shot at and had sustained injuries.

Savita, who was Manoj's pillion passenger, had got off, saying that her *chappal* had fallen. When the motorcycle was stationary, the assailant shot at Manoj. It was argued by the prosecution that PW-1 and PW-15 proved that Savita was instrumental in ensuring that this incident was not reported to the police. This was to show that she was anxious to rule out the possibility of an investigation, and therefore, that a conspiracy to do away with Manoj existed at the time. The prosecution argument further was that Savita did not report this incident, even as informant about the homicidal attack leading to Manoj's death, and that she did not help the police to recover or seize the clothes worn by Manoj on the day of the attack. Being the most proximate to the point of time when the murder took place, her omission to mention about the previous attack was unnatural, pointing to a guilty mind.

50. The record discloses that Savita, in her statement under Section 313 Cr. PC. did not dispute the incident itself, or the sequence of events connected with it. The prosecution had placed strong reliance on the testimonies of PW-1, Manoj's mother, as well as that of PW-15 (Madan Lal Girotra) to say that Savita was instrumental in prevailing on all others not to report the shooting incident of 15.11.1994, which injured Manoj. Both these witnesses have no doubt stated this, in their depositions – not once, but repeatedly, at various stages. However, three other aspects have to be noticed while considering this circumstance. The first is that PW-15 stated, in the course of her evidence to a specific question about the reactions of individual family members, to the incident, that:

> *"We did not lodge FIR as we were of the opinion that our son had been saved by the grace of God, despite such a dangerous incidence* (sic incident). *This was the decision of the whole family."*

Secondly, PW-3, Manoj's father, who was not in Delhi, on 15.11.1994, was not even informed about the incident on that day, by other members of the family. He deposed that he learnt about the incident 2 or 3 days later when he returned to Delhi from Agra, on a visit. He also sought to corroborate the evidence of PW-1 and PW-15 that Savita prevailed on him not to report the incident because the assailant was apparently a mad person. This aspect is somewhat strange, because the gravity of the incident, i.e. an attempted murder, was sufficient for the elders in a family, normally to have reported the matter to the police. PW-3 and the deceased were educated; so too, was PW-15. Yet, they inexplicably allowed themselves (according to their depositions) to be persuaded by Savita, a young and inexperienced bride, into not reporting the matter. Apart from the fact that PW-1's deposition regarding the collective decision of all members of the family not to report the matter, having

a ring of conviction, it is unbelievable that in the circumstances of this case, a newly married, barely one month into the family bride could have prevailed over all members of the family and ensured that the attack was not reported. The third aspect is that the alleged assailant, i.e. Raju, was also sent up for trial. There was no recovery. The Trial Court held that there was no evidence, and acquitted him.

51. So far as the second argument on this previous incident is concerned, the prosecution has sought to use the statement of Savita, recorded in the first incident, while reporting the attack, on 3rd November, 1994, to allege that she deliberately suppressed any reference to it, which indicated a culpable mind, bent upon misleading the course of investigation. For this purpose, the prosecution relied on Ex. PW-6/A, to highlight the omission. The appellants argued that the statement cannot be gone into by the Court, because of the bar contained in Section 162, as well as the settled line of authorities, which have ruled that the statement of an accused, in the course of investigation, or as a first informant, cannot be taken in evidence.

52. The earliest decision on the question is *Nissar Ali (supra),* in which, in the Supreme Court outlined the position as follows:

> *"A First Information Report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under s. 157 of the Evidence Act or to contradict it under s. 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. In this case, therefore, it is not evidence."*

*Agnoo Nagesia (*supra) explained the matter in the following terms:

> *"10. Section 154 of the Code of Criminal Procedure provides for the recording of the first information. The information report as such is not substantive evidence. It may be used to corroborate the informant under s. 157 of the Evidence Act or to contradict him under s. 145 of the Act, if the informant is called as a witness If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under s. 8 of the Evidence Act.."*

The position was reiterated in *Khatri Hemraj Amulakh v. State of Gujarat,* AIR 1972 SC 922, as follows:

> *"...no part of a first information report lodged by the accused with the police could be admitted into evidence if it was in the nature of a confessional statement. The statement could, however, be admitted to identify the accused as the maker of the report. The part of the information as related distinctly to the fact discovered in consequence of the information could also be admitted into evidence under Section 27 of the Indian Evidence Act if the other conditions of that section were satisfied."*

K.A. Vish (supra) explains the issue thus:

> *"It may be pointed out that any statement made in the Panchnama cannot be used in evidence except for the purposes of contradicting the witness whose statement is contained in Panchnama but if it is intended to contradict him by the writing his attention must before the writing can be proved, be called to those parts of it which are to be used for contradicting him. This is what is required under Section 145 of the Evidence Act but even where a witness is confronted by his previous statement and given an opportunity to explain, that part of the statement that is put to him does not constitute substantive evidence."*

53. In this case, the trial court inferred – and concluded – that Savita's omission to mention the previous 15th November 1994 incident, in the first information statement recorded by her, on 3rd December, 1994, showed a culpable mind, and was an established circumstance against her. The rule spelt out in *Nissar* and *Nagesia* are clear, that the facts stated in the first information report are *ipso facto* inadmissible, against an accused, except to show that she (or he) was an informant. In this case, therefore, only the circumstance that Savita was the first informant who reported the matter, and got the statement recorded can be validly considered. However, all other allegations, and inferences, stemming out from her omission to mention the 15th November 1994 incident, cannot be looked into by the Court. Significantly, there is evidence on the record in the form of deposition of PW-35, who testified that Ex. PW-14/4 (a wind cheater worn by Manoj when he was attacked on 15.11.1994) was handed over to him by Savita. This witness stated that PW-15 had mentioned about the incident. Yet, PW-15 does not mention having told PW-35 about the previous attack on Manoj, in his deposition. PW-3 sought to build on the prosecution story by stating that Savita was reluctant to hand over Manoj's clothes – a statement clearly contradicted by the documentary evidence, as well as PW-35, who does not mention any such obstruction, in his testimony. The Court, therefore, holds that the trial court fell into error in considering the first information report and the omission by Savita to report the previous incident, as an incriminating suspicious circumstance against her.

