

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

% **RESERVED ON : 5th January, 2012**
DECIDED ON : 8th February, 2012

+ **Crl.A.944/2011**

STATE (NCT of Delhi) Appellant
Through : Ms.Richa Kapoor and Mr.Sanjay
Lao, APPs for the State.

versus

PRAKASH Respondent
Through : Mr.Vikas Arora, Advocate.
Respondent in person.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The State has preferred this appeal against the judgment of the Additional Sessions Judge dated 20.08.2009 by which the Respondent was acquitted of the charges of having committed the offences under Sections 376/302/201/436 IPC.

(A) **Facts :**

2. The prosecution case is that on 18.01.2000 at about 3.05 P.M., an entry- (DD) No.38B -was made at police station Hauz Khas. The intimation was that a girl was burnt in a Jhuggi, near Avtar Taxi Stand, Green Park, Arya Samaj Road. It was further alleged that two police personnel, i.e., ASI Badami Lal and Ct. Banwari Lal reached the spot and found Jayanti, aged 14 years, lying dead inside her Jhuggi. Kali Charan

aged 8/10 years, brother of the deceased met them. ASI Badami Lal recorded his statement; he disclosed that one Prakash had come to their Jhuggi at about 12.30 P.M. in the afternoon when Jayanti was sitting on the roof. Prakash met Jayanti and both went into the Jhuggi. Prakash asked him (Kali Charan) to play outside. When he returned to the Jhuggi after some time, he saw that the door of the Jhuggi was closed and on peeping through the door, he saw Prakash lying on his sister on the cot. Prakash and Jayanti were not wearing their lower garments (pant and salwar respectively). On his knocking on the door, Prakash opened it after a delay and asked him to go out to play. He saw his sister Jayanti weeping at that time. Kali Charan further stated that when he returned after some time, he saw Prakash going out of the Jhuggi after locking it. At about 2.30 P.M., he saw smoke and fire coming out from the Jhuggi. He raised an alarm; many members of the public, including Dasha Ram, Ram Gopal and Mangla reached the spot and broke open the door. On entering the Jhuggi, they found Jayanti lying dead on the ground.

3. This statement formed the basis of the *rukka* and an endorsement was made on it. ASI Badami Lal sent the *rukka* at about 4.30 P.M. and lodged the FIR in the present case.

4. During the investigation, statements of concerned witnesses were recorded. Post-mortem of Jayanti's dead body was conducted. Prakash was arrested from the Deer park, on 19.01.2000 and his disclosure statement was recorded. Pursuant to his disclosure statement, the police recovered a polythene bag containing his blue pants, underwear and a key. All these articles were seized and necessary seizure memos were prepared.

5. On the basis of the evidence collected, the Respondent was charged with the offences mentioned above. He entered the plea of not guilty and claimed Trial.

6. The prosecution relied upon testimonies of 24 witnesses and also produced several exhibits. After considering them, the Trial Court, by judgment dated 22.05.2004 convicted Prakash for committing the offences under Sections 302/201/436 IPC. He, however, was acquitted of the charge under Section 376 IPC.

7. Prakash challenged his conviction before this Court in Crl.A. No.666/2004. His Appeal was allowed by an order dated 29.01.2009. This court observed that the Trial Court had not recorded the testimony of child witness Kali Charan in accordance with law, because the Court's satisfaction that the witness understood that he was deposing in a Court proceeding, and also about the consequences of his deposition, was not recorded. Accordingly, judgment dated 22.05.2004 was set aside and Trial Court was directed to take corrective measures.

8. On remand, the Trial Court recalled PW-4 Kali Charan and recorded his statement afresh. PW-6 Dasha Ram, and PW-11 Gore Lal were cross-examined, and the statement of Prakash was again recorded under Section 313 Cr.P.C. After considering the material on record, the Trial Court acquitted Prakash of all charges by the impugned judgment. The State has challenged acquittal of the accused; it was granted leave to Appeal. Therefore, the present Appeal.

9. Ld. Addl. PP for the State argued that the Trial Court fell into error in not appreciating the deposition of PW-4 in its proper perspective. He urged that this witness had seen the occurrence and had seen both

Jayanti and Prakash together inside the Jhuggi at the relevant time. The Trial Court ought not to have disbelieved him merely on the assumption that the testimony was not corroborated by any public witness and there were vital discrepancies and contradictions. It was submitted that five different statements were on the record; one was recorded by the police under Section 161, Cr.P.C.; the second and third were the examination in chief and cross examination of PW-4 in 2001; the fourth and fifth were the examination in chief, and cross examination of the same witness in 2009. There were no doubt some variations; yet the Court should have been alive to the fact that when the witness was made to depose in Court eight years after the incident, some lapses in memory were bound to occur. Yet, in all material particulars, this witness did not contradict himself, nor could the contradictions be deemed material. It was urged that Prakash was named in the PCR form where the incident was reported at the first instance. Recovery of the key at the instance of Accused was another incriminating circumstance which was ignored by the Trial Court. Furthermore, urged the APP, the Court also overlooked the fact that the testimony of PW-4 about Prakash's involvement, remained unshaken. His presence was corroborated by the testimonies of PW-6, PW-11 and PW-23. The FIR was recorded at the earliest opportunity, after the PCR intimation was received, and PW-4's statement was recorded. There was no question of false implication.

10. Ld. Defence Counsel submitted that PW-4 Kali Charan gave different versions at different times and his testimony was not relied upon by the Trial Court to convict the Accused. The Accused had no motive to murder Jayanti. PW-4 Kali Charan was even not present at the spot and

his statement was fabricated subsequently to falsely implicate the Accused though he was present at his place of work with DW-1 Bagirath. Reliance has been placed on the authorities reported in *Dudh Nath Pandey Vs. State of U.P.* AIR 1981 SC 911, *Munshi Prasad & Ors. Vs. State of Bihar* 2001 (4) RCR (Crl.) 415, *State of Haryana Vs. Ram Singh* 2002 (1) Scale 149, *State Vs. Pawan Kumar & Anr.* 2004 (3) JCC 1652, *Kalyan Vs. State of U.P.* 2001 (4) RCR (Crl.) 424 and *Dr.Sunil Kumar Sambhudayal & Ors Vs. State of Maharashtra* Criminal Appeal No.891/2004, decided by the Supreme Court.

11. It was argued by the respondent's counsel, that Kalicharan's testimonies could not be relied, since he contradicted himself about whether he had gone to school on the day of the incident, how he was asked to go out of the jhuggi, whether he saw his sister on the jhuggi roof, whether the accused had threatened to kill him, etc. Since the entire prosecution case hinged on the "last seen" testimony of PW-4 a child witness, the discrepancies were sufficiently grave as to cast serious doubts and suspicions about the prosecution story.

