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

**+ CRL.A.No.394/2010**

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Date of decision: 28<sup>th</sup> March, 2012

RAVINDER SINGH ..... Appellant  
Through : Mr. Siddharth Aggarwal and  
Mr. Simon Benjamin, Advs.  
versus

STATE (NCT) OF DELHI ..... Respondent  
Through : Ms. Ritu Gauba, APP.

**CORAM:**  
**HON'BLE MS. JUSTICE GITA MITTAL**  
**HON'BLE MR. JUSTICE J.R. MIDHA**

**JUDGMENT (ORAL)**

1. The appellant has assailed the judgment dated 16<sup>th</sup> of April, 2009 finding him guilty for commission of offences under Sections 302/201 of the Indian Penal Code. The appellant was heard on sentence and by an order dated 20<sup>th</sup> April, 2009, the learned Trial Judge sentenced the appellant to imprisonment for life and payment of Rs.10,000/- as fine and in default of payment of fine, the appellant was sentenced to undergo further simple imprisonment for a period of three months for commission of offence under Section 302. So far as the sentence for commission of the offence under Section 201 IPC is concerned, the learned Trial Judge sentenced the appellant to undergo rigorous imprisonment for three years and to pay

Rs.3,000/- as fine in default thereof to undergo simple imprisonment for a further period of three months. It was also directed that the sentences shall run concurrently and the appellant was directed to be entitled to the set off in terms of Section 428 of the Cr.P.C, in respect of the period already undergone by him during judicial custody.

2. The prosecution commenced on receipt of telephonic information received at 06:40 A.M. on the 17<sup>th</sup> of April, 2002 by the PCR which was passed on by Lady Constable Hemlata of the PCR net of the South West District of Delhi to the police station Dabri scribed as DD No.9 (Ex.PW3/B) to the effect that a dead body was lying at the Shivani Senior Secondary School, Mahavir Enclave, Palam. The report was handed over to PW18 - Sub-Inspector Tara Chand who, accompanied by PW7 - Ct. Jaipal Singh, proceeded to the spot.

3. The two police officials found a naked headless male body lying on its stomach in the lane behind the Shivani Senior Secondary School. There was some blood near the body while spots of blood were found on the nearby wall. The thumb of the right foot had been split open while the left shoulder bore an injury inflicted with a sharp weapon. As per the police officials, the circumstances and the small quantity of blood lying there suggested that the person had not been killed at

the spot but was thrown at the spot after being killed elsewhere. Despite search, the head of the body could not be traced. No eye-witness was also available.

4. An endorsement in the above terms was effected on DD No.9 (Ex.PW18/A) which was returned to the Police Station Dabri. On receipt of this information, FIR No.286/2002 dated 17<sup>th</sup> April, 2002 under Sections 302/201 of Indian Penal Code (Ex.PW3/A) was registered. The same was handed over to the PW20 - Inspector Lakhwinder Singh for investigation.

5. After completion of investigation, a charge sheet was filed against the appellant. The following charges were framed against him by an order dated 23<sup>rd</sup> May, 2003:-

“ CHARGE

I, R. Kiran Nath, Addl. Sessions Judge, New Delhi, do hereby charge you accused Ravinder Kumar S/o Baro Mehto as under :-

That on the night intervening 16/17.4.02 at Shiv Vani Sr. Sec. School, Mahavir Enclave, Part-I, within the jurisdiction of PS Dabri you committed murder of Sanjay @ Dashrat and you thereby committed an offence punishable under Section 302 IPC and within the cognizance of this court.

Secondly, on the abovesaid date, time and place you hide the skull of Sanjay @ Dashrat in the aforesaid school in order to causing disappearance of evidence of the offence in order to screen yourself from the legal punishment and you thereby committed an offence punishable under Section 201 IPC and within the cognizance of this court.

And I hereby direct that you be tried by this court for the aforesaid charge.

ASJ, New Delhi”

6. There was no eye-witness to the crime. The case of the prosecution rested on circumstantial evidence.

7. In support of its case, the prosecution examined 20 witnesses. The statement of the appellant under Section 313 of the Cr.P.C. was recorded. We find that the prosecution attempted to lead evidence with regard to;

(i) Time of occurrence.

(ii) Place of occurrence.

(iii) The deceased having been last seen alive in the company of the appellant.

(iv) Recoveries made pursuant to a disclosure statement allegedly made by the accused.

(v) The blood of the deceased being found on the articles which had been recovered/seized.

(vi) Identification of clothes which were recovered/seized from the spot as belonging to the deceased.

(vii) Motive.

8. After a detailed consideration, the learned Trial Judge pronounced the judgment dated 16<sup>th</sup> April, 2009 finding the appellant guilty of commission of offences under Sections 302/201 IPC.

9. Aggrieved thereby, a challenge has been laid to the conviction as well as the sentence imposed upon the appellant by way of present appeal.

10. Mr. Siddharth Aggarwal, learned counsel, who has assisted this court on behalf of the appellant, has strongly challenged the conviction on the ground that the prosecution has been unable to prove any of the allegations laid upon against the appellant.

11. Mr. Siddharth Aggarwal, learned counsel for the appellant has challenged every aspect of the prosecution case including the evidence led with regard to the place of occurrence as well as the evidence on the deceased having been last seen alive in the presence of the appellant. Mr. Aggarwal, learned counsel for the appellant has assailed the claim of the prosecution that the appellant made any disclosure statement or that recoveries were effected pursuant thereto. It is urged that in fact as per the evidence brought on record, the police effected the recoveries first; the appellant was arrested thereafter and the disclosures scribed in the police station only in order to support the false prosecution against the appellant.

12. Learned counsel has also urged that the prosecution has failed to connect the recoveries to the deceased person and that there is no evidence which supports the claim of the

prosecution that the blood of the deceased was found on any of the recovered clothing/articles. It is also contended that the clothes which have been allegedly recovered or seized by the police have not been connected to the deceased person and there is no credible evidence that the clothes which were recovered belonged to the appellant let alone that they had been actually worn by the deceased on the fateful night.

13. It is the submission of Mr. Siddharth Aggarwal, learned counsel for the appellant that in a case of circumstantial evidence, the prosecution has to establish an unbroken chain of circumstances which leads to only one conclusion which is of the guilt and culpability of the accused person and does not in any manner suggest or support the hypothesis of innocence of such person. It is also submitted that the proof of existence of a motive for the offence is a material circumstance in order to support the case of the prosecution and to pass a judgment of conviction. In the instant case, the prosecution has miserably failed to even suggest a motive, let alone lead any evidence thereof. It is submitted that the evidence which has been brought on record is to the contrary.

14. A challenge has also been laid to the impugned judgment and order of sentence on the ground that there is no forensic or scientific evidence to support the case of the prosecution;

that the prosecution has failed to conduct any scientific examination in the nature of finger printing or identifying the blood grouping of the accused or the deceased so as to connect the seizure of alleged weapons of offence or the other recovered articles with the accused to the deceased.

15. It is contended that in the instant case, the prosecution has miserably failed to prove such an unbroken chain. It is urged that there are glaring loopholes in the evidence which has been led by the prosecution in all material respects and that there was no evidence which could have supported the conviction of the appellant.

16. A vehement challenge has been laid to the manner in which the trial was conducted. It is urged by learned counsel for the appellant that the trial suffered from processual unfairness to the appellant inasmuch as he has been denied an adequate and fair representation by a counsel of his choice. It is urged that mid-trial, the case was transferred from the District Court at Patiala House to the Dwarka District Court whereafter the counsel he had engaged for his representation had stopped appearing. It is urged that it was the duty of the learned trial judge to ensure that the appellant, who was accused of a serious crime for which the capital sentence could have been imposed upon him, was duly represented by a

counsel of his choice at every stage of trial. The contention is that the learned trial judge has grossly erred in failing to consider the fact that the appellant was illiterate and economically deprived and was certainly not conversant with the impact of refusing to cross-examine a witness or the import thereof. In these circumstances, it is urged that the statement attributed to the appellant by the learned Trial Judge in the order dated 22<sup>nd</sup> January, 2009 to the effect that he did not wish to wait for his counsel for cross-examination of the investigating officer PW 20 – Lakhwinder Singh certainly cannot be held to be an informed option exercised by the appellant. It is urged that the closure of the opportunity to cross-examine the investigating officer, who was one of the main witnesses in the case, has caused grave prejudice to the appellant. Learned counsel has also contended that the learned Trial Judge has proceeded in the matter with unwarranted haste in recording the statement of the appellant under Section 313 of the Cr.P.C. on the 10<sup>th</sup> of February, 2009 again when the appellant did not have the benefit of any guidance or assistance of a counsel as evidenced by the fact that on the 6<sup>th</sup> of March, 2009, the learned Trial Judge adjourned the case for the reason that there was no counsel appearing on behalf of the appellant. It is pointed out only on

23<sup>rd</sup> March, 2009 an amicus was appointed on behalf of the appellant. It is urged that it was because the appellant was not represented by a counsel that the question at serial nos. 26 to 31 as well as questions at serial nos. 31 to 39 could not have been put to the appellant inasmuch as there is no evidence at all on these aspects.

17. Learned counsel has urged at great length that the prosecution of the appellant ought to have failed for the reason that a material witness had not been examined by the prosecution. It is urged that Surinder Mehto, brother of the appellant was allegedly residing with him in the school premises and that it was the case of the prosecution that Surinder Mehto was also available in the school premises at the time of the alleged murder. Non-production and examination of Surinder Mehto, the brother of the appellant, necessitated that an adverse inference be drawn against the prosecution that if he had been examined, evidence of the innocence of the appellant would have come on record.

In support of these submissions, Mr. Siddharth Agarwal, learned counsel has placed reliance on **1976 (2) SCC 819 (Para 25)** titled **S. Harnam Singh v. State (Delhi Admn.)**.

18. Ms. Ritu Gauba, learned APP for the State has repudiated the challenge laid by the appellant. It has been urged that the

prosecution has established the commission of the offences by the appellant beyond reasonable doubt and that the judgment of conviction as well as the order of sentence imposed upon him deserve to be maintained. The prosecution has led evidence of PW-17, a chowkidar in the school to establish that the deceased was last seen alive in the company of the appellant entering the school on the fateful night. The learned APP for the State has contended that the prosecution has conducted the investigation strictly as per law and there is no reason for doubting either the disclosure statement or the recoveries and seizures effected by the police. It is urged that there is no absolute proposition that non-existence of motive for commission of an offence of murder has to be fatal to the prosecution. The submission is that the prosecution has adequately proved that the deceased was last seen alive in the company of the appellant and that the prosecution has also connected the recovered/seized articles to the deceased person. It is urged that recovery of the head of the deceased, weapons of offence, clothing of the deceased and appellant as well as the blood stained mop (pocha) was effected upon disclosure and pointing out by the appellant which have been rightly relied upon by the trial court for pronouncing the appellant guilty.

19. Learned APP draws our attention to Ex.PW18/C which is a recovery memo dated 17<sup>th</sup> April, 2002 to show that the police seized blood stained plaster from the stairs where the head of the deceased was recovered as well as the gallery; the plaster from the wall of room no.21 and floor tiling and other articles.

20. Learned APP for the State submits that PW9 – Dr. L.K. Baruah had taken a sample of blood of the deceased on a piece of gauze which was sealed with the seal of “CMO LKB, Civil Hospital, Delhi”. This piece of cloth was sent for forensic examination as parcel no.18 with other exhibits on the 17<sup>th</sup> of June, 2002. It is urged that the Forensic Science Laboratory in its report dated 25<sup>th</sup> October, 2002 (Ex.PW-20/A) has reported that human blood of the AB group was found on the said gauze which was Exh-18 which is therefore the blood group of the deceased.

21. Learned APP for the State has contended that the blood of this very grouping was seized from the greyish powder material (Exh.-3); wall plaster; (Exh.-5); the floor piece (Exh.-7); marble tile (Exh.-9) as well as the mop (pocha – Exh. 15). It is contended that these articles were seized on the 17<sup>th</sup> of April, 2002 by the police from the school premises.

22. It is also contended by Ms. Gauba, learned APP that the appellant made a conscious and considered statement on the

22<sup>nd</sup> of January, 2009 to the effect that he did not want to wait for his counsel and did not wish to cross-examine PW20 – Inspector Lakhwinder Singh. The submission is that no fault can be found in the order which was recorded on 22<sup>nd</sup> January, 2009 in closing the cross-examination of PW20. She further points out that even the learned Trial Judge in the order dated 22<sup>nd</sup> of January, 2009 gave liberty to the accused person to move an application for permission to cross examine the witness. Having failed to do so, the appellant must be deemed to have waived his right to cross-examine PW20 in terms of Section 465(2) of the Cr.P.C. Learned counsel has contended that an amicus was appointed on 23<sup>rd</sup> March, 2009 to represent the appellant and that the appellant had adequate opportunity to request for another opportunity to cross-examine the prosecution witness.