II. The attack on Manoj and prosecution evidence that Savita's description was false

54. The prosecution had relied on Ex. PW-35/C, a sketch prepared by PW-35, who had reached the spot soon after the occurrence. In addition, the prosecution relied on a scaled sketch, drawn on 04.01.1995, by the draftsman, Balbir Singh. This map sets out the various points in detail, pinpointing the topography of the first floor of the premises in question, the different rooms, the point where the attack took place, where the various furniture pieces were kept, etc. These two documents, as well as photographs, proved by PW-17, and the

post-mortem report, which indicated that the deceased succumbed to stab injuries, were relied on. The prosecution argument was that Savita had facilitated the attack, by keeping the outer, as well as the main wooden door open, for the accused to enter the premises, which they did, and thereafter proceed to stab a peacefully sleeping Manoj, who was in the last room. It was argued that Savita's story about assailants forcing their way inside, after Manoj opened the door, when they knocked, is simply unbelievable, because no one, especially someone who was attacked as recently as Manoj, and who was recently married, would easily open the door at 1:30 AM. Great emphasis was given to the statement of PW-15 – he had deposed that when Savita called him out, saying *"Pitaji upar aao, Dekho na inko kya ho gaya"* after the attack, he rushed to the first floor, which was locked from outside.

55. The evidence of PW-1 and PW-15 indicates that the ground floor of the premises were occupied by the latter (PW-15's) family; PW-1, PW-3, deceased Manoj and Savita lived on the first floor. PW-1 and PW-3, resided at that time in Agra, where PW-3 was posted on duty. PW-15's evidence also indicates that a tenant used to reside on the second floor; this is corroborated by PW-35 in his deposition; he even stated that the said tenant had been questioned. He stated that the dog squad arrived at 4:30 AM, and nothing could be made out through the search. He further stated that no dirt had been disturbed on the back walls of the premises. Now, beyond proving that the incident took place on the first floor, and that it had an entry through a wooden gate or door, the prosecution did not state anything of the kind, as is sought to be made out before the Court. Its argument here is built upon the appreciation of an unmarked sketch drawn to scale, spoken about by a witness who drew the sketch more than a month after the incident. This detailed scaled sketch contains particulars such as the precise points where the furniture was placed, where the assailants entered from and went to, where the attack took place, and the jewellery was looted. This document is inadmissible, because of the rule spelt out in *Tori Singh,* where the Supreme Court held as follows:

> *"The validity of this argument depends mainly on the spot which has been marked on the sketch-map Ex. Ka-9 as the place where the deceased received his injuries. In the first place, the map itself is not to scale but is merely a rough sketch and therefore one cannot postulate that the spot marked on the map is in exact relation to the platform. In the second place, the mark on the sketch-map was put by the Sub-Inspector who was obviously not an eye-witness to the incident. He could only have put it there after taking the statements of the eye witnesses. The marking of the spot on the sketch-map is really bringing on record the conclusion of the Sub-Inspector on the basis of the statements made by the witnesses to him. This in our opinion would not be admissible in view of the provisions of section 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-Inspector that the eye-witnesses told*

him that the deceased was at such and such place at the time when he was hit. The sketch-map would be admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch-map based on the statements made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of section 162 of the Code of Criminal Procedure as it will be no more than a statement made to the police during investigation."

This decision was followed, and the rule, applied in *Jagdish Narain* (supra). In the present case, the scaled map or sketch is, therefore, clearly inadmissible, and cannot be taken into account, because its maker prepared it on 04.01.1995, under instructions from someone who was not an eyewitness to the incident. However, Ex. PW-35/C cannot meet the same fate; it was prepared by PW-35, on the basis of his personal observations. This document, nevertheless, is of not much assistance, because it merely shows the entries to the different rooms in the first floor of the premises where the crime occurred. As far as evidence of PW-15 is concerned, the prosecution attempted to say that when the incident was reported, immediately after it happened, to other members of the family, the door was locked from outside. A strong insinuation was made that Savita facilitated the safe escape of the assailants. On this, PW-15 varied his earlier statement; in Ex. PW-15/DA, he stated that the first floor door was closed from inside; his deposition in Court was that it was closed from outside. He later clarified that what he meant was that it was closed from Savita's side. Nothing much can be made out of this statement, because PW-35 states that the entry into the first floor premises was through only one door. There is of course a reference to another outer door, in PW-15's deposition. However, he also admitted that the first floor could be accessed from the main ground floor staircase. PW-15 stated that the wooden outer door on the first floor was 3 feet high, and that a wall abuts that gate, which can be jumped by anyone. His evidence also is that the entry for the first and second floor, from the street level, is through a common door, and a common staircase.