12. It was urged, in addition, by the respondent's counsel that the alleged recovery of the key from the accused was an utterly unbelievable circumstance. The very idea of someone committing a crime as serious as murder, and fleeing the spot, only to return near the locality, to enable the police to nab him, the next day, is incomprehensible, and against the normal course of human conduct. It was also submitted that the prosecution's reliance on the semen traces, allegedly found in the deceased's clothes, was correctly disbelieved by the Trial Court, because there was nothing to prove that the articles were seized and sealed in time,

and seals given to an independent person. It was also submitted that the Trial Court findings are sound and ought to be sustained, because the evidence on record suggested that Prakash was not the only person with that name; there were three others in the vicinity, and the possibility of PW-4 not being truthful about the present Appellant was very strong.

13. It was submitted that the respondent's acquittal meant that he was entitled to the presumption of innocence, which is a fundamental tenet of criminal law. The prosecution, in its appeal could not show that the impugned judgment, manifestly and apparently disclosed substantial or compelling grounds to persuade the reversal of the acquittal. It was argued that while considering the correctness of an acquittal, the High Court would be slow and extremely circumspect in reversing the Trial Court judgment and would certainly not do so if the view which appeals to it, is just another reasonable one, and that the Trial Court's view is also reasonably plausible.

14. We have examined the record and proceedings in context of the submissions made before us.

(B) Homicidal Death :

15. It is not in dispute that Jayanti met a homicidal death. PW-9 Dr.Sudhir Gupta, in the post-mortem report Ex.PW-9/A opined cause of death as asphyxia as a result of ligature strangulation, sufficient to cause death in the ordinary course of nature. This opinion was not challenged by the Accused.

16. On 18.01.2000, Jayanti was hale and hearty and was present inside her Jhuggi where strangulation took place. PW-2 Prem Lal, her brother had gone to school at about 12.30 Noon at Sarojini Nagar No.2

and on getting information from a neighbour about the incident, he reached the spot at about 4.00 P.M. His mother and brother (PW-4) were crying. Jayanti's father, in his deposition stated having gone to his place of work and reaching the spot on getting information about the incident. PW-6 Dasha Ram and PW-11 Gore Lal, neighbours who reached the spot immediately on getting information about the incident did not find any other family member of Jayanti except PW-4 present at the spot. Statements of all these witnesses reveal that on 18.01.2000 only PW-4 and Jayanti were in their Jhuggi during the relevant time.

17. PW-4 Kali Charan raised an alarm on seeing the fire and smoke coming out of the Jhuggi at about 2.30 P.M. PW-10 Yashpal present at a nearby Taxi Stand reached the spot and informed the police on Number 100 through his telephone No.6960651. PW-15 lady Ct.Vandna received the message at about 2.49 P.M. in which it was reported that a girl had received burn injuries; she filled the PCR form Ex.PW-15/A. The Prosecution examined PW-15A ASI Ram Singh to prove contents of PCR form Ex.PW-15/B. PW-12 SI Ram Singh proved DD No.38B Ex.PW-12/C recorded at PS Hauz Khas at about 3.05 P.M. All these documents demonstrate that the occurrence took place in between 2.30 P.M. to 3.00 P.M.

(C) **Presence of PW-4 Kali Charan :**

18. PW-4 gave a graphic account of the incident and named Prakash as the one present with his sister Jayanti since 12.30 Noon. in his statement (Ex.PW-4/A) made to PW-16 ASI Badami Lal soon on his reaching the spot. Since the *rukka* was sent at about 4.30 P.M. without any

delay, there was hardly any possibility of fabrication of statement Ex.PW-4/A in such a short interval.

19. At the time of his examination before the Court on 22.01.2001, PW-4 claimed that he was present at the spot and identified Prakash residing near the locality as the one, who came to their Jhuggi. He further deposed that Prakash told him to run away after opening the door a bit and threatened him to kill in case he insisted to come inside. He further disclosed that when he returned after some time, he saw Prakash sprinkling kerosene oil and setting the Jhuggi on fire; Prakash ran away after locking the Jhuggi with the key. As the Jhuggi caught fire, people gathered and broke open the door. Jayanti was found dead and half burnt. He further testified that earlier he had seen the Accused Prakash and his sister Jayanti sitting on the cot without their lower garments i.e. pant and salwar, respectively.

20. The Trial Court, on remand of the case, again, recorded Kali Charan's statement on 09.04.2009 on oath after a gap of about 10 years. By this time he had turned 18 years old. He proved statement Ex.PW-4/A made to the police and deposed that in the afternoon only he and his sister Jayanti used to remain present in the Jhuggi. Prakash, resident of that area used to meet Jayanti on finding her alone. On that day i.e. 18.01.2000, he reached his Jhuggi as usual by 12.30 Noon after returning from school and saw Prakash inside the Jhuggi sitting without pant on the cot where his sister also sat without her salwar. He saw peeping through the entry door of the Jhuggi. When he knocked at the door, Prakash opened it and he saw his sister Jayanti weeping. Accused asked him to go away to play. After covering some distance in the gali, he saw Prakash fleeing after putting

lock on the door of the Jhuggi. He cried and raised an alarm on seeing smoke; many people gathered who broke open the door where his sister Jayanti was found lying dead on the floor.

21. The respondent's counsel had sought to highlight the fact that the prosecution was unable to prove conclusively that Prakash and none else was responsible for the crime. In this regard, it was urged that a close reading of the various statements of PW-4 during the investigation and subsequently his deposition in Court on 22.1.2001, his cross-examination the same day and his later examination-in-chief and cross-examination on 4.4.2009 reveal serious inconsistencies. It was submitted that PW-4 had recorded in the statement to the police that he came back after playing; yet in his deposition on 22.1.2001 as well as later on 4.4.2009 he stated having gone to School and returned around 12-12:30 PM. He mentioned about having kept his bag in the jhuggi - for the first time on 4.4.2009 - a fact which has been omitted in his previous statement and depositions. Counsel also pointed out that though PW-4 had deposed in Court earlier that the police had not recovered anything from the spot in his presence, yet on 4.4.2009, he has stated that his school bag was burnt even though the police was unable to find it. Again, counsel submitted, that PW-4 mentioned for the first time that he came to know that Prakash had been apprehended by the police. It was submitted that this was a false statement since the police' case was that the accused was arrested on 19.1.2001. Another serious inconsistency pointed out by the counsel was that whereas in the previous deposition in Court on 22.1.2001 PW-2 mentioned that the accused had threatened to kill him in case he did not run away upon seeing him and Jayanti together; this fact was omitted in

his later deposition made in 2009. Again, for the first time, he deposed in 2009 having seen the sister Jayanti weeping inside the jhuggi and that Prakash had asked him to go away to play.

