

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

Date of Hearing : 3rd May, 2011
Date of Decision : 20th May, 2011

+ **CRL.A No.249/2008**

TARA SHANKAR & ORS. ... APPELLANTS
Through: Mr. B.S. Choudhary Advocate with
Mr. Anshul Baranwal and
Mr. M. Nageshwar, Advocates.

Versus

STATE ... RESPONDENT
Through: Mr. Lovkesh Sawhney 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 is an Appeal against a judgment dated 09.01.2008 and the order on sentence dated 14.01.2008 whereby the Appellants were convicted for the offence punishable under Section 302/364/201/34 Indian Penal Code (IPC). They were sentenced to undergo imprisonment for life and to pay fine of ₹ 2,000/- each or in default of payment of fine to undergo simple imprisonment for one year for the offence under Section 302 IPC; and were sentenced to undergo Rigorous imprisonment for ten years and to pay fine of ₹ 2,000/- each or in default of payment of fine to undergo simple imprisonment for one month for the offence under Section 364 IPC. They were further sentenced to undergo simple imprisonment for five years and to pay fine of ₹ 1,000/- each or in default of payment of fine to undergo simple imprisonment for six months under Section 201 IPC.

2. Briefly stated, the prosecution case is that on 12.08.1999 at about 2:40 P.M. complainant Kishori Shah reached Police Station (PS) Model Town and made a statement before the Duty Officer that he was a resident of House No. N-21/A-195, Moti Wala Bagh, Azad Pur. On 07.07.1999 Ms. Usha daughter of Tara Shankar (the Appellant) had left her house. Tara Shankar suspected that she had eloped with the (complainant's) son Ranjit.
3. On 11.07.1999 at about 8:30 A.M. Tara Shankar approached the complainant with a request to trace the two (i.e. the daughter of Tara Shankar and son of the complainant). At 12:00 noon on that day, Tara Shankar again approached the complainant and postponed their departure for the next morning. It is alleged that without waiting for the next morning, Appellant Tara Shankar along with Appellants Shambhu Dayal @ Bhola, Jai Singh @ Guddu and co-accused Komal and Srikishan came to his house at 11:30 P.M. They abducted his (Complainant, PW-1's) wife Sita Devi, son Pradeep and him (the complainant) by forcing them to sit in a Tempo No. DL-1LA-6677 and they took them to a forest in Agra. On 13.07.1999 the complainant escaped from the clutches of the Appellants and proceeded to his village (in Nepal). The complainant suspected that Tara Shankar and his associates might have killed his wife and son.
4. On the basis of the complainant's statement, FIR No.404/1999 was directly registered. Investigation was carried out and a challan was filed in the Court for the offence punishable under Section 364/342/302/201/34 of the IPC against Appellant Tara Shankar and Shambhu Dayal @ Bhola. Appellants Jai Singh @ Guddu, Komal, Srikishan and co-accused Sarnam Singh son of Kanwar Singh were named in the column No.2 of the challan as they were declared proclaimed offenders.
5. The complainant was not satisfied with the investigation carried out by the police and the evidence collected by them. He, therefore moved an application before the learned Metropolitan Magistrate for reinvestigation of the case. The request of the complainant did not find favour with the Metropolitan Magistrate.

6. A Criminal Writ Petition No.957/2000 filed by the complainant was allowed by a Division Bench of this Court by an order dated 30.11.2000. Supplementary statements of the complainant and some of the witnesses including Sarnam Singh son of Kanwar Singh, who had earlier been made an accused (and a proclaimed offender in the case) were recorded and a supplementary charge sheet was filed by the police under Section 173 (8) Criminal Procedure Code (Cr.P.C.).
7. In the first supplementary statement recorded on 02.10.1999 the complainant made out a case that his wife and son had been killed by the Appellants and the co-accused after he managed to escape their clutches. The complainant made a second supplementary statement on 30.11.2000 wherein he stated that after abduction all the three (i.e., Complainant, his wife and their son) were taken to Kushwaha Nursery in Ashok Vihar where his wife Sita Devi was raped by all the five accused persons. Thereafter, they were taken into the forest near Agra and where confined in a hut. On 13.07.1999 the complainant's wife and son were killed on account of knife injuries inflicted by the Appellants, after which the Complainant managed to escape to Nepal. A complaint case for the offence punishable under Section 302/364/323/506/376/342/201/ 120-B/34/149 IPC was also filed against the accused persons. In the meanwhile the complaint was committed to the Court of Session by the learned Metropolitan Magistrate on 09.03.2001. The complaint case and the police report were clubbed under Section 201 Cr.P.C.
8. A charge for the offence punishable under Section 364/34, 302/34 and 201/34 IPC was framed against the Appellant Tara Shankar and Shambhu Dayal on 16.10.2000. The charge was amended to include the names of Kishan son of Chaman and Komal as co-accused on 18.02.2002.
9. Another charge for the offence punishable under Section 364/34, 201/34 IPC was framed against Appellant Jai Singh on 14.10.2004.
10. In order to establish its case the prosecution examined 30 witnesses. PW-1 Kishori Shah, who is also the complainant, is the star witness of the prosecution. He deposed about the kidnapping, commission of rape of his wife Sita Devi and murder of Sita and his son Pradeep in his presence at the