56. The evidence discussed about the first floor topography of the premises, though lengthy, is to show that the prosecution did not allege any specific route alleged to have been used by Manoj's assailants on the fateful day. No photographs of the premises, or the stairs, have been placed on record. No clear cut plan showing how the assailants entered, according to the prosecution, and how Savita facilitated the attack has been argued. The prosecution attempt was to bank on the sketches, and build on the theory that the attack mentioned by Savita was not possible, and that Manoj was sleeping at the time he was murdered. While there can be no doubt that Manoj was brutally assaulted, and that the attack was with

homicidal intention, having regard to the nature of stab injuries all over the face, neck and shoulders, particularly the neck – which led to his death, that itself cannot be connected with the hypothesis that such attack was not possible without Savita's connivance. The testimony of PW-15 who arrived at the scene, soon after the incident, shows that the apartment was in disarray, with the almirah open and articles scattered around. Apart from the fact that Savita's statement describing the sequence of events leading to the incident, cannot be looked into for the reason mentioned in the previous section dealing with the 15.11.1994 incident (on an application of the rule in *Nissar Ali* and *Agnoo Nagesia*), there is no acceptable evidence, to support the prosecution version, which at best is an unproven hypothesis, that she had collaborated with the accused, and facilitated their entry. The prosecution apparently did not argue about the location of the body, and the nature of injuries found on it, to submit that the attack was a preplanned and calculated one (as is argued here, based on the cuts found on the neck, the towel used to staunch the blood, the pillow, and also the location of the khes, on Manoj). The Trial court also did not put the relevant queries, as regards these circumstances. Therefore, the prosecution argument that Savita had facilitated the entry of the co-accused into the premises, since the nature of Manoj's injuries, and the various entries into the premises bespoke a contrary story, being another strong circumstance pointing to her guilt, cannot be accepted. The findings to the contrary by the trial court cannot be sustained.

III. An illicit relationship between Savita and the Swami, the deceased's family members' suspicions, telephonic conversations, and meetings between the two Appellants and similar circumstances leading up to the incident and death of Manoj

57. These circumstances are projected as motive, as also the proof of the two accused having committed the crime. On this, the evidence relied upon by the prosecution was the suspicion of Manoj's family members, about the involvement of Savita and the swami, in the murder, frequent telephone calls between each of the said accused, clandestine meetings between them few days before the incident and Savita's telephonic conversation at 08:30 PM, on 2nd December, 1994, when she is alleged to have been heard saying *"Aj raat ko kaam ho jana chahiye"*. Most importantly, the prosecution relied on three letters, Ex. PW-37/E-1 to E-28, Ex. PW-39/B and Ex. PW-37/R. The first two were recovered from Savita; the last was said to have been recovered along with an envelope, from the premises of PW-21.

58. PW-1 and PW-15 deposed having been suspicious about Savita's conduct and role in the murder, as well as the involvement of the swami. However, PW-1 was confronted with a previous statement made to the police, under Section 161 Cr. P.C. on 11.02.1995, when

concededly no such suspicion had been voiced. Similarly, PW-15's statement, recorded immediately after the incident, does not reflect any such suspicion. The prosecution sought to explain this by saying that these witnesses had entertained their suspicions, at the relevant time, but it was not reflected in the earliest statements, because the police at that time was of opinion that the angle should not be pursued without any concrete material. Reliance is placed on the evidence of PW-35, who has so stated. The prosecution evidence, in the form of testimony of PW-1 and PW-3, is also to the effect that a complaint was made to the superior police officers, after which the conspiracy angle was explored, and subsequently, investigation was handed over to PW-45.

59. It is a matter of record –as is evident from the deposition of PW-1, that no suspicion was voiced, or recorded in the statement recorded by the police on 11.02.1995. The witness, i.e. Manoj's mother, mentioned that soon after the incident, in early December, she was in a shock, and confused state of mind, and several relatives were visiting to condole with her. What is significant, however, is that more than two months later, i.e. in February, 1995, she did not deem it appropriate to voice this suspicion. Furthermore, she deposed that Savita stayed with Manoj's family till end December, 1994, or January, 1995. This part is corroborated by PW-3. This witness also stated that he too harboured some suspicions about Savita's involvement. However, he was confronted with his previous statement, recorded by the police, on 25.12.1994, where no such suspicion had been recorded. As regards PW-15, though he deposed in his examination-in-chief, about Savita's alleged unnatural behaviour and suspicions about her involvement, he was confronted with the previous statement made to the police, where such allegations had been noted. Having regard to these, the Court is of opinion that it would be unsafe to consider the vague suspicions supposedly entertained by members of the deceased's family.

60. PW-1, PW-3 and PW-15 deposed that the swami and Savita used to hold long conversations over telephone. It was also deposed that the swami had, after about four days of the homicidal attack, mentioned that Savita was a suspect, and that considerable amount of money had to be spent to save her. They also deposed that the swami had attended the death ceremony of Manoj, and was also there when his *asthi* were consigned to the Holy Ganges. These witnesses also deposed having gone to his Ashram at Hardwar, with Savita, and that she spent a long time talking to him, and even remained closeted alone with him. Further, the prosecution case was that the swami had met Savita on 30.11.1994, in the evening, and tried

to cover it up, by asking PW-13 to depose in Court that if questioned by the police, he should tell that he (the swami) had in fact visited PW-13 that time, since he lived in West Patel Nagar. PW-18 deposed that when Manoj and his sister were watching television on the night of 02.12.1994, Savita was on the phone, distinctly saying that *"Aj raat ko kaam ho jana chahiye"* to someone.

