

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

Date of Hearing: 1st September, 2011
Date of Decision: 23rd September, 2011

+ **Crl. A. No.298/2011**

PATI RAM Appellant
Through: Ms. Rakhi Dubey, Advocate.

Versus

STATE (NCT OF DELHI) Respondent
Through: Mr. M.N. Dudeja, APP for the State.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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

J U D G M E N T

G. P. MITTAL, J.

1. This Appeal is directed against the judgment dated 16.08.2010 and the order of sentence dated 20.08.2010 in Sessions Case No.52/2009 whereby the Appellant Pati Ram was convicted for the offences punishable under Section 302/364/201 Indian Penal Code (IPC) and was sentenced to undergo life imprisonment and also to pay a fine of ₹ 1,000/- for the offence punishable under Section 302 IPC or in default of payment of fine to undergo SI for 3 months; sentenced to undergo RI for ten years and to pay a fine of ₹ 500/- or in default to undergo SI for two months for the offence punishable under Section 364 IPC and sentenced to undergo RI for five years and to pay a fine of ₹ 500/- or in default to undergo SI for two months for the offence punishable under Section 201 IPC. The sentences were to run concurrently.

2. Initially, five persons i.e. Pati Ram (the Appellant), Brijesh Kumar, Betal Singh, Mani Ram and Ram Niwas were arraigned as accused. Accused Betal Singh, Mani Ram and Ram Niwas were discharged by an order dated 06.09.2004 passed by the Trial Court. The Trial Court was of the view that there was no admissible evidence against the said three accused except their confessional statements. Since there was no discovery of any fact in pursuance of the confessional statements, no part thereof was admissible. Accused Brijesh Kumar faced trial along with the Appellant. Brijesh Kumar was acquitted on the ground that his identity as having accompanied the Appellant and the deceased from Shankar Sweets was not established; the Trial Court opined that there was no discovery in pursuance of the disclosure statement made by the accused Brijesh Kumar; the fact that the dead body was buried was within the knowledge (of the police). There was consequently, no admissible evidence against Brijesh Kumar. He was also acquitted of the charges giving him the benefit of doubt. With regard to the Appellant, the Trial Court held that it was established beyond any reasonable doubt that he had taken the deceased Bhudev with him on the pretext of showing him a girl in connection with a matrimonial proposal for Umesh (the deceased's younger brother). A skeleton was discovered pursuant to the Appellants confessional statement Ex.PW-14/A. These two circumstances were firmly established. The Trial Court, therefore, opined that the prosecution's case for the offence punishable under Section 364/302/201 IPC was established against the Appellant beyond any doubt. He was convicted and sentenced as stated above.
3. Briefly put, the prosecution's case is that on 08.08.2001 at about 6:00/7:00 PM the Appellant Pati Ram, accompanied by another approached the deceased at Shankar Sweets, Shora Kothi, Pahar Ganj, Delhi. He offered a proposal for getting his sister-in-law married to Bhudev's younger brother Umesh. Mahesh (PW-4) informed his father Ram Bahadur, who used to work in Chandni Chowk, about Pati Ram's visit. The deceased accompanied Pati Ram and his companion to Fatehbad to have a look at the girl and informed his father that he would be back in 2-3 days. Bhudev did not return as per schedule and Mahesh informed his father about Bhudev's absence. Ram Bahadur (PW-9) searched for Bhudev at

various places including in village *Dharam Singh Ka Pura*, PS Jaitpur, District Agra as the girl who was to be shown hailed from that village. Pati Ram was also not traceable.

4. It is alleged that on 28.08.2002 a missing person report was lodged by Mahesh in Police Station Pahar Ganj. On 31.08.2002 PS Pahar Ganj policemen contacted Mahesh who made a statement Ex.PW-4/A (to the police) wherein he disclosed about Bhudev being taken away by the Appellant (Pati Ram) and his associate. Mahesh also suspected that Bhudev might have been done to death by Pati Ram. SI Sanjeev made endorsement Ex.PW-29/B on the statement Ex.PW-4/A (of Mahesh) and sent it to the Police Station for registration of a case under Section 364/302/201/34 IPC.
5. An information was received from PS Trilokpuri that accused Betal Singh and the Appellant had been arrested in case FIR Nos.367/2002 and 368/2002 under the Arms Act by the Police of PS Trilokpuri. In the said case, according to the prosecution, confessional statements were made by the Appellant and accused Betal Singh. Pati Ram showed his willingness to get the skeleton recovered from the fields of Chottey Lal in village Lehar Patti, PS Shamshabad, U.P. In the meanwhile, accused Mani Ram was arrested in case FIR No.260/2002 under Section 25 of the Arms Act by the police of PS Anand Vihar. He too made a confessional statement and showed his desire to get Bhudev's skeleton recovered from the fields. Inspector Kamla, Additional SHO, PS Pahar Ganj recorded statement of the police officers including of Trilokpuri and Anand Vihar's cases. Copies of the disclosure statement allegedly made to the IOs in FIR No.367/2002 and 368/2002 of PS Trilokpuri and FIR No.260/2002 of PS Anand Vihar were obtained by Inspector Kamla. Further investigation was taken over by Inspector V.K. Dham, SHO PS Pahar Ganj.
6. Inspector V.K. Dham obtained permission from the Court of Metropolitan Magistrate to interrogate accused Pati Ram, Mani Ram and Betal Singh as they were in custody in other cases. Pati Ram, Mani Ram and Betal Singh made disclosure statements Ex.PW-14/A, Ex.PW-14/B and Ex.PW-14/C respectively.