23. Learned APP for the State has contended that Section 313 of the Cr.P.C. mandates that it is the accused person who has to personally give an explanation for the material in evidence which has been recorded against him; and has in fact an opportunity to do so. Ms. Gauba has urged that no prejudice has therefore been caused to the appellant on account of absence of the counsel.

24. It is urged by learned APP that the prosecution has adequately established an unbroken chain of incriminating circumstances against the appellant meriting the dismissal of the challenge laid in the present appeal. Given the nature of the crime and the above circumstances it is contended that the conviction of the appellant and the sentence deserve to be sustained.

**Time of occurrence**

25. We may now examine the evidence led with regard to the time of the occurrence and the challenge thereto at the instance of the appellant. The prosecution has primarily relied on the evidence of PW 9 – Dr. L.K. Baruah in order to pinpoint the time on which the murder took place. PW 9 conducted the postmortem on the body of the deceased on the 22<sup>nd</sup> of April, 2002 and gave a report which has been proved on record as Ex.PW9/A. In the written document Exh. PW-9/A, the doctor has not given any opinion with regard to the time of the death anywhere. In his cross-examination in court on 4<sup>th</sup> November, 2004, PW9 – Dr. L.K. Baruah has stated that the time since death was approximately one week prior to his conducting the postmortem. Unfortunately, Ex.PW9/A does not contain the time at which the postmortem was conducted and not even an opinion with regard to the date of the death.

26. Learned counsel for the appellant has contended that the period of one week, taken back from 22<sup>nd</sup> of April, 2002 would take the occurrence to 15<sup>th</sup> April, 2002. Ms. Ritu Gauba, learned APP for the State has on the other hand contended that if calculated correctly, the opinion of the doctor would relate back the time of the murder to the night intervening the 16<sup>th</sup>/17<sup>th</sup> of April, 2002. In her submission, the entire day of 22<sup>nd</sup> April, 2002 has to be considered while computing the time of death.

27. The question of pinpointing the time of occurrence assumes importance in the context of the prosecution's case that the deceased was last seen alive in the company of the appellant. If this circumstance was accepted, then its proximity to the time of the murder is necessary to support a finding of culpability of the appellant to rule out the possibility of a third party intervention as the offender.

28. PW-9 in his cross examination has stated that he is regularly conducting post mortems since 1986 and had conducted thousands of post-mortems since then. He confirmed that the police had informed him that a "dau" was the weapon of offence. He also stated that rigor mortis started about 3 to 4 hours of the death and completes within 6 to 8 hours and that it passes away from the dead body after 24

hours in normal condition. The doctor could not recollect the colour of the skin of the dead body at the time of his evidence. Exh. PW-9/A mentions that *“rigor mortis was absent in upper limb but lower limbs are stiff (cold stiffening) present”*.

29. Learned counsel for the appellant has placed reliance on the provisions of Section 45 of the Indian Evidence Act in support of his submission that the testimony of PW-9 Dr. A.K. Baruah cannot be ipso facto relied upon by this court to accept his statement with regard to the time of the death. Learned counsel has pointed out that the doctor was required to give the scientific basis for his oral testimony which is completely unsupported by either the post-mortem report or any statement in the witness box to this effect.

30. PW-9 does not support his statement in court regarding estimation of the time of the death with any factual narration or the body condition. Given the period of almost two and a half years between the post mortem on 22<sup>nd</sup> of April, 2002 and 4<sup>th</sup> November, 2004 when his evidence was recorded, it is improbable that the doctor could possibly remember the condition of the body to opine about the possible time of death of a person who he had seen in 2002. Given the nature of the deposition of PW9 and the endorsement contained on Ex.PW 9/A, undoubtedly, it is therefore difficult to accept the oral

statement of PW-9 to pinpoint the exact time at which the incident took place. No other evidence has been led by the prosecution on this aspect of the matter.

**Place of occurrence**

31. We may now consider the arguments led by both sides with regard to the place of occurrence as well as the effort of the prosecution to draw a linkage or proximity of the place to the residence of the appellant.

32. In this regard, it has been urged by learned counsel for the appellant that the evidence led by the prosecution renders it impossible to identify the place of the murder. It is also urged that vague depositions with regard to the co-habitation and residence of the appellant and his brother Surinder Mehto have been placed before the court.

33. The prosecution has examined PW1 – Prashant Narula, the owner of the Shivani Senior Secondary School as a witness who has stated that he was the then Vice Principal of the said school in 2002. In his entire deposition, only a vague statement with regard to the residence of the appellant in a *“school room at Shiva Block, Second Floor”* has been made. It is urged that apart from this statement, there is no evidence at all with regard to the residence of the appellant in any particular identifiable portion of the school premises.

34. PW17 – Dharam Raj Yadav, a security guard at the school is another witness who has stated that the appellant used to reside inside the school without again specifically adverting to any particular room in the school.

35. The police has claimed to have effected recoveries from a room adjoining room no.21. It is important to note that there would be a room on either side of Room no.21 which would be adjunct to it. The site plans on record do not show such room. Therefore, the prosecution has been unable to connect the appellant to a particular room adjoining room no. 21 (class VII) in the school. The prosecution has also not been able to establish that the appellant was in exclusive possession or control over the room “adjoining room no.21”.

**Last Seen Together**

36. Apart from the reliance on the disclosure attributed to the appellant, the case of the prosecution primarily rests on the evidence of the deceased allegedly being last seen alive in the company of the appellant. In this regard, the prosecution has relied completely on the sole testimony of PW17 – Dharam Raj Yadav who was employed as a Chowkidar on the school premises. PW17 has deposed that on the night of 16<sup>th</sup> April, 2002 from 9:00 pm to 8:00 am, he was assigned the duty of guarding the main gate of Shivani Senior Secondary School.

He further deposed that at about 9:15 pm on that night he had seen the appellant and the deceased Sanjay entering the school from the main gate. In the examination-in-chief, the witness has categorically stated that he did not know anything thereafter. PW17 has also stated that he had left on a school bus at about 7:30 am and that he had not seen Surinder coming out or going inside the school. This bald assertion has to be examined in the light of other evidence which has come on record as well as the applicable legal principles.

37. The evidence of the prosecution on the issue of a deceased person being last seen alive in the company of an accused person has also been the subject matter of judicial consideration and pronouncement in a catena of precedents prior hitherto. The principles laid down in these judgments would guide adjudication by this court. Our attention has been drawn by Mr. Aggarwal to the pronouncement of the Supreme Court in **(2007) 3 SCC 755** titled **State of Goa v. Sanjay Thakran & Anr.**, it was held by the Supreme Court as follows:-

*“31. .... It is a settled rule of criminal jurisprudence that suspicion, however grave, cannot be substituted for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of circumstantial evidence. This Court has applied the above-mentioned general principle with reference to the principle of last seen together in **Bodh Raj alias***

**Bodha and Ors. v. State of Jammu and Kashmir :**  
2002 CriLJ 4664 as under:

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

*[See also: **State of U.P. v. Satish** : 2005 CriLJ 1428 (para 22) and **Ramreddy Rajeshkhanna Reddy and Anr. v. State of Andhra Pradesh** : AIR 2006 SC 1656*

*32. In **Ramreddy Rajeshkhanna Reddy** (supra), this Court further opined that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.*

*33. In **Jaswant Gir v. State of Punjab** : (2005) 12 SCC 438, it was observed that:*

*“5. ...In the absence of any other links in the chain of circumstantial evidence, it is not possible to convict the appellant solely on the basis of the 'last-seen' evidence, even if the version of PW 14 in this regard is believed.”*

34. From the principle laid down by this Court, the circumstance of last-seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after a considerable long duration. There can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a

*relatively wider time gap would not affect the prosecution case.”*

38. On the same issue, learned counsel for the appellant has placed reliance on the pronouncement of the Supreme Court reported at **1983 Cri.L.J. 155 : AIR 1983 SC 61, Prem Thakur v. State of Punjab** in support of his submission that there was nothing unnatural about the deceased and the appellant being seen together in the company of each other on the evening before the murder was committed for the reason that the appellant was working with the deceased. It is urged that therefore, no inference that the appellant was guilty of the murder would arise in the instant case from even the circumstances that PW-17 may have seen the deceased in the company of the appellant.

39. Ms. Ritu Gauba, learned APP for the state has placed reliance on the pronouncement of the Supreme Court reported at **(2005) SCC 642, State of U.P. v. Satish**. We find that even in this case, the Supreme Court has held that the last seen theory comes into play when the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. The Supreme Court

in para 22 held that *“it would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.”*

40. Learned APP has further placed reliance on the pronouncement of the Supreme Court reported at **AIR 2009 SC 712, Ramachami v. State Rep. by State Prosecutor.**

In this case, the prosecution had established on record that on the night of the occurrence, the accused and the appellant were alone in the hotel where they used to sleep. There was evidence of their having been last seen together on the night before the murder of the deceased and the accused had been absconding and was arrested more than nine month thereafter. In this background, the court had held that the circumstances established by the prosecution were sufficient to hold the accused guilty of the offence.

41. We may firstly examine the issue of the various gates which provided ingress and egress to the school premises. PW17 - Dharam Raj Yadav has stated that in the year 2002 there were three gates to the school premises including the

main gate providing entry to the school. He has also stated that a register was maintained for entering attendance at the gate and that he had not made any entry regarding the entry of the appellant and Sanjay into the school premises for the reason that the appellant was an employee of the school. The witness admitted that the deceased Sanjay was not an employee of the school.

42. It is also in the evidence of PW20 – Inspector Lakhwinder Singh that there were three entrances to the school.

43. PW1 – Prashant Narula who was the owner of the school and the then Vice Principal has stated that the school had two gates and that both the gates were manned by security guards who remained on duty.

44. The prosecution has also examined PW11 – Rohtas Saroha who has deposed that he was performing guard duty at the school gate from 1:00 pm to 9:00 pm in the year, 2002. This witness has stated that in the year, 2002 he had not seen the appellant and Sanjay in the school. It is also in his deposition that Sanjay was a relative of the appellant and that he used to visit the school with the appellant with whom the deceased had good relations.

45. Ms. Ritu Gauba, learned APP for the State has pointed out that in view of the deposition of PW20 – Inspector Lakhwinder

Singh, it would appear that Surinder Mehto, brother of the appellant was also performing the duties of Chowkidar on the fateful night.

46. The only conclusion from the above evidence on record with regard to the gates is that there were multiple gates, at least two, providing entrance into the school premises and that these gates were duly manned by chowkidars (guards).

47. The prosecution, therefore, relies on the sole testimony of PW17 in support of its case that the deceased had been last seen alive with the appellant on the fateful night. However, the prosecution has failed to lead any evidence with regard to ingress and egress from the other gates.

48. As per PW17, the deceased was seen entering the school in the company of the appellant at about 9:15 pm. The above discussion shows that the prosecution has, however, not been able to also pinpoint the time of death of the appellant. There is no evidence at all that no other person was available in the school building and complex.

49. The above principles when applied to the instant case, would show that before this court it has been discussed hereinabove, that the prosecution has not been able to pin point the time of death of the deceased. The prosecution has led evidence only of the fact that the deceased was seen

entering the gate of the school premises at about 9.15 p.m. in the company of the appellant by PW-17. In this background, if the evidence of the prosecution, that the deceased was last seen alive in the company of the appellant is accepted, there is no evidence to establish that the same was proximate to the time that he was murdered or there was no intervention by any other person. There is also no evidence that the appellant or the deceased were both in the school premises at the time of the murder. No evidence to the effect that there was no other person in the school building or premises has been led. The prosecution has also not led in evidence as to whether any other person entered or exited from the other gates. On the contrary, evidence of PW-15, brother of the deceased has been considered to examine that the deceased had left his house to actually visit Surinder Mehto and not the appellant.

50. The requirement of proximity between evidence of last being seen alive with the time of death has also escaped discussion before the learned trial court. There can be no conclusion with regard to the time of death that the deceased was last seen alive in the company of the appellant close to the time when he was murdered in order to lead to the inevitable and only hypothesis that the accused is responsible for the murder and no other person.

51. In this background, it is not possible to conclusively opine with regard to the length of time between the time when PW-17 saw the appellant with the deceased and the time of the offence as well as the recovery of the body. Learned counsel for the appellant has vehemently contended that in this background the evidence of PW-17, even if accepted, is completely irrelevant and of no consequence so far as the case in hand is concerned.