61. PW-1 was, in her cross-examination confronted with her previous statements, where she had not mentioned about the swami frequently trying to talk to Savita on telephone, or that the family had gone to Hardwar, and stayed there, after Manoj's death, for immersing his ashes. She was also confronted with her previous statement, where it was not mentioned that Savita and the swami were closeted together for some time, by themselves, when in Hardwar. These facts were not part of the witnesses' statement dated 11.02.1995. The witness made two subsequent statements to the police, in August, and September 1995. As regards PW-3, the prosecution recorded no less than four statements; the first on 25.12.1994 (22 days after the incident); the second on 11.02.1995, the third on 04.04.1995 and the last one, on 01.08.1995. In the first three statements, he did not mention about the swami spending a lot of time, talking to Savita at Rishikesh; he was confronted with these, when he deposed in Court. Likewise, in the first three statements, there was no mention that the swami suggested that money had to be given or spent, to save Savita, who was then allegedly suspected by the police, soon after Manoj's death. This allegation was recorded for the first time, in the last statement made to the police on 01.08.1995; the witness was confronted with his previous statements. PW-3, however, has not mentioned about any telephonic conversations between Savita and the swami. The last circumstance was PW-18's deposition that he heard Savita on the phone, distinctly saying that *"Aj raat ko kaam ho jana chahiye"* to someone at 08:30 PM on 02.12.1994. This witness also stated that he had mentioned this to other family members; however, PW-1 and PW-15 or even PW-3 do not corroborate his testimony, on this score.

62. It was argued, in addition to the evidence discussed above, that a cumulative reading of the testimonies of PW-16, PW-13, PW-30, PW-31 and PW-34 (though some of them had been declared hostile, and cross-examined by the prosecution) revealed that soon before the incident of 02/03.12.1994, the swami and Savita had met, in house of PW-34, (where they were normally in the habit of holding trysts and meetings, on a one to one basis) and that PW-13 was asked by the swami not to reveal this if questioned by the police.

63. PW-16 had deposed that Savita returned late from school, around 4:30 PM, (where she used to work) and told her that she had visited PW-20, a colleague. She further deposed that when PW-20 was asked about this, after Manoj's death, she stated that Savita had never visited her (PW-20's) place. As opposed to this, PW-20, in her deposition, admitted that Savita was a colleague, and had not visited her. She also stated that no one asked or verified this fact form her at the time of performance of the death rites of Manoj, when she had visited to condole with Savita. PW-13 Ramesh Kumar deposed about his acquaintanceship with the swami and that on 06.09.1995 the swami asked him to reach Rishikesh, which he did the next day. The swami, whom PW-13 met in his Ashram, asked him (PW-13) to help his follower who was in trouble and that one driver, namely, Makhan Singh was blackmailing his follower. The swami also asked PW-13 to help him (the swami) and tell the police, in case of any inquiry by them, that he had visited PW-13 on 30.11.1994, at 26/14, East Patel Nagar, which was factually incorrect. PW-33 was cited as a witness; the prosecution sought permission to cross-examine her, which was granted. She used to live in Tagore Garden; she denied the suggestion that frequently, the swami and Savita used to meet each other, and that at times, Savita used to stay overnight in her place, with the swami. She was confronted with her previous statement, made to the police, to the contrary. PW-34 was a long standing devotee of the swami. She was cited as a witness, because in the previous statement recorded to the police, she had allegedly stated that Savita had visited her place (PW-34's) place and met the swami. She was confronted with this statement, which she denied; She also denied having told the police, in any previous statement that Savita used to meet the swami at times, in a third floor room, in the witnesses's house, which was kept aside for the swami's room. She confirmed about her knowing Raj Kumar, who had been accused for the offence of attempted murder, but was acquitted of the charge, in the impugned judgment.

64. Now, a careful and objective analysis of the above evidence would reveal that the testimony of PW-16 is unreliable, because it is contradicted by PW-20, as far as Savita returning late is concerned. PW-20 categorically denied having conversed with anyone in Savita's family, including PW-16, although the latter stated that she had talked with her, and obtained the information about Savita not visiting her. So far as the clandestine meetings on 30.11.1994 or 01.12.1994, the two eyewitnesses - alleged to have seen these, and have first-hand knowledge of the incident, are concerned, -turned hostile. The only positive evidence favouring the prosecution is that PW-13 was asked by the swami to inform the police – untruthfully – that he had visited the witness, on 30.12.1994. This circumstance is pressed as

the starting point, to persuade the Court to accept the unsworn testimony of the two witnesses, PW-33 and PW-34. However, those two witnesses have not supported the prosecution story at all. They are also not witnesses to any other proven circumstances. Also, the prosecution has not brought on record any objective evidence or deposition showing that the swami was in Delhi, and in the vicinity of the premises, where the offence occurred, at around 30.11.1994 and for the next few days. The testimony of PW-13 no doubt results in some suspicion about the swami, and his relationship with Savita. However, that alone, in the absence of any evidence to corroborate the Section 161 statements of PW-33 or PW-34 or lead the Court to take into account such statements, and discard as untrue their sworn testimony before the Court, to the contrary.