They were arrested in the case. It is alleged that accused Pati Ram made a confessional statement that deceased Bhudev had killed his relative's (Ram Niwas) five years old son; Bhudev was arrested in that case. After trial, he was acquitted of the charges. Pati Ram disclosed that Bhudev also tried to kill Ram Niwas, but he (Ram Niwas) escaped. Pati Ram informed the police that Ram Niwas contacted him and offered a sum of ₹ 40,000/- to kill Bhudev. In pursuance of the offer given by accused Ram Niwas, Pati Ram hatched a plan with Brijesh Kumar, Betal Singh and Mani Ram to kill Bhudev. In execution of the plan, the deceased was enticed from Shankar Sweets on the pretext of showing him a match for his brother Umesh. It is alleged that Bhudev was taken to the field of accused Mani Ram's uncle, (Chottey Lal) where Betal Singh joined them. All of them took liquor. Bhudev got intoxicated as he was prompted to have more (liquor). The Appellant put *angocha* (a thin large towel) around Bhudev's neck; Mani Ram and Brijesh Kumar caught hold of his legs and arms. The Appellant and accused Betal Singh tightened the noose around Bhudev's neck until he died due to strangulation. Bhudev's dead body, it is alleged, was buried by digging the fields of Chhotey Lal to conceal commission of the offence and to avoid any foul smell of the dead body.

7. Inspector V.K. Dham, along with police officers from PS Pahar Ganj visited Shamshabad Agra on 03.09.2002. He took permission of the SDM for exhumation of the dead body. The IO reached Police Station Shamshabad and requested for necessary assistance of the local police to exhume the dead body. Initially, the Appellant led the police party to Chhotey Lal's fields in village Jaitpur and pointed out the place where the dead body was buried. Accused Mani Ram and then Betal Singh and Brijesh Kumar, it is claimed, also pointed out the place where the dead body was buried. The digging started on 03.09.2002. The dead body, however, could not be exhumed. The digging resumed on 04.09.2002 and the dead body was recovered it was buried around three feet under the earth. One socks on a leg bone was also recovered from the skeleton. A black thread was recovered around the neck. These, said the prosecution belonged to the deceased.

8. The digging was video-graphed and photographed. The skeleton was sent to the doctor for postmortem examination but the cause of death could not be ascertained. The Test Identification Proceedings was arranged in respect of the Appellant on 16.09.2002. The Appellant refused to participate in the TIP. The blood sample of Bhudev's parents was obtained and sent to CFSL, Kolkatta along with femur bones of the skeleton for DNA test.
9. PW-31 Dr. S.Sathyam, Senior Scientific Officer, CFSL, Hyderabad (working in Calcutta when the samples were sent) gave a positive report regarding the DNA of the femur bone and the blood samples of Bhudev's parents as under:-

“.....from the above result it is concluded that the individual (source of exhibit C Femur Bone) cannot be excluded from being biologically related to Smt. Hanso Devi (the source of Exhibit B blood stain) as son and mother. The likely hood of any other female person biologically related to bone as mother and son is 1.9×10^{-7} approx.”

10. On completion of the investigation, a report under Section 173 Cr.P.C. was filed in the Court.
11. To establish its case, the prosecution examined 38 witnesses. PW-4 Mahesh (the deceased's brother), PW-9 Ram Bahadur (the deceased's father) and PW-8 Harish Gupta (the deceased's employer) are the witnesses of the last seen evidence. They deposed about the deceased being taken away by the Appellant and his companion. PW-21 Inspector Kamla was the initial IO, whereas, PW-36 ACP V.K. Dham (the Inspector and SHO of PS Pahar Ganj at the relevant time) is the main IO of the case; PW-13 HC Devender Singh, PW-14 HC Maman Singh, PW-15 ASI S.P.Singh, PW-29 SI Sanjeev are the police officials from PS Pahar Ganj who visited the village Lehar Patti, PS Shamshabad and deposed about accused Pati Ram leading the police party to the spot and pointing out the place where the deceased's dead body was buried and later exhumed on 04.09.2002 after digging on 03.09.2002 and 04.09.2002. PW-22 ASI Lankesh Singh is a police officer from PS Shamshabad. He was associated in the digging operation in the fields of Chhotey Lal in village Lehar Patti from where the dead body was recovered. PW-36 Inspector V.K. Dham and PW-29 SI Sanjeev also deposed about recording of

the confessional statement of the Appellant regarding the exhumation of the skeleton. PW-5 Mahesh, PW-6 Joginder Singh, PW-7 Bhup Singh and PW-25 Bhogi are labourers who carried out digging operation in the fields of Chhotey Lal. They did not initially support the prosecution version. However, when they were confronted with the videography of the digging and the recovery of the skeleton which showed their involvement in the digging operation, they admitted having carried out the digging. They further deposed about recovery of the skeleton and its exhumation.