**Non-examination of a material witness**

52. At this stage, we may also examine the emphatic submissions made by learned counsel for the appellant to the effect that the prosecution has led evidence with regard to the presence of Surinder Mehto who was the brother of the appellant within the school premises at all material times. It is urged that Surinder Mehto was considered a material witness on behalf of the prosecution and also cited in the list of witnesses filed by the prosecution along with the chargesheet. Yet, he was not examined and consciously dropped as a witness for the prosecution on the 4<sup>th</sup> of November, 2004 when the learned APP for the State made a statement that he was dropping Surinder “*being a brother of the accused*”.

53. Our attention has been drawn to the deposition of PW18 – S.I. Tarachand, who was the first Investigating officer in the

case. In his deposition, PW18, after referring to the traces of blood found in room no.21 on the second floor of the school; gallery of the primary block to the second floor near bathroom up to Shiva block, stated that the room adjoining room no.21 was locked and that Surinder who was residing in that room, met the investigating team. A statement has been attributed by PW-18 to Surinder to the effect that the key of the room was with the appellant who had gone on the bus as he was working as the helper.

54. PW20 – Inspector Lakhwinder Singh has also made a similar deposition in this regard and has attributed a similar statement to Surinder Mehto, chowkidar of the school, who had expressed his inability to open the room for the reason that the key was with the appellant.

55. Mr. Aggarwal, learned counsel for the appellant has urged that the statement attributed to Surinder Mehto is inadmissible in evidence being hearsay in the mouths of PW18 and PW20. There is certainly substance in the objection. Be that as it may, the context of the statement attributed to Surinder Mehto assumes importance in the light of the failure of the prosecution to examine him as a witness. This is more so as the case of the prosecution rests on the allegation that the

appellant was residing with his brother Surinder in the room adjacent to room no.21.

56. It is also the case of the prosecution that the room adjoining room no.21 was locked by the appellant and that he had locked the room and taken the key when he went on duty on the school bus in the morning of the 17<sup>th</sup> of August, 2002. The respondents have identified this room as the place where the clothes of the deceased and the knife, one of the weapons of offence were recovered. It is the case of the prosecution that the room could not be searched for the reason that it was locked till such time the key was made available by the appellant. Therefore, the recovery of the key is the material factor for establishing possession and control of the appellant over the room and ought to have been documented in the recovered articles in the documents which include personal search of the appellant.

57. In this regard, our attention has been drawn to the personal search memo of the appellant – Ex.PW1/C. It has been urged that the police effected a personal search of the appellant and in Ex.PW1/C has noted the items recovered from his person.

58. We find that Ex.PW1/C does not record the recovery of any key from the person of the appellant when he was searched by the police.

59. Our attention has also been drawn to the prosecutor's suggestion to PW-2 Vijay Singh after he was declared hostile. The prosecution suggested to him that first the room was opened and then Surinder helper was called.

60. The submission is that the above circumstances would show that the prosecution has been unable to prove the fact that the room adjoining room no.21 was either locked by the appellant or that its key was in his possession.

61. It is noteworthy that PW-1 Shri Prashant Narula has clearly stated that when the investigation team entered the room, the room was already open.

62. The prosecution has, therefore, not been able to establish that any room adjoining room no.21 was under the appellant's exclusive occupation or control or, for that matter, under his occupation or control.

63. Learned counsel for the appellant has submitted that the perusal of Ex.PW1/C would show that it mentions the particulars of the case as FIR No.286/2002 which would show that FIR stood registered before the arrest of the appellant and he was also searched only after the registration of the case. It

is in evidence that FIR No.286/2002 was registered at 11:00 am on 17<sup>th</sup> April, 2002.

64. Even if Ex.PW1/C is held to be having been recorded after the opening of the said room or recovery of the articles which have been recovered from this room, the recovery of the key and opening of the room was certainly a material factor which would have been documented in the documents scribed by the police.

65. Ms. Ritu Gauba, learned APP for the state has placed reliance on the pronouncement reported at **2004 SCC (Cri.) 294, Banti @ Guddu vs State of M.P.** in support of a contention that it is for the prosecution to decide which person is to be examined as a witness and who is not to be examined. We find that this judicial pronouncement does not support any such absolute proposition. The Supreme Court has referred to Section 226 of the Code of Criminal Procedure as well as Section 231 of the Code and thereafter has set down the applicable principles thus :-

*“14. The situation in a case where the prosecution cited two categories of witnesses to the occurrence, one consisting of persons closely related to the victim and the other consisting of witnesses who have no such relation, the Public Prosecutor's duty to the Court may require him to produce, witnesses from the latter category, also subject to his discretion to limit to one or two*

*among them. But if the Public Prosecutor got reliable information that any one among that category would not support the prosecution version he is free to state in court about that fact and skip the witness from being examined as a prosecution witness. It is open to the defence to cite him and examine him as a defence witness. The decision in this regard has to be taken by the Public Prosecutor in a fair manner. He can interview the witness beforehand to enable him to know well in advance the stand which that particular person would be adopting when examined as a witness in court."*

66. It is clear from a reading of the above that the prosecutor can withhold examination of a witness only if there was reliable information that such person would not support the prosecution version and he is required to inform the court about this.

67. In the instant case, the only statement made by the prosecutor before the court on 4<sup>th</sup> November, 2004 is to the effect that Surinder, a person named in the list of witnesses on behalf of the prosecution was related to the appellant. Relationship to a person accused of an offence would not lead to an absolute presumption that he would not speak the truth in the witness box. There is no material before the trial court to the effect that the witness would not have supported the prosecution case in case he had been examined as a witness. This is more so when the prosecution had recorded a

statement under Section 161 of the CrPC. The prosecutor did not say that the witness had been won over, or was unwilling to depose or to state the truth.

68. In the light of the above discussion, there is strength in the submission on behalf of the appellant that Surinder was a material witness who would have shed valuable light on what had transpired in the school; in Room no.21 and in the room adjacent to it, on the night intervening 16<sup>th</sup>/17<sup>th</sup> April, 2002.

69. We do not agree with the prosecution stand that Surinder was the appellant's brother and so he was not examined. There is no presumption that merely because a person is related to person standing trial, he will not speak the truth.

70. We may also notice the deposition of PW15 Shambhu Kumar, brother of the deceased at this stage. Shambhu Kumar has categorically stated that on the 15<sup>th</sup> or 16<sup>th</sup> of April, 2002 his brother Sanjay (deceased) had gone to the Shivani Senior Secondary School to meet Surinder (brother of the appellant) herein and that he had been carrying a sum of Rs.30,000/- or Rs.35,000/- with him. The deceased had not gone to meet the appellant. This is the last time that PW15 – Shambhu Kumar saw his brother alive. Shambhu Kumar has stated that he presumed that after meeting Surinder, his brother had left for his native village. He reiterates in his cross-examination that

the deceased, Sanjay used to visit Palam to meet Surinder, the brother of the appellant, where the two brothers were living together. The witness has also confirmed that there was no quarrel between the family of the appellant and the deceased.

71. Strangely, so far as the knowledge of the murder of his brother Sanjay is concerned, PW15 Shambhu has stated that he learnt about the same on receiving a telephone call about 2-4 days thereafter from his employer that his brother Sanjay had been murdered and he was asked to go to the police station, Dabri, whereupon he had identified the body of his brother on the 21<sup>st</sup> of April, 2002 in terms of Ex.PW15/A.

72. The prosecution has in fact brought evidence of PW-15 Shambhu on record to the effect that the deceased was having good relations with the appellant and his brother. PW-11 Rohtas has also deposed in the same manner. There is, therefore, substance in the submission of learned counsel for the appellant that even if the accused and the deceased had actually been seen together, there would be nothing unnatural or suspicious in the same for the reason that they were not only cousin brothers but were on good social terms.

73. Learned counsel has called upon the court to doubt the testimony of PW-17 for the reason that he has failed to make an entry in the register which was being made at the gate

even though he has stated that the deceased Sanjay was not an employee of the school and the register ought to have reflected his entry. Ms. Ritu Gauba, learned APP for the state on the other hand has pointed out that it is in the deposition of PW-1 that the register was being maintained only till 4 p.m.

74. We find that the deposition of PW15 – Shambhu Kumar to the effect that the deceased had gone to visit Surinder and not Ravinder, the appellant before us, was a material circumstance which has completely escaped the notice of the learned Trial Judge. We also find no discussion on the impact of the non-examination of Surinder in the impugned judgment.

75. We also find that the learned trial Judge has heavily relied on the statement of PW-17 that on that night, no other person had come inside the school except the appellant and his cousin Sanjay, the deceased. Unfortunately, this finding has completely ignored the material factor that the school had more than one entrances and PW-17 was deposing about the position at only one of the three (or two) gates.

76. No evidence is forthcoming as to when or how Surinder entered the school or reached room no.21 or the room adjoining to it. There is also no explanation as to why, if Surinder Mehto had actually given the statement attributed to him by PW20 – Inspector Lakhwinder Singh, he was not joined

in any aspect of the investigation. It is an admitted position that Surinder Mehto does not feature on any of the documents including the recovery memos etc. effected by the police even though his statement under Section 161 of the Cr.P.C. was recorded and he was cited as a witness.

77. The prosecution has failed to prove that Surinder was not in the school premises. On the contrary, it has been urged on behalf of the prosecution before us that he was posted and deputed as one of the guards at the school entry gates.

78. Mr. Aggarwal, learned counsel for the appellant has urged that if the case as set up by the prosecution was accepted in its totality, then the prosecution had attempted to prove the fact that both Ravinder as well as Surinder were in the school premises on the fateful night especially at the time of the alleged crime. Learned counsel contended that if this was accepted, the case of the prosecution itself suggests four hypotheses : the first being the culpability of the present appellant; the second being the possibility of Surinder being the person guilty of the offence; the third being that Ravinder and Surinder were together guilty of the crime or fourthly, that there was another unidentified person who has not been identified as being responsible for the occurrence. It has been contended by learned counsel that given these four

possibilities, no conclusion can be reached that the appellant was guilty of the commission of the offence beyond reasonable doubt.

79. In support of this submission, learned counsel has placed reliance on the pronouncement of the Supreme Court in **AIR 1984 SC 1622 Sharad Birdhichand Sarda v. State of Maharashtra** which is the landmark pronouncement on the manner in which a case of circumstantial evidence has to be examined and the circumstances which a prosecution is required to prove. The oft quoted principles laid down by the Supreme Court deserve consideration and read as follows :-

*“151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh : 1953CriLJ129 . This case has been Uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of Uttar Pradesh : (1969)3SCC198 and Ramgopal v State of Maharashtra : 1972CriLJ473 . It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (at pp. 345-46 of AIR) (supra):*

*It is well to remember that in cases where tile evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in*

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

80. So far as the submission of learned counsel for the appellant pointing out the possibilities aforenoticed is concerned, we find that in ***Sharad Birdhichand Sarda v. State of Maharashtra*** (supra), the Supreme Court had laid down the legal position thus:-

*"162. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. In *Kali Ram v. State of Himachal Pradesh* .: 1974CriLJ1, this Court made the following observations:*

*Another golden thread which runs through the web of the administration of justice in criminal cases 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. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.”*

81. In this background, even if the evidence brought on record by the prosecution was accepted in totality, it is not possible to hold that it permits more than one view, including one suggesting that the appellant was innocent.

