

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

**RESERVED ON: 07.04.2011
PRONOUNCED ON: 29.07.2011**

+ **CRL.A. No. 844/2001**

DEVENDER KUMAR Appellant

Through : Mr. Rajesh Mahajan, Advocate.

CRL.A.No. 972/2001

PREETAM Appellant

Through : Mohd. Nasir, Advocate

CRL.A. No. 356/2002

HIMMAT Appellant

Through : Mr. Rajesh Mahajan, Advocate

CRL.A. No. 357/2002

SHYAM LAL Appellant

Through : Mr. Rajesh Mahajan, Advocate

Versus

STATE Respondent

Through : Mr. Lovkesh Sawney, APP

**CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE G.P. MITTAL**

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| 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. These four appeals impugn a common judgment and order of learned Additional Sessions Judge, Delhi dated 19.10.2001 in SC No.16/2000.

2. The prosecution case briefly was that Parvesh, the Appellant Shyamlal's daughter had an affair with Mahesh (hereafter referred to as "the deceased") and had eloped with him in December 1999. Shyam Lal had lodged a missing person report with the Police. The prosecution contended that on 23.03.2000 Mahesh and Parvesh went to Surender's, (an Electrician's) shop at Najafgarh; he was Mahesh's friend. Shyam Lal, Himmat, Pritam and Devender, the Appellants in this case (referred to hereafter by their names), alongwith some others, reached there in a Tata Sumo Car -DL4CF 9386. It was stated that Surender had previously received a telephone call from Mahesh informing him that Parvesh's parents had agreed to his marriage with her and that they would be visiting him (Surender) on 22.03.2000. On that day i.e. 23.03.2000 Parvesh and Mahesh reached Surender's shop. All the four appellants (who reached there later, along with Parvesh's mother Rajindri), took Parvesh and Mahesh away with them. Subsequently on 26.03.2000 Mahesh's dead body was discovered near the Nazafgarh drain, near Chawla Bridge. The body showed injury marks and it appeared that Mahesh had died on account of beating. Surender (hereafter referred to as "PW-12") and Mahesh's brother Umesh (hereafter referred to as "PW-9") identified the dead body at Subzi Mandi mortuary. A post mortem was conducted which indicated that the dead body had several injuries on various parts of the body; death was caused by throttling. An FIR was registered, and investigation commenced. The prosecution alleged that the deceased was taken from Surender's shop in a Tata Sumo to Gurgaon where he was subjected to beating by the appellants. From Gurgaon he was taken to Roshan Vihar at Najafgarh where he was again beaten. The prosecution alleged that due to the injuries and beating, the deceased could have raised an alarm. He was shifted to some other place. It was alleged that Lalit @ Pinki arranged a Maruti van no. HR26F6207, which belonged to Deepak @ Deepu. The four appellants sat in the Maruti Van and took Mahesh with them; they proceeded to village Shikharpur where they called Jagmohan @ Jag and Sunil @ Pappu and talked with them.

3. The prosecution alleged that Jag and Pappu were friendly with Devender. They sat in the van at his (Devender's) insistence and headed to Gurgaon through the fields. It is alleged that after a short distance Devender stopped the van and along with the appellants took them aside in the pretext of having some deliberations. It was alleged that Deepak heard some noises and screams and then he saw that Jag was holding the deceased's hand, whereas Sunil and Shyamlal were holding the deceased's head. Devender had a hockey stick with him; Himmat had a danda and they were beating the deceased. The Appellant Pritam was instigating others to beat Mahesh. Deepak is reported to have stated that, (when he enquired why this was done), the accused told him that the deceased Mahesh had spoiled their honour and would not be spared. They also threatened Deepak, upon which he left the spot. After some time, Jag and Sunil brought back the Maruti van and left.

4. The prosecution alleged that the appellants were subsequently arrested. Pursuant to their disclosure statements when they lead the Police to various places where the deceased had been taken, weapons of offences such as hockey stick and *thapi* were recovered. The prosecution alleged that after the incidents narrated by Deepak the deceased was brought once again to Roshan Vihar where again he was beaten. The appellants allegedly conspired to get rid of him since he had suffered series injuries. Devender caught hold of Mahesh legs; Pritam and Himmat caught hold of his hands and Shyam Lal sat on his chest and strangulated him till he died. All this happened in the morning of 23.03.02000. Shyamlal allegedly sent Himmat to arrange a vehicle to dispose of the body. He hired a Maruti Car No.DL1CB2554 driven by Sukhbir @ Billu. He declined to take Mahesh because he suspected that he had died. It is stated that Himmat sat on the driver's seat of the vehicle stating to Sukhbir that he should wait there and that they are taking the Mahesh to the hospital. It was alleged that Himmat sat on the driver's seat (of the said Maruti van) with Devender by his side; Shyamlal and Pritam sat on the rear seat and Mahesh was laid in between the two seats. It was alleged that appellants threw his body near Chawla village near a bridge at a lonely place and returned the vehicle to the driver. The appellants were charged with offence under Sections 302/308/I20B/201/34 IPC. They entered the plea of not guilty and claimed trial. By the impugned judgment and order the trial court convicted all the Appellants.

Appellants' submissions

5. It is urged that the entire prosecution story is built round circumstantial evidence, and that the accused- Appellants were “last seen” in the company of the deceased. The Appellants rely on the judgment reported as *Sharad Birdhichand Sarda v. State of Maharashtra* AIR 1984 SC 1622, and urge that the court has to tread with care and caution while basing a conviction solely on circumstantial evidence, and avoid the danger of converting suspicion into proof. Reliance is also placed on *Hanumant Govind Nargundkar v. State of M.P.* AIR 1952 SC 343, *Dharam Das Wadhvani v. State of UP* 1974 SCC (CrL.) 429 and *State of Haryana v. Jagbir Singh & Anr.* 2004 SCC (CrL.) 126.

6. It is urged that broadly the circumstances of “last seen” alleged against the appellants by the prosecution were that the deceased was seen last with the Appellants by PW 12 - Surender. The body of the deceased was recovered on 25.03.2000 at about 11.26 AM by DD No.15A – Ex.PW10/A, near Baru Sarai. The said DD No.15A was made the basis of the FIR in the present case. The body was, according to the prosecution, identified as that of Mahesh by PW-9 Umesh and PW 12 Surender Kumar, on 27.3.2000. Learned counsel submitted that PW12 was projected as the solitary witness of last seen, on whose testimony the case of the prosecution rests. Here, the appellants relied on the decision reported as *Bodhraj @ Bodha and Ors. v. State of Jammu and Kashmir* (2002) 8 SCC 45, where it was held that:

“31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and the possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.”

Learned counsel emphasized that the dead body was recovered on 25.03.2000 at around 11.26 AM. The postmortem was conducted on the dead body on 28.03.2000. Time since death was given as 6-7 days approximately. Counsel for the Appellant submitted that to calculate this time gap between the point of time when the deceased were last seen alive and when the deceased was found dead as referred to in *Bodhraj's* case (supra), it was incumbent on the prosecution to

prove the point of time when the accused and deceased were last seen alive. This crucial aspect, according to the Appellants, the prosecution failed to prove in the present case. PW-12 in his testimony did not give the date when he allegedly saw the accused and the deceased at his shop. In fact he deposed “*I cannot give the date when Shyamlal and others came to my shop in Sumo to take away Mahesh for my shop.*” Therefore, when date and time of alleged last seen was unclear, it could not be conclusively said that the time gap between the point of time when accused and the deceased were last seen alive and when the deceased was found dead, was so small to rule out the possibility of someone, other than the accused, having committed the crime.