22. Learned counsel argued that the prosecution's version could not also be believed because PW-11 Gore Lal contradicted and made improvements from his previous testimony. This witness did not name Kalicharan as the boy crying out that his jhuggi had caught fire; however, in the cross-examination conducted in 2009, he stated that Kalicharan appeared to have come back from school since he had his school bag.

23. We find that in all the above statements made by PW-4 before the police (Ex.PW-4/A) or before the Court on both occasions, he did not deviate from his deposition about having seen the respondent, at the spot during the relevant period when he saw Prakash with Jayanti inside the Jhuggi. Lengthy cross-examination of the witness on both occasions could not shatter his testimony on this aspect. Whether PW-4 returned from school at about 12 Noon or had not gone to school on that day and was playing outside the Jhuggi is of no consequence as he claimed his presence at the spot soon after the incident and gave detailed account to police as to how and under what circumstances, he had seen Accused with Jayanti inside the Jhuggi. He even testified that he had seen both without their lower garments. A child aged about 8/10 years cannot fabricate such a story, especially to bring his deceased sister into disrepute for having a sexual relationship with someone. Since PW-4 was of tender age, possibly the accused did not fear him while having a sexual *liaison* with Jayanti. There is nothing improbable in the Accused trying to induce PW-4 to play outside when he was with the sister, the deceased Jayanti,

inside the *jhuggi*. The witness PW-4 knew the accused, and probably did not comprehend fully what was going on between the Appellant and Jayanti, when he left the *jhuggi* after being asked to do so. Despite having seen both in a compromising position, PW-4 did not raise an alarm. This conduct of PW-4 shows his innocence and renders the possibility of his deposing falsely, highly improbable. .

24. As stated earlier, the Court had reversed Prakash's conviction, and remanded the matter for retrial, primarily because PW-4 had not been questioned in the previous proceeding, whether he understood that he was deposing in a criminal trial, and the consequences thereof; the Trial Court had not recorded its satisfaction in that regard. The net result of this was that PW-4 had to depose *de novo* about 9 years after the incident. By this time, he had become a major, and was no longer a young boy. Nevertheless, his deposition was consistent *vis-à-vis* the respondent's role on the fateful day. We are also not unmindful of the fact that witnesses's memories are not, and cannot be expected to be perfect, or razor sharp; most people have imperfect recollections about details of incidents, and only the main highlights of something out of the ordinary – such as being witness to a crime, are recalled. As a result, some inconsistencies are bound to occur.

25. In the present case, PW-4's testimonies were consistent as to certain crucial particulars. They are:

- (a) Having seen Prakash in the company of the deceased Jayanti, on the day of the incident, after returning from school;
- (b) Prakash asking him to go out to play, and his (Prakash) staying behind to be with Jayanti, and shutting the *jhuggi* door;

(c) PW-4 later seeing Prakash leaving the *jhuggi*, after locking it from outside.

(d) Noticing the *jhuggi* on fire, and raising an alarm.

26. The points or factual details on which PW-4 can be said to have been inconsistent, are:

(i) His keeping the school bag in the *jhuggi*,

(ii) Whether he was asked by Prakash to go out of the *jhuggi*,

(iii) Whether he saw the deceased and Prakash in a compromising position;

(iv) Whether PW-4 saw Prakash setting fire to the *jhuggi*.

27. In this context, it would be useful to recollect that in *State of Rajasthan v Smt. Kalki*, AIR 1981 SC 1390, the Court observed how Courts should carefully analyze evidence in criminal trials, and not draw ready conclusions about minor discrepancies being serious contradictions, in the following terms:

*“The discrepancies referred to by the High Court are, in our opinion, minor, insignificant, natural and not 'material'. The discrepancies are with regard to as to which accused 'pressed the deceased and at which part of the body to the ground and sat on which part of the body; with regard to whether the respondent, **Kalki**, gave the axe blow to the deceased while the latter was standing or lying on the ground, and whether the blow was given from the side of the head or from the side of the legs. In the deposition of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person. As indicated above we have*

not found any material discrepancies in the evidence of PW 1."

28. Similarly, in the decision reported as *Leela Ram v. State of Haryana* ((1999) 9 SCC 525 it was held that:

"There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason thereof should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence....

The court shall have to bear in mind that different witnesses react differently under different situations : whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise."

29. In this case, the Court is of the opinion that the contradictions pointed out or highlighted by the respondent, during the course of hearing in this appeal, are not so serious or vital as to discard PW-4's testimony altogether. As a child, he had vivid recollections of seeing the accused with the deceased, leaving them and then seeing the *jhuggi* in flames, later. Even if his statements do show some inconsistencies and exaggerations, such as Prakash threatening to kill him, or that he saw Prakash setting the *jhuggi* on fire, or that he saw the accused and deceased

in a compromising position, in other essentials, about Prakash having visited their *jhuggi*, asking him to leave, and his later seeing the house in flames, have been consistently deposed to. Even if the Court were to disregard his version about having seen the accused and the deceased in a compromising position, or about the inconsistencies, the statements on the whole, are consistent about Prakash's involvement, and his having visited the *jhuggi* and staying with the deceased for some time, soon after which the *jhuggi* was on fire. The external corroboration in the form of the post-mortem report proving that the cause of Jayanti's death, was strangulation, and not due to the fire, strengthens PW-4's deposition.

30. PW-6 Dasha Ram in his deposition before the Court corroborated the version given by PW-4 about his presence and stated that Kali Charan's statement was recorded by the police on the same day. No suggestion was put to this witness in the cross-examination if PW-4 was not present at the spot, at that time. He also deposed having heard commotion in the afternoon of the incident, that fire had broken out in the *jhuggis*, and seen PW-11 and some children running. In his cross examination, PW-6 deposed that PW-4's statement was recorded by the police, the same day. He further deposed that the *jhuggi* was locked from outside, and that he kicked it open. This fact was later corroborated by PW-11 in his statement. He also deposed, in cross-examination, in 2009, that PW-4 Kalicharan had a school bag with him, that day.