hands of the accused persons. PW-5 Chander Kala, PW-6 Ganga Singh and PW-25 Sarnam Singh are the other important witnesses examined by the prosecution who deposed about the kidnapping of the complainant, his wife Sita Devi and their son Pradeep by the Appellants and the other co-accused. PW-7 Rambir, PW-8 Om Prakash, PW-9 Mukesh, PW-10 Raghubir Singh and PW-11 Satinder Singh were examined by the prosecution to prove the recovery of the two human skeletons (one male and one female). These witnesses did not support the case of the prosecution fully. However, recovery of the skeleton from the well from village Bachela Bacheli, Firozabad was proved from their statements. It also emerged from cross-examination of PW-8 by the APP that one skeleton was of a female and the other was of a male. PWs 9 and 10 showed their ignorance in recognizing the gender of the skeletons. PW-8 Om Prakash admitted that there was a red printed *dhoti* on one of the skeletons', though he claimed ignorance if there was a black shirt and a *baniyan* found on the other skeleton.

11. PW-21 SI Manvinder Singh and PW-24 Inspector Gurmeet Singh are the investigating officers, who carried out the investigation from time to time.
12. PW-17 SI Hari Singh was posted as a Sub-Inspector in Police Station Sirsaganj on 21.07.1999. He deposed about his visit to village Bachela Bacheli and recovery of skeletal remains of two dead bodies from a well. He proved the inquest proceedings Ex.PW-17/B and PW-17/C and clothes of the skeleton as Ex.P-1 and P-2.
13. On closure of the prosecution evidence, the Appellants were examined under Section 313 Cr.P.C. to provide them with an opportunity to explain the incriminating evidence produced by the prosecution. The Appellants denied the prosecution's allegations and took up the plea that the daughter of Tara Shankar was kidnapped by the son of Kishori Shah and FIR was registered against the son of Kishori Shah and in order to take revenge, the Appellants were falsely implicated in the said case. They took the plea of enmity between them and the prosecution witnesses' as there were few pending cases between them. Further, they stated that Kishori Shah's wife and son might be

alive in Nepal and the complainant may have manipulated the killing of his wife and son just to frame the accused persons falsely.

14. By the impugned judgment, the Trial Court while relying on *Maruti Rama Naik v. State of Maharashtra*, 2003 Cri.LJ 4326 repelled the contention of unusual behavior of the complainant and other witnesses in not reporting the matter immediately to the police. The Trial Court drew support from *Banti alias Guddu v. State of Madhya Pradesh*, 2004 Cri. L.J. 372 in holding that the delay of one month in recording of the FIR was not of any significance unless an explanation regarding the same was sought from the IO. The Trial Court observed that minor contradictions are bound to occur in the testimony of truthful witnesses. The accused was not entitled to benefit of doubt merely by denying the allegations of the prosecution. The accused, opined the Trial Court, can be given benefit of doubt only if he has been able to raise an actual and substantial doubt in the story of the prosecution. The Trial Court found the testimony of complainant to be reliable and worthy of credence which was supported by PWs 5, 6 and 25 (the witnesses of last seen evidence). The Trial Court observed that the accused persons had a motive to commit the crime and accordingly held the Appellants guilty for committing the offences punishable under Section 302/364/201/34 IPC.
15. We have heard Mr. B.S. Choudhary learned counsel for the Appellants, Mr. Lovkesh Sawhney, learned APP for the State and have perused the record.
16. It is argued by the learned counsel for the Appellants that there is an unexplained delay of about one month in the recording of complainant's statement to the police; his behavior in not reporting the matter (to the police) immediately after he allegedly escaped from the clutches of the Appellants is unnatural and makes the prosecution version and the witness unreliable. According to the complainant (PW-1) he did not have any money. He reached Nepal by changing several trains without buying any ticket which is highly improbable and unbelievable. The learned counsel for the Appellants submits that the Appellants were implicated merely on suspicion as the Appellant's daughter was allegedly abducted by the complainant's son and, therefore, the Appellant Tara Shankar and the other Appellants who are his relations /