7. The Appellant relied on the testimony of PW-8 Govind, (the deceased’s landlord) who deposed that the deceased had a quarrelsome nature. Given these circumstances, applying the ratio in *Bodhraj*, the possibility of some else having committed the offence could not be ruled out. It is next submitted that even otherwise, PW 12 in his testimony stated that Mahesh and Parvez came to his shop two days after Holi in 2000. He further deposed that in the meantime 8-10 persons including the appellants came in a Tata Sumo. The learned counsel argued that though the prosecution failed to prove when Holi was celebrated in the year 2000, yet judicial notice of the fact that in that 2000 Holi was on March 19 can be taken. That implies that the date of last seen (two days after Holi) deposed by the PW 12 would be 21.03.2000. This, urged counsel, is corroborated by PW-12’s statement that after 5-6 days he was called by the Umesh, brother of Mahesh in P.P. Madipur. He further deposed that he went to identify the dead body on day next day to his going to P.P. Madipur with Umesh. By reverse calculation, the date of last seen can also be arrived at from this aspect in the following manner. As per documentary evidence on record, the body was identified by this witness on 27.03.2000. According to the witness PW-12, body was identified the “next day”, on reverse calculation, one day prior would make it 26.03.2000 when the witness went to PP Madipur PW 9 Umesh. 5/6 days prior to this date of 26.3.2000, deposed to by this witness would mean that the relevant date was 20th or 21st of March. Therefore, as per this calculation, the “last seen” date works out to 20th or 21st of March, 2000. Both these dates, however do not fit the prosecution case, because according to it, the date of “last seen” was 22.03.2000 and not any other date. Learned counsel submitted that it is impermissible in law to make out a new case than the story projected by the prosecution to establish guilt of the accused. Reliance in this regard is placed on *Bhagirath v. State of MP*

1975 SCC CrL. 742. The shift in the date of “last seen” by PW-12 is fatal to the case of the prosecution. It is urged that the date, 20/21 March, 2000, arising from PW-12’s testimony of PW-12, does not find corroboration from any other quarter. Even the first charge framed against the appellants, the date of alleged kidnapping, (which is the date of last seen too), is given as 22.3.2000.

8. The Appellant urges that the date (s) of last seen given by PW-12 in court is also contradicted by the testimonies of PW 9 Umesh and the police witnesses, who recorded the statements of witnesses according to whom the date of last seen was 22.03.2000. This inconsistency in date of last seen cannot be termed as minor as it goes to the root of the case for the reason that the entire circumstances of last seen depends upon the time gap referred to above in *Bodhray’s* case (supra). On account of inability of the prosecution to conclusively prove the time of last seen, the circumstance of last seen must fail and benefit of such discrepancy has to go to the accused.

8. Learned counsel submitted that another factor is that the time gap between the alleged last seen and the recovery of dead body in the present case was 3 days if last seen is taken as 22.03.2000 (as deposed by PW-9) and 4/5 days if taken as 20/21 March 2000 (as deposed by PW-12). Relying on *State of Maharashtra v. Annappa Bandhu Kavatage* AIR 1979 SC 1410, where the last seen was on 26 July 1974 and the body was recovered on the next day from a well, the Supreme Court held that

“as there was sufficient interval between the death of the boy and the recovery of the body, the link in the chain of circumstantial evidence does not appear to be fully complete.”

In the present case the interval of time is much more. It was further urged, relying on *Mohibur Rahman v. State of Assam* AIR 2002 SC 3064 that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. The test of proximity of place and time was discussed. If last seen is a few unsure or unascertainable days before death,- urged the Appellant’s counsel- as in the present case, the “last seen” evidence is of no consequence. Learned counsel also relies on *Phool Singh v. State* (CrL. A.412/2001, rendered by Division Bench of this High Court on 1st September 2009), where it was held that “last seen” evidence becomes lethal and incriminating evidence, depending upon

the ;circumstances of a case, with a proximate nexus between the time of last seen and the time of death of the deceased as also the proximity of the place where the deceased and the accused were last seen alive and the place wherefrom the dead body was recovered. It was also urged that in any case, last seen evidence by itself is a weak type of evidence and cannot form the sole basis of conviction. Reliance is placed on *Inderjeet Singh v. State of Punjab* AIR 1991 SC 1674, *Shera Singh v. State of Punjab* 1996 SCC (Cri) 1271, *Anant Bhujangrao Kulkarni v. State of Maharashtra* AIR 1993 SC 110, *Lakhanpal v. State of MP* AIR 1979 SC 1620, *Ramesh Babulal Doshi v. State of Gujarat* 1996 SCC (Cri) 972 and *Ramreddy Rajeshkhanna Reddy v. State of AP* 2006 (3) SCALE 452.

9. It was argued that another circumstance is that PW 12 deposed that the deceased was last seen with 8-10 persons. In the absence of any eye witness to the actual assault, it could not have been possible for the prosecution to pin point that only four of those 8-10 persons, namely the appellants, were responsible for kidnapping and murder of deceased Mahesh. Reliance in this regard is placed on *Pohalya Motya Valvi v. State of Maharashtra* AIR 1979 SC 1949. Where it was held that when the deceased was last seen with two accused and one was acquitted, it cannot be said that only the convicted accused had to account for disappearance of the deceased. Relevant extracts of the judgment are as follows:

“9. According to Bhikjya all the three, i.e., deceased, appellant and Bhamta left his house together. Undoubtedly thereafter deceased was not seen alive by anyone but two persons were in company of the deceased, viz., appellant and Bhamta when they left the house of Bhikjya. Now, Bhamta was the co-accused. This very circumstance has not been found to be of some importance against Bhamta. To some extent the circumstance ceases to be of an incriminating character because not only the appellant should account for the disappearance of the deceased but simultaneously an evidence of Bhikjya, original accused No.2, Bhamta would also be required to explain the same circumstance. Not only was Bhamta acquitted in respect of the offence, the State even did not choose to question his acquittal though it did prefer appeal against the acquittal of the present appellant. In this background the fact that deceased was seen last alive in the company of the accused would cease to be a circumstance of an incriminating character.”

Reliance is also placed on *State of Orissa v. Kansa Behera* 1987 SCC (Cri) 601 (para 14)

10. It was submitted that for last seen evidence to be convincing, the prosecution had to prove the identity of those last seen. Crucially the two main witnesses PW-9 and PW-12 gave

contradictory versions when they deposed with regard to the conveying of information regarding identity of persons who allegedly kidnapped Mahesh. In this regard, submitted counsel, PW-9 Umesh categorically stated that

“Surinder did not disclose the name of Shyamlal and his associates on telephone on 22.3.2000. He had only told me that 5/6 persons had taken away Mahesh in a Sumo TATA.”