65. It would now be necessary to examine the letters recovered from Savita, being Ex. PW-37/E-1 to E-28 and Ex. PW-39/B. The first document is a 28 page long letter, addressed by the swami to Savita. Both letters are written with intensity, and contain advise to Savita, about the transience of life, immortality of the soul, inevitability of destiny and fickleness of the mind, which is attached to objects, contexts and people. The swami emphasized that a guru is a spiritual guide, whose objective is to help and educate the disciple to achieve peace and understanding. The swami mentions about previous saints, who were able to achieve what they set out to acquire, despite several barriers and obstacles put in their paths. Exhibiting at times a depth of feeling and intensity that is normally not seen between a *guru* and *shishya*, the letters do not show anything incriminating against Savita and the Swami. PW-37 mentioned, in his deposition, that these letters were seized pursuant to Savita's disclosure statement. These letters, in the opinion of the Court only show that the swami felt very concerned about the mental unhappiness, and trauma, which Savita apparently experienced, and which he tried to minimize with the help of his advice (to her).

66. The next letter is Ex. PW-37/R. The prosecution relied heavily on this, to say that Savita and the swami had an intimate and illicit relationship, which, taken together with several trysts between each other, constituted a motive for conspiracy and murder of Manoj. PW-21, Rama Bajaj, deposed that sometime in 1995, one Swami, Gajanand, connected with her guru, (the Appellant-swami in this case) had handed over an closed envelop to her and asked it to be handed over to Savita. This envelop was taken, subsequently by the police, who went outside, and later returned, asked her to sign, in acknowledgement of handing over the envelope. She therefore, proved the memo Ex. PW-21/A, the seizure memo in respect of the

envelope. The envelope was addressed to "Savita", and was handed over when PW-21 was sitting with her lady friends. PW-37 initially stated that he had seized the letter PW-37/R; he however, later clarified that he did not do so. PW-45 Rajbir, the last IO in the case, deposed having recovered Ex. PW-37/R under memo Ex. PW-21/A. Now, Ex. PW-21/A mentions an envelope, as well as some letter in it. However, it does not identify the letter as a two page document, such as Ex. PW-37/R. In her evidence, PW-21 merely stated that the envelope was recovered from her possession; she did not say that Ex. PW-37/R was taken out of it; she does not also identify it. Her signatures are not found on Ex. PW-37/R. To compound these complications, the Trial Court's question to Savita, under Section 313, was that Ex. PW-37/R was recovered on 13.09.1995 from her possession. The swami's statement under Section 313 was, however, that Ex. PW-37/R was forcibly procured from him, after his arrest.

67. It was argued on behalf of the Appellants that having regard to the circumstances in which the recovery of Ex. PW-37/R is alleged to have been made, and the further fact that the letter was not put to Savita, suitably in examination under Section 313, it was not correct for the trial court to have relied on the document. The decision of the three judge Bench in *Sarda* was relied on for this purpose; it was also contended that the course suggested by the prosecution to put the correct query to Savita, in the appellate stage, would result in grave prejudice, because even if the case were to be remanded for considering whether to permit her to lead additional evidence, now, 17 years after the incident, prejudice is inherent and writ large. In this context, it was submitted that the only witness proving the document, PW-45 Rajbir died some while ago, during an encounter operation. It was argued that the Appellant's chance of cross-examining him, on this aspect therefore would be denied; equally, the appellant's opportunity to put other letters written by the swami, showing intense and close relationship, to PW-45 is deprived. Savita's counsel relied on the decision reported as *Machander v. State of Hyderabad,* (1955) 2 SCR 524, where it was held by the Supreme Court, rejecting a similar request, as follows:

> *"We were asked to reopen the question and, if necessary, to remand the case. But we decline to do that. Judges and Magistrates must realise the importance of the examination under Section 342 of the Criminal Procedure Code and this Court has repeatedly warned them of the consequences that might ensue in certain cases. The appellant was arrested in December 1950 and has been on his trial one way and another ever since, that is to say, for over 4½ years. We are not prepared to keep persons who are on trial for their lives under indefinite suspense because trial judges omit to do their duty. Justice is not one-sided. It has many facets and we have to draw a nice balance between conflicting rights and duties. While it is incumbent on us to see that the guilty do not escape, it is even more necessary to see that persons accused of crime are not indefinitely harassed. They must be given a fair and impartial trial*

and while every reasonable latitude must be given to those concerned with the detection of crime and entrusted with the administration of justice, limits must be placed on the lengths to which they may go. Except in clear cases of guilt, where the error is purely technical, the forces that are arrayed against the accused should no more be permitted in special appeal to repair the effects of their bungling than an accused should be permitted to repair gaps in his defence which he could and ought to have made good in the lower courts. The scales of justice must be kept on an even balance whether for the accused or against him, whether in favour of the State or not; and one broad rule must apply in all cases."

Learned counsel argued that the subsequent rulings relied on by the prosecution did not take note of this decision, and the approach indicated in it, and that the applicability of the test of prejudice, indicated in recent decisions, was evolved by two judge Bench decisions, as opposed to the above ruling, rendered by three judges. On the other hand, the prosecution had urged that the applicable test in all these cases, is one of prejudice (by referring to *Basavraj Patil; Shivaji Sahabrao Bobade;* and *Santosh Kumar Singh* supra). It was stated that since both the swami and Savita were represented ably by counsel, who knew what was the case put against them, and all the circumstances leading to the recovery of Ex. PW-37/R had been proved by PW-45, if at all the Court feels there is some prejudice, it would be in the fitness of things that the correct query is put to Savita, and depending upon her answer, the matter could be remanded to the limited extent to the trial court, if she feels that additional evidence has to be led by her, on that aspect.