82. Undoubtedly, the manner in which a serious crime has been executed can influence the court and impact the outcome of the case. On this reality, in **(2011) 3 SCC 109 State v. Mahender Singh Dahiya**, the Supreme Court had observed as follows :-

*“24. We have examined the submissions made by the learned Counsel for the parties, particularly keeping in view the gruesome nature of the crime and the complexities presented in the investigation, as also at the trial of this particular case. Undoubtedly, this case demonstrates the actions of a depraved soul. The manner in which the crime has been committed in this case, demonstrates the depths to which the human spirit/soul can sink. But no matter how diabolical the crime, the burden remains on the prosecution to prove the guilt of the accused. Given the tendency of human beings to become emotional and subjective when faced with crimes of depravity, the Courts have to be extra cautious not to be swayed by strong sentiments of repulsion and disgust. It is in such cases that the Court has to be on its guard and to ensure that the conclusion reached by it are not influenced by emotion, but are based on the evidence produced in the Court. Suspicion no matter how strong can not, and should not be permitted to, take the place of proof. therefore, in such*

*cases, the Courts are to ensure a cautious and balanced appraisal of the intrinsic value of the evidence produced in Court."*

83. On the duty of the appellate court in **AIR 2003 SC 4664, Raj Kishore Jha v. State of Bihar & Ors.**, the court observed as follows:-

*"10. A bare perusal of the judgment of the High Court shows that it has disposed of the appeal in a rather casual manner. Most of the conclusions arrived at the by the High Court are per se not on sound footing. The appellate Court will not abjure its duty to prevent miscarriage of justice by interfering where interference is imperative. Where doubt is based on irrelevant grounds or where the Court allows itself to be deflected by red herrings drawn across the track, or where the evidence accepted by the Trial Court is rejected by the High Court after a perfunctory consideration or where the baneful approach of the Court has resulted in vital and crucial evidence being ignored or for any such adequate reason, the Court should feel obliged to secure the ends of justice, to appease the judicial conscience, as it were. The High Court has noted that the names of witnesses do not appear in the first information report. That by itself cannot be a ground to doubt their evidence as noted by this Court in Bhagwan Singh and Ors. v. State of M.P.: 2002CriLJ2024 , Chittar Lal v. State of Rajasthan: 2003CriLJ3548 and State of Madhya Pradesh v. Man Singh and Ors.: 1993CriLJ3669 . There is no requirement of mentioning the names of all witnesses in the first information report. No reason has also been indicated by the High Court as to why the evidence of PWs. 3, 8, 11, 12, and 15 was to be obliterated merely because they were accused in the counter case. In a case of this nature, when counter case has been registered, the Court hearing the same has to scrutinize the evidence with greater detail and even in such a situation the evidence which is cogent, credible and trustworthy cannot be totally wiped out because of the only circumstance that they were accused in the counter case. Additionally, we find that PWs. 3, 6 and 9 have not been merely described in the first information to have taken the deceased to the*

*hospital, as observed by the High Court. A bare reading of the first information report clearly shows that they were described as eyewitnesses also. Here again, the High Court has committed an error."*

84. The fallibilities of the human mind and its temptation to supply the gaps and omissions to solve crime were noticed and in **2000 (55) DRJ 13 State vs. Shaqila & Ors.**, it has been held as follows :-

"11. It is the cardinal principle of criminal justice that fouler the crime, higher the proof required. A golden thread which runs through the web of administration of criminal justice is to the effect that if two views are possible on the evidence adduced, one pointing to the guilt of the accused and the other to his innocence, the latter is to be adopted. This principle has a special relevance in cases where the guilt of the accused is sought to be established by circumstantial evidence. Baron Alderson stated the following to the jury in Reg. v. Hedge, (1838) 2 Law 227:

"The mind was apt to take a pleasure in adapting circumstances to one another and even the straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individual the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." These observations were referred to in Shankarlal v. State of Maharashtra' AIR 1981 SC 785: and in [Jaharlal Das v. State of Orissa](#) . Unlike direct evidence, indirect circumstances which throw light may vary from suspicion to certitude and care must be taken to avoid subjective pitfalls of exaggerating a conjecture into a conviction."

85. The evidence placed before the court in the present case has to be examined keeping these cardinal principles at the forefront.

86. It is trite that the gruesome manner in which the murder was executed would not dilute the burden of proof or permit this court to pronounce a judgment based on suspicion.

**Challenge to disclosure and recoveries**

87. Learned counsel for the appellant has challenged the disclosure statements attributed to the appellant. It is urged that Sections 25 and 26 of the Indian Evidence Act prohibit proof and admissibility of any confessional statement made by an accused while in custody of the police. It bars admissibility of any statement attributed to an accused person and other than such statement which leads to the discovery of a material fact. It is urged that by virtue of Section 27 of the Indian Evidence Act that only such part of the information received from the accused is admissible in evidence provided that such statement relates distinctly to the fact thereby discovered. Learned counsel would contend that given the circumstances alleged by the prosecution, it is apparent from the face of the record that the police had first effected recoveries; then arrested the appellant and only thereafter proceeded to attribute a disclosure statement to him. It is urged that no fact

has been discovered pursuant to the statements attributed to the appellant and that as such the statement attributed to the appellant was completely inadmissible in evidence and could not have been proved by the prosecution before the trial court.

88. Learned APP for the State on the other hand contended that it was only pursuant to the disclosure statement made by the appellant that the head of the deceased was recovered. It is also urged that upon the disclosure statement made by the appellant, the police recovered the weapons of offence; blood stained clothes of the deceased as well as the blood stained clothes of the appellant have been recovered. It is urged that in these circumstances the disclosure statement was admissible in evidence and that the same establishes beyond doubt the culpability and guilt of the appellant.

89. For the purposes of examining this challenge laid down by the appellant, it becomes necessary to examine the sequence of these events as alleged by the prosecution.

90. The prosecution has sought to attribute a statement to the appellant (Exh.PW1/A) as having been made on the 17<sup>th</sup> of April, 2002. Learned counsel for the appellant has contended, and rightfully so, that the entire statement could not have been exhibited by the learned Trial Court and that only the portion which led to the recovery of a relevant fact could have

been exhibited. In view of the prohibition under Sections 24 and 25 of the Indian Evidence Act, the rest of the ExPW1/A has to be discarded and cannot be looked at for any purpose in order to support the conviction.

91. So far as the disclosure statement is concerned, the prosecution has relied on the testimony of PW1 Prashant Narula; PW18 SI Tara Chand; and PW20 Insp. Lakhwinder Singh to support the same.

92. On the other hand, Mr. Aggarwal, learned counsel for the appellant has disputed that the appellant made any disclosures. It is urged that the evidence brought on record clearly militates against any disclosures having been made by the appellant or recoveries having been effected pursuant thereto. In the alternative, it is urged that, even if the disclosures were accepted, the same at best attribute knowledge of the location of some of the articles recovered by the police. It is urged that these articles in any case do not suggest culpability of the appellant in the commission of the offence.

93. So far as the recoveries are concerned, the prosecution has claimed to have recovered the head of the deceased; blood stained earth from the place where the body was lying; blood stained flooring; blood stained floor tile; two vests with

dark brown stains; one underwear; a rough cloth piece described as “pochha”; one metallic dau; and one knife. In addition, the prosecution has led evidence of a cotton wool swab having dark brown stains having been handed over by PW-9 Dr. L.K.Baruah to the investigation team. Learned APP has relied on certain statements attributed to the appellant as disclosure statement made by him leading to the recovery of above articles. To support the contention of the disclosure statement coupled with these recoveries and the forensic examination thereto, learned APP has placed reliance on the forensic science report dated 25<sup>th</sup> October, 2002 (Exhibit PW-20/A) to contend that human blood was identified on all these articles.

94. It has been submitted that so far as the grouping of the blood on the gauze cloth (Exh.18); powder material floor piece, tile piece (marble) and the pochha is concerned, the laboratory has identified AB blood group, whereas on the two vests, the laboratory has identified B group blood. Learned APP submits that the prosecution has therefore established that the blood of the deceased belonged to the AB group which was found on all the material recoveries effected at the instance of the appellant.

95. We may first refer briefly to the deposition of the witnesses who have been examined by the prosecution in support of these recoveries. PW-1 Sh. Prashant Narula was the first in time to reach the spot. It has come in his deposition that the appellant was one amongst several staff members who were interrogated by the police in the morning of 17<sup>th</sup> April, 2002. During the interrogation of the appellant, he was removed by the police somewhere on a two wheeler scooter. The investigating officer returned to the school with the appellant after twenty minutes and informed the Additional Commissioner of Police that the appellant had made a confession. The witness has deposed that the appellant led the police thereafter to a place on the second floor wherefrom he had got the head of the deceased recovered from waste paper which was removed by the police. We find that this witness was declared hostile and cross examined by the learned APP for the state. It was suggested to him that he could not depose about facts on which he was cross examined for the reason that he had forgotten the same. However, the witness has reiterated his statement in the examination in chief wherein he had also stated that the appellant had not disclosed the identity of the deceased person. This witness had also testified that the police had got recovered the weapon

of offence at the visits of the appellant from the terrace of the Shiva Block of the School as well as a knife (Exh. P-2). So far as the disclosure statement is concerned, the same was exhibited as Exh.PW-1/9 and bore the signatures of this witness.

96. When cross examined, the witness has stated that the knife was not recovered either from the class room where blood stains were found nor from the residence of the accused. The witness had stated that the knife was not recovered in his presence. The witness has further stated that the statement of the appellant was not recorded by the police in his presence nor the seizure memos of the various articles recorded in his presence. The witness has also stated that the appellant had not disclosed to the police in his presence that he could get either the head recovered or the iron dau recovered in his presence. The witness has stated that he did not read the contents of the document which had been prepared by the police on which his signatures appeared. So far as the chronology of the events is concerned, the police has first recovered the articles and then arrested the accused and taken him to the police station and his disclosure statement Exhibit PW-1/A recorded.

97. As per the prosecution, PW-2 Vijay Singh was also a witness to the disclosure and the recoveries. This witness was also declared hostile and cross examined by the prosecutor. In his examination in chief, he had corroborated the discovery of the headless body in the lane behind the school and blood stains in the verandah on the second floor from the school. Despite an incisive cross examination based on a previous statement of the witness, he had maintained his stand that he has been struck outside by the police and was not allowed to enter the school building and that the proceedings were not conducted in his presence. So far as the signatures of this witness on Exhibit PW-1/A is concerned, PW-2 had admitted his signatures but stated that his signatures on the disclosure statement and recovery memos were obtained by the police one or two days after the head was found. The witness has also stated in his cross examination that his signatures had been obtained on papers on which something was written but he had not been permitted to go through the contents. Mr. Aggarwal, learned counsel for the appellant has taken us carefully through the testimony of the other persons who according to the prosecution were present at the spot. In this regard, our attention has been drawn to the testimony of PW-4 Ct. Ravinder Singh who has been examined as the police

photographer who has taken photographs of the headless body. This witness has stated that he remained at the spot from 10 a.m. to 2 p.m. The witness has stated that the appellant has not given any statement pursuant where to any recoveries were effected in his presence and that he had also not taken any photographs of any of the articles which included the knife or the dau.

98. In this context, learned counsel for the appellant has drawn attention to the statements of PW-13 SI Balram and PW-14 Ct. Virender who, it is pointed out, have stated that they were also present at the spot at all material time. PW-13 SI Balram was the incharge of the mobile crime team. The signatures of PW-13 and 14 are not to be found on any of the recovery or seizure memos. PW-13 SI Balram has given a report (Exh.PW-13/A) wherein also he makes no mention of either any of disclosure statement or of any recoveries. We also find that PW-20 Inspector Lakhwinder Singh has stated that the dead body was lying at about three meters from the wall of the school and some blood was visible on the school wall. He has also deposed that on the gallery of the second floor of the school, there was a trail of the blood which was visible from a point marked in the site plan and went up to the

room no. 21 of the school. The police official had followed the blood trail which led to the room no.21.

99. It is urged on behalf of the appellant that it was the case of the prosecution that the blood trail led them to the scene of the crime which spoke for itself and that no fact was discovered pursuant to a disclosure.

100. At this stage, we may consider the judicial pronouncements relied upon by Mr. Siddharth Aggarwal, learned counsel for the appellant in support of his contention that the information of the facts were already known to the police and that nothing new was discovered pursuant to the disclosure statement which was, therefore, completely inadmissible. In support of these contentions, reliance has been placed on the pronouncement of the Privy Council reported at **AIR 1947 PC 67 Pulukuri Kottaya & Ors. v. Emperor** and **(1976) 1 SCC 828 Mohmed Inayatullah v. State of Maharashtra.**

101. In **Pulukuri Kottaya (supra)**, the court authoritatively laid down the judicial principles where the prosecution placed reliance on Section 27 of the Indian Evidence Act to urge that the statement attributed to an accused person was admissible in evidence. The courts had authoritatively interpreted the proviso to Section 27 which states that when any fact is

deposed to as discovered in consequence to information received from a person accused of any offence in the custody of a police officer so much of such information, whether it amounts to confession or not, as relates distinctly to the fact thereby discovered may be proved. Such portion of a statement given by accused person which would be rendered admissible in evidence. As far as proviso to Section 27 is concerned, the court laid down the law thus :-

*“10. ....On normal principles of construction their Lordships think that the proviso to S.26, added by S.27, should not be held to nullify the substance of the section. In their Lordships’ view it is fallacious to treat the “fact discovered” within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that “I will produce a knife concealed in the roof of my house” does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added “with which I stabbed A” these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.”*

102. The Privy Council had overturned the view taken by the Madras High Court in the judgment reported at **ILR (1937) Madras 695** wherein the Madras High Court had held that any

information which served to connect the object recovered with the offence charged was admissible under Section 27. On this aspect in ***Pulukuri Kottaya (supra)***, it was held that:-

*“11. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into Section 27 something which is not there, and admitting in evidence a confession barred by Section 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.”*

103. We may usefully refer to the facts which were before the Madras High Court in the judgment reported at ***ILR (1937) Madras 695*** (which have been noticed in para 11 of ***Pulukuri Kottaya(supra)***). *“In that case, the court had to deal with the confession of murder made by a person in police custody and the court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag, which, according to the confession had been used in, or were connected with, the commission of the murder, and the objects were in fact produced. The court was impressed with the consideration that as the objects produced were not in themselves of an incriminating nature their production would be irrelevant*

*unless they were shown to be connected with the murder, and there was no evidence so to connect them apart from the confession."*

104. Before us as well in the present case, the prosecution has thereon placed reliance on Exh.PW-1/A and the aforenoticed testimony of PW-17 on the last seen together aspect, there is no other evidence was led by the prosecution. Given the principles of law laid down by the Privy Council which hold good even today, clearly the contents of Exh.PW-1/A other than the last sentence wherein the appellant has merely stated that he could get articles recovered, was inadmissible even by application of the proviso to Section 27 and cannot be looked at for any purpose. This court is, therefore, duty bound to discard the contents of Exh.PW-1/A except to the limited extent that they attribute the statement to the appellant to the effect that he could get the articles recovered.