11. However, PW-12 Surinder’s deposition showed shifting stands. He first claimed knowledge about identity (and names) only Shyamlal and Himmat; later, he claimed to know Bittoo as well; yet later, he named all four as those who had come in the Sumo. Such shifting stands of PW-12, contradicted by PW-9, make this witness unreliable with regard to fixing of identity. It is also urged that the said two witnesses also contradict with regard to the number of persons who had allegedly taken away Mahesh. While PW-12 claimed that 8-10 persons had come in the Sumo, PW-9 stated that he was told by Surinder that 6/7 persons had taken away Mahesh in Sumo. Such inconsistency in testimonies renders the “last seen” evidence unreliable. The learned counsel submitted that therefore, the circumstance of last seen, has to be excluded from consideration while assessing if the Appellants were guilty. Here it is urged that this alleged circumstance (of last seen) was not been correctly put to the appellant in his statement recorded under Section 313 Cr.P.C. The only question which regard to last seen put to the Appellants was as under:

*“Q. 3. It is in evidence against you accd. persons that in pursuance to love affair you all accused persons conspired together to kill Mahesh and in pursuance to your conspiracy you called Mahesh and Parvesh in Delhi at the shop of Surender in the year 2000 prior to Holy near Milind cinema. What have you to say?
Ans. It is incorrect.”*

12. It is submitted that the fact that the period of last seen has been put as “prior to Holi” means that the circumstance appearing in the evidence and as deposed to by PW-12 was not put to the accused in their statements under section 313 Cr.P.C. A circumstance not put to the accused has to be excluded from consideration while assessing the guilt of the accused. Reliance in this regard is placed on *Sharad Birdhichand Sarda v. State of Maharashtra* AIR 1984 SC 1623, *Ranvir Yadav v. State of Bihar* 2009 CrL LJ 2962 ; *Kehar Singh v. State (Delhi*

Admn.) 1988 SCC (Cri) 711, *Kanhai Mishra v. State of Bihar*, 2001 SCC (Cri) 537 and *Lallu Manji v. State of Jharkhand* 2003 (1) JCC 137 (SC).

13. Counsel next urged that the third charge framed against the Appellants with respect to Section 302/34 IPC was defective. The Appellants were charged with the commission of murder of Mahesh on 23.3.2000. This date does not fit in the prosecution case at all. As per the Post Mortem evidence also, the death had taken place on 21.3.2000 or 22.3.2000 and not 23.3.2000 as stated in the charge framed against the Appellants. The findings of the Trial Court with regard to date of kidnapping and the date of death are also not consistent with the charge framed.

14. The Appellants' counsel next urged that the conduct of the two witnesses PW-9 and PW-12, (PW-9 being the deceased's brother and PW-12 being a friend and co-employee) in not reporting to the police about the kidnapping of the deceased was unnatural. PW-9 stated that

"I did not inform the police on 22.3.2000 that I had received the telephonic message from Surrinder about the abduction of Mahesh by Shyamlal and his associates. I did not make any efforts to trace out my brother nor I lodged any report in this regard from 22.3.2000 to 27.3.2000."

Such conduct is unnatural and shows that PW-12 had not seen the deceased last with the accused as alleged nor had informed PW-9 about it and the circumstance was introduced later on.

15. It was next urged that there was an unexplained delay in recording the statement of PW-12 regarding last seen, which according to the prosecution was recorded on 27.3.2000. Reliance in this regard was placed on *Paramjit Singh v. State of Punjab* 1997 SCC (Cri) 156.

16. Learned counsel submits, that with prejudice to other arguments, , when conviction is based on a solitary witness testimony, his (or her deposition) ought to be wholly reliable, clear and cogent. In the present case, PW-12 is not a witness of truth nor is reliable. There are material contradictions, improvements and variations in the testimony of PW12, which makes the testimony of this witness doubtful. At each stage, the witness faltered in one manner or the other. He either contradicted himself or contradicted PW 9 or the police witnesses, or improved his statement or gave a substantially different version than that given by him in his statement recorded under Section 161 Cr.PC. The counsel pointed to the following improvements and discrepancies:

(1) Parvesh's mother Rajindri had come earlier and not in Tata Sumo.

- (2) The number of people whom he saw in the Tata Sumo. In the police statement, the witness had said 7-8 people were in the vehicle, of whom about 5 or so went to the car. This, he did not depose in the Court – merely mentioned about the accused.
- (3) The witness mentioned about Mahesh's scuffle with the accused, and he asked them to refrain from it, upon which the accused threatened him to be quiet or else they would kill him. This was however, not stated in the police statement.
- (4) That Umesh (Mahesh's brother) had called him after 5-6 days (of the incident) after which they went to Police Station Najafgarh. This was not mentioned in the statement under Section 161 Cr.PC.
- (5) The witness had mentioned about a quarrel between Mahesh and Shyamlal's family, in the police statement, which he did not support in his deposition in Court.
- (6) The witness had mentioned in the previous statement that the accused used to visit him, to enquire about Parvesh and Mahesh. In his deposition, PW-12 mentioned that they had visited him only once.
- (7) PW-12 had deposed that Parvesh's mother had talked with Mahesh, and abused him – which he had not stated in the police statement.
- (8) In the deposition-in Court-PW-12 said that Parvesh's mother had gone to his shop two days before Holi – which was an improvement on the Section 161 statement.
- (9) For the police statement, the witness mentioned that Mahesh and Parvesh had eloped in December 1999. But he deposed in Court that they eloped in March 2000.
- (10) PW-12 contradicted himself about Mahesh's face injury caused by Shyam Lal.
- (11) In the statement to police, he claims to have noted the Tata Sumo registration number; but admitted, in his Court deposition, to being illiterate.
- (12) PW-12's statement about being called 5-6 days after the incident by Umed is not corroborated by him (i.e. PW-9 Umesh).
- (13) In the previous statement, he claims to have received a telephone call from Mahesh, in his shop. He deposed, however, in Court that he did not have a telephone in his shop or at home in March 2000.
- (14) The witness had three different versions as to who were in the Tata Sumo. At one stage, he mentioned that except Shyam Lal and Himmat, he did not know the names

of other accused. However, he said that all accused used to enquire about Mahesh from him.

- (15) The witness clearly stated that the incident occurred 2 days after Holi (which was on 19.3.2000). The charge, and prosecution story was, however, that the incident happened on 22.03.2000.

17. Likewise, submitted counsel, PW-9 wavers in his testimony substantially. He made vital improvements, variations and omissions with regard to various aspects deposed by him. Regarding identity of persons who allegedly took away Mahesh, he gave different versions, at places names some and at another place stating that Surender did not give the name of any person. There is variation with PW-12's testimony, in regard to the number of persons who allegedly took away Mahesh, as told to him. He was confronted with the threat theory that he introduced for the first time in Court. He brought in knowledge of Mahesh's death through Malti also for the first time in Court. That date of knowledge of death through Malti, was 26.3.2000; it does not confirm to the prosecution case at all as the body was allegedly identified only on 27.3.2000. The other contradictions, improvements etc. were sought to be pointed out.

18. It is argued that once the main plank of the prosecution case, i.e. last seen evidence gives way, the entire prosecution case crumbles and it is difficult to sustain conviction on other pieces of evidence. Reliance in this regard is placed on *Jaharlal Das v. State of Orissa* 1991 SCC (Crl) 527 (para 19). The chain of circumstantial evidence gets irreparably broken and the link evidence becomes conspicuously missing.