31. PW-23 Ct. Bhanwar Lal, who reached the spot along with ASI Badami Lal, took the *rukka* to the police station for registration of the FIR when ASI Badami Lal made endorsement over the statement of PW-4. In his cross-examination, PW-23 reiterated that no other relative of the

deceased was found at the spot except her brother i.e. PW-4, Kali Charan aged about 10 years. PW-16 ASI Badami Lal also testified on similar lines and proved statement Ex.PW-4/A recorded by him which formed basis of the FIR. He claimed that statement Ex.PW-4/A was recorded by him in his own hand writing.

32. Testimonies of all these witnesses reveal no material discrepancies/ contradictions, to doubt PW-4's presence at the spot just before the incident, and having seen Prakash with the deceased. No ulterior motive has been attributed to these witnesses to falsely claim PW-4's presence. Being a family member of the deceased, presence of PW-4 at the spot was quite natural and probable. A number of memos prepared at the spot bear his signatures and that supports his presence.

33. In our opinion the Trial Court entirely misread the evidence in holding that PW-4's testimony cannot be accepted, because of its discrepancies and because other witnesses do not corroborate his presence. This is factually incorrect. PW-11 clearly deposed in 2001 itself having been told by a boy aged 10 or 11 years that his *jhuggi* had been set on fire. He thereupon rushed to the spot; PW-6 saw him doing so, and also saw that children were with PW-11 when he rushed to the *jhuggi* which had caught fire. Having regard to all these, the Trial Court, in our opinion, fell into error in doubting PW-4's presence at the place of incident, in the manner described by him.

(D) Last Seen :

34. In all his statements, PW-4 disclosed that at the relevant time, he had seen both Prakash and Jayanti inside the *Jhuggi*. Prakash was known to the witness prior to the occurrence as a resident living in a

nearby area. Consequently he did not hesitate to identify him. PW-4 also identified Prakash in the Court and proved that he was with Jayanti in the *Jhuggi*. Even if the court were to discard the statement about PW-4 having seen Prakash and Jayanti, in a compromising position, nevertheless the surrounding circumstances point to only Prakash as the one with whom the deceased was at the time, when the incident occurred, on the relevant date. PW-4 Kali Charan attributed a specific role to Prakash whereby first he went upstairs to the roof where his sister Jayanti was sitting; both went inside *Jhuggi* and then sat on the cot. On the circumstance of last seen, no material inconsistencies have been elicited in cross-examination.

35. PW-4 Kali Charan told the police about Prakash's involvement, with Jayanti soon after the occurrence. A child aged 9/10 years cannot be expected depose falsehood. His statement naming the Respondent/Accused as perpetrator of the crime in Ex.PW-4/A is without of any previous ill-will or animosity. Kali Charan admittedly is Jayanti's brother. Ordinarily a close relative would not intend to screen the real culprit as he would be interested to see that the real offender is brought to book. Close relationship of a witness with victim far from being a foundation for criticism offender is often a sure guarantee of truth. In this context, it was held, by the Supreme Court, in *Anvaruddin v V. Shakur* 1990 (3) SCC 266, that:

"It is well settled law that evidence of witnesses to the occurrence cannot be thrown overboard merely because they are interested and partisan witnesses. All that the law demands is that their evidence should be scrutinised with great care and caution to safeguard against the normal temptation to falsely implicate others."

36. In a similar vein, the Supreme Court had ruled, in *Dalip Singh and others v. The State of Punjab* AIR 1953 SC 364 it was stated that:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

Vivien Bose, J, put the matter even more clearly, as follows:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - 'Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p. 59) (1952 Cri LJ 547). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

The above decision was followed in *Guli Chand and others v. State of Rajasthan* AIR 1974 SC 276.

37. The PCR form Ex. PW-15/A and Ex.PW-15/B are vital documents containing details of the occurrence. PW-15 lady Constable Vandana proved these documents on 14.01.2002 and 06.03.2003. Subsequently, PW-15A ASI Ram Singh, author of Ex.PW-15/B proved its photocopy, stating that original of Ex.PW-15/B was in his hand-writing. He further deposed that on 18.01.2000 at about 2.49 P.M. on receipt of a call from Telephone No.6960651 regarding burning of a Jhuggi in Green Park near Avtar Taxi Stand, he directed PCR Van E-89 to go there. On the basis of the information given by PCR officials, he recorded the information in Ex.PW-15/B. Counsel for the respondent had urged that the latter document, particularly Ex. PW-15/B is a fabrication, and was introduced later, and that the witness, PW-15 could not depose about it. He had questioned the veracity of the PCR form.

38. These documents (Ex.PW-15/A and Ex.PW-15/B) were part of the charge-sheet from the inception. Furthermore, even though PW-15 could not say anything about Ex.PW-15/B, which, significantly bore a separate diary number, and was recorded immediately after Ex. PW-15/A, within a minute, the other witness, PW-15A, clearly deposed having recorded the original. He had brought the log book to court, in support of his deposition, and further stated that the original register had been destroyed, during the intervening period. Significantly, neither was PW-15 Vandana, who had produced the first exhibit, cross examined on that score; nor was PW-15A, on his assertions; he was not contradicted that the log book produced by him, contained the record of the incident. In our

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view, there was no possibility of fabrication of the document, Ex.PW-15/B subsequently as argued by Counsel for the respondent. Contents of Ex.PW-15/B reveal the Respondent's name soon after the incident at about 3.15 P.M. It was also noted there that Prakash, residing in the Jhuggi was missing and the girl was lying naked. Contents of Ex.PW-15/B are fully consistent with Kali Charan's version recorded in the statement before the police and before the Court.

39. In his statement under Section 313 Cr.P.C. Prakash at the first instance did not plead 'alibi'; he later examined DW-1 Bagirath. The latter deposed that Prakash was with him on the day of occurrence, in his place of work near a park in Jor Bagh area. He further deposed that on 18.01.2000, he and Prakash had gone for some job in the morning and returned at about 7.00 P.M. when Prakash was whisked away by the police on suspicion at about 7.30 P.M. This defence evidence does not inspire confidence as no such plea was put to any of the prosecution witnesses during their cross-examination. Prakash too did not claim that he was with DW-1 at his place of work at the time of incident, during the course of his statement under Section 313 Cr.P.C. DW-1 failed to specify where the construction work was on and who was his, as well as Prakash's employer.