105. We may also advert to the pronouncement of the Supreme Court in **(1976) 1 SCC 828 Mohmed Inayatullah v. State of Maharashtra**. In para 12, 13 and 16 of the pronouncement, the court had laid down the following essentials which would render a statement attributed to the appellant as read inadmissible in evidence:-

*"12. ....It will be seen that the first condition necessary for bringing this section in to operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably" "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the proveable information. The phrase "distinctly" relates "to the fact thereby discovered" (sic) (and?) is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.*

*13. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact see Sukhan v. Crown AIR 1929 Lah 344; Gangu Chandra v. Emperor : AIR 1932 Bom 286. Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this see Palukuri Kotayya v. Emperor 74 Ind App 65 : AIR 1947 PC 67 : Udai Bhan v. State of Uttar Pradesh AIR 1962 SC 1118.*

xxx

*16. After culling out and rejecting the inadmissible portion, it was to be considered further whether the admissible portion of the information taken in conjunction with the facts discovered was sufficient to draw the presumption that the accused was the thief or receiver of stolen property knowing it to be stolen. The answer to this question, in the circumstances of the case, had to be in the negative. The drums in question were found in the compound or yard of a Musafirkhana which was a place of rest and waiting for Musafirs (travellers). It was not alleged by the prosecution - much less proved - that the drums were lying concealed, or that the compound was under the lock and key of the accused. There is not even an oblique hint that the place of the deposit of the drums was in any way under the control or occupation of the accused. The place being a Musafirkhana, was from its very nature accessible to all and sundry."*

The recoveries made in the instant case have to be examined in the light of these well settled principles and may be considered in seriatum.

106. We may firstly examine the recovery of the head of the deceased person. In this regard, we have been carefully taken through the record of the case. There is no contemporaneous seizure memo of this recovery. The recovery has been effected from some garbage (waste paper) lying in the open in the school premises near some stairs. As noticed above PW-1 Prashant Narula has deposed that the accused has not stated in his presence that he could get the head recovered. Even if, this recovery was held to be a piece of evidence against the

accused person, then at best, it is evidence only of the fact that the appellant had knowledge of the place where the head was lying. The prosecution would still have to place other evidence to attach culpability of the appellant with the offence of the murder.

107. We may next examine the dau and the knife which have been allegedly recovered at the instance of the appellant and have been put forth by the prosecution as the weapons of the offence. The dau was recovered underneath the beam affixed on the roof which was again in an open place.

108. The Forensic Science Laboratory report (Exh.PW-20/A) has opined that there was no blood on the dau. There is no evidence available that the dau had been cleaned or washed. This dau (Exh.16) was not even sent to the doctor who has conducted the post mortem for an opinion as to whether it was the weapon of the offence. In his cross examination, PW-9 has said that the injuries were possible with the dau. The prosecution has failed to carry out any scientific investigation on the dau and has not examined the same for any fingerprints etc. In view of this evidence, it cannot be at all be conclusively held that this particular dau was the weapon of offence in the instant case.

109. So far as the knife (Exh.17) which has been claimed to have been recovered from a vegetable basket in the room adjacent to room no.21 is concerned, again the forensic examination thereof has found no blood on the same. Again there is no evidence at all to connect the knife to the murder of the deceased. Interestingly, the prosecution case that the dau and knife had blood stains on it has not been supported by the forensic examination. It is not possible to connect the dau or the knife to the offence.

110. The prosecution has strongly relied on the recovery of two vests (Exh. 12 & 13) and one underwear (Exh. 14) being blood stained from the room adjacent to room no.21.

As noticed above, the two vests had blood of B group thereon whereas no blood was found on the underwear.

111. We have noticed above that the blood of the deceased was of AB grouping. There is no evidence to explain the B group blood on the two vests which were allegedly recovered.

112. The prosecution has also claimed to have recovered a pant, shirt and a half-pant belonging to the deceased vide Exh.PW-14/F. A perusal thereof would show that so far as the pant and shirt are concerned, Exh.PW-18/F records that they have been recovered from inside a suitcase in the residential room of the appellant. The half-pant was allegedly found

hanging from a peepal tree. It is important to note that these articles were not having any blood stains. We also find that there is nothing to connect these clothes with the deceased. His brother PW-15 Shambu Mehto has not identified these clothes as belonging to the deceased. These recoveries are therefore, completely irrelevant and of no assistance to the case of the prosecution against the appellant.

In this background, learned APP has conceded that there was no evidence to connect these items of clothing to the deceased.

113. We may also notice the alternate arguments advanced by learned counsel for the appellant that it was the prosecution's case that the appellant and the deceased were close relatives and that the deceased was often visiting the appellant and his brother. It is urged that for this reason as well, there was nothing unusual or suspicious even if these clothes were held to be those of the deceased.

114. We may now examine the recovery of the pochha (mop) by the memo Exh.PW-18/E from a tin roof on the terrace. This recovery has been challenged by learned counsel for the appellant on the ground that the same has been effected from a place open to everybody. It is urged that the recovery of these articles have been planted on the appellant inasmuch as

the same is not even reflected on the site plan without scale (Exh. PW18/E) and the scaled site plan (Exh. PW-5/A). It has been vehemently urged that the police had available the trail of blood and other blood stains. It has been argued that if the appellant was guilty of commission of the offence, he had adequate opportunity when he went on the school bus in the morning of 17<sup>th</sup> April, 2002 to dispose off the evidence. It has been urged that the mop (pochha) is used for cleaning and is an article which would be normally found in the school premises. The argument is therefore that recovery thereof would not lead to any inference of the culpability of the appellant for the commission of the offence under Section 302 of the IPC and that in case it was held that this recovery was actually effected, the appellant could at best be alleged to have committed an offence under Section 201 of the IPC.

115. The prosecution has proved on record the site plan without scale (Ex.PW18/B) as well as scale site plan (Ex.PW5/A) on record. Even though the same is hopelessly incomplete so far as the situs of the offences as well as the locations of the room or the places wherefrom the claimed recoveries have been effected, however we find that the site plan clearly reflects the place from which the headless body of the deceased was recovered. Both exhibits Ex.PW5/A as well as

Ex.PW18/B shows that the body was found lying in the open lane near the boundary wall. Two gates of the school, one in the immediate vicinity of the body are also shown. The site plan also shows the positioning of the electricity poll. Both these gates were manned by Chowkidars of the school at the time when the body is stated to have been thrown from the second floor.

116. It has been vehemently urged by learned APP for the State that the incident took place in the dead of the night in the empty school.

117. The incident has occurred in the summer months on 16<sup>th</sup> April, 2002 when the guards would not be expected to be under a cover and there is greater possibility of their being in the open. It needs no elaboration that even a small object if thrown from the second floor of a building would make an audible sound when it hit the ground. The extensive movement attributed to the appellant moving the body in the building as per the case of the prosecution certainly would have attracted attention. Even if it did not, certainly the noise which would be generated upon the impact of human body upon being thrown from the second floor would be loud and audible especially in the dead of the night in the empty building. The electricity pole would have lit up the area and the

guards would have noticed the dead body. The public lane where the body was found between the two school gates which are placed in the walls at right angles, is clear and unobstructed. Yet, there is no evidence of the body falling on the ground from the second floor, other than the suggestions by the police witnesses.

118. In these circumstances, the case of the prosecution is that the body was discovered only on the next morning of 17<sup>th</sup> April, 2002. The incident went completely unnoticed by PW-11 Rohtas Saroha who was on duty or PW 17 Dharm Raj Yadav is strange and suspicious.

119. So far as the situs of the recoveries and the trail of blood is concerned, we find that the prosecution has proved Exhibit PW-18/B on record purporting to be a rough sketch plan prepared contemporaneously with the recoveries and seizures effected on 17<sup>th</sup> April, 2002. Exhibit PW-18/B does not reflect any trail of blood, blood stains or the location any of the recoveries.

120. The prosecution has placed reliance on a scaled sketch plan (Exhibit PW-5/A) prepared by PW-8 SI Madan Pal, four months thereafter on 21<sup>st</sup> June, 2002 on the pointing out of Insp. Lakhwinder Singh.

121. Learned counsel has strongly contested the blood grouping of the appellant as well. It has been urged that the malkhana register does not contain any entry of a blood sample of the deceased. Our attention is drawn to the testimony of PW-6 Ct. Surinder to this effect and further that the blood samples were not sent to the laboratory.

122. Ms. Ritu Gauba, learned APP has submitted that the statement of PW-1 and 2 and the challenge to the disclosures and the recovery memos has to be rejected. Placing reliance on the pronouncement in **(2011) 10 SCC 675 Gajraj v. State (NCT of Delhi)**, it has been urged by Ms. Ritu Gauba that a formal arrest of an accused person is not necessary for applicability of the proviso to Section 27 of the Indian Evidence Act. Our attention is also drawn to the pronouncement of the Supreme Court reported at **(2010) 3 SCC 56 Vikram Singh & Ors. v. State of Punjab** in support of this aforenoticed contention.

123. In **Gajraj v. State of NCT of Delhi (supra)**, the witnesses had denied signing the recovery memo and had asserted that their signatures were taken on blank papers which were used in preparing the recovery memo. This is not so in the present case. Before us the witnesses have stated

that they had signed papers with writing on them but they have disputed knowledge of the contents thereof.

124. Our attention has been drawn to para 16 of the impugned judgment wherein the trial court has dealt with this aspect and has accepted the prosecution case holding that PW-1 was the principal of a school and could not have been forced to sign any document. An examination of the deposition of PW-1 would show that he has not stated that he was forced to sign any document. The witnesses have said that they have affixed signatures at a subsequent day on papers prepared by the police. This testimony is reinforced by the testimony of the several other police personnel who were present at the spot at all relevant time who do not refer to the preparation of any documents by the police while at the school on the eventful day which includes PW-13 SI Balwant who was the incharge of the mobile crime team. The failure to lodge a complaint would show lack of interest or involvement with the investigation by the police on the part of the public witnesses.

125. It is trite that disclosure statements and recoveries made prior to formal arrest, would be admissible in evidence provided they satisfied the well settled principles which would render the proviso to Section 27 of the Evidence Act applicable.

126. The learned trial court has erred in discussing that PW-1 was a principal of a school and could not have been forced to sign any document. Such position has not been stated by the witness. He has only stated that he signed on documents which had already been prepared by the police. The above discussion would show that even if the recoveries of the head of the deceased or the other articles were believed to be based on disclosures made by the appellant, however, the same would only indicate that the appellant had knowledge of the place where they were to be found which by itself would not be sufficient to find him guilty of the offence of murder. The learned trial court has placed strong reliance on the statement attributed to the appellant under Section 313 of the CrPC. We have strong doubts that it is legally permissible or, appropriate in the present case to draw a presumption that the recovery of the aforementioned exhibits at the instance of the appellant led to the inevitable and only presumption that the appellant was responsible for the murder. We also find that the learned trial judge has erred in noting that there is no evidence to show that the articles had been concealed by the appellant, on the previous night or otherwise as has been found by the learned trial judge.