friends have been falsely implicated in the case. The learned counsel for the Appellants argues that the complainant incrementally made improvements in the prosecution version and blamed the police for lapses allegedly committed by them. It is argued that there are grave doubts in prosecution case and the Appellants are entitled to the benefit of doubt.

17. On the other hand, relying on *Ram Bihari Yadav v. State of Bihar 1998 (4) SCC 517* it is submitted by the learned APP that the police intentionally botched up the investigation in order to help the Appellants and in these circumstances they cannot be given benefit of the lapses on the part of the police. The complainant was scared of the Appellants, and, therefore, fled to Nepal (the country of his origin) to regain his composure and returned to Delhi as soon as he regained confidence. Since his report was not lodged by the police, he had to meet the DCP of the area. It was only with the intervention of the DCP that his statement could be recorded, but even then the entire facts were not mentioned. The learned APP argues that the complainant had to file a criminal writ petition in the High Court for correctly recording his statement and the statements of the witnesses, who witnessed the said incident. It is argued on behalf of the Complainant that, a suggestion was given to PW-1 that somebody else had kidnapped Sita Devi and Pradeep which would prove that the factum of abduction was admitted by the Appellants.
18. It is submitted by the learned APP that there was a strong motive for the Appellants to commit the offence as Appellant Tara Shankar wanted to avenge of his daughter's abduction by complainant's son and thus Tara Shankar in collusion with his co-accused abducted and killed Sita Devi and Pradeep.
19. It is contended by the learned APP that the principle of *falsus in uno and false in omnibus* is not applicable in India and even if the story of the alleged rape of Sita Devi was disbelieved, there was nothing on record to disbelieve the complainant and other prosecution witnesses with regard to the abduction and murder of Sita Devi and Pradeep. The learned APP relying on *Ram Gulam Chaudhury & Ors.v. State of Bihar, 2001 (8) SCC 311* and *Bhagwan Singh &*

Ors. v. State of Punjab, 1992 (2) Recent Criminal Reporter 98 submitted that the recovery of dead bodies, is not a *condition precedent* for conviction of an accused for the offence of murder. It is urged that the impugned judgment does not call for any interference and the Appeal is liable to be dismissed.

20. The prosecution is relying on four sets of evidence which can broadly be bifurcated into four:-

(a) The Eye witness account of the complainant PW-1 Kishori Shah and the ocular evidence of PWs 5, 6 and 25, for abduction.

(b) The Recovery of dead bodies of Sita Devi and Pradeep,

(c) The Disclosure statements made by the accused persons,

(d) The Motive for commission of the offence i.e. kidnapping of Appellant Tara Shankar's daughter by Ranjit Singh son of the complainant.

EVIDENCE OF THE COMPLAINANT AND PWs 5, 6 & 25

21. PW-1 Kishori Shah, the complainant testified that on 7th July about 3½ years back (the testimony of the witness was recorded on 07.10.2002) Tara Shankar's daughter eloped with someone. Tara Shankar suspected that this was the handy work of complainant's son Ranjit and an FIR was registered against his son by Tara Shankar's wife.

22. PW-1 deposed that on 11.07.1999 between 11:00 – 12:00 in the night he along with his wife Sita Devi and son Pradeep were sleeping on the roof of his house, when all the Appellants(except Srikishan), armed with a knife came upstairs. Co-accused Srikishan was sitting downstairs. The accused forcibly lifted them and brought them downstairs after which they were forcibly put in a Tata 407. They were taken to Kushwaha Nursery, Ashok Vihar where the accused beat him, his wife and his son and further all the accused raped his wife Sita Devi in his presence. They were confined in the house for 1½ hours when his wife Sita Devi became unconscious. The witness testified that thereafter they were forcibly taken to a forest near Agra, where on 12.07.1999 the Appellant Tara Shankar obtained his signature and his son's signature on some blank papers. On 13.07.1999 the accused persons gave them beatings and all the five accused persons inflicted knife blows to his wife and his son in