68. Both *Sarda* and *Machander* are by three judge benches of the Supreme Court. They underline the importance of asking the right questions to the accused, and the prejudice being inherent if the query is not put, but sought to be relied on to return a finding of guilt. The subsequent judgments, such as *Bobade* and *Patil* do not refer to the previous decision in *Machander,* but seem to suggest that if found appropriate, the appellate Court may put the question to the accused or his counsel. Undoubtedly, there appears to be a shift in approach. However, even the later decisions emphasize that the Court should be alive to whether not putting the right question would result in prejudice. In this case, Ex. PW-37/R is sought to be used as a prized evidence, to substantiate conspiracy between Savita and the swami, and an attempt to cover up something, which is unsavoury and a crime. If the proper question is not put to the accused – in this case, Savita, there can be no question that it would result in her prejudice; even without putting the right question, the trial court took the letter into consideration, and this has resulted in prejudice, and conviction. These apart, the Court is also alive to the fact that now, 17 years after the incident, it would be a travesty of justice to ask the relevant question to Savita, and if requested for by her, remit the matter for permission to

lead further evidence. This course will undoubtedly prejudice her, as it will amount to admitting that PW-45's version was correct. That witness cannot now be cross-examined since he is no longer alive. Furthermore, prejudice is also discernable, because it would be difficult, if not impossible, for Savita, to lead further evidence on any aspect – howsoever limited, due to long passage of time.

69. Another reason why the Court feels the inappropriateness of agreeing to the prosecution to question Savita, is that the circumstances surrounding recovery of Ex. PW-37/R are suspicious. PW-21 merely referred to the envelope, recovered under Ex. PW-21/A. She did not mention about the letter, said to have been extracted from it, by PW-45. Furthermore, significantly, to the extent she does not support the prosecution on this aspect, she was not declared hostile, or cross-examined, which is significant. Her deposition clearly contradicts that of PW-45, who mentions having seized Ex. PW-37/R in her premises. It is inconceivable that the witness to recovery of an envelope is not made witness to the recovery of the most relevant prosecution piece of evidence, i.e. Ex. PW-37/R. For all these reasons, this Court is of opinion that Ex. PW-37/R should not have been taken into account, in evidence; the trial court's findings to the contrary cannot be sustained.

70. Another fact which the prosecution had relied on was the alleged conversations which Savita held with the swami, over telephone. To establish this, reliance was placed on the deposition of PW-44, Ms. Porus, the owner or service provider of a STD booth at East Patel Nagar. This witness could not positively identify Savita as one of her customers; she could not also depose, with any degree of specificity that Savita used to make STD calls to the swami's Hardwar telephone number. There is something in the evidence that a few calls were made to a place in Hardwar, from the telephone booth; however, the identity of the person making the calls is utterly unclear. In these circumstances, these facts cannot be considered as suspicious circumstances, or conclusively proven circumstances. The trial court fell into error in holding otherwise.

IV. Tape recordings relied on by the prosecution

71. The prosecution alleged – through PW-26 that pursuant to authorization from the DCP, a police party went to Rishikesh, and on the basis of the authorization, kept a surveillance over the conversations from the swami's end, over telephone. PW-38 deposed that on three dates, in September, 1995, the police party listened to conversations, and on the basis of pre-decided signals, recorded them. The general purport of two of these tape

recordings was that one Mr. Sharma posed himself to be a CBI official, and sought to extort the swami in respect of a murder which had taken place in East Patel Nagar, in 1994. The third conversation was with someone, and the swami, instructing the latter to deliver a letter. PW-45 marked the three transcripts of the tapes. PW-26 exhibited them. The prosecution also relies on PW-41's evidence; he is a voice analyst, who prepared a report which was submitted in evidence, to say that the swami's conversations had been recorded.

72. The appellants argue, quite pertinently that although transcripts have been marked in evidence, the trial court did not play the tapes during the trial. It is argued, significantly, that the authorization even from the concerned police officer, to tap the telephone, which is spoken about by the witness, has been exhibited. Besides, these concerns, the Court observes that the concerned MTNL officer who was involved in the tape recording has neither been named nor produced as a prosecution witness. Furthermore, the prosecution relied on the evidence of PW-26 and PW-38, both of whom mentioned that a private tape recorder was used for this purpose. That instrument was not seized; one wonders how such a "private" phone tapping device was available, and if the police had authority to record conversations, as they claim they did, why no official device was used. No record of the kind of instrument used has been filed. Most crucially, none of the witnesses who claim to have witnessed or assisted in the recording procedure, in fact knew, were familiar with the swami's voice. Similarly, there is nothing to show that the telephone number under surveillance and from which the conversations were recorded, belonged to or was accessed by the swami.

73. So far as the expert evidence is concerned, the Court notes that the transcripts relied on by the trial court do not show the exact conversations, and who spoke what. Though the voice samples given to PW-41, are said to match those in the three tape-recordings, in the absence of identity of those conversing, in the transcripts, it would be unsafe for the Court to rely on this evidence. The rulings in *R.M. Malkani*; *Ziyauddin Burhanuddin Bukhari* and *Ram Singh* (supra) have mandated safeguards, which are to be followed by courts while taking into account tape-recorded telephonic conversations. Here, none of the witnesses knew, or could have identified the swami's voice; none of them have shown convincingly that the possibility of tampering with tape recordings had been eliminated. Besides, the authenticity of the tapes becomes questionable, since the prosecution does not produce the authority documents which persuaded the MTNL officials to accept the request for telephone tapping; in fact even MTNL officials did not depose in support of the prosecution, corroborating its version. The authorities are uniform and clear on this aspect; the voice of the accused, or the maker to

whom a conversation was attributed, had to be identified by someone familiar with it. That is not the case here; the prosecution merely points at the transcripts and states that copies were given. In the absence of proof that the swami's conversation was in the tapes, by one who was familiar with his voice, the Court cannot jump to the conclusion that he was one of the participants in the three telephonic tape recordings. In view of this finding, it is held that the trial court fell into error in considering the alleged transcripts of telephonic conversations, or even the conversations, and concluding that it constituted a proven suspicious circumstance.