127. In the same discussion, we find that the learned trial judge has erred in holding that the dau and the knife were the weapons of offence. The above discussion would show that there is no evidence at all to connect either of the two to the incident. Even though, there is no evidence on record that the accused person had washed the recovered weapons, the learned trial judge has concluded that the appellant had washed the weapon of offence thoroughly with water before hiding them. The reliance placed on the statement of PW-9 Dr. Baruah and the observation that the injuries on the deceased could have been caused by the dau is not the same thing as saying that the dau was the weapon of offence. We, therefore, find that the findings and conclusions drawn by the learned trial judge are contrary to record.

**Lack of motive**

128. Learned counsel for the appellant has submitted that motive is an important circumstance in a case resting on circumstantial evidence.

129. Our attention has been drawn to the testimony of PW-15 Shambu wherein he has deposed that his brother (the deceased) used to visit Palam to meet Surinder, brother of the appellant where they were both living together. In this regard, PW-11 Rohtas Saroha also stated that Sanjay, the deceased

was a relative of the appellant who used to come with him to the school. He has specifically stated that the relations of the appellant and the deceased were good. In this background, there is no evidence of any motive on the part of the appellant to have caused the murder of the deceased.

130. Learned counsel for the appellant has placed reliance on the pronouncement of the Supreme Court reported at **(2011) 3 SCC 109 State vs. Mahender Singh Dahiya** in support of this submission.

131. Learned APP for the state on the other hand has submitted that failure to prove motive is not fatal to the prosecution at all and has heavily relied on the pronouncement of the Supreme Court reported at **(2012) 1 SCC (Cri) 624 Amitava Banerjee Alias Amit Alias Bappa Banerjee vs. State of West Bengal.**

132. It is trite that absence of a motive may not necessarily be fatal to the prosecution. On this aspect, in para 29 of **State vs. Mahender Singh Dahiya (supra)**, the Supreme Court has observed as follows :-

*“29. In assessing the evidence, the High Court was aware of the legal principles that absence of motive may not necessarily be fatal to the prosecution. Where the case of the prosecution has been proved beyond reasonable doubt on the basis of the material produced before the Court, the motive loses its significance. But in cases based on circumstantial evidence, motive for*

committing the crime assumes great importance. In such circumstances, absence of motive would put the Court on its guard to scrutinize the evidence very closely to ensure that suspicion, emotion or conjecture do not take the place of proof (See **Surinder Pal Jain** v. **Delhi Administration** : 1993 Supp (3) SCC 681 and **Tarseem Kumar** v. **Delhi Administration** : 1994 Supp (3) SCC 367).

30. We may also notice here the observations in **Subedar Tewari** v. **State of U.P.** : 1989 Supp (1) SCC 91 wherein it has been observed that -

“20. ....The evidence regarding existence of motive which operates in the mind of an assassin is very often than (sic) not within the reach of others. The motive may not even be known to the victim of the crime. The motive may be known to the assassin and no one else may know what gave birth to the evil thought in the mind of the assassin.”

31. Again reiterating the role played by motive in deciding as to whether the prosecution has proved the case beyond reasonable doubt against an accused, this Court in the case of **Suresh Chandra Bahari** v. **State of Bihar** : 1995 Supp (1) SCC 80 held as under:

“21. ....Sometimes motive plays an important role and become a compelling force to commit a crime and therefore motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act with illegal means with a view to achieve that intention. In a case where there is motive, it affords added support to the finding of the Court that the accused was guilty for the offence charged with. But the evidence bearing on the guilt of the accused nonetheless becomes untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to adopt a certain course of action leading to the commission of the crime.”

133. So far as the pronouncement of the Supreme Court reported at **(2011) 12 SCC 554 : (2012) 1 SCC (Cri.) 624**

***Amitava Banerjee Alias Amit Alias Bappa Banerjee v. State of West Bengal*** is concerned, the court had reiterated the above well settled principles and held that absence of motive in a case depending entirely on circumstantial evidence is a factor that shall no doubt weigh in favour of the accused, but what courts need to remember is that motive is a matter which is primarily known to accused and which prosecution may at times find difficult to explain or establish by substantive evidence. In para 42, the court held as follows :-

*“42. Absence of motive in a case depending entirely on circumstantial evidence is a factor that shall no doubt weigh in favour of the accused, but what the Courts need to remember is that motive is a matter which is primarily known to the accused and which the prosecution may at times find difficult to explain or establish by substantive evidence.”*

134. In para 41, the court had observed that *“absence of a motive for commission of an offence results in that the court shall have to be more careful and circumstance in scrutinizing the evidence to ensure that suspicion does not take the steps of proving while finding the accused guilty”*. Before us, it is not disputed that motive has not been established by any legally admissible evidence. The evidence led by the prosecution has to be examined in the light of the above well settled principles.

**Opportunity to cross examine**

135. We may now examine the objections urged by Mr. Siddharth Aggarwal, learned counsel for the appellant which as per counsel go to the root of the fairness of the trial. It has been urged that the case was pending before the New Delhi District Courts at the Patiala House courts where the appellant was represented by Sh. Gautam, Advocate who had his chambers in Chamber no.35, Supreme Court as per the vakalatnama filed on the trial court record. It is pointed out that on 23<sup>rd</sup> September, 2008, the case was transferred to the district courts at Dwarka at a stage when the examination in chief of PW-20 Inspector Lakhwinder Singh was being recorded.

136. The case was received before the learned Addl. Sessions Judge at the Dwarka courts on 17<sup>th</sup> November, 2008 and was adjourned to 27<sup>th</sup> November, 2008 for recording of evidence. There was no representation by a counsel on behalf of the appellant on 27<sup>th</sup> November, 2008; 3<sup>rd</sup> December, 2008 as well as 12<sup>th</sup> January, 2009. The witness had also not appeared on any of these dates. The record of the trial court shows that on 22<sup>nd</sup> January, 2009, the trial court recorded the remaining examination in chief of PW-20 Insp. Lakhwinder Singh in the presence of the appellant. The court called upon the accused to cross examine the witness. The order dated 22<sup>nd</sup> January,

2009 reflects that the appellant had stated that the *"opportunity of the cross examination may be closed as his counsel is not appearing and he does not want to wait for his counsel"*. As per the order sheet at the request of the accused, opportunity to cross examine is closed. The court gave liberty to the appellant to move an application for cross examination of this witness before the next date of hearing which was fixed for 10<sup>th</sup> February, 2009.

137. On 10<sup>th</sup> January, 2009, the appellant was again not represented by a counsel. The court, however, proceeded to record the statement of the appellant under Section 313 of the CrPC as well as his statement that he did not wish to lead any defence evidence. The case was directed to be listed on 6<sup>th</sup> March, 2009 for final arguments.

138. On 6<sup>th</sup> March, 2009, the court adjourned the matter on the ground that counsel for the appellant was not available. Only thereafter on 23<sup>rd</sup> March, 2009 Mr. Surat Singh was appointed as an amicus curiae to represent the accused. The case was adjourned by only a day to 25<sup>th</sup> March, 2009 when even Mr. Surat Singh, amicus curiae did not put in appearance. The case was adjourned to 28<sup>th</sup> March, 2009 for final arguments. Arguments were heard on 28<sup>th</sup> March, 2009 and the matter was posted for 10<sup>th</sup> April, 2009 for pronouncement.

139. Learned counsel for the appellant has contended that the investigating officer was a material witness on behalf of the prosecution so far as all aspects of investigation which included the recording of the disclosure statement; recoveries; forensic examination are concerned. It is submitted that after transfer of the case, the court ought to have ensured that the appellant was represented by a counsel of his choice especially in any regard to the seriousness of the offence with which he was charged, which could have resulted in even the imposition of capital punishment. It is contended that the denial of opportunity to cross examine PW-20 has caused extreme prejudice to the appellant.

140. Mr. Aggarwal has urged at length that the appellant is a poor illiterate person who as per the prosecution was working as a bus helper in school bus. The appellant could not be expected to know the impact of the failure to cross examine a witness. As a result, the unchallenged testimony of PW-20 Inspector Lakhwinder Singh relied upon by the court against the appellant in a murder trial. It is urged that given the transfer of the case from the Patiala House courts to Dwarka, the court ought to have examined the record and ensured legal assistance to the appellant so that he could have cross examined the material witness on behalf of the prosecution in

this case of which completely rests on the alleged disclosures and recoveries.

141. In this regard, learned counsel has contended that the closure of the opportunity to cross examine on record by the court on 22<sup>nd</sup> January, 2009 was not in exercise of an informed option of a person who was conversant either with the impact thereof or with his rights and therefore deserves to be disregarded. It is urged that in a criminal trial where the accused is in judicial custody, a solemn responsibility rests on the court to ensure that the rights of the defence are adequately protected.

142. Ms. Ritu Gauba, learned APP for the state has contended at great length that the procedure followed by the learned trial judge cannot be faulted and that the court had adequately secured the rights of the appellant when opportunity was given to the appellant to move an application for cross examination of the witness. Placing reliance on the pronouncement of the Supreme Court reported at **(2010) 2 SCC (Cri) 500 Jayendra Vishnu Thakur v. State of Maharashtra & Ors.**, it is urged that the right to cross examination is a statutory right and as in the instant case, it can be waived. It is urged that the appellant had made a statement that he did not wish to wait for his counsel and that therefore, the cross examination of the

witness may be closed. In this regard, it is urged that the closure of the cross examination on the refusal of the appellant to conduct the same was fair and justified. Reliance has been placed by Ms. Gauba on the pronouncement of the Supreme Court reported at **AIR 2002 SC 3552 Sarwan Singh v. State of Punjab** in this regard.

143. Learned APP has vehemently contended that given the failure of the appellant to cross examine the witness in the light of the principles laid down in **AIR 1961 Calcutta 359, A.E.G. Carapiet v. A.Y. Derderian**, the unchallenged testimony of the witness has to be accepted.

144. Before dealing with the contentions of learned counsel for the appellant, reference may usefully be made to the pronouncement in **Jayendra Vishnu Thakur (supra)**. We find that in para 24 of the pronouncement, the court has observed on the right of an accused person to cross examine a witness as follows: -

*“24. A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself he has also the right to be*

*informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis-à-vis opinion. (See Sarabjit Rick Singh v. Union of India, (2008) 2 SCC 417)."*

The importance of the right of a meaningful opportunity to cross examine a witness as well as grant of an opportunity to do so cannot be sufficiently emphasized.

145. The observations of the Supreme Court in paras 55 to 58 of **Jayendra Vishnu Thakur** (supra) also shed valuable light on the importance of the cross examination and the prejudice which a party may suffer on account of breach of the said right and deserve to be considered in extenso. It was observed thus: -

*"55. This Court in **Kartar Singh v. State of Punjab, (1994) 3 SCC 569 : 1994 SCC (Cri) 899** has held: (SCC p. 686, para 278):*

*"278. ...It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:*

*(1) to destroy or weaken the evidentiary value of the witness of his adversary;*

*(2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;*

*(3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;*

and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character.

[See also Cholan Roadways Ltd. v. G. Thirugnanasambandam, (2005) 3 SCC 241 : 2005 SCC (L&S) 395.

56. In Vimalben Ajitbhai Patel v. Vatslaben Ashokbhai Patel, (2008) 4 SCC 649, this Court observed: (SCC p. 663, para 32)

“32. The provisions contained in Section 82 of the Code of Criminal Procedure were put on the statute book for certain purpose. It was enacted to secure the presence of the accused. Once the said purpose is achieved, the attachment shall be withdrawn. Even the property which was attached, should be restored. The provisions of the Code of Criminal Procedure do not warrant sale of the property despite the fact that the absconding accused had surrendered and obtained bail. Once he surrenders before the court and the standing warrants are cancelled, he is no longer an absconder. The purpose of attaching the property comes to an end. It is to be released subject to the provisions of the Code. Securing the attendance of an absconding accused, is a matter between the State and the accused. The complainant should not ordinarily derive any benefit therefrom. If the property is to be sold, it vests with the State subject to any order passed under Section 85 of the Code. It cannot be a subject-matter of execution of a decree, far less for executing the decree of a third party, who had no right, title or interest thereon.”

57. Mr. Nafade would submit that the appellant did not suffer any prejudice. We do not agree. Infringement of such a valuable right itself causes prejudice. In S.L. Kapoor v. Jagmohan: [1981]1SCR746, this Court clearly held:

“24. ....In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-

*observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced."*

58. In A.R.Antulay v. R.S.Nayak and Anr. 1988CriLJ1661 a seven Judge Bench of this Court has also held that when an order has been passed in violation of a fundamental right or in breach of the principles of natural justice, the same would be nullity. {See also State of Haryana v. State of Punjab : (2004)12SCC673 and Rajasthan State Road Transport Corporation and Ors. v. Zakir Hussain, (200) 7 SCC 447: 200 SCC (L&S) 945."