his presence. Somehow he managed to escape from the clutches of the Appellants and reached Nepal completely perplexed and frightened. After 15 days he returned to Delhi and reached his house. He went to the Police Station to lodge a report but the police did not lodge any FIR, he continued to visit the Police Station for 3-4 days and pursued the Police to lodge the FIR but to no avail. He approached the DCP of the area and on his direction he went to the Police Station and narrated the sequence of events to the SHO. The SHO ordered registration of the FIR against four persons and excluded the name of Srikishan son of Jhamman. PW-1 further deposed that he was taken to Police Station Sirsaganj by the Delhi Police. He identified the clothes of his son and wife which were taken into possession by the local police by seizure memo Ex.PW-1/B. The post mortem papers were also taken into possession by the Delhi Police by memo Ex.PW-1/C. He identified the *dhoti* worn by his wife and the clothes worn by his son at the time of abduction as Ex.P-1 and Ex.P-2 respectively.

23. When cross-examined the witness deposed that the accused persons had not conducted either his personal search or the personal search of his wife and son. He further deposed that they reached Agra at 7:00 – 8:00 A.M. on 12.07.1999 and during the abduction, he did not have any money in his pocket nor did the accused give him any money. PW-1 stated that the FIR was lodged by him in the Police Station on his own and the same was not read over to him by the police. He deposed that he had told the police that the accused persons had killed his wife and son but they had not recorded the same in the FIR. He denied having stated to the police in the FIR that he merely suspected the accused persons. PW-1 testified that from Agra he went to a small railway station but he, however, could not give the name of the railway station. He admitted that he did not lodge any complaint in any Police Station at Agra. He deposed that he was perplexed and reached Nepal after 3-4 days by changing various trains; on reaching there he disclosed about the incident to his elder son in Nepal and he returned to Delhi within 15 days.
24. PW-1 deposed that his wife and his son raised alarm when the accused were stabbing them but nobody could hear them as the incident took place in a

jungle. He asked the police to accompany him to the place of incident but they refused to do so. The witness testified that while his wife and son were murdered one of the accused was holding him. He went on to say that God gave him courage to free himself from the clutches of the accused persons and he ran away. He stated that his hands were not tied by the accused persons during their journey to Agra but they (the accused) continued to wield knives on them. Further PW-1 deposed that the accused persons did not blindfold him while taking him to the Nursery. He denied the suggestion of not making any statement of the incident of rape. (alleged to be committed by the Appellants before he filed the complaint case).

25. PW-1 deposed in cross-examination that he had to run for about an hour or so before he reached the railway station and further stated that no person met him nor anyone asked him on the way, while he was running from the place of occurrence in Agra till the railway station, as to why he was running. He did not turn back to see if any of the accused was chasing him nor he knew if anybody actually chased him. He did not see any policeman in the railway station. He boarded a train at the railway station and thereafter changed many trains before he reached Nepal in four days. He added that he did not remember the names of the railway stations where he changed the trains. He narrated the incident to his son (in Nepal) and then became unconscious and regained consciousness only after 15 days. He stated that he did not become unconscious while travelling from Agra to Nepal but he was only nervous.
26. The learned counsel for the Appellants attacked the testimony of PW-1 on the ground that the conduct of PW-1 (the complainant) was not only improbable but completely unbelievable.
27. On the other hand, it is submitted by the learned APP that different people react differently to the same situation and since the complainant was scared because of the grave offence committed upon his wife and his son, it cannot be said that the conduct of the complainant was abnormal or his version is incredible.