12. PW-26 Dr. Ajay Aggarwal conducted the postmortem examination of the skeleton and opined that it related to a male, whose height was about 5 ft. and 6 inches who was aged more than 17 years. He could not determine the cause of death because of the long duration between death and recovery of the skeleton. PW-31 Dr. S.Sathyam conducted the DNA fingerprinting examination upon the femur bone of the skeleton with the deceased's parents (Ram Bahadur and Hanso Devi) blood sample. PW-1 Shyam Sunder and PW-2 Raj Kumar deposed about the videography and photography during digging and exhumation in Chhotey Lal's fields in village Lehar Patti, PS Shamshabad.
13. When examined under Section 313 Cr.P.C. the Appellant denied having taken the deceased with him from Shankar Sweets on 08.08.2001. He denied having made any disclosure statement and recovery of any skeleton at his instance. He stated having been falsely implicated in the case at Ram Bahadur's instance. He had never known him (Ram Bahadur). He was in judicial custody in Agra at the time of alleged commission of the offence, in another case. The Appellant examined DW-1 Lakhan Singh in his defence. He deposed that on 22/24.08.2002 four persons including the Appellant were lifted from their village Lehar Patti. In 2-3 days their whereabouts could not be known. He along with 3-4 villagers went to Agra and sent a telegram about the incident to CO City, Agra and DIG, Delhi Police. He produced copy of the telegram which was marked as 'DA'. No evidence was produced regarding the actual dispatch of the telegram or its receipt by any authority.

14. We have heard Ms. Rakhi Dubey, learned *Amicus* for the Appellant, Mr. M.N.Dudeja, learned APP for the State and have perused the record.
15. There is no direct evidence of the commission of the offence of murder or disposing of Bhudev's dead body. There is direct evidence in the form of PW-4 Mahesh and PW-8 Harish Gupta's testimonies regarding Bhudev's abduction on 08.08.2001.
16. The circumstances relied upon by the prosecution are:-
 - (1) Last seen evidence.
 - (2) Recovery of a skeleton at the Appellant's instance in pursuance of the disclosure statements Ex.PW-14/A, Ex.PW-14/G and Mark 16/A from the fields of Chhotey Lal.
 - (3) Identity of the skeleton.
17. We would take each of the circumstances to find out if the prosecution has been able to prove the chain of circumstances so as to draw an inference that the offence, with which the Appellant has been charged, was committed by him; and also if the circumstances so established unerringly point to the guilt of the Appellant and that no other hypothesis is deducible except the Appellant's guilt and that it is established that in all probabilities the offence has been committed only by the Appellant.

CIRCUMSTANCE NO.1.

18. PW-4 Mahesh, PW-8 Harish Gupta and PW-9 Ram Bahadur are the relevant witnesses to prove this circumstance.
19. PW-4 Mahesh deposed that on 08.08.2001 accused Pati Ram and one more person (Brijesh) came to Shankar Sweets and took away deceased Bhudev with them to Fatehbad, Agra on the pretext of showing his sister-in-law for Umesh, who was younger brother of PW-4 and Bhudev. He deposed that Bhudev contacted his father on telephone and he (the deceased's father) permitted Bhudev to

accompany Pati Ram. Pati Ram and the deceased left the shop at about 6:00/7:00 P.M. Accused Brijesh was also with them. He deposed that Bhudev had promised to return in 2-3 days, but he did not return. He informed his father about Bhudev's non return. His father (PW-9) went to village Dharam Singh Ka Pura, PS Jaitpur as the girl with whom the matrimonial proposal was discussed belonged to that village. Bhudev too was searched at Fatehbad, District Agra but neither Bhudev nor the Appellant Pati Ram was traceable. He stated that the matter was reported to the Police on 28.08.2002. The police contacted him on 31.08.2002 and he made a statement Ex.PW-4/A to the police. The witness also proved the missing report DD No.10-A Ex.PW-4/B. It may be noticed that the Appellant was identified by the witness with certainty, though he tried to shift his stand regarding Brijesh's identity. (Brijesh was acquitted by the impugned order).