146. We may also refer to the impact of failure to cross examine a witness at this stage. On this issue, the judgment of the Division Bench of the Calcutta High Court in para 10 of **A.E.G. Carapiet v. A.Y. Derderian (supra)** stated the principles as follows :-

*"10. The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a*

*counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated."*

147. The above judicial pronouncements relied upon by the prosecution before us amply establish the importance of an opportunity to effectively cross examine a witness.

148. Learned APP has vehemently urged that given the opportunity to the appellant to cross examine the witness on 22<sup>nd</sup> January, 2009 and his refusal to do so, he cannot object to the failure to grant this opportunity in view of the principles laid down by the Supreme Court in **AIR 2002 SC 3652, Sarwan Singh v. State of Punjab**. In this case, the court had reiterated the well settled rule of essentialities that whenever the opponent had declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted.

149. Before opining on the objection urged by learned counsel for the appellant, it is essential to deal with the scope of the constitutional protection and the reasons for as well as the entitlement of an accused person to legal assistance. The

same does not emanate from any statutory provision but the protection given to an accused is of the higher order and has to be found in the right of the appellant under Article 21 of the Constitution of India. The principles on which the lack of adequate legal assistance has to be decided were settled by the Supreme Court in the landmark pronouncement reported at **(1978) 3 SCC 544 Madhav Hayawadanrao Hoskot v. State of Maharashtra**. The court had considered the expression '*procedure established by law*' as appears in article 21 of the Constitution of India and observed as follows :-

*"11. One component of fair procedure is natural justice. Generally speaking and subject to just exceptions, at least a single right of appeal on facts, where criminal conviction is fraught with long loss of liberty is basic to civilised jurisprudence. It is integral to fair procedure, natural justice and normative universality save in special cases like the original tribunal being a high bench sitting on a collegiate basis. In short, a first appeal from the Sessions Court to the High Court, as provided in the Criminal Procedure Code, manifests this value upheld in Article [21](#).*

*12. What follows from the appellate imperative ? Every step that makes the right of appeal fruitful is obligatory and every action or inaction which stultifies it is unfair and, ergo, unconstitutional (In a sense, even Article [19](#) may join hands with Article [21](#), as the Maneka Gandhi reasoning discloses). Pertinent to the point before us are two requirements : (1) service of a copy of the judgment to the prisoner in time to file an appeal and (ii) provision of free legal services to a prisoner who is indigent or otherwise disabled from securing legal*

*assistance where the ends of justice call for such service. Both these are State responsibilities under Article [21](#). Where the procedural law provides for further appeals what we have said regarding first appeals will similarly apply.*

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*14. The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said:*

*What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is ? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee ?*

*15. Gideon's trumpet has been heard across the Atlantic. Black, J. there observed Processual Justice to the People (May, 1973) p. 69 :*

*Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal, quite*

*properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."*

In paras 15 and 16, the court has emphasized that lawyers in criminal courts are necessities and not luxuries and that any person who has been hailed into court has to hire a lawyer and cannot be assured a fair trial unless is provided with the same. The same is necessary for making the machinery of justice effective so that every citizen shall believe in a benefit of its impartiality and fairness.

150. In para 17, the Supreme Court has quoted from the pronouncement of Douglas, J in ***Jon Richard Argersinger v.***

**Raymond Hamtin, 407 US 25: 32 L Ed 2d 530 at 535-36**

**and 554** observing as follows :-

“17. More recently, the U.S. Supreme Court, in Raymond Hamlin has extended this processual facet of Poverty Jurisprudence. Douglas, J. there explicated :

*The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. **If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.***

**The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals**

**in which every defendant stands equal before the law.** This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. 372 US 344: 9 L Ed 2d 805: 93 ALR 2d 733.

Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.

**The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed.... The court should consider the individual factors peculiar to each case. These, of course, would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case.**

(Jon Richard Argersinger v. Raymond Hamlin (407 US 25 :32L Ed 2d 530)

(Emphasis supplied)”

151. After this detailed discussion, in para 18 and 25, so far as the Indian context is concerned, the court ruled as follows: -

“18. ....The Indian socio-legal milieu makes free legal service, at trial and higher levels, an imperative processual piece of criminal justice where deprivation of life or personal liberty hangs in the judicial balance.

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25. If a prisoner sentenced to imprisonment, is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the Court under Article [142](#), read with Articles [21](#), and [39A](#) of the Constitution, power to assign counsel for such imprisoned individual for doing complete justice.

*This is a necessary incident of the right of appeal conferred by the Code and allowed by Article 136 of the Constitution. The inference is inevitable that this is a State's duty and not government's charity. Equally affirmative is the implication that while legal services must be free to the beneficiary, the lawyer himself has to be reasonably remunerated for his services. Surely, the profession has a public commitment to the people but mere philanthropy of its members yields short mileage in the long run. Their services, especially when they are on behalf of the State, must be paid for. Naturally, the State concerned must pay a reasonable sum that the court may fix when assigning counsel to the prisoner. Of course, the court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the court."*

152. The legal position was summed up by the court in para 27 and the observations of the court at serial no.4 of para 27 which have bearing on the objections raised by learned counsel for the appellant read as follows :-

**"27. ....4. Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence, provided the party does not object to that lawyer;**

*(Emphasis supplied)"*

153. It is now necessary to consider the impact of the denial of a fair opportunity to the appellant to cross examine PW-20 Inspector Lakhwinder Singh.

154. Let us now examine the impact of the non-availability of legal assistance to the appellant. PW-20 Inspector Lakhwinder Singh has deposed at length with regard to the investigation conducted by him on 17<sup>th</sup> April, 2002 which included recording of the disclosure statements as well as the recoveries and the forensic examination. It is noteworthy that the sole evidence to connecting the recoveries to the crime by the prosecution is the report of the forensic science laboratory (Exhibit PW-20/A). The specialist who has given the report was not examined but the same has been tendered in evidence in the testimony of PW-20 Insp. Lakhwinder Singh who has not been cross examined in the aforementioned circumstances.

155. It is trite that the right to cross examine a witness is not only a statutory right but in view of the pronouncement of the Supreme Court is a natural right which would inhere in every party to the litigation. An accused must be granted an opportunity to cross examine every witness, unless statutorily excepted. Such opportunity cannot be notionally granted but must be ensured meaningfully. Given the judicial precedents placed before us by learned counsel for the appellant as well

as learned APP for the state, we have no manner of doubt that the right to cross examine the investigating officer who was a material witness was a valuable right of the appellant. The right to legal assistance on every stage of the trial was imperative.

156. There is nothing at all before us to suggest that the appellant was remotely aware of either the importance of cross examination or the consequences of the failure to cross examine the investigating officer or that he understood the impact of the statement attributed to him. In the light of the well settled principles which we have noticed hereinabove, the denial of this right has caused grave prejudice to the defence of the appellant. We are unable to apply the equitable doctrine of waiver in the instant case. It is, therefore, not possible to hold that the appellant was granted a fair or meaningful opportunity to cross examine PW-20 Inspector Lakhwinder Singh.

### **Duty of the Court**

157. Learned counsel for the appellant has urged that even if the investigating officer had not been examined as a witness it would not have effected the credibility of the prosecution witness. Placing reliance on para 11 of the Supreme Court pronouncement in ***Raj Kishore Jha (supra)***, it is urged that

the Supreme Court has ruled that at best it would be desirable for the prosecution to produce the investigating officer for his cross examination.

158. To explore this possibility we put a query to the APP about the availability of PW-20. In response, the respondents have filed a status report to the effect that PW-20 Insp. Lakhwinder Singh has expired on 10<sup>th</sup> November, 2011. The office order issued by the Additional Deputy Commissioner, South-West, Delhi, dated 16<sup>th</sup> November, 2011 in this regard has been placed on record. It, therefore, would not be possible to remand the matter for a re-trial of the case to give the appellant a fresh opportunity to cross examine PW-20 Inspector Lakhwinder Singh at this stage.

159. The same would not be appropriate in the instant case for another reason.

160. PW-20 Inspector Lakhwinder Singh had completed his examination in chief on 22<sup>nd</sup> January, 2009 when the appellant was not assisted by a counsel. It needs no elaboration that human memory fades with passage of time. It would unfair to the witness as well to subject him to a cross examination almost ten years after the occurrence and more than three years after his examination in chief.

161. In view of the above, it has to be held that the appellant has been denied a fair and reasonable opportunity to cross examine PW-20 in violation of his rights under Article 21 of the Constitution of India. The testimony of PW-20 Inspector Lakhwinder Singh, therefore, cannot be looked at for any purpose.

**Non-compliance of provisions of Section 313 of CrPC**

162. The last ground of challenge pressed before us by Mr. Siddharth Aggarwal, learned counsel for the appellant is premised on non-compliance of the necessary safeguards while recording the statement of an accused person under Section 313 of the Code of Criminal Procedure.

163. In support of this submission, the learned counsel has emphasized the principle laid down by the Supreme Court in ***Madhav Hayawadanrao Hoskot v. State of Maharashtra (supra)*** noticed by us hereinbefore as well as the amendments which the legislature has effected to the Section 313 of the Code of Criminal Procedure.

164. It is noteworthy that by virtue of Section 22 of Act 5 of 2009, an amendment was effected in Section 313 of the Code of Criminal Procedure with effect from 31<sup>st</sup> December, 2009 to include sub-Section 5 therein which reads as follows:-

*“(5). The court may take help of prosecutor and defence counsel in preparing relevant questions which are to be put to the accused and the court may permit filing of written statement by the accused as sufficient compliance of this section.”*

165. Undoubtedly, the instant case relates to the incident of 2002 and the recording of statement on 10<sup>th</sup> February, 2009 which was prior to the amendment. Learned counsel for the appellant has painstakingly drawn our attention to the amendment which has been effected by the legislature to underscore the importance of availability of counsel to accused person at the stage when his statement under Section 313 of the Code of Criminal Procedure being recorded.

166. So far as the contention of Ms. Ritu Gauba, learned APP for the state based on the statements attributed to the appellant under Section 313 is concerned, the position in law in this regard has been settled by the Supreme Court of India and is best stated in the pronouncement in ***Sharad Birdichand Sarda v. State of Maharashtra (supra)*** in the following terms: -

*“150. It is well settled that the prosecution, must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the*

chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity on lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court."

*(Underlining by us)*

167. It is, therefore, trite that the prosecution cannot rest its case on the statements attributed to an accused person under Section 313 of the CrPC and is bound to prove an un-broken chain of circumstances pointing only to the guilt of accused before it can draw additional strength for the same from any answer which an accused may have given in such statement.

168. Ms. Ritu Gauba, learned APP for the State has very fairly drawn our attention to a pronouncement of the Supreme Court reported **at AIR 2012 SC 750 Mohd. Hussain alias Julfikar Ali v. State (Government of NCT) Delhi** on the issue of non-representation of an accused person by any counsel when witnesses were examined and discharged without cross-examination in the absence of defence counsel.

169. An argument was laid by learned APP for the State that no prejudice was caused to the accused in not providing him a defence counsel and that Supreme Court did not take exception to the trial in this case conducted by the Sessions Judge and the conviction and sentence passed against the accused. In this regard, the authoritative principles which

would guide consideration of a plea of prejudice or non prejudice were laid down by the Supreme Court in the following terms:-

*“19. The Learned Counsel for the Respondent-State, Sri Atri contends that since no prejudice is caused to accused in not providing a defence Counsel, this Court need not take exception to the trial concluded by the learned Sessions Judge and the conviction and sentence passed against the accused. I find it difficult to accept the argument of the learned senior Counsel. The Code of Criminal Procedure ensures that an accused gets a fair trial. It is essential that the accused is given a reasonable opportunity to defend himself in the trial. He is also permitted to confront the witnesses and other evidence that the prosecution is relying upon. He is also allowed the assistance of a lawyer of his choice, and if he is unable to afford one, he is given a lawyer for his defence. The right to be defended by a Learned Counsel is a principal part of the right to fair trial. If these minimum safeguards are not provided to an accused; that itself is 'prejudice' to an accused. It is worth to notice the observations made by this Court in the case of Rafiq Ahmad alias Rafi v. State of U.P. : (2011) 8 SCC 300, wherein it is observed:*

*35. When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. It is also a settled canon of criminal law that this has occasioned the accused with failure of justice. One of the other cardinal principles of criminal justice administration is that the courts should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage, as this expression is perhaps too pliable. With the development of law, Indian courts have accepted the following protections to and*

*rights of the accused during investigation and trial:*

*(a) The accused has the freedom to maintain silence during investigation as well as before the court. The accused may choose to maintain silence or make complete denial even when his statement under Section 313 of the Code of Criminal Procedure is being recorded, of course, the court would be entitled to draw an inference, including adverse inference, as may be permissible to it in accordance with law;*

*(b) Right to fair trial;*

*(c) Presumption of innocence (not guilty);*

*(d) Prosecution must prove its case beyond reasonable doubt.*

*36. Prejudice to an accused or failure of justice, thus, has to be examined with reference to these aspects. That alone, probably, is the method to determine with some element of certainty and discernment whether there has been actual failure of justice. 'Prejudice' is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there is serious prejudice to either of these aspects and that the same has defeated the rights available to him under the criminal jurisprudence, then the accused can seek benefit under the orders of the court.*

*37. Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof i.e. the prosecution must prove its case beyond reasonable doubt are the basic and crucial tenets of our criminal jurisprudence. The courts are*

*required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such principle with exactitude as it will always depend on the facts and circumstances of a given case. Therefore, the court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication.”*

170. The impugned judgments were reversed and the matter was remanded to the trial court with the directions to complete trial in a time bound manner.