40. There is no doubt, that testimonies of defence witnesses are to be treated at par with that of prosecution witnesses. Yet consistency and credibility claim precedence over parity, which is given only if defence witnesses depose to a plausible story. In this case, it is noteworthy that in a bail application moved on behalf of the accused (by Sh.A.K.Gahaloth, Advocate on 14.07.2000) before the Court of Ld. Additional Sessions

Judge, Delhi, it was averred that Prakash was in the company of one Munna from 1.00 P.M. to 3.00 P.M. and had gone to school with him. It was averred that after returning from school Prakash went to his Jhuggi where he heard about the incident and the police arrested him from his house at about 3.30 P.M. These pleas in the bail application (in para Nos.7 and 8) are apparently contrary to the defence taken before the Court during Trial. The Appellant perhaps failed to remember contents of the bail application and examined DW-1 Bagirath, who gave entirely different version. We are conscious that this circumstance cannot be used against the respondent, as a weighty or significant one, as a link in the chain. Yet, we note this, since it discloses shifting and varying explanations as to where Prakash was, at the relevant time.

41. During the course of arguments, it was urged that there was more than one Prakash in the vicinity of the *jhuggi*, and the respondent was falsely implicated. A further argument was sought to be made that Prakash was in fact taken to the police station, the same day, as was evident from the depositions of some witnesses. The testimony of PW-4 was used, in this regard. The earliest statement of PW-4, under Section 161 itself mentioned that Prakash used to visit his house, and talk to Jayanti, for quite some time before the incident. The Court cannot obviously consider this statement; however, in his deposition PW-4 clearly mentioned that he knew Prakash since he used to live in the same locality. This assertion remained unchallenged by the defence. Therefore, the respondent's argument about false implication, of an innocent Prakash is without merit. So far as PW-4 deposing about his having seen Prakash the same evening in the police station is concerned (another submission

made by the respondent, which was upheld by the Trial Court), in the entire evidence of PW-4, there is nothing to indicate that he saw Prakash after the incident, or that he saw him in the police station.

42. In the case reported as *Babu S/o Raveendran vs. Babu S/o Bahuleyan and Anr.* (2003) 7 SCC37 Supreme Court observed :

“14. The second important circumstantial evidence the accused is that the accused and the deceased were last seen together. To put it tersely both of them slept together by retiring to the room that night. Last seen together in legal parlance ordinarily refers to the last seen together in the street, at a public place, or at any place frequented by the public. But here, the last seen together is much more than that. The last seen together here is sleeping together inside the bolted room. It is in the evidence of PW-3 and PW-6 that they had dined together and the accused and the deceased were closeted in a room at about 8.30 p.m. Therefore, on the fateful day the accused and the deceased were closeted in a bedroom at about 8.30 p.m. is undisputed and it is for the accused alone to explain as to what happened and how his wife died and that too on account of strangulation.”

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“18. Now the question remains to be considered is who is responsible. As already noticed, the accused and the deceased were closeted inside the room. There is no evidence of intruder. In such a situation, the circumstances leading to the death of the deceased are shifted to the accused. It is he who knows in what manner and in what circumstances the deceased has met her end and as to how the body with strangulation marks found its way into the nearby well. All the aforesaid circumstances, taken together cumulatively lead and unerringly point only to the guilt of the accused.”

43. Another case '*State of Madhya Pradesh Vs. Ratan Lal*' AIR1994SC458 is also relevant to note :

“4. There is no eye-witness to the incident. The prosecution case rests on circumstantial evidence. The prosecution has placed strong reliance on the evidence of P.W. 2 Wazir Khan (wrongly mentioned as Gafoor Khan by the High Court), a neighbour, who claims to have gone to the place of occurrence at the behest of P.W. 3 Thakurain alias Mehtab, also a neighbour. As stated earlier the father of the accused had informed P.W. 4 Prem Raj, a village watchman, about the incident and it was the latter who had lodged the complaint Exhibit P-6. Weapon of assault was found from the room and was stained with blood. The High Court has rejected the evidence in regard to the discovery of this weapon at the behest of the respondent. We do not propose to doubt that part of the High Court's finding. We will assume that this weapon was found and attached in the course of investigation when the police reached the scene of occurrence. The stains of blood on the weapon have been found by the Serologist and the chemical analyser, to be of human origin. In addition thereto a banian of the accused was also attached as it was blood-stained. It was also stained with blood of human origin. The group was identified. Thus the circumstances on which the prosecution relied are (1) the accused did not open the door when P.W. 2, Wazir Khan knocked at it and even after the latter showered abuses till he had withdrawn 8 or 10 paces therefrom, (2) the accused also had three injuries on his person which have not been explained satisfactorily, (3) the accused had requested P.W. 2 Wazir Khan to pacify his mother as he apprehended that she may not be able to take the shock of loss of her daughter-in-law, (4) the father of the accused was not present at the time of occurrence and yet falsely involved by the accused, (5) find of bloodstained weapon and banian and (6) the statement made to P.W. 2 Wazir Khan that his wife was dead and he too would die. The evidence of P.W. 2 clearly establishes that shrieks were heard by Thakurain from the room, which was bolted from inside and even after he knocked at it and showered abuses, none opened the room. It was only after he withdrew 6 or 10 paces, that the accused opened the room and ran away

towards the jungle. The accused returned some time later and requested P.W. 2 to pacify and console his mother. Although P.W. 3 Thakurain does not say that she had sent P.W. 2 to the house of the respondent, we see no reason to doubt the statement of P.W. 2 in this behalf. P.W. 2 is a totally independent person who has no axe to grind against the respondent and who had visited the place of occurrence only after he was informed that shrieks of a woman were heard from the room which was bolted from within. We repeatedly asked counsel for the respondent to point out any reason why P.W. 2 should go out of his way to falsely implicate the accused. The defence of the accused is also false when he says that it was his father who killed his wife and thereafter tried to inflict injuries on him. The evidence shows that the father was not there when the incident occurred. This false explanation was rightly used by the learned Sessions Judge as an additional link to the chain of events presented by the prosecution. If the evidence of P.W. 2 is trustworthy, which we hold it is, we see no reason why reliance should not be placed thereon, particularly when it is corroborated by the find of the bloodstained sickle, a bloodstained banian on the person of the accused and the injuries on the person of the accused which could have been caused to him in the course of the struggle which his wife who was a well built person must have put up. Since this part of the prosecution evidence is accepted and it is further accepted that on return the accused had requested P.W. 2 to console his mother and had told him that now that the wife is dead, there is no point in his living and he too will die, we find it difficult to brush aside this evidence as unacceptable. With respect the High Court has not tried to come to grips with the evidence tendered by the prosecution. The High Court has rejected his evidence on the following line of reasoning.

From his evidence it is clear that he had not actually seen the appellant beating his wife inside the house or his even coming out of the house, as admittedly by that time he had returned back. It is further clear that it is nothing but an

inference of this witness that the appellant was the person inside the house and he came out after opening the doors.