28. We would turn to the actual manner of the abduction of complainant, his wife and son a little later while appreciating the testimonies of other witnesses. We would, however, like to deal with the conduct of the complainant here.
29. It is true that the instinct of self preservation is the most natural conduct of a human being. It is possible that a husband may not intervene while his son and wife are inflicted with fatal blows and his wife is also being raped, if the assailants are armed. This may be to avoid any injury from the armed assailants.
30. In this case, we would not attach any importance for the complainant's non intervention when his wife was being raped by the five accused and further when his wife and son were given fatal blows in his presence. Though, even this conduct is unnatural, yet, it is a natural human instinct that once the fear of the assailants ends, any person would immediately approach the police to save at least his close relations like his wife and son. The complainant, therefore, as a natural human conduct would have approached the local police in Agra once he was freed from the clutches of the accused persons.
31. Assuming that the complainant was very scared and was not comfortable or secure enough to approach the police at Agra, the natural conduct for him was to return to Delhi and lodge a report rather than travelling to a far off place like Nepal that too without any ticket. According to the complainant; he reached Nepal, told about the incident to his son and became unconscious. He not only claimed to have been unconscious for a day or two, but, he claimed that he was unconscious for 15 days. To say the least, we are not persuaded to believe this version of the complainant. No medical record has been produced to support the version that the complainant remained unconscious for 15 days. If anything like that had happened to his wife or his son, he might have had sleepless nights and may have become unconscious for a while but it is not palatable that he would become unconscious for 15 days.
32. On the basis of the statement made by the complainant an FIR was directly recorded by the duty officer in Police Station Model Town on 12.08.1999, in which there are no allegations of rape and knife injuries inflicted on PW 1's wife and son respectively. The plea taken by the complainant is that his

version was not correctly recorded by the police. It has not been explained as to why the police did not record his version correctly. Moreover, the first supplementary statement of the complainant was recorded on 02.10.1999. Even in that statement there was no allegation of rape. The complainant claims to have approached the police of Police Station Model Town for recording the FIR immediately after he returned to Delhi but his FIR was not recorded. He, therefore, approached the DCP. It was only on his (DCP's) intervention that the FIR was recorded on 12.08.1999. This means, the complainant was well aware of his rights -which is fortified not only from his complaint made to the DCP but also by the fact that he filed a criminal writ petition (of course through an Advocate) seeking direction for deletion of the name of certain accused and for examination of certain witnesses. The Copy of the FIR recorded on 12.08.1999 was delivered to the complainant. He was, therefore, well aware of the contents of the FIR. We are therefore, not inclined to believe the complainant's version that true and full facts were not recorded in the FIR or that he was not aware of the contents of the FIR.

33. We are conscious of the fact that recovery of corpse is not a condition precedent for conviction of an offence of culpable homicide or murder. However, the version put forward by the complainant is such that it cannot be believed, in the absence of some other evidence to connect the Appellants with the commission of the offence.
34. PWs 5, 6 and 25 are the witnesses to the abduction of the complainant, his wife Sita Devi and their son Pradeep. The testimony of PW-5 was not taken into account by the Trial Court for holding that the Appellants were guilty of abduction and committed murder of Sita Devi and Pradeep on the ground that the witness was convicted in FIR No.258/2000, Police Station Jagdishpura, Agra under Section 307 IPC on a complaint made by the brother of Tara Shankar. We would advert to the evidence of these three witnesses to test the veracity of their testimonies.
35. PW-5 Chander Kala testified that on 11th July, five years ago, at about 11:30 P.M. Guddu and Bhola came to the house of Kishori Shah along with Tara Shankar, Komal and Srikishan. These five persons took Kishori Shah, his

wife and his son from the terrace of PW-1's house, brought them downstairs and took them away in a Tata 407. She testified that Srikishan was driving the vehicle.

36. During her cross-examination, PW-5 deposed that she raised a noise but nobody came due to the fear of the accused persons. She told Sudama and Nanhey about the occurrence. She added that on the day of incident the accused persons had come to kidnap her but the neighbors disclosed (to the accused) that she (PW-5) was insured and the accused persons therefore did not abduct her. In the next sentence PW-5 added that the accused persons did not come to her house and for four days after the occurrence they expressed their intention to kidnap her. In her further cross-examination, the witness made certain improvements and was confronted with her statement regarding the purpose of her visit to the wife of Kishori Shah.
37. PW-6 Ganga Singh corroborated PW-5 regarding abduction of the complainant, his wife and their son on 11.07.1999 at 11:30 P.M. in a Tata 407. In cross-examination the witness stated that he did not raise an alarm when the five accused persons took away Kishori Shah and his family in Tata 407 nor did he make any complaint to the police. He did not tell any person of the locality about the occurrence and did not ask anyone of them to go to the Police Station. As stated above, the witness admitted the suggestion that he was convicted under Section 307 IPC on a complaint made by brother of Tara Shankar. He deposed that the house of Kishori Shah was at a distance of 40-50 paces from the place where he was standing. The faces of Kishori Shah, his wife and son were not covered at the time of the incident.
38. PW-25 Sarnam Singh too corroborated the testimony of PWs 5 and 6 on the abduction of the complainant and his family on 11.07.1999 at 11:30 P.M. He stated that all the accused persons dragged Kishori Shah, Sita Devi and Pradeep towards the East side near the shop of Sharma. One Tata 407 was parked opposite to the said shop. All the accused persons (except Srikishan who was the driver), and the complainant and his family sat in the rear portion of Tata 407 before they left.