20. PW-9 Ram Bahadur corroborated PW-4's testimony on the aspect of Bhudev being taken away by Pati Ram. He deposed that Pati Ram had gone to his village and had some negotiations with his brother-in-law Brij Raj regarding his son Umesh's marriage. Pati Ram also went to meet him (PW-9) but he did not show much interest in the matrimonial proposal. Thereafter, the Appellant reached Bhudev's work place in Pahar Ganj. On 08.08.2001 Pati Ram accompanied with Brijesh, took away Bhudev to his native village on false assurances.
21. PW-4's testimony was corroborated by an independent witness PW-8 Harish Gupta, owner of Shankar Sweets. He deposed that Bhudev had joined his employment sometime in February-March, 2001. He took two days leave in the year 2001 sometime after *Raksha Bandhan* and did not return. PW-8 deposed that the day Bhudev took leave, 2-3 persons had come to see him at the shop at in the evening time. He deposed that Mahesh (PW-4) joined the services at his shop 2-3 days before Bhudev left with those persons. He could not identify the Appellant with certainty. He deposed that from the height and build he could guess that it were Pati Ram and Brijesh who had gone to his shop and with whom the deceased had gone.

22. It is urged by Ms. Rakhi Dubey, learned *Amicus* for the Appellant that the prosecution evidence with regard to the deceased being taken away by Pati Ram and his companion is shaky. According to the prosecution, argues the learned counsel, the deceased was taken away by the Appellant on 08.08.2001. Yet no police report was lodged by the deceased's family for more than a year. It is urged that PW-8's testimony falsifies PW-4's version that he (PW-4) was also in employment as he had deposed that PW-4 was employed in place of the deceased.
23. It may be noticed that the deceased and PW-8 were working as semi-skilled workers, i.e. as cooks away from their village Jaitpur Kalan, U.P. to make both ends meet. PW-9's (Ram Bahadur) evidence shows that the deceased used to disappear for months together without giving any information. It seems that the deceased had also remained in jail for some time and therefore, PW-9 did not take Bhudev's absence very seriously. In these circumstances, the defence cannot make any capital regarding delay in lodging a missing person report about Bhudev.
24. Indeed, PW-8 did depose at one place that Mahesh was employed in place of Bhudev but, at the same time, PW-9 was categorical that Mahesh had joined the services at his shop 2-3 days before Bhudev took leave.
25. PW-8 is an independent witness. He did not have any motive or ill will against the Appellant. It, therefore, cannot be said that he would make a false statement to support Ram Bahadur or Mahesh's version regarding Bhudev's disappearance and his accompanying the Appellant Pati Ram.
26. The Trial Court found this circumstance to be established and did not attach much importance to the delay in lodging the report with the police. The conclusion of the Trial Court as given in para 41 is extracted hereunder:-

“41. From the evidence of above three witnesses, it emerges that on 08.08.01, accused Pati Ram and Brijesh had gone to the shop where both PW4 and deceased Bhudev had worked. Accused Pati Ram had asked deceased Bhudev to accompany him as there was a proposal for marriage of his elder brother Umesh with his sister-in-law. Accordingly, deceased Bhudev had accompanied both the

accused persons in the evening in the presence of PW4 & PW8. Thereafter Bhudev did not come back and he was not traceable. It was urged on behalf of accused persons that testimony of PW4 pointing out last seen evidence is not reliable as this information was given to the police after one year of missing of Bhudev. Thus manipulation in the names of the persons who took away deceased cannot be ruled out. It raised a grave suspicion on the prosecution case.”

27. In view of the above discussion, we find no infirmity in the conclusion reached by the Trial Court. We, therefore, hold that it is established by the prosecution that the deceased was taken away by the Appellant Pati Ram and his companion on 08.08.2001 from his (Bhudev's) place of employment i.e. Shankar Sweets, Shora Kothi, Pahar Ganj.

CIRCUMSTANCE NO.2

28. PW-21 Inspector Kamla started investigation of the case. She deposed that on 31.08.2002 having been posted as Additional SHO at PS Pahar Ganj. She testified that on receipt of information from the Duty officer regarding Mahesh's brother's murder, she visited the place of occurrence at Shora Kothi, Pahar Ganj. She met Mahesh and his father Ram Bahadur and made enquiries from them. She, along with SI Sanjeev Kumar went to the PS Trilokpuri and obtained copies of the disclosure statement of the Appellant (and a co-accused).
29. PW-16 SI Anupan Bhushan, who at the relevant time was posted in Special Staff, East District, is the most crucial witness. He deposed about the apprehension of the Appellant Pati Ram and co-accused Betal Singh (discharged by the Trial Court). He deposed about making of the confessional statement Mark 16/A by the Appellant. That first para of the said disclosure statement concerns the present case wherein apart from disclosing as to how the offence was committed (which is inadmissible), the Appellant volunteered to get Bhudev's dead body recovered. In cross-examination, PW-16 stated that he did not apply for recording of the Appellant's statement under Section 164 Cr.P.C. No suggestion was given to this witness that no such disclosure statement had been made by the Appellant.