19. It is alleged that Appellant Himmat on his disclosure made on 28.3.2000 (at page 183) got recovered a danda by recovery memo dated 30.3.2000 while Appellant Shyamlal through disclosure made on 28.3.2000 got recovered a thapi by recovery memo dated 30.3.2000. The Trial Court itself had not taken the said recoveries/circumstances as incriminating in any manner. The weapons were sent to the forensic laboratory, but were not found to contain any blood. They were not shown to the post mortem doctor to seek his opinion as to whether the injuries on the person of the deceased were caused by these weapons. Counsel argued that the weapons also do not have any nexus with the cause of death and are thus inadmissible in evidence. Reliance in this regard is placed on *Keshav v. State of Maharashtra* 2008 (1) Crimes 88 (SC). The said weapons thus do not get connected with the offence in question in any manner. The recovery witnesses, none of whom were independent witnesses, admit that they articles were recovered

recoveries from open places and the weapons were not concealed. This has been so deposed by PW-18. Learned counsel points out that the weapons were not recovered from the exclusive possession of the Appellants and that a two day gap between the disclosure and recovery also adds to the suspicion.

20. Likewise, the counsel urged that the alleged seizure of vehicles – Sumo, van etc.(though not recovered at the instance of Appellants) do not further the case of the prosecution in any manner for the reason that the prosecution did not lift any blood stains or other material from the said vehicles to show their use in the murder in question. This aspect has also been dealt by the Trial Court in Para 24 of the impugned judgment.

21. Commenting on motive, it was argued that motive alleged by the prosecution was the elopement of Parvesh, (daughter of Shyamlal) with Mahesh, the accused persons bore a grudge against the deceased. It is submitted that mere motive by itself cannot be a proof of murder or conspiracy. Reliance in this regard is placed on *Girja Shankar Mishra v. State of UP* AIR 1993 SC 2618. Counsel emphasized that motive may impel the mind to bridge gaps in the prosecution version, which otherwise cannot be bridged for want of legal evidence. It is submitted that the Court have to guard against such attempt by prosecution, as presence of motive may give a suspicion, but suspicion howsoever strong cannot take the place of legal proof. Without prejudice counsel argued that on this part, i.e the motive, if taken to be proved, for the sake of argument, it can be considered as only incriminating the Appellant Shyamlal the father of Parvesh and against not all others. Motive being a double edged weapon, could be reason for false implication. Counsel lastly submitted that the chain of circumstances is thus not established in the present case. It is submitted that tested on the touchstone of principles for basing conviction on circumstantial evidence, the present case ought to fail.

22. Learned counsel for the appellant Pritam supplemented the arguments. He adopted the arguments made on behalf of the other appellants and stated that originally six accused were sent to trial, out of whom two, i.e. Sunil and Jagmohan were acquitted. The four appellants before the Court, however, were convicted. It is emphasized that the Trial Court's conviction rests solely on the testimony of PW-12, Surrender, which is uncorroborated and for several reasons, not worthy of credence. Learned counsel urges that even though PW-12 deposed that the appellants had taken-away the deceased Mahesh in a Tata Sumo, PW-5, the driver of that vehicle did not support his version. On an application of the ratio in *Smt. Rukma & Ors. v. Jala & Ors.*, AIR

1997 SC 3907, it was urged that the appellants are entitled to benefit of doubt due to the lack of corroboration of PW-2's allegations. Learned counsel further highlighted that PW-12 kept silent for five days even though he witnessed the abduction of the deceased on 22.03.2000; his statement was recorded on 27.03.2000 after recovery of the deceased's body. Learned counsel urged that the absence of a Test Identification Parade (TIP) *vis-à-vis* the appellant Pritam is critical because of the uncertainty about the names and identities of the abductors disclosed by PW-12 in the course of his deposition. Learned counsel relies upon the decision reported as *Kanan v. State of Kerala* AIR 1979 SC 1127 to say that when a witness identifies an accused, who is not known to him, in the Court for the first time, his evidence is absolutely valueless. It was urged that the Trial Court's reliance on PW-12's testimony to convict the appellant Pritam was, therefore, erroneous. It is also submitted that there was no motive *vis-à-vis* Pritam or at least none was proved by the prosecution. Having regard to these facts, he was entitled to acquittal and the findings, resulting in his conviction and sentence recorded by the Trial Court, therefore, have to be set-aside.

23. Sh. Lovkesh Sawhney, learned APP urged that the impugned judgment ought to be confirmed by the Court. Although the prosecution case was premised upon circumstantial evidence, learned counsel urged that each circumstance in the entire chain of circumstances was conclusively proved to unerroneously implicate the appellants and none else as the propounder of the crime. Urging that there was a strong motive, which stood established *vis-à-vis* the appellants for the commission of crime, learned counsel relied upon PW-16/A, which was a D.D. entry No. 11, recorded by the police on 24.12.1999, stating that Parvesh, the daughter of Shyam Lal was missing. The abduction of Mahesh took place on 22.03.2000. PW-14 proved the D.D. entry No. 5, recorded on 26.03.2000 (Ex. PW-14A), reported by Shyam Lal, which stated that on 22.03.2000, Parvesh returned home. The report went on to state that she had returned voluntarily after she had left earlier with Mahesh and that she was unharmed. If the fact of alleged abduction is seen in the light of the subsequent conduct, whereby PW-12's deposition mentioned that Parvesh's mother had tried to meet Mahesh few days before the incident and the subsequent abduction incident, the proof of motive becomes a certainty and conclusive. Contesting the appellants' arguments that there was uncertainty in the prosecution evidence regarding the alleged date when the death occurred, or about the date of the incident and also other relevant dates and periods, learned counsel relied upon PW-12's testimony in this regard. It is submitted

that the admitted case of the parties was that 19.03.2000 was a Holi that year; it was argued that the statement by PW-12 that he took Parvesh's mother to his shop two days "after Holi" would really mean the 22.03.2000. Learned counsel submitted that the appellant Himmat is Shyam Lal's nephew whereas the appellant Pritam was a friend and Devender is Parvesh's paternal aunt's (Bua's) son or the son of Shyam Lal's sister. All these were closely linked with each other and found the deceased Mahesh's action in eloping with Parvesh unacceptable.

24. Learned APP urged next that even though there are seeming discrepancies in the deposition of PW-12 with regard to the identity of the appellants; a careful reading of the findings would show that it was PW-9, who had some difficulty in that regard, and had to be confronted with his previous statement recorded under Section 161. However, PW-12 categorically deposed that out of six people who came to his shop after getting-down from the Tata Sumo, Devender, Shyam Lal, Pritam and Himmat, who went there and the other three were not known to him. He also clarified later during the course of the cross-examination that before the date of the incident, the appellants Shyam Lal, Himmat, Bittu (@ Devender) used to visit him and enquire about Mahesh and Parvesh. Therefore, it was open to the appellants to confuse the two facts, i.e. knowledge of PW-12 about the identity of the abductors and the accused with what he conveyed to PW-9, and the latter's knowledge in that regard. Learned APP emphasized that so far as the appellant's/assailant's identity was concerned, PW-12's depositions remains unshaken till the end. This, coupled with the existence of proof of motive clearly established that the deceased was last seen in the company of the appellants. It was argued that having regard to these, the Trial Court's approach could not be faulted.