39. In the cross-examination, the witness admitted that he and Tara Shankar were involved in a case under Section 107/151. He could not give the details as to who had dragged Kishori Shah. He stated that all the five accused persons were dragging the three i.e. the complainant, his wife and son. He stated that he was at a distance of ten steps. The complainant and his family did not ask him to save them. The incident had taken place on the road and many other persons saw the incident.
40. Like PWs 5 and 6 he admitted that he did not go to the Police Station to make any report.
41. A close look to the depositions of PWs 1, 5, 6 and 25 would show that there were contradictions in their testimonies regarding the manner of abduction by the Appellants. PW-1, the complainant deposed that accused Tara Shankar, Bhola, Komal, Guddu and Srikishan son of Jhamman who were armed with knives came to his house and they forcibly lifted them from the roof and brought them downstairs.
42. PW-6 on the other hand testified that all the five accused were holding knives in one hand and were holding Kishori Shah, his wife and son with the other hand. PW-25 gave a completely different version; he deposed that he saw all the five accused persons dragging Kishori Shah, his wife Sita Devi and his son Pradeep from their house. Few of the accused persons were having knives in their right hands and others were having it in their left hands.
43. It is true that witnesses are not expected to have photographic memories. The power of observation, retention and recapitulation differ from person to person. Yet, there is a world of difference between “a person being led” and “a person being dragged” by the accused persons..
44. Not only are the testimonies are contradictory on this vital aspect as well as the actual act of abduction but the witnesses’ conduct is highly unnatural. Admittedly, these witnesses are residents of Delhi. Even if, they had not reported the matter immediately to the police, it was a natural instinct that when the complainant, his wife and son did not return they (PWs 5,6 and 25)

would inform the police about the said incident either by calling Number 100 or otherwise.

45. Moreover, it is interesting to note that PWs 5, 6 and 25 were not cited as witnesses to the abduction by the police. The complainant filed a criminal writ petition in Delhi High Court on the basis of which the statements of PWs 5, 6 and 25 were recorded and they were made witnesses. In fact, PW-5 Sarnam Singh was earlier named as an accused and shown in Column No.2. Though, the complainant tried to make out a case that PW-5 was intentionally made an accused instead of a witness, however, no material was produced on the record which could suggest that the police was favouring the Appellants as against the complainant.
46. It has come in evidence that Tata 407 was parked on the main road in front of the shop of Sharma and the incident took place in a congested locality. The complainant, however, selected the witnesses i.e. PW-6 who was convicted in a criminal case under Section 307 IPC on a complaint made by brother of Tara Shankar and PW-5 was named as one of the accused. PW-25 was named one of the persons involved in the alleged abduction. PW-5 stated in her cross-examination that on the day of the said incident the accused persons came to kidnap her but the neighbours informed (the accused) that she was insured and for that reason the accused persons left her alone. It seems that there was some sort of grudge or ill will between PW-5 and the accused and she had an apprehension that the accused wanted to abduct her.
47. PW-25 admitted in cross-examination that he and Tara Shankar were involved in a case registered under Section 107/151 Cr.P.C. It was an old case which was compromised. Again, this would show some kind of ill will between PW-25 and Appellant Tara Shankar. Therefore, apart from the fact that the conduct of the witnesses i.e. PWs 5, 6 and 25 was not natural, they had animus against the Appellants. Selecting them as eye witnesses by the complainant by filing a writ petition in spite of the fact that other persons were available makes their testimonies suspect and unreliable, particularly, in view of the conduct of PW-1 to which we have referred to earlier.

48. In view of these, we are not inclined to rely upon PWs1, 5, 6 and 25 testimonies with regard to the alleged abduction and commission of murder of Sita Devi and Pradeep.
49. This ground itself is sufficient to knockout the prosecution case. However, we would like to refer to the other circumstances relied upon by the prosecution as well.