With respect this is not a correct reading of the evidence of P.W. 2. P.W. 2 does not claim to be a witness to the occurrence nor does he say that the accused had beaten his wife in his presence and seeing. All that he says is that on being informed that a woman's shrieks were heard from the house, he went there, knocked at the door and when no one opened the door, he uttered abuses and then withdrew by 8 or 10 paces and in his full view the accused thereafter opened the door and ran out from the room towards the jungles. There were only two persons in the room viz. the accused and his wife. The witness was, therefore, justified in inferring that it was the accused who had done his wife to death. We, therefore, do not see any reason why the evidence of this witness should not have been accepted. If accepted it clearly involves the accused in the commission of the crime. As stated earlier his evidence is further corroborated by the find of the human blood on the weapon of assault and his banian as well as the injuries on his person. The totality of the evidence and the circumstances relied on clearly establish the guilt of the accused. The learned Sessions Judge had reached the correct conclusion and the High Court, with respect, has interfered with the judgment on untenable grounds."

(E) Other Circumstances :

44. The respondent's plea that the prosecution failed to prove Prakash's motive to murder Jayanti is correct. In circumstantial evidence based cases, motive assumes some importance but its absence does not undermine the credibility of the prosecution case entirely. It only alerts the court to be careful in scrutinizing the materials before it. Motive, as the saying goes, remains locked in the heart of the offender and it is well known dictum that even the devil may not know the thoughts of man.

Motive is a fact which no human being but the individual himself can divine. Therefore, failure to discover a motive for an offence does not signify its absence; failure to produce evidence does not fatally affect the case. In the present case, Prakash had intimate relations with Jayanti; she had not objected his visit; she went with him inside the *Jhuggi*. In the post-mortem report PW-9 Dr. Sudhir Gupta's opinion was that there was a possibility that Jayanti had sexual intercourse before her death. As per FSL report, human semen of 'B' group was detected on Ex.PW-3/B i.e. the accused's underwear and in the vaginal swabs of the deceased suggestive of sexual intercourse. Jayanti was a consenting party throughout as she never raised alarm. What happened between the two inside the four walls of the *Jhuggi* soon after sexual intimacy was only within the special knowledge of the accused. He failed to give any explanation for the death of Jayanti inside the *Jhuggi* during his presence there. The possibility of some demand for marriage by Jayanti or her reluctance to continue her affair with Prakash, since they were perhaps seen in a compromising position, by her brother, forcing Prakash to commit the crime cannot be ruled out. However, this is just one of the possibilities, and all that can be said is that the materials on record could have led to inference of some motive, on Prakash's part, though the prosecution was unable to prove it.

45. The impugned judgment completely discarded the medical evidence, in the form of the FSL report, which sought to corroborate the prosecution allegation that Prakash had sexual intercourse with Jayanti, and his semen was discerned in the vaginal swab sample collected by the police. The Trial Court reasoned that the prosecution unduly delayed

sending the samples for testing to the FSL; the report of the agency was dated 27-3-2000. PW-9, the post-mortem doctor, deposed having given swabs for testing to the police. He was not challenged in cross examination on this aspect. PW-21 corroborated the recovery of a pant and underwear from the accused Prakash; they were exhibited in court, and had been recovered under seizure memo Ex. PW-18/C and Ex. PW-18/D. The FSL report was no doubt prepared on 27th March 2000; however, significantly Ex. PW-13/A and Ex. PW-13/B the reports, are preceded by covering letters; they state that the samples together with seals were received by the laboratory on 17th February, 2000. According to the opinion, Blood stains could be detected on some samples; the report Ex. PW-13/B stated that semen stains, of B group blood type, were found on the underwear (Ex. 3b in the report) and one of the vaginal swabs (Ex. 7B in the report). The underwear was that of the accused, Prakash. In our opinion, these reports constituted a strong incriminating circumstance which pointed to Prakash's involvement; they corroborated PW-4's version about the former's presence, and intimacy with Jayanti. The Trial Court rather hastily concluded that this evidence was unreliable, and overlooked that the samples were not sent in March, 2000, but earlier, in February, on 17th of the month. There was no doubt some delay; however, that itself is not a ground to completely discard the evidence, since it clearly incriminated the accused.

46. Another important piece of evidence, which incriminated the respondent, Prakash in this case was recovery of key with which Jhuggi was locked and FSL report Ex. PW-14/A confirming that the key matched the lock. This too pointed an accusing finger at the accused.

47. The prosecution case solely rests on circumstantial evidence. It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt. (*Hanumanth Govind Nargundkar & Anr. v. State of M.P.*, AIR 1952 SC 343; *Bhagat Ram v. State of Punjab*, AIR 1954 SC 621; *Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116 and *Chandmal and Anr. v. State of Rajasthan*, AIR 1976 SC 917). In this case, as noticed earlier, the prosecution relies on the "last seen" theory. Here, there is practically no time lag between the time when PW-4 saw the deceased and the accused together, and the time the death was discovered. It can be said that the time lag was less than one hour.

48. We find no merit in the respondent's plea to discard testimony of PW-4 as it is full of discrepancies, improvements and contradictions. Even if these improvements or discrepancies are ignored, we are of the view that the prosecution has proved the circumstances which are complete and are of conclusive nature, consistent with the hypothesis of guilt of the Accused and so that in all human probability the crime was committed by the Accused Prakash. PW-4 aged about 8/10

years at the time of occurrence, gave an innocent account of the incident in the manner he witnessed it at different times. The previous conviction of accused was set aside due to a technical flaw in recording statement of a child witness without putting questions to understand his capability to testify. When PW-4 appeared again after 10 years for deposition, he reiterated his statement made to the police as well as to the Court. Since this witness was re-examined after a lapse of 10 years, there was every possibility of some contradictions, improvements or discrepancies to emerge. All such deficiencies are not so glaring as to lead to the rejection of his truthful version, seen as a whole.

49. In this context, it would be useful to notice that the law relating to a testimony of a child witness is discussed in the case of 'State of Uttar Pradesh Vs. Krishna Master and Others' (2010) 12 SCC 324 :

“15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

17. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eyewitnesses examined in this case proves the prosecution case.

24. The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness.

29. At this stage, it would be well to recall to the memory the weighty observations made by this Court as early as in the year 1988 relating to appreciation of evidence and the duties expected of a Judge presiding over a criminal trial. In State of U.P. v. Anil Singh, 1988 Supp SCC 686 : 1989 SCC (Cri) 48 : AIR 1988 SC 1998, it is observed as under: (AIR pp. 1998-99)

“... in the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases, the entire prosecution case is

doubted for not examining all the witnesses to the occurrence. The indifferent attitude of the public in the investigation of crimes could also be pointed. The public is generally reluctant to come forward to depose before the court. It is, therefore, not correct to reject the prosecution version only on ground that all witnesses to occurrence have not been examined. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. It is also experienced that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.”