25. It is submitted in this regard that having regard to the deposition of prosecution witnesses identifying the appellants, the Trial Court's findings could not be overturned on account of the alleged discrepancies. Commenting next on the appellants' submission that PW-12 did not report the incident to the police, learned APP argued that his testimony showed that both he and Mahesh's brother, PW-9 were of the opinion that his love affair with Parvesh would not be well received. They had counseled him not to indulge in it. PW-12 was also aware of the disapproval by Shyam Lal and other members of Parvesh's family. Therefore, when Mahesh was forcibly taken-away by the appellants, at that stage, he thought that at worst, the deceased would be thrashed and asked to keep-away from Parvesh. This was in view of the fact that on 22.03.2000 itself, according to Shyam Lal reporting (Ex. PW-14/A) Parvesh had returned and disclosed

about her elopement with Mahesh. Having regard to these backgrounds, the conduct of PW-9 and PW-12 in not reporting the matter to the police could not be considered unnatural. It is further argued that PW-12 also was slightly intimidated because at that time when he sought to intervene, and asked the appellants not to create a scene, he was threatened. It was argued that having regard to the fact that the accused were members of a family and apparently had some influence, it was reasonable to infer that they had prevailed upon some of the prosecution witnesses to resile from the statement recorded by them immediately after the body was recovered and identified. Learned counsel submitted that the depositions of PW-15, 18 and 19 disclosed that when the body was found on 25.03.2000, the same was photographed by PW-20 and sent to the mortuary; simultaneously, steps for its identification were taken. It was submitted that the police discovered that the deceased Mahesh wore a shirt which contained the label "R.K. Tailors". Upon further investigation, PW-4, Rakesh Kumar, was found to be the tailor. In his deposition, he confirmed having stitched the shirt but could not be identify the dead body or his customer.

26. It is submitted that the deposition of PW-18 established that wireless information was flashed all over the neighborhood and the vicinity to confirm the identity of the deceased. It is submitted that the deposition of PW-1, Deepak Sharma confirmed that he was the driver of Maruti Van used by the appellants. It is stated that though this witness turned hostile, significantly, in the examination-in-chief itself, he made a positive statement that on 22.03.2000, nobody had hired his vehicle. He admitted knowing Lalit, Sunil and Devender. He made a second positive statement that they had not hired the Maruti Van. The witness was confronted with the statement which he denied. He further admitted that his signatures were secured. If this statement were to be seen along with the deposition of PW-18, and particularly, the personal search memos of the Appellants, (PW-18/H, PW-18/I and PW-18/J), it was clear that the said accused were arrested at the instance of Deepak. Similarly, Deepak was witness to the discovery statement made by the appellant Shyam Lal (Ex. PW-18/A). Learned APP emphasized that PW-18 was not confronted on this aspect. Having regard to these circumstance, the Court ought to take into consideration the statement recorded by PW-1 under Section 161 Cr.PC, regardless of his having resiled from it during the course of the trial. In support of this argument, learned APP relied upon the judgment *Krishna Mochi v. State of Bihar*. It is submitted that the appellants' arguments about the uncertainty of the date and the alleged time-lag between the discovery of the

body and the time when the deceased went missing, has to be seen in the light of the entirety of circumstances. Learned APP emphasized that one circumstance alone cannot be highlighted and the Court should not take a compartmentalized view. Having established the motive that Parvesh was missing from December 1999 and was in the company of the deceased and that she returned later, the testimony of PW-12, as corroborated by PW-9 clearly established that the deceased was seen last in the company of the appellants. The postmortem report (Ex. PW-20/A) indicated that the doctor commenced the postmortem at 01.00 pm on 28.03.2000. It fixed the date of death as 6-7 days before the commencement of the postmortem.

27. It was urged that the argument that the evidence led before the Court varied with the charge framed, has no basis and is misconceived. Learned counsel relied upon the Illustration-d to Section 215 of Cr.PC and stated that no error in stating the particulars of the offence which has been stated in the charge and no omission to state the offence or its particulars would be recorded as material issues to vitiate the findings in a criminal trial. It was submitted that so long as the accused is aware of the broad nature of the charge, the identity of the victim and the offence he is charged with, the error or errors, if any, in stating certain facts, such as the dates would not matter. It was urged that the conspectus of circumstances proved by the prosecution, namely, the elopement of Mahesh and Parvesh in December 1999 leading to motive on part of the appellant; the abduction of Mahesh, as witnessed and spoken to by PW-12; the discovery of Mahesh's body on 25.03.2000 and its subsequent identification by PW-9 and PW-12; the testimony of the deceased having been last seen in the company of the appellants, principally deposed by PW-12 and corroborated in some material particulars by PW-9; the statement recorded by PW-1 and the other drivers who gave details about the assault on Mahesh (PW-5 Vijay and PW-6 Sukhbir), which also corroborated with the version of PW-12 and which the Court sought to take into consideration since PW-1's testimony received independent support from PW-18, all unerringly eliminated the innocence of the appellants.

28. Learned APP urged that all these circumstances coupled with the postmortem report (Ex. PW-20/A) and testimony of PW-20 fixed the date of death to be 22.03.2000. Having regard to these facts, the appellants were under a duty to explain all the incriminating circumstances by virtue of Section 106 of the Evidence Act, which came into play. Learned counsel relied upon the judgment of the Supreme Court in *State of Rajasthan v. Kashi Ram* 2006 (12) SCC 254. Commenting lastly on the appellants' submission that material incriminating circumstances

about the conspiracy amongst each one of them as well as the date of the incident had not been put under Section 313 Cr.PC, which constituted a fatal infirmity, it was submitted that the role and material facts played by the appellants were put to them; the appellant – Shyam Lal even corroborated the prosecution version about Parvesh leaving with Mahesh on 22.12.1999; lodging of a report in that regard, and her return on 22.03.2000, which was reported to the police on 26.03.2000. In this context, learned counsel urged that on a fair application of the role enunciated in *Santosh Kumar v. State* 2010 (9) SCC 747; *Paramjeet Singh v. State of Uttarakhand* 2010 (10) SCC 439 and *Janak Yadav v. State* 1999 (9) SCC 125, it was submitted that the so-called discrepancies were not material and were in any event not so prejudicial as to vitiate the entire trial and the conviction recorded by the Trial Court. Dealing with the argument of Pritam, regarding omission to conduct a TIP, learned APP submitted that there is no invariable or iron-clad rule in that regard and that if the identity of an accused is known to a witness, the law does not mandate that the prosecution must conduct a TIP. He relied on *Malkhan Singh v. State of Madhya Pradesh* 2003 (5) SCC 746.

29. The Appellant's conviction was based on the Trial Court's conclusion that the deceased was "last seen" in the company of the accused Appellants. The Trial court also reasoned that the prosecution had proved the Appellant's motive for committing the crime because Parvesh, (Appellant Shyam Lal's daughter) had eloped with the deceased. The Trial Court also relied on the testimony of PW-12, to conclude that he witnessed the abduction of deceased Mahesh.

30. The Appellants' submissions hinge principally on the discrepancies and contradictions, pointed out by them – both internal, and *inter se* as far as eye witness testimonies are concerned. The appellants argue that there is also vagueness and uncertainty about the date of death, and indeed the incident, and that the time lag between when the deceased went missing, and when his body was discovered is too great to reliably conclude that all circumstantial evidence pointed to the accuseds' guilt, ruling out their innocence altogether. It is also urged that material incriminating circumstances was not put to the accused/Appellants by the Trial Court.