30. Further investigation of the case was carried by PW-36 ACP V.K. Dham, SHO of the Police Station. He deposed having gone to the Court of the Metropolitan Magistrate, Tis Hazari along with other police officers and interrogating the Appellant and co-accused with the Court's permission. The Appellant made a disclosure statement Ex.PW-14/A on the lines of Mark 16/A. PW-36 Inspector V.K. Dham testified that on 03.09.2002, after obtaining permission of senior officers, he, along with the complainant Mahesh, his father Ram Bahadur, SI Sanjeev Kumar, ASI S.P.Singh, HC Maman Singh, HC Devender and Constable Jaswinder etc. left for Agra in a Govt. vehicle. On reaching Agra, a request was made to the Superintendent of Police for providing necessary police assistance. Additionally, a request was also made to the SDM, Fatehbad for exhumation of Bhudev's dead body (as per disclosure statement of the Appellant) from the fields of Chhotey Lal at village Lehar Patti. The SDM granted permission Ex.PW-29/D. SHO Shamshabad deputed ASI Lankesh along with staff to provide necessary assistance in the investigation. Thereafter, the Appellant led the police party to the fields of Chhotey Lal and pointed out the place where Bhudev's dead body was buried. Four labourers Bhup Singh, Joginder, Mahesh and Bhogi Ram were hired for digging the place. He deposed that all the activities in the fields were videographed and photographed. The dead body could not be recovered till dusk and digging was postponed for the next day. The police officials of PS Shamshabad kept guard in the fields under the supervision of ASI Lankesh, PS Shamshabad. PW-36 deposed that on 04.09.2002 digging was again resumed after the place was pointed out by Pati Ram. At about 3:00 PM a skeleton was recovered; its height was 5 feet 6 inches and it had socks; the teeth and the skull were clearly visible.
31. PW-29 SI Sanjeev Kumar, PW-14 SI Maman Singh, PW-4 Mahesh and PW-9 Ram Bahadur corroborated PW-36's testimony regarding the start of digging on 03.09.2002 at Pati Ram's instance, its resumption on 04.09.2002 and exhumation of a skeleton that day. PW-1 Shyam Sunder testified that at the request of the SHO V.K. Dham he visited village Lehar Patti and carried out the photography and videography of the digging on 03-04.09.2002. He deposed that the skeleton

was discovered on 04.09.2002. PW-2 Raj Kumar was also associated in the photography and videography being an employee of PW-1 and corroborated PW1's testimony. These witnesses proved the video cassette Ex.P-11. 57 photographs Ex.P-13 (collectively) and the negatives Ex.P-12 (collectively). The video cassette was also played in the Court during evidence and the witnesses proved the same as having been prepared at the site.

32. PW-5 Mahesh, PW-6 Joginder Singh, PW-7 Bhup Singh and PW-25 Bhogi were labourers who dug the field. Initially, these witnesses did not support the prosecution case regarding exhumation of the skeleton on 04.09.2002. Video cassette Ex.P-11 was played in the Court in presence of each of the witnesses and they were shown 57 photographs (Ex.P-13 collectively). The witnesses thereafter admitted their presence and exhumation of the skeleton on 04.09.2002. They explained that they did not support the prosecution version earlier due to fear.
33. The Appellant examined DW-1 Lakhan Singh to prove that he was taken away from the village on 22-24.08.2002 and was subsequently implicated in the case falsely. DW-1 deposed that a telegram regarding Pati Ram's illegal detention was sent to CO City, Agra and DIG police Delhi. The telegram was not legally proved by the witnesses. Moreover, the Appellant's apprehension does not affect the prosecution case if the genuineness of the disclosure statement and the skeleton's recovery are established. PW-13 HC Devender, PW-14 Maman Singh, PW-15 ASI S.P.Singh, PW-29 SI Sanjeev and PW-36 ACP V.K. Dham did not have any motive to falsely implicate the Appellant to the extent of planting recovery of a skeleton. Moreover, the testimonies of the police officers from PS Pahar Ganj was corroborated by PW-22 ASI Lankesh Singh, who was associated from PS Shamshabad, District Agra, U.P. PW-4 Mahesh and PW-9 Ram Bahadur (the deceased's brother and father respectively) would not have implicated the Appellant after a year of Bhudev's disappearance. We see no reason to disbelieve their testimonies regarding digging of Chhotey Lal's fields on 03.09.2002 and 04.09.2002 and recovery of the skeleton on 04.09.2002.