50. Similarly, regarding testimony of child witnesses Supreme Court observed as under :

“36. The abovestated reasons are the only grounds on which testimony of witness Madan Lal is disbelieved by the High Court. This Court fails to understand as to on what principle and on which experience in real life, the High Court made a sweeping observation that it is inconceivable that a child of Madan Lal's understanding would be able to recapitulate facts in his memory witnessed by him long ago. There is no principle of law known to this Court that it is

inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. This witness has claimed on oath before the Court that he had seen five members of his family being ruthlessly killed by the respondents by firing gunshots. When a child of tender age witnesses gruesome murder of his father, mother, brothers, etc. he is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time, notwithstanding the gap of about ten years between the incident and recording of his evidence.

37. This Court is of the firm opinion that it would be doing injustice to a child witness possessing a sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. Therefore, the specious ground on which the reliable testimony of PW 2 Madan Lal came to be disbelieved can hardly be affirmed by this Court.”

51. The child witnesses’ testimony, in any event is corroborated on several particulars, by PW-6 and PW-12, as well as PW-11. The reporting of the incident took place at the earliest point in time. The Trial Court’s finding that since the Special Report was not sent early enough, the prosecution fabricated against the respondent, is unfeasible. No doubt, the police have to take steps at the earliest to apprise the concerned Magistrate about any incident concerning the death of an individual, by virtue of Section 157. However, this single fact cannot vitiate the entire trial. In *Pandurang Chandrakant Mhatre v. State of Maharashtra*, (2009) 10 SCC 773, it was held that:

"As regards delayed receipt of the copy of FIR by the Court of Magistrate on 12-4-1988, in the first place Ext. 84, FIR register indicates that copy of FIR was sent to the Magistrate concerned on 3-4-1988 itself. Secondly, and more importantly, if the evidence of eyewitnesses is found cogent, convincing and credible, the delay in receipt of the copy of FIR by the court concerned would not be of much significance."

52. Similarly in *Pala Singh v. State of Punjab*, (1972) 2 SCC 640, the Supreme Court observed that:

"No doubt, the report reached the Magistrate at about 6 p.m. Section 157 CrPC requires such report to be sent forthwith by the police officer concerned to a Magistrate empowered to take cognizance of such offence. This is really designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under Section 159. But when we find in this case that the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to our notice, then, however improper or objectionable the delayed receipt of the report by the Magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It is not the appellant's case that they have been prejudiced by this delay."

53. In this case, the prosecution witnesses' depositions were credible in material particulars. The respondent's role was clearly deposed to by the witnesses. They were also corroborated by other materials and events. In the circumstances, the mere late or delayed compliance with Section 157 Cr.P.C. would not result in the entire prosecution getting vitiated.

54. This court is conscious of the limitations in an appeal against acquittal; unless the record discloses substantial or compelling reasons, or a manifestly unreasonable approach, the High Court would not reverse an acquittal after a criminal trial. This aspect was explained in *K. Gopal Reddy –vs- State of AP* 1979 (1) SCC 355, as follows:

“The learned Counsel for the appellant advanced the usual argument submitted in all cases where an order of acquittal is reversed, namely, that where two views of the evidence are possible, the accused is entitled to the benefit of the doubt arising from the two views and that where the trial Court has taken a possible view and acquittal merely because another view is also possible.

*9 The principles are now well settled. At one time it was thought that an order of acquittal could be set aside for "substantial and compelling reasons" only and Court used to launch on a search to discover those "substantial and compelling reasons". However, the 'formulae' of "substantial and compelling reasons", "good and sufficiently cogent reasons" and "strong reasons" and the search for them were abandoned as a result of the pronouncement of this Court in *Sanwat Singh v. State of Rajasthan* (AIR 1961 SC 715 : (1961) 3 SCR 120 : (1961) 1 Cri LJ 766). In *Sanwat Singh* case, this Court harked back to the principles enunciated by the Privy Council in *Sheo Swarup v. Emperor* (61 IA 398 : AIR 1934 PC 227) and reaffirmed those principles. After *Sanwat Singh v. State of Rajasthan*, this Court has consistently recognised the right of the Appellate Court to review the entire evidence and to come to its own conclusion bearing in mind the consideration mentioned by the Privy Council in *Sheo Swarup's* case. Occasionally phrases like 'manifestly illegal', 'grossly unjust', have been used to describe the orders of acquittal which warrant interference. But, such expressions have been used more as flourishes of language. To emphasise the reluctance of the Appellate Court to interfere with an order of acquittal than to curtail the power of the Appellate Court to review the entire evidence and to come to its own conclusion. In some cases (*Ramabhupala Reddy v. The State or A. P.* ((1970) 3*

SCC 474 : 1971 SCC (Cri) 80 : AIR 1971 SC 460) *Bhim Singh Rup Singh v. State of Maharashtra* ((1974) 3 SCC 762 : 1974 SCC (Cri) 238 : AIR 1974 SC 286), it has been said that to the principles laid down in *Sanwat Singh* case may be added the further principle that "if two reasonable conclusions can be reached on the basis of the evidence on record, the Appellate Court should not disturb the finding of the trial Court". This, of course, is not a new principle. It stems out of the fundamental principle of our criminal jurisprudence that the accused is entitled to the benefit of any reasonable doubt. If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of a reasonable doubt. But, fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonable probable as that against him. If the preponderance of probability is all one way, a bare possibility of another view will not entitle the accused to claim the benefit of any doubt. It is, therefore, essential that any view of the evidence in favour of the accused must be reasonable even as any doubt, the benefit of which an accused person may claim, must be reasonable. "A reasonable doubt", it has been remarked, "does not mean some light, airy, insubstantial doubt that may fit through the minds of any of us about almost anything at some time or other; it does not mean a doubt begotten by sympathy out of reluctance to convict; it means a real doubt, a doubt founded upon reasons" *Salmon, J.* in his charge to the jury in *R. v. Fantle* reported in 1959 *Criminal Law Review* 584. As observed by Lord Denning in *Millerr v. Minister of Pension* ((1947) 2 All ER 372), "Proof beyond a reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is no strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice". In *Khem Karam v. State of U. P.* ((1974) 4 SCC 603 : 1974 SCC (Cri) 689 : AIR 1974 SC 1967), this Court observed :

Neither mere possibilities nor remote possibilities nor mere doubts which are not reasonable can, without danger to the administration of justice, be the foundation of the acquittal of an accused person, if there is otherwise fairly credible testimony.