31. The starting part of the prosecution story, in this case was the motive aspect. For this, the prosecution relied on the testimonies of PW-16 and the report given by Shyam Lal that his daughter Parvesh had disappeared on 22-12-1999. That DD entry extract was proved as Ex. PW-16/A. The incident, and what actually transpired on the day of abduction was spoken about by PW-12, the deceased's friend. He claimed to be aware of the elopement of Mahesh, and Parvesh,

and said that the latter's mother had visited him, at his shop. He spoke about how on the day of the incident, the abductors went to his shop in a Tata Sumo and took away Mahesh. The Appellants impeach his credibility by stating that he was inconsistent about the identity of the abductors; in the statement recorded under Section 161, he stated something, and in his examination in chief, and yet later, in cross examination, he deposed differently.

32. The witness, PW12 deposed that Mahesh was his friend and had an affair with Shyamlal's daughter of which he (Shyam Lal) did not like. The materials on record (including Shyam Lal's statement under Section 313 Cr. PC) established that Parvesh went missing in December, 1999. Parvesh's mother, Rajendri made enquiries from PW-12 about her (Parveen's) whereabouts. PW-12 testified that approximately two days after the Holi, (in 2000) Mahesh along with Parvesh went to his shop where the latter's mother was already present. Later, the Appellants Devender, Shyam Lal, Pritam and Himmat along with others reached there, in a Tata Sumo No. DL-4C-F 9386. PW-12 did not know Pritam and Devinder by name. He however, knew Shyam Lal and Himmat by their name and according to him, a scuffle took place in his shop, between deceased and the accused. He (PW-12) witness asked them not to behave in that manner. PW-12 deposed that Himmat asked him to keep quiet if he wanted to save himself. The witness testified that he wanted to go with Mahesh in the Tata Sumo but he was not allowed by the accused. PW-12 deposed that all these four persons took Mahesh and Parvesh in the Tata Sumo. Shyam Lal and one or two persons followed the Tata Sumo on a two wheeler. He deposed about informing Mahesh's brother, PW-9, on telephone, about the incident, on the same day. After 5/6 days he identified the dead body of Mahesh at Subzi Mandi mortuary. Significantly (an aspect noted by the Trial Court) in cross-examination PW-12 was specifically asked that mother of Parvesh had given him a telephone number to him with a request to inform her in case Mahesh and Parvesh went to his shop, which he noted on a page in his diary. This was been exhibited as Ex. PW12/DB. The telephone number noted down by him was 5412484. He also noted the number of the Tata Sumo in his diary and the extract of the diary was exhibited as Ex. PW12/DA. PW-12 gave this information on telephone to PW9 brother of the deceased.

33. The first challenge to PW-12's testimony- rather the foundational one, is his varied deposition in regard to awareness about the identity of the different accused. On this aspect, the Trial court reasoned that

“A witness some time may well know a person only by face and may not be knowing his name but it does not mean that his identification is unworthy of credit. To my mind even if he did not know the name of accused Pritam and Devender his identification is reliable because he had been meeting the accused prior to the incident.”

PW-12, in his evidence, stated that:

“Out of the person who came to my shop after getting down from TATA Sumo (the witness pointed out toward accd. Davinder, Shyam Lal, Pritam and Himmat) were the persons who came to my shop I don't know these persons by their name except Shyam Lal and Himmat present in the court. These persons had altercation and scuffling with Mahesh (Hatha Pai Karney Lagey). I asked them not behave this manner in my shop. Himmat told me that either I should keep mum or I shall be killed (Saley ya to chup ho jha nahi to tujhe bhi jaaan say maar Deyange). All the 5/6 persons made Mahesh sit I TATA Sumo Car. All these persons took away Mahesh and Parvesh in TATA Sumo Car. Shyam Lal and other 1/2 persons followed the TATA Sumo car on two wheeler scooter. I gave a ring to brother of Mahesh on the same day. After 5/6 days I was called by Umesh brother of Mahesh in PP Mdi Pur. Thereafter we both went to P.S. Najafgarh. I came to mortuary Subzi Mandi and identified the dead body of Mahesh there. The identification of dead body is Ex. PW-12/A which bears my signature at Point A. “

Equally, in an earlier part of the statement, he did not mention all the names. This however, does not mean that the witness was not aware of the identities of those who went to his shop, on the date of the incident. The above portion of his deposition shows that he knew all the accused, though at that time, he was not aware of the names of some of them.

34. PW-12's deposition, to an extent, receives corroboration from the statement of PW-9, who, at the suggestion of the Appellants, during cross-examination, testified as follows:

“It is correct that the telephonic message recd. by me from Surrender on 22.3.2000 was to the effect that Mahesh and Shyamlals daughter Parvesh came here today, Shyam Lal, Devinder @ Bittoo Himmat and Pritam came to the shop of electrical goods at Milan Cinema and those people took away Mahesh and Parvesh in Tata Sumo No. DLACF 9386...”

This witness (PW-9) corroborated, at more places than one, that PW-12 had informed him about the abduction incident, and who were involved in it, on 22-3-2000. This witness had mentioned about these aspects and what PW-12 had told him, on this, in his statement recorded under Section 161, Cr. PC.

PW9 Umesh Kumar deposed that his brother, Mahesh had a love affair with Shyam Lal's daughter and that she left her house with his brother. Therefore, Shyam Lal and two other accused come to his house and informed about it. After some time Surrender informed him on

telephone that Shyam Lal and six others had taken Mahesh in a Tata Sumo to some unknown place; he had also disclosed the number of the Tata Sumo. PW-9 identified accused Shyam Lal, Devender and Himmat to be the persons who had come to him. Subsequently, he identified the dead body at Subzi Mandi mortuary by Ex. PW9/A. This witness was specifically asked whether he had recorded the Tata Sumo number given by Surrender; he produced a diary and a torn page from it and exhibited as Ex. PW9/DX. In this, the Tata Sumo number was recorded as DL 4CF 9386. In cross-examination PW-9 testified to not receiving any telephonic message from Surrender prior to 22.3.2000 nor meeting him. He corroborated the suggestion (in cross examination, extracted above) that the telephonic message was that Mahesh and Shyam Lal's daughter Parvesh went to him, Shyam Lal, Devinder, Bittu, Himmat and Pritam came to his electric shop at Milan Cinema and those people took away Mahesh and Parvesh in Tata Sumo No. DL4CF 9386. He, however denied that he responded to the telephonic call of Surrender by saying "*jo jessa karega, vaisa bhareha*".

35. A reading of the testimonies of the two witnesses, would show that:

- (1) Both were aware of the disappearance of Parvesh, Shyamlal's daughter, in December, 1999, and that she had a love affair with deceased Mahesh;
- (2) Shyam Lal with some accused had enquired regarding whereabouts of Parvesh and Mahesh from Umesh, PW-9, prior to the incident;
- (3) PW-12 stated that Parvesh's mother had visited his shop, to talk to her (i.e Parvesh);
- (4) PW-12 also stated that later, the Appellants visited his shop, and took away Mahesh and Parvesh. Both of them had reached there. Before that, Parvesh and her mother had talked to each other.
- (5) The witness (PW-12) identified the Appellants, though in his deposition he was not able to mention their names in the beginning.
- (6) PW-12 deposed having informed PW-9, - a fact corroborated by the latter, in his deposition.
- (7) PW-9 and PW-12 identified Mahesh's dead body.