34. It is argued by the learned counsel for the Appellant that PW-36 ACP V.K. Dham stated having recorded the disclosure statement (of the Appellant) and the co-accused Mani Ram and Betal Ex.PW-14/A, Ex.PW-14/B and Ex.PW-14/C respectively simultaneously and, therefore, it cannot be said that there was an exclusive knowledge of presence of the skeleton in Chhotey Lal's fields with the Appellant. It is contended that the disclosure statement Ex.PW-14/A is valueless and the alleged discovery is inadmissible in evidence. The question of the joint disclosures and simultaneous disclosure statements came up for consideration before the Supreme Court in the case of *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru*, (2005) 11 SCC 600. The Supreme Court held that it was permissible to have simultaneous or successive disclosure statements one after the other after a gap of few seconds or few months and discovery of any fact in pursuance thereto would be admissible in evidence. In Para 145 of *Navjot Sandhu @ Afsan Guru* (*supra*), the Supreme Court observed as under:-

“145.....Joint disclosures, to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27. “A person accused” need not necessarily be a single person, but it could be plurality of accused. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or, in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. We do not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break, almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section 27. However, there may be practical difficulties in placing reliance on such evidence. It may be difficult for the witness (generally the

police officer), to depose which accused spoke what words and in what sequence. In other words, the deposition in regard to the information given by the two accused may be exposed to criticism from the standpoint of credibility and its nexus with discovery. Admissibility and credibility are two distinct aspects, as pointed out by Mr. Gopal Subramaniam. Whether and to what extent such a simultaneous disclosure could be relied upon by the Court is really a matter of evaluation of evidence.....”

35. In this case, the Appellant led the police to the fields of Chhotey Lal and pointed out the place from where the dead body could be recovered. Since the open field was large in area, it took time in digging it out as it was difficult to pin point the spot which is the reason why an area of approximately 100 sq. ft. was dug. In *Navjot Sandhu @ Afsan Guru (supra)*, it was held by the Supreme Court that presence of the maker of the disclosure statement is not required at the place of discovery. If a fact is disclosed and the discovery is effected by any police officer or any other person even without presence of an accused, the discovery of a fact would be admissible. This case stands on a better footing as the accused not only made a disclosure statement but he also pointed out the place to get the skeleton recovered. In view of *Navjot Sandhu @ Afsan Guru (supra)*, the Appellant's contention has to be rejected.
36. The learned counsel for the Appellant argued that the exhumation of the skeleton was not carried as per the instructions given in Modi's - *Medical Jurisprudence & Toxicology* as, the digging was neither started in the morning nor a medical officer was present at the time of exhumation.
37. We have gone through the relevant instructions in Modi's - *Medical Jurisprudence & Toxicology*, Twenty-Second Edition, Chapter V. It is stated in this Chapter that “*Under the written order of the District Magistrate or the Coroner, the body should be exhumed by the police preferably in the presence of a medical officer.*” It is true that the medical officer was not present. The postmortem on the skeleton was performed by a Board of medical officers including PW-26 Dr. Ajay Aggarwal on 06.09.2002 in Agra. The postmortem report is Ex.PW-26/A. The Appellant has not shown any prejudice by absence of a medical officer at the time of exhumation.

38. It is always better to start exhumation in the morning. In this case, the disclosure statement was made by the Appellant on 02.09.2002. The IO took permission of the senior officers to go to Agra. The police party started early on 03.09.2002 and reached Agra at about 10:00 AM. The IO obtained SDM's permission for exhumation as required and then police assistance was taken through the SP Agra. It has been disclosed from evidence that the police party reached the fields of Chhotey Lal and after 2½ hours i.e. at about 12:30 noon the process of exhumation started. No prejudice was caused to the Appellant due to the absence of a medical officer at the time of exhumation or the start of exhumation after 12:30 noon on 03.09.2002. In the circumstances, it was not expected of the IO to have postponed the exhumation as the disclosure statement had to be pursued with promptitude to avoid any allegation of planting any article. The contention that Modi's jurisprudence was not strictly adhered to, in our view, does not affect the prosecution case.
39. It is urged by the learned counsel for the Appellant that his identity of having led the exhumation is doubtful as according to PWs 4 and 9, the Appellant was present there in a muffled face. This contention, in our opinion, is misconceived. Though, the Appellant refused to participate in the TIP which was fixed for 16.09.2002, there was no dispute as to the Appellant's identity as his name was mentioned in the FIR and he was previously known to PW-9 Ram Bahadur, Bhudev's father. Moreover, PW-4 Mahesh had sufficient time to see the Appellant; he, along with his companion went to Shankar Sweets where the deceased and PW-4 Mahesh used to work and had talks with them for a good duration of time. Further, all police officers including PW-36 ACP V.K. Dham were aware who was leading the police party to Chhotey Lal's fields. Thus, we do not find any merit in the Appellant's contention that the identity of the person, who let to recovery of the dead body was not established.
40. In view of the above discussion, it is held that a skeleton was recovered at the Appellant's instance in pursuance of his disclosure statement Ex.PW-14/A. The skeleton was found to be of a male having height of 5 ft. 6 inch, aged more than 17 years as per the postmortem examination.