V. Recovery of Jewellery and its identification and recovery of weapons

74. According to the prosecution, and deposition of PW-26 jewellery is alleged to have been recovered from the premises of the swami, Ravi Chauhan and Asutosh. It is alleged that pursuant to statement of Ravi Chauhan, eight rings were recovered from E-396, First floor, JJ Colony, Inder Puri, New Delhi through Memo Ex. PW26/C. Ashutosh was arrested at the pointing out of Ravi Chauhan and his disclosure statement Ex. PW26/D led to recovery of six pairs of ear tops, one pair of ear rings, one pair of jhumka weighing 46 gms by Memo Ex. PW26/E. PW27 Const. Babu Lal deposed that on 18.01.1995 he collected 8 pulandas from MHC (M) and deposited them in CFSL, Lodhi Complex by RC No.214/21. It is alleged that when the police party visited and questioned the swami, who opened a steel almirah and took out a red coloured potli containing eight gold bangles, two gold karas, one gold chain, one mangal sutra and a necklace, which were taken into possession by Memo Ex. PW37/N.

75. PW36 Shri Paramjit Singh, Metropolitan Magistrate, Tis Hazari Courts deposed that on 04.11.1995 an application for the TIP of the case property was marked to him and the TIP was fixed for 10.11.1995 by his endorsement Ex.PW36/A and on 10.11.1995 the TIP of the case property was fixed for 15.11.1995 by endorsement Ex. PW36/B. On 15.11.1995 Jagdish Rai, father of deceased identified the case property and he prepared the TIP proceedings for the identification of the case property by Ex.PW36/C. He gave certificate regarding the correctness of the proceedings was given to the IO by endorsement Ex.PW-36/E.

76. PW-3 claimed to have purchased the jewellery. He testified that jewellery was bought for Savita, from R.R. Jewllers. This witness did not interestingly, mention about the jewellery or its particulars in the first two statements, recorded by him, on 25-12-1994 and 11-2-1995. There is mention of jewellery for the first time, on 04.04.1995. The witness PW-3 however, is general and unspecific in his evidence on this aspect. The second aspect is that he states that

particulars about the jewellery were obtained from Savita. Now, the prosecution story is that Savita was suspected by the family; that is what PW-3 stated in his second statement dated 11.02.1995. If that were correct, these details were allegedly obtained after 11.02.1995. This contradicts the prosecution story about Savita's conduct. Moreover, the prosecution evidence is also that Savita left Manoj's house in January, 1995. The second aspect is that PW-1, Manoj's mother, expressed unawareness of the jewellery and particulars looted. She stated that the jewellery for Manoj's marriage, and whatever was given to Savita, was bought by her husband, PW-3. The latter mentioned that jewellery was purchased from R.R. Jewellers. However, no evidence of that fact was led; no receipt or document was placed on the record, and the prosecution also did not examine anyone from R.R. Jewellers. The third aspect is that even though the jewellery is said to have been recovered in the second week of September, 1995, the prosecution got the test identification parade for the jewellery, done in November, 1995. No explanation for this delay has been given. The other significant aspect which the Court cannot overlook is that even though the prosecution made no headway for about 10 months, once the arrests were made, all the missing items of jewellery were recovered. If there indeed was a conspiracy to kill Manoj, and the theft of jewellery was to throw the authorities off the scent, there was no reason for anyone, much less Ashutosh and Ravi Chauhan, to keep the items of jewellery. One last point of discrepancy is that prosecution witnesses, such as PW-18 and PW-1 have deposed that a video recording of the marriage between Manoj and Savita existed. If that were seized and produced in evidence, it would have settled the question whether the items of jewellery recovered were Savita's. The prosecution's failure to produce it, also improbabilizes the recovery and identification of the jewellery produced in Court, and relied as another incriminating circumstance.

77. PW-26 and PW-37 deposed having witnessed recovery of one knife each upon the disclosure statements of Asutosh and the swami. These weapons were sent for forensic examination; however, the report did not reveal anything incriminating against either appellant. These weapons were also recovered pursuant to disclosure statements, and witnessed only by the police. Now, even though the law is clear that there is no invariable rule that recoveries should be testified by independent witnesses, what is noteworthy in this case is that the investigation had reached a dead end, and clues were gathered 10 months later. The places where recoveries of weapons effected, were not isolated. It was possible for the prosecution, by way of precaution and as a prudent measure, to associate members of the public, as witnesses to these recoveries. Not doing so has undermined the prosecution.

Further, it is not as if the swami and Asutosh had any previous history of violence or crime, to keep weapons such as knives; the evidence also does not disclose any other reason for them to keep these weapons, especially if they had committed the offence. It would have been easiest for the swami to get rid of it, considering that Hardwar is on the banks of the river Ganga. Similarly, if Asutosh a hired assassin, as the prosecution alleges, there was no possible reason for him to hold on to the murder weapon.