Despite the Appellants' best efforts, PW-12's testimony about the unfolding of the incident, whereby Mahesh was taken away by them, in the Tata Sumo, and the surrounding circumstances, remained unshaken. In this context, this court is of the opinion that the discrepancies highlighted by the Appellants' counsel is not of such nature as to be fatal to the

prosecution story. Whether Umesh, PW-9 had a telephone, or not, and discrepancies in the details as to what was informed to him, are natural as a result of lapses in memory and recollection of witnesses. If witnesses are exact in their recollection of dates and events, and corroborate each other in all these aspects, the possibility of tutoring is strong. However, inessential inconsistencies, are not material, at any rate, to undermine the basic version. Having regard to the overall conspectus of circumstances, a reading of the testimony of the two witnesses shows that they were aware about the elopement of Parvesh and Mahesh, which the accused were also aware of (as testified by PW-9). PW-12's deposition shows that Parvesh's mother had met him earlier, leading to a meeting between mother and daughter on the date of the incident. Contemporaneously, the Appellants reached there, with some others, a Tata Sumo vehicle, and forcibly took away Mahesh and Parvesh.

37. As far as the argument that without a TIP, the Appellants could not have been convicted is concerned, the Supreme Court, in its later judgment in *Malkhansingh v. State of M.P.*, (2003) 5 SCC 746, held that:

"7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Admn.1, Vaikuntam Chandrappa v. State of A.P.2, Budhsen v. State of U.P.3 and Rameshwar Singh v State of J & K)

16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In the instant case the courts below have concurrently found the evidence of the prosecutrix to be reliable and, therefore, there was no need for the corroboration of her evidence in court as she was found to be implicitly reliable. We find no error in the reasoning of the courts below. From the facts of the case it is quite apparent that the prosecutrix did not even know the appellants and did not make any effort to falsely implicate them by naming them at any stage. The crime was perpetrated in broad daylight. The prosecutrix had sufficient opportunity to observe the features of the appellants who raped her one after the other. Before the rape was committed, she was threatened and intimidated by the appellants. After the rape was committed, she was again threatened and intimidated by them. All this must have taken time. This is not a case where the identifying witness had only a fleeting glimpse of the appellants on a dark night. She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic experience, the faces of the appellants must have got imprinted in her memory, and there was no chance of her making a mistake about their identity. The occurrence took place on 4-3-1992 and she deposed in court on 27-8-1992. The prosecutrix appears to be a witness on whom implicit reliance can be placed and there is no reason why she should falsely identify the appellants as the perpetrators of the crime if they had not actually committed the offence. In these circumstances if the courts below have concurrently held that the identification of the appellants by the prosecutrix in court does not require further corroboration, we find no reason to interfere with the finding recorded by the courts below after an appreciation of the evidence on record."

In view of the above ruling, and having regard to an overall reading of PW-12's testimony, the court is of opinion that the Trial Court did not fall into error, in holding that the witness knew the identities of the Appellants, and was therefore, a credible and reliable witness.

36. So far as the argument that the prosecution witnesses did nothing to report the incident, and are, therefore, untrustworthy, is concerned, the Trial Court reasoned as follows:

"19. The testimony of this witness further has been challenged on the ground that despite the fact PW12 Surrender came to know that Mahesh has been taken away by the accused persons nevertheless he did not inform the police and such a conduct create suspicion about his testimony. To my mind this contention is not well founded. Different persons behave in different fashion. Some time a person may not taken things seriously as the circumstances may warrant. In the present case perhaps when the deceased was taken by the accused persons, according to witness, he was taken on the pretext that he was to be married with Parvesh. In such circumstances it is not unnatural on the part of the witness to believe that either the proposal is serious or at the most Mahesh would be let off with mild thrashing. Similarly is the conduct of PW9 Umesh. PW12 Surrender had

passed on information of Mahesh have been taken away by the accused persons yet he even did not take it seriously perhaps he had the impression in mind that Mahesh would be let off after beating. This is why no report was probably lodged. Even otherwise merely because PW12 Surrender and PW9 Umesh did not act as the circumstances had warranted is not the ground to disbelieve their testimony. There can be number of factors like that they are outsider to Delhi and had been earning their livelihood where as accused persons are settled in Delhi, and fear of retaliation are such which might effected their conduct. Therefore, merely because PW9 Umesh and PW12 Surrender did not lodge the report with the police about taking away of Mahesh by the accused persons, is not sufficient to disbelieve the testimony of these witnesses. ”

In the circumstances of the case, considering that several accused persons had visited PW-12's premises, and abducted the deceased Mahesh, and also took away Parvesh, the reasoning of the Trial court does not disclose any error, and is both plausible, as well as sound.

37. The next important argument of the Appellants was that the prosecution version about the death of Mahesh is unacceptable, and a conviction on the basis of “last seen” evidence could not have been returned, because the time gap between the incident witnessed by PW-12 and the discovery of Mahesh's body was about 3 days. It is also argued that the prosecution was not able to establish the precise day when the abduction took place. To take up the latter argument, PW-12 mentioned that Parvesh's mother had visited him and that he took her to his shop two days after Holi. Learned counsel (for the Appellants) urged that since both parties admitted that Holi was celebrated on 19th March, in that year, two days later would mean 21st March. However, this reasoning is flawed, because in common parlance, reference to an event after some specific day would imply that the earlier date is not included for the purpose of calculation. So seen, 19th March would be excluded; two days “after” Holi would then mean 22nd March, 2000. This date is even otherwise corroborated –indirectly- by the fact that Parvesh is reported to have returned home, according to Shyam Lal. It is more firmly corroborated, by the post mortem report, which fixes the date of death 6-7 days from the date of the report (28-3-2000).

38. As far as the other argument about the long time lag is concerned, it would be useful to consider the judgments cited on behalf of the Appellant. In *Bodhraj v. State of J&K*, (2002) 8 SCC 45 it was observed that:

"31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish

that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2."

In *Mohibur Rahman*(supra) it was held that:

"10. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. In the present case there is no such proximity of time and place. As already noted the dead body has been recovered about 14 days after the date on which the deceased was last seen in the company of the accused. The distance between the two places is about 30-40 km. The event of the two accused persons having departed with the deceased and thus last seen together (by Lilima Rajbongshi, PW 6) does not bear such close proximity with the death of the victim by reference to time or place. According to Dr Ratan Ch. Das the death occurred 5 to 10 days before 9-2-1991. The medical evidence does not establish, and there is no other evidence available to hold, that the deceased had died on 24-1-1991 or soon thereafter. So far as the accused Mohibur Rahman is concerned this is the singular piece of circumstantial evidence available against him.... "

39. As would be apparent, the "last seen" evidence class of cases does not posit any stereotyped rule that the interval between when a victim is seen last in the company of the accused and the date of his death, or recovery of his body ought to be few days, or few hours. Undoubtedly, being a circumstantial evidence based case, courts have to exercise caution. However, if the evidence is forthright and unambiguous, and is also corroborated by the medical evidence, there is no reason for the court to rule it out, on application of a ritualistic formula that the time duration is lengthy. In this case, the evidence of PW-12 is clear that the abduction took place and Mahesh went missing on 22-3-2000; on the same day, Parvesh went home – a fact reported to the police, and proved during the trial. The medical evidence in the form of testimony of the postmortem doctor PW-20, and the post-mortem report Ex. PW-20/A also establish that death occurred 6-7 days previous to the date when post mortem was conducted, i.e on 28th

March, 2000. Thus, the prosecution established that the deceased Mahesh was seen last in the company of the Appellants.