10. Where the trial Court itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule. That is what the High Court has done in this case...”

55. In *State of Goa v Pandurang Mohite*, AIR 2009 SC 1066, after an extensive review of previous authorities, the Supreme Court held that:

In Allarakha K. Mansuri v. State of Gujarat (2002) 3 SCC 57, referring to earlier decisions, the Court stated :

"7. The paramount consideration of the court should be to avoid miscarriage of justice. A miscarriage of justice which may arise from the acquittal of guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view based upon conjectures and hypothesis and not on the legal evidence, a duty is cast upon the High Court to reappreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether the accused has committed any offence or not. Probable view taken by the trial court which may not be disturbed in the appeal is such a view which is based upon legal and admissible evidence. Only because the accused has been acquitted by the trial court, cannot be made a basis to urge that the High Court under all circumstances should not disturb such a finding."

In Bhagwan Singh v. State of M.P. (2002) 4 SCC 85, the trial court acquitted the accused but the High Court convicted them. Negating the contention of the appellants that the High Court

could not have disturbed the findings of fact of the trial court even if that view was not correct, this Court observed :

"7. We do not agree with the submissions of the learned counsel for the appellants that under Section 378 of the Code of Criminal Procedure the High Court could not disturb the finding of facts of the trial court even if it found that the view taken by the trial court was not proper. On the basis of the pronouncements of this Court, the settled position of law regarding the powers of the High Court in an appeal against an order of acquittal is that the Court has full powers to review the evidence upon which an order of acquittal is based and generally it will not interfere with the order of acquittal because by passing an order of acquittal the presumption of innocence in favour of the accused is reinforced. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Such is not a jurisdiction limitation on the appellate court but judge-made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to reappreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether all or any of the accused has committed any offence or not".

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From the above decisions, in Chandrappa and Ors. v. State of Karnataka (2007 (4) SCC 415), the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal were culled out :

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) *The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*

(3) *Various expressions, such as, "**substantial** and **compelling** reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.*

(4) *An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*

(5) *If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."*

56. In this case, we are satisfied that the Trial Court committed manifest errors in regard to appreciating the evidence of PW-4, in holding that his testimony was not corroborated by anyone else (though PW-6 and PW-11 supported his statement about being present); discarding Ex.PW-15/A and Ex.PW-15/B which proved that Prakash's name had figured at a very early stage; in holding that the delay in sending the special report to the Magistrate was fatal; in discarding the FSL reports which confirmed that the semen in the undergarments seized from the accused, matched

with the vaginal swab of the deceased, which was seized at the time her body was sent for post-mortem examination. These amount to substantial and compelling reasons, why the acquittal recorded by the Trial Court needs to be reversed, in the interests of justice.

57. For the above reasons, we are of the view that the findings of the Trial Court are unsustainable. The Trial Court failed to take into consideration admissible evidence in proper perspective which has resulted in miscarriage of justice. The findings of the Trial Court, whereby the accused was acquitted of charges under Sections 302 IPC are set aside.

Sections 436 and 201 IPC

58. As regards the offences under Sections 436 and 201, PW-4 has in his various statements and depositions, been consistent in one regard, i.e., that he saw the accused lock the house and run away, and almost simultaneously, saw smoke emanating from his house. His testimony with regard to the accused locking the house has been corroborated by PW 6 Dasha Ram who stated that on reaching the burning house, he found the door locked from outside and had to kick it open. PW-4's testimony with regard to the smoke is testified by PW 24 Inspector Data Ram who had seized a kerosene oil '*dubbi*' (box) from the scene of crime. Further, the post mortem report of the deceased Ex. PW-24/B is clear on the fact that the deceased's body had burn marks all over.

59. As far as the respondent's conviction under Section 436 is concerned, it would be necessary to notice that provision; it reads as follows:

*"436. **Mischief** by fire or explosive substance with intent to destroy house, etc. - Whoever commits **mischief** by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody or property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."*

Mischief is defined in Section 425, I.P.C. as follows:-

"Mischief- Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits mischief".

Explanation 1. It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2. Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and persons jointly."

60. The above provisions reveal that damage or loss must be caused to the property of the public or any other person. The evidence on record also shows that though PW-4 Kali Charan contradicted himself about whether the accused had sprinkled kerosene and set the *jhuggi* on

fire, he was consistent about having seen Prakash locking it, and thereafter his (the witness) having seen the flames. The fire; how the locked *jhuggi* had to be forced open; the discovery of the burnt body of Jayanti; and objective evidence in the form of FSL report corroborating the burning of the *jhuggi*, are matters of record. Therefore, even though there is no direct evidence about the involvement of Prakash in offence of causing mischief to a dwelling house, there is circumstantial evidence which points to his being the only person who could have committed that offence, and absence of every hypothesis of his innocence. Even though PW-4's evidence about the use of kerosene is not consistent, the testimony of PW-24 proves that kerosene oil was recovered from a can. In these circumstances, this Court is of the opinion that the Respondent's conviction under Section 436, IPC was also warranted. The impugned judgment is also reversed on this score, and the Respondent is convicted for that offence.

61. In this case, the accused's act of causing mischief by setting fire, was clearly intended to result in disappearance of evidence; had the fire in the *jhuggi* not been detected in time, and quelled, not only could the evidence of his crime (under Section 302) have disappeared, leaving no trace of the body; even the crime of murder could well have gone undetected. However, he could not succeed on that score. Therefore, he is guilty of the offence punishable under Section 511 IPC for attempting to commit the offence under Section 201, IPC.

62. In view of these findings, the impugned judgment and order of acquittal is hereby reversed. The Appellant is convicted for the

offences punishable under Sections 302, 436 and 201 read with Section 511 IPC. For the offence under Section 302, he shall undergo imprisonment for life, and shall be liable to pay fine of ₹ 5,000/- or, in default of which to undergo simple imprisonment for three months. For the offence under Section 436, he shall undergo RI for five years; and shall be liable to pay fine of ₹ 1,000/- or, in default of which to undergo simple imprisonment for one month. For the offence under Section 201 read with Section 511 IPC, he shall undergo RI for one year, and shall be liable to pay fine of ₹1,000/- or, in default of which to undergo simple imprisonment for one month. All sentences shall operate concurrently. The period already spent by the Respondent/Accused, both pre-trial and post-trial shall be set off under Section 428 Cr.P.C. The Respondent shall surrender before the Trial Court on 22nd February, 2012, to serve the remainder of the sentence awarded to him. The appeal is allowed, to the above extent.

(S.P.GARG)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

FEBRUARY 08, 2012
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