78. For the above reasons, the Court is of opinion that the recovery and identification of jewellery and recovery of the knives, relied upon by the prosecution, are neither proved beyond reasonable doubt, nor is there anything especially incriminating in the manner shown by the prosecution.

VI. Involvement of Ravi Chauhan and Asutosh

79. The earlier discussion of prosecution evidence has shown that apart from the disclosure statement of the swami, and the alleged recovery of articles, there is nothing to connect these two accused appellants, with the crime. For them to be involved on account of statements made by the swami, they are to be admissible. What is admissible here is only those portions of the statement, which led to the recoveries, and nothing more. That by itself, in the absence of any other connecting evidence, admissible in law, cannot be the sole basis for holding that they too were involved in the commission of the crime, in this case. In *Sunwat Khan* (supra) the Supreme Court held as follows:

> *"Beaumont, C.J. and Sen, J. in Bhikha Gober v. Emperor[2] rightly held that the mere fact that an accused produced shortly after the murder ornaments which were on the murdered person is not enough to justify the inference that the accused must have committed the murder. There must be some further material to connect the accused with the murder in order to hold him guilty of that offence. Our attention was drawn to a number of decisions which have been summed up in a Bench decision of the Allahabad High Court in State v. Shankar Prasad[3] in some of which a presumption was drawn of guilt from the circumstance of possession of stolen articles soon after a murder. We have examined these cases and it appears to us that each one of these decisions was given on the evidence and circumstances established in that particular case, and no general proposition of law can be deduced from them. In our judgment, no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof."*

In the present case too, there is no material on record to link these two accused with the swami, or Savita; apart from the recoveries, no witness has spoken about their presence near

about the scene of crime, or its vicinity, at the relevant time. Therefore, it would be hazardous for the Court to hold that they were linked with the other co accused, and were part of a conspiracy to commit it.

VII. Conspiracy

80. The prosecution story is that conspiracy was hatched by Savita and the swami in the end of November, of first two days of December, 1994, to kill Manoj. The only circumstance, which has some contemporaneous nexus with this theory is the deposition of PW-13 who stated that the swami had requested him, sometime in September, 1995, to tell the police a false fact that he (the swami) visited PW-13 in November, 1995. The other circumstances are that letters were written by the swami to Savita – two of them were recovered from her (those letters not containing any incriminating material) and the third, from PW-21. These latter facts are *post* event, i.e. post 02/03.12.1994.

81. The essence of the crime of conspiracy and the material a court can use, in the form of statement of a co-accused, was summarized by the Supreme Court in *Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra*, (1964) 2 SCR 378, in the following words:

> *"Before dealing with the individual cases, as some argument was made in regard to the nature of the evidence that should be adduced to sustain the case of conspiracy, it will be convenient to make at this stage some observations thereon. Section 120-A of the Indian Penal Code defines the offence of criminal conspiracy thus:*
>
> *"When two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy."*
>
> *The essence of conspiracy is, therefore, that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence: it can be established by direct evidence or by circumstantial evidence. But Section 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co-conspirators. The said section reads:*
>
> *"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."*

This section, as the opening words indicate, will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a prima facie evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them."

82. It is also settled authority (*Mirza Akbar v. King Emperor,* AIR 1940 PC 176 and *Caveeshar (supra))* that the phraseology in Section 10, Evidence Act, is not capable of being widely construed. Where the charge specifies the period of conspiracy, evidence of acts of co-conspirators outside the period is not receivable in evidence. Here, the prosecution has relied mostly on acts of the appellants *after* the incident, i.e. the killing of Manoj. Such facts are not considered as proof of such conspiracy, and certainly not sufficient to implicate any accused on the sole charge of conspiracy. Furthermore, to establish conspiracy beyond reasonable doubt, there has to be objective evidence, linking accused with each other, as well as the recoveries said to have been recovered. The recovery of objects, in this case, without the necessary linkage between the co-accused, between each other, and the articles, therefore, does not amount to acceptable proof of a conspiracy. There is also no statement of any one accused, admissible, in law, which can implicate the others on the theory of agency. For these reasons, the prosecution has not proved the conspiracy beyond reasonable doubt.

Conclusions

83. As noticed in more than one place during this judgement, the prosecution relies on circumstantial evidence to establish the charge in this case. Contrary to the trial court's conclusions, the facts and materials brought on record during the trial are insufficient to hold that each of them was proved beyond reasonable doubt. Nor has each circumstance been proved on application of the exacting standard of proof, i.e. beyond reasonable doubt. The prosecution has also not established a conclusive link connecting each individual circumstance with the other, and all the appellants. The materials placed on the record in the form of letters, and some evidence about Savita and the swami's meetings, raise suspicions about their conduct. Their relationship – not being a spiritual one, but a more earthly one, of lovers, can be arguably be inferred. However, the materials and evidence on the record do not

bridge the gap between "may be true" and "must be true" so essential for a court to cross, while finding the guilt of an accused, particularly in cases based on circumstantial evidence.

84. For the above reasons this Court is of opinion that the charges were not proved beyond reasonable doubt. All the appeals are, therefore, entitled to succeed; they are accordingly allowed. The bail bonds and surety bonds furnished by the appellants or on their behalf are therefore cancelled. Criminal Appeals being CRL.A. 786/2001, CRL.A. 795/2001, Crl.A.919/2001 and Crl.A.926/2001 are therefore, allowed.

(S.RAVINDRA BHAT)
JUDGE

(G.P. MITTAL)
APRIL 28, 2011 **JUDGE**