40. The appellants had argued that there is no evidence on record that accused had taken the deceased either to Gurgaon or Roshan Vihar or from Roshan Vihar to the fields. PW-5 Vijay driver of the Tata Sumo No. DL-4CF 9386 did not support the prosecution. PW1 Deepak @ Deepu & PW3 Lalit also had not supported the prosecution that about hiring of Maruti Van No. HR 26E 6207 or that they had taken the deceased to the fields. The prosecution evidence was that after Mahesh was beaten by the accused after he was taken by them since Deepak @ Deepu PW-1 was only the eye witness to it (the beating). He did not support the prosecution story during the trial. The trial court held that as far as the first part of the prosecution evidence was concerned the testimony of PW12 was trustworthy that the Appellants had gone in the Tata Sumo and took away Mahesh from his shop on 22.03.2000 at about noon time. Although PW-1 denied his involvement in the investigation, he as well as PW-5 deposed in the positive, about nothing having taken place on 22-3-2000. Apart from this curious aspect, PW-18 had deposed that the Appellants were arrested at the behest of PW-1, and their personal search memos were signed by him, as a witness. These were placed on the record, and proved as Ex. PW-PW-18/H, PW-18/I and PW-18/J. Having regard to these facts, the court is of opinion that the prosecution witnesses having been won over by the accused, particularly since they were known to them, and they belonged to the same village, cannot be ruled out.

41. The Trial Court had disbelieved the prosecution story regarding the recovery of alleged weapons of offence. Although the Appellant argued that this reasoning undermines the conviction recorded by the Trial Court, this court does not discern any fatal infirmity with the reasoning in the impugned judgment. As held by the Trial Court, the deposition of PW-12 is trustworthy, as regards the abduction incident; the post-mortem report confirms the date of date of death. Therefore, the prosecution, in the opinion of the court established beyond reasonable doubt, that the deceased was last seen in the company of the Appellants, who took him away forcibly. The deceased was not seen by anyone else after that time, and his body was found on 25th March, 2000.

42. The next question is whether the Trial court did not put the incriminating circumstance regarding the date of occurrence of the incident to the accused. In this connection, it was submitted by counsel for the Appellants that the Trial court did not specify the date of the alleged

murder. However, the evidence on record, according to the prosecution, pointed to one date, i.e. 21-3-2000, whereas the finding was otherwise, and none of these, were in accord with the charges framed against the accused-Appellants. Learned counsel relied on *Sharda's case* (supra) for this purpose.

43. It is no doubt correct, that the Appellants were not specifically questioned about the date when the incident is alleged to have taken place, when they abducted the deceased Mahesh, and later he died. The learned APP had relied on Section 215, Cr. PC, to say that omission to frame charge in regard to dates and other such particulars cannot be construed as so prejudicial as to vitiate the trial and findings in a criminal case. He also relied on some decisions, to say that the irregularity in not putting the concerned incriminating circumstance, under Section 313, Cr. PC does not automatically vitiate the trial, and that the court has to examine whether such omission resulted in prejudice.

44. The effect of a defect in framing charges, in the context of findings rendered by a criminal court, has been provided for under Section 215, of the Code of Criminal Procedure. It reads as follows:

“215. Effect of errors.— No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

Illustrations

(a) A is charged under Section 242 of the Indian Penal Code (45 of 1860), with “having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit”, the word “fraudulently” being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material.

(b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in the case, a material error.

(d) A is charged with the murder of Khoda Baksh on the 21st January, 1882. In fact, the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January, 1882. A was never charged with any murder but one, and had

heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(e) A was charged with murdering Haidar Baksh on the 20th January, 1882, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January, 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled, and that the error was material."

Speaking about the effect of this provision, the Supreme Court underlined that unless prejudice is established in regard to an omission, vis-à-vis a charge framed, the court would be slow in interfering with a conviction recorded by the competent criminal court, in the decision reported as *Mohammed Ankoos v. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad*, 2010 (1) SCC 94, the Supreme Court observed :

"The legal position is also fairly well settled that because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if the accused has not been affected thereby."

45. As regards the Appellants' submission that the relevant questions about the precise date when the homicidal attack took place, had not been put to them, under Section 313, Cr. PC is concerned, no doubt the object of the section is to enable an accused to focus on particular incriminating materials proved by the prosecution, and explain them, to the court, at the conclusion of prosecution evidence. However, here too, the mandate of the law is not blind and mechanical adherence to the letter of the law. Interference with a conviction, by the Appellate court is justified, when the omission is fundamental, and the result, incurable prejudice. So long as the essential facts constituting the incriminating materials are put to the accused, the requirement of the law is fulfilled. This was underlined in *Asraf Ali v. State of Assam*, (2008) 16 SCC 328, in the following terms:

"In Shivaji Sahabrao Bobade v. State of Maharashtra⁵ as the Bench has widened the sweep of the provision concerning examination of the accused after closing prosecution evidence. Learned Judges in that case were considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence. The three-Judge Bench made the following observations therein: (SCC p. 806, para 16)

'16. ... It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an

omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration...”

Similarly, in *Jai Dev v. State of Punjab* AIR 1963 SC 612, it was observed that:

“The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.”

In *Bakhshish Singh Dhaliwal v. State of Punjab* AIR 1967 SC 752 a three-Judge Bench of the Supreme Court held that:

“It was not at all necessary that each separate piece of evidence in support of a circumstance should be put to the accused and he should be questioned in respect of it under that section;”

46. In the present case, this court notices that the essential facts, such as abduction of the deceased, in the presence of PW-12, the motive, i.e. affair with Shyamlal’s daughter, the circumstance of the accused being seen last, with the deceased, and other material circumstances were in fact put to the Appellants. In these circumstances, the omission to put the precise date, (even though the relevant question about their complicity in the crime was put to them) does not vitiate the entire trial, or the conviction.

47. This court notices that the Appellants motive – which stands corroborated by Shyamlal’s statement during the trial – was their anger at his daughter’s love affair with the deceased, which did not meet his and his family’s approval. The abduction of the deceased, and return of the daughter, appear to be part of a seamless transaction. This anger, at the deceased, translated into something more serious, leading to a murderous attack, resulting in his death. The injuries indicate merciless beatings rained on the deceased. By all accounts, the Appellants’ motive was to teach the deceased a lesson, and do him to death- what has been termed as “honour killing”. The practice negatives an individual’s freedom of exercise choice of his or her spouse, and leading a life, with dignity, and enjoying the rights guaranteed by the Constitution. The practice places exaggerated value endogamous choice, dictated by kith and kin, on the one hand, and

denies “outsiders” the freedom of choosing their partners, based on consent. Such social practices, which sanction what are plainly crimes, require the severest condemnation.

48. In view of the above findings, this court is of opinion that the findings recorded in the impugned judgment do not call for interference. The Appellants shall surrender before the Trial Court on 1st September, 2011, to serve the remainder of their sentence. The Registry shall transmit the Trial Court records and this judgment, forthwith, to ensure compliance. The Appeals are, accordingly dismissed.

(S. RAVINDRA BHAT)
JUDGE

JULY 29, 2011

(G. P. MITTAL)
JUDGE