RECOVERY OF DEAD BODIES OF SITA DEVI AND PRADEEP

50. Prosecution examined PWs 7, 8, 9, 10 and 11 to prove the recovery of two human skeletons one of a male and another of a female from the well in village of Bachela Bachel, Firozabad, U.P.
51. All these witnesses turned hostile and did not support the prosecution version except PW-8 who stated in his cross-examination by the learned APP that one skeleton was of a female and the other skeleton was of a male. PW-8 Om Prakash also admitted that there was a red printed *dhori* on one of the skeleton.
52. PW-1 the complainant identified the *dhori* Ex.P-1 and the clothes of his son collectively as Ex.P-2. These clothes were taken into possession by the IO of this case from the U.P. police.
53. The bones of the two human skeletons were preserved as per the postmortem report Ex.PW-27/B and Ex.PW-27/D. It is very strange that neither the police nor the complainant (who was taking all steps for the proper investigation of the case by filing writ petition in the High Court) preferred to get a DNA test to match the blood of the complainant. No scientific test was conducted to correlate the skeletons with those of Sita Devi and Pradeep.
54. The complainant did not give the details of the clothes worn by Sita Devi and Pradeep in his statement to the police. Thus, under these circumstances, it would be unsafe to hold that the skeletons were those of the deceased Sita Devi and Pradeep merely on the identification of *dhori* Ex.P-1 and the clothes Ex.P-2 found on the two skeletons, particularly, when the skeletons were recovered from a dry well and the time of death. It was also given in the Postmortem report, that the death could have taken place 2-3 weeks prior to

the date of postmortem examination i.e. 21.07.1999, therefore the clothes could be hardly identifiable because the skeletons were lying in a well for at least a week or so.

55. We are conscious that recovery of dead body is not necessary for conviction of an accused for the offence of culpable homicide or murder provided clinching evidence is produced to show that the deceased was in the custody of the accused on a particular date and he was not seen alive thereafter and there also other circumstances to show that he died near about that time.
56. Sufficient evidence has not been produced by the prosecution to connect the two skeletons recovered from the well in village Bachela Bacheli to that of Sita Devi and Pradeep. Even otherwise, in view of our findings on the ocular evidence (testimonies of PWs 1, 5, 6 and 25) even if it is assumed that the skeletons belonged to Sita Devi and Pradeep the accused persons are not connected with the commission of the offence of abducting and murdering them.
57. No fact was discovered on the basis of the disclosure statements Ex.PW-14/A, Ex.PW-14/B and Ex.PW-16/A of Appellants Tara Shankar, Shambhu Dayal, Jai Singh respectively. These statements are confessional in nature, allegedly made by the Appellants Tara Shankar and Shambhu Dayal. The pointing out of the place of murder (Pointing out Memo Ex.PW-12/A) or throwing of all the dead bodies was of no consequences as nothing was recovered from the place where the alleged murder took place and the said place could not be connected with the murder and the recovery of the skeletons from the well was already known.

MOTIVE FOR COMMISSION OF THE OFFENCE

58. It is argued by the learned counsel for the Appellants that the complainant had a suspicion about the abduction of his wife and son by Appellant Tara Shankar and his associates as Tara Shankar's daughter was kidnapped by son of the complainant. On the other hand, it is submitted by the learned APP that this was a motive for the Appellants for the commission of the offence. In *Sushil & Ors. v.State of U.P., 1995 Supp. (1) SCC 363*, it was held that the

enmity is a double edged weapon which cuts both ways. It may constitute a motive for the commission of the crime and at the same time it may also provide a motive for false implication.

59. The prosecution, however, has failed to produce a reliable evidence to connect the Appellants with the commission of the crime and, therefore, the Appellants cannot be held guilty simply on the ground that they had a motive to commit the offence.
60. On the basis of the evidence produced on record there can only be a suspicion of commission of crime by the Appellants. Suspicion, however strong cannot take the place of proof. In our criminal jurisprudence, the prosecution is under obligation to prove its case against an accused beyond the shadow of all reasonable doubt which, in our view, the prosecution has failed.
61. The Trial Court fell into error in believing the testimony of the complainant and PWs 5 and 25 in spite of the lacunae pointed out in their testimonies. The impugned judgment, in our view, cannot be sustained.
62. We, therefore, allow the Appeal and set aside the judgment dated 09.01.2008 convicting the Appellants and the order on sentenced dated 14.01.2008 whereby the Appellants were sentenced to various terms of imprisonment and fine. The Personal bonds and Surety bonds of the Appellants are hereby discharged; they are ordered to be set at liberty.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

MAY 20, 2011
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