CIRCUMSTANCE NO.3

41. The prosecution relied on a pair of socks on the leg and a black thread tied around the skeleton's neck. PW-4 Mahesh and PW-9 Ram Bahadur's testimonies are discrepant. It is doubtful whether there was one sock or it was a pair of socks. Even otherwise, it is difficult to identify socks or a black thread on a skeleton if it lies buried for more than a year. Much value cannot be attached to recovery of a piece of a sock or a pair of socks or a black thread on the skeleton. PW-28 Inspector Mahender Singh took Bhudev's parents to Lady Harding Hospital for collection of blood sample for DNA fingerprinting. After collecting their blood samples, he sent them to CFSL Kolkatta. The skeleton's femur bone was also sent to CFSL Calcutta. PW-31 Dr. S. Sathyam conducted DNA fingerprints on the femur bone of the recovered skeleton Ex.C with the bloodstains Ex.A of Ram Bahadur (Bhudev's father) and bloodstains Ex.B of Smt. Hanso Devi (Bhudev's mother). He tallied the seals on the parcel with the sample seal. The conclusion of the Trial Court are extracted hereunder:-

“63. PW31 Dr. S. Satyam had conducted the DNA examination of a femur bone of the recovered skeleton which is Ex.C with blood stains of Ram Bahadur, father of deceased Bhudev which is Ex.A and with blood stains of Smt. Hanso Devi, mother of deceased Bhudev which is Ex.B. The witness has deposed that he had received one sealed cloth packet and two sealed paper packet. The seals on the parcel tallied with the forwarded specimen seal impression. A portion of blood stains Ex.A and Ex.B and pieces of femur bone were subjected for DNA isolation, by organic extraction method. Degraded High Molecular Weight DNA could be recovered from the Ex.A, Ex.B & Ex.C. The witness has deposed in detail about the tests conducted by him and testified that genetic profile of Ex.A stated to be father could not be successfully developed. However, the alleles of the successfully amplified loci of the Ex.C femur bone had one of the allele of the amplified loci, matching with one of the alleles of the Ex.B (source Smt. Hanso Devi), said to be the mother of the deceased. The witness from the tests, concluded that the individual i.e. source of Ex.C femur bone cannot be excluded from being biologically related to Smt. Hanso Devi as son and mother. The likelihood of any other female person biologically related to bone as mother and son is 1.0×10^{-7} approximately. PW31 has also deposed that the skeleton was of human male origin which was confirmed by

identifying the SRY Gene. The testimony of this witness is also un rebutted.

64. Thus, from the deposition of PW31, it emerges that the DNA of mother of the deceased Smt. Hanso Devi had matched with DNA of femur bone which was preserved by PW26 after examining the skeleton. A very negligible error i.e. 1.0×10^{-7} approximately has been stated in the said test which is equivalent to as "No Error". PW26 has deposed that the height of skeleton was estimated about 5 ft 6 inches and the estimated age of more than 17 years. IN the DD entry Ex.PW-9/D, lodged by PW9, father of the deceased, regarding missing of his son, the particulars of Bhudev have been given to be 5 ft 5 inches in height. PW4 has deposed the age of his deceased brother Bhudev to be around 25 years. Thus, from the evidence on record, the prosecution has been able to establish that the recovered skeleton was that of deceased Bhudev."

42. As observed by the Trial Court, PW-31's testimony was not challenged in the cross-examination. In view of the DNA report, it can be safely concluded that the skeleton recovered on 04.09.2002 from the agricultural fields of Chhotey Lal was that of Bhudev. This circumstance, coupled with the fact that the Appellant had the knowledge of the skeleton buried in Chhotey Lal's fields would make us believe that it was the only Bhudev's skeleton.
43. It is urged by the learned counsel for the Appellant that Bhudev disappeared on 08.08.2001 and the skeleton was allegedly recovered on 04.09.2002 i.e. after more than a year of the disappearance. It is contended that last seen theory in this case would not help the prosecution case because of the long gap. Reliance is placed on *Bodh Raj @ Bodha & Ors. v. State of Jammu and Kashmir*, 2002 (8) SCC 45, where it was held that "*the last seen theory comes into play where the time gap between the point of time when the accused and 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 crime becomes impossible. Further, it would be hazardous to come to a conclusion of guilt in cases where there is no positive evidence to conclude that the accused and the deceased were last seen together.*"
44. There is no dispute about the proposition of law. In this case, the last seen evidence is just one of the circumstances. It is true that in a case like this, an

accused cannot be convicted for an offence of murder only on the basis of last seen evidence. However, there are other circumstances and most importantly, the recovery of the skeleton together with the last seen evidence, implicates the Appellant.

45. It is urged by the learned counsel for the Appellant that when an accused is charged for an offence of committing murder in furtherance of the common intention with other persons, in the absence of an independent charge under Section 302 IPC, an accused cannot be convicted under the said section. Reliance is placed on *State of West Bengal v. Vinu Lachmandas*, 1994 CrLJ 919 (SC), where it was held as under:-

“3. Learned Counsel for the respondent has raised a further point for our consideration. According to him there was no independent charge under Section 302, Indian Penal Code either against the husband or against the wife. Both were charged under Section 302 read with 34, Indian Penal Code. He states that the element of sharing the common intention by husband and the wife was the core of the charge. The husband having been acquitted and there being no independent charge under Section 302, Indian Penal Code against the wife, she cannot be convicted for the said offence.

4. We see force in the argument advanced by the learned Counsel. Both husband and wife were charged with an offence under Section 302 read with Section 34 IPC. The charge which was based on the common intention of the two failed with the acquittal of the husband and there being no charge under Section 302 simpliciter against the wife she could not be convicted. In any case there is no evidence on the record to show that she independently committed the offence.”

46. We have gone through the authority cited at the Bar. We are of the opinion that the ratio in *Vindu Lachmandas (supra)* is not applicable to the facts of this case. In that case, there was a trial of a husband (Lachmandas) and wife (Vindu Lachmandas) for kidnapping and murder of a six years old child named Neeta. The Trial Court acquitted the husband but convicted the wife for the offence punishable under Section 302 and 364 IPC. The State appealed against the acquittal of the husband whereas the wife filed appeal against her conviction and sentence. The High Court dismissed the State appeal and the appeal filed by the Respondent was allowed; she was acquitted of both the charges. The Supreme

Court held that the circumstances relied against the Respondent wife were found by the High Court not to have been proved. It was in these circumstances that the Supreme Court held that since the Respondent were charged for having committed the offence on the basis of sharing common intention, the husband having been acquitted, the Respondent could not have been convicted for the substantive offence in the absence of any charge.

47. There is a five Judges Bench decision of the Supreme Court in *Willie (William) Slaney v. State of M.P.*, AIR 1956 SC 116, where it was held as under:-

“Sections 34, 114 and 149 of the Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled up one involving the direct liability and the constructive liability, without specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.”

48. In *Nallabothu Venkaiah v. State of A.P.*, (2002) 7 SCC 117, the Supreme Court posed two questions before it. “Firstly, whether the appellant could be convicted under Section 302 IPC (simpliciter) without the aid of Section 149 IPC in the absence of substantive charge under Section 302 IPC. Secondly, whether the appellant could be convicted under Sections 302/149 on selfsame evidence on the basis of which other accused are acquitted.” The Supreme Court answered the questions in the following terms:-

“The propositions of law in this regard as follows: (a) the conviction under Section 302 simpliciter without the aid of Section 149 is permissible if overt act is attributed to the accused resulting in the fatal injury which is independently sufficient in the ordinary course of nature to cause the death of the deceased and is supported by medical evidence; (b) wrongful

acquittal recorded by the High Court, even if it stood, that circumstances would not impede the conviction of the appellant under Section 302 read with Section 149 IPC; (c) charge under Section 302 with the aid of Section 149 could be converted into one under Section 302 read with Section 34 if the criminal act done by several persons less than five in number in furtherance of common intention is proved.”

49. Thus, on the strength of *Willie (William) Slaney (supra)* and *Nallabothu Venkaiah (supra)* it can be said that an accused can be convicted for the substantive offence even if he/she has been charged with the aid of Section 34 of 149 IPC, provided there is material to show that he/she was guilty of the substantive offence. In other words, the prosecution must produce evidence to show that the said offence was committed by the accused. In this case, it is established that on 08.08.2001 the Appellant enticed Bhudev from Shankar Sweets in Shora Kothi, Phar Ganj. At that time, the Appellant was accompanied by one more person. Even if, identity of that person was not fully established and accused Brijesh was acquitted by the Trial Court, the Appellant cannot escape the liability for the offence punishable under Section 364 IPC as there is evidence to show that he had knowledge of Bhudev's skeleton being buried in Chhotey Lal's fields in village Lehar Patti, PS Shamshabad. He is also liable for the offence punishable under Section 302 IPC as well as the offence punishable under Section 201 IPC. We are conscious of the fact that in the case of circumstantial evidence, (1) the circumstances from which the inference of guilt is to be drawn must be cogently and firmly established; (2) the circumstances so established should be of definite tendency unerringly pointing out towards the guilt of the accused; (3) the circumstances must be incapable of explaining any hypothesis other than the guilt of the accused; and (4) the circumstances must show that within all human probability, the crime was committed by the accused and none else.
50. The three circumstances, enumerated earlier i.e. Bhudev's being enticed away by the Appellant on 08.08.2001 from Shankar Sweets in the presence of PW-4 is fully proved. It is also proved that the Appellant made a disclosure statement Ex.PW-14/A exhibiting his knowledge of Bhudev's skeleton and there was discovery of the skeleton confirming the Appellant's knowledge of burying

Bhudev's skeleton in Chhotey Lal's fields. The identity of the skeleton was also established by DNA fingerprinting. The circumstances established unerringly point to the guilt of the accused and are not capable of any explanation other than the one i.e. the guilt of the accused.

51. We do not find any error or infirmity in the impugned judgment. The Appeal, therefore, has to fail. It is accordingly dismissed.
52. The appeal is disposed of in the above terms.

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In view of the dismissal of the Appeal, this application has become infructuous and the same is accordingly dismissed.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

SEPTEMBER 23, 2011

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