171. In the judgment, Justice C.K. Prasad, while concurring with the setting aside of the conviction and sentence, has however differed with the directions for retrial. Certain observations made in the judgment of Justice C.K. Prasad on the importance of right to cross-examine deserve to be considered in extenso and read as follows:-

*“29. While holding the Appellant guilty the trial court has not only relied upon the evidence of the witnesses who have been cross-examined but also relied upon the evidence of witnesses who were not cross-examined. The fate of the criminal trial depends upon the truthfulness or otherwise of the witnesses and, therefore, it is of paramount importance. To arrive at the truth, its veracity should be judged and for that purpose cross-examination is an acid test. It tests the truthfulness of the statement made by a witness on oath in examination-in-chief. Its purpose is to elicit facts and materials to establish that the evidence of witness is fit to be rejected. The Appellant in the present case was denied this right only because he himself was not trained in law and not given the*

*assistance of a lawyer to defend him. Poverty also came in his way to engage a Counsel of his choice.*

*30. Having said so, it needs consideration as to whether assistance of the Counsel would be necessary for fair trial. It needs no emphasis that conviction and sentence can be inflicted only on culmination of the trial which is fair and just. I have no manner of doubt that in our adversary system of criminal justice, any person facing trial can be assured a fair trial only when the Counsel is provided to him. Its roots are many and find places in manifold ways. It is internationally recognized by covenants and Universal Declaration of Human Rights, constitutionally guaranteed and statutorily protected.”*

172. The court has thereafter extensively referred to the Article 14 of the International Covenant on Civil and Political Rights as well as the universal declaration of the human rights; article 21, 22(1), 39(A) of the Constitution of India; Sections 303 and 304 of the Code of Criminal Procedure and finally observed as follows:-

*“35. In my opinion, the right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22(1) of the Constitution has further been fortified by the introduction of the Directive Principles of State Policy embodied in Article 39A of the Constitution by the 42nd Amendment Act of 1976 and enactment of Sub-Section 1 of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go thorough the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to*

*be heard in criminal trial would be inconsequential and of no avail if within itself it does not include right to be heard through Counsel. One cannot lose sight of the fact that even intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time loses his equilibrium in face of the charge. **A guiding hand of Counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it of the ignorant and the illiterate or those of lower intellect An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence.***

*(Emphasis supplied)*

173. The Supreme Court held the appellant was held guilty and sentenced to death in a trial which was not reasonably fair or just.

174. In the instant case, Ms. Ritu Gauba, learned APP for the State has urged at length that no prejudice has resulted to the appellant on account of non-availability of the counsel at this stage when his statement under Section 313 of the Code of Criminal Procedure was recorded. It has been urged that the stage of recording of statement under Section 313 of the Code of Criminal Procedure is between the court and the accused person and that no intervention by lawyer is legally envisaged. She also submits that the reliance on the amendment to Section 313 of the Code of Criminal Procedure for the purpose of consideration of the present case is totally misconceived as

the amendment would effect only on 31<sup>st</sup> December, 2009. Learned APP has relied on the pronouncement of the Supreme Court reported at **AIR 2000 SC 3214 Basavaraj R. Patil v. State of Karnataka.**

175. The challenge by learned counsel for the appellant is to the manner in which the statement of the appellant under Section 313 of the Code of Criminal Procedure was recorded on the 10<sup>th</sup> of February, 2009. Mr. Aggarwal, Advocate has painstakingly drawn our attention to the fact that the appellant was not represented by a counsel when his statement under Section 313 of the Code of Criminal Procedure was recorded on the 10<sup>th</sup> of July, 2009 and has painstakingly taken us through the same. His submission is that this non-representation has resulted in miscarriage of justice in as much as there is strong possibility that the appellant may not have understood either the questions which were put to him or the impact of the answers which he has given to the questions which has been put to him.

176. Ms. Ritu Gauba, learned APP has urged at some length that the appellant has given answers of some questions in his statement under Section 313 of the Code of Criminal Procedure which tantamount to admission of the case. In the alternative, it is urged that if this court were to accept the contentions of

the appellant, then at best the matter would require to be remanded for recording of the appellants' statement afresh.

177. Before examining the rival contentions, reference may be made to the principles laid down by the Supreme Court in Para 150 of ***Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622*** wherein the court held as follows:-

*"150. It is well settled that the prosecution, must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court."*

178. We have considered the submissions made by counsel on the objection raised by learned counsel for the appellant. It cannot be denied that Section 313 of the Code of Criminal Procedure is an extremely important and salutary provision and is the first opportunity given to the accused person to explain such circumstances which stand established in the evidence against him. Even though, the law mandates that the statement under Section 313 of the Code of Criminal Procedure

shall not be on oath, however the courts were empowered to take into consideration the answers given by the accused.

179. By virtue of Section 313 of the Code, law mandates that an opportunity be given to the accused to personally explain *any circumstance appearing in the evidence against him* by the court. He is called upon to lead his defence in terms of statutory provision. Law mandates that no oath shall be administered to the accused when he is examined under sub Section (1). In terms of Sub-Section (4) of Section 313, the answers given by the accused person may be taken into consideration any such answer or trial and put in evidence for or against him in any other inquiry into or trial for any other evidence which such answer may tend to say that he has committed the offence.

180. So far as the requirement of a counsel being available to the accused person is concerned, the several pronouncements noted by us hereinabove have repeatedly mandated that accused is entitled to an adequate and appropriate legal assistance at every stage of the trial. In ***Mohd. Hussain @ Julfikar Ali v. State (supra)*** and ***Madhav Hayawadanrao Hoskot v. State of Maharashtra (supra)***, the Supreme Court at length devolved on the limitations and disadvantages faced by an accused person who is incarcerated and would

also be facing the disadvantages of illiteracy and poverty. It has been authoritatively held that he is entitled to legal assistance at every stage.

181. In the instant case, the appellant was standing trial for alleged commission of an offence under Section 302 of the Indian Penal Code and culpability thereunder could have resulted even in imposition of capital punishment on him as envisaged in law. His counsel had stopped appearing in the matter after the case was transferred from Patiala House Courts to the Dwarka District Court which would be more than 25 kms. away for no fault attributable to the appellant. Given the principle noticed above, inability of the accused person to understand the import of the statement which the court was recording by itself per se would have resulted in prejudice to him and would tantamount to unfairness of procedure and the trial which the appellant had undergone.

182. In ***Basavaraj R. Patil v. State of Karnataka (supra)*** the court was concerned with the issue as to whether it is indispensable or mandatory that the accused himself should be questioned under Section 313 of the Code of Criminal Procedure and whether the court is empowered to allow an advocate to answer such questions on behalf of the accused in some exigent condition.

The Supreme Court has made contextual reference to the earlier pronouncement reported at **(1973) 2 SCC 793: AIR 1973 SC 2622, Shivaji Sahabrao Bobade v. State of Maharashtra** wherein the Supreme Court had considered the fall out of the omission to put to the accused a question of vital circumstance appearing in the prosecution evidence. In **Basavaraj R. Patil (supra)** case, the court has held as follows:-

*“16. Contextually we cannot bypass the decision of a three Judge Bench of this Court in Shivaji Sahabrao Bobade and Anr. v. State of Maharashtra and Anr. : 1973CriLJ1783 as the Bench has widened the sweep of the provision concerning examination of the accused after closing prosecution evidence. Learned Judges in that case were considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence. The three Judge Bench made the following observations therein:*

*It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission had occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the Court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what*

*explanation the accused has as regards the circumstances established against him but not put to him and if the accused is [1963]3SCR489 unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction."*

183. So far as the object of examination of an accused under Section 313 of the Code of Criminal Procedure is concerned, the same has been considered in para 18 and 19 of the **Basavaraj R. Patil** in the following terms :-

*"18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him." In Jai Dev v. State of Punjab [1963]3SCR489 Gajendragadkar, J. (as he then was) speaking for a three Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus: "The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him, If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity."*

*19. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion."*

184. Learned counsel has taken us to the questions which were put to the appellant. We find that a large number of questions which were put to the accused were based on legal evidence on record and are really such material which was completely inadmissible in evidence. Counsel has also drawn our attention to several questions which were not based on any evidence on record. In this regard, our attention has been drawn to the questions at serial nos. 26 to 31 as well as questions at serial nos. 33 to 39. Learned APP has urged that answers to these questions attributed to appellant be read against him.

185. Certainly, if the appellant had the assistance of counsel, when the evidence was being put to the appellant, he would have pointed out the impressibility of the questions and the statutory prohibitions to the court. Counsel would have guided the appellant on the importance of the statement.

186. We find substance in the submission that counsel would have explained the questions to him. The presence of the counsel would have ensured that only circumstances which were in evidence against the appellant would have been put to the appellant and not inadmissible evidence especially those which were barred by operation of Section 24 to 27 of the Evidence Act or the questions which were not based on any

legal evidence. Learned counsel has also pointed that the reliance placed by the learned trial judge on answers attributed to the appellant to such questions has also gravely prejudiced the adjudication and the result of the consideration by the trial judge resulting in grave injustice to the appellant. It is obvious that in this background, grave prejudice has resulted to the appellant on account of non-availability of any counsel to him at the time of recording his statement under Section 313 of the Code of Criminal Procedure, who would have explained the statutory provisions; the consequence of failure to answer or explain the circumstances put to him.

187. Learned counsel for the appellant has also placed reliance on Section 3 of the Indian Evidence Act to urge that the statement without oath of the accused under Section 313 of the Code of Criminal Procedure cannot be a substitute for the evidence which the prosecution must lead to prove the unbroken chain of circumstance beyond the reasonable doubts in order to support a conviction in a case based on circumstantial evidence.

188. The learned trial court has put to the appellant, as part of question no.5 a completely inadmissible hearsay statement attributed to Surinder Mehto. Learned counsel for the

appellant has contended that this question itself could not have been put to the appellant.

189. It has also been urged that the prosecution has failed to establish that the room 'adjoining room no. 21' was locked or that the key was with the appellant. He had clearly stated that he was picked up by the police when he was returning to the school after dropping children at the St. Mary School, Sector 9, Dwarka and has disputed alleged disclosures and recoveries claimed to have been established at his instance.

190. Learned counsel has pointed out that there was no evidence on record that clothes of the deceased were identified by Shambhu Mehto and that the answer attributed to the appellant is contrary to the case of the prosecution that the deceased had come to the school on the fateful night. It is contended that identical answers have been attributed to questions no.12 and 13 which questions make different queries and are not logical. It is urged that even in the questions which have been put to the appellant, there is no identification of the actual room which was allegedly under the occupation of the appellant.

191. In the instant case, so far as the legally admissible evidence discussion herein before is concerned, at best, the prosecution has led evidence on the circumstance of the

appellant being last seen alive in the company of the deceased at about 9:15 p.m. on the night of 16<sup>th</sup> April, 2002 and recoveries of some articles on the next date purportedly based on disclosure made by the appellant.

192. We have discussed hereinabove as to why it is not possible to hold the presence of the deceased in the company of the appellant may not necessarily be proximate to the time of his murder.

193. The prosecution has also failed to connect recoveries to the appellant or the offences. In any case, the recoveries of the articles would at best attribute to the knowledge of the place where the recovered articles where from they were traced and by itself would not establish anything more. The material witness who could have shed some light has not been brought into the witness box. The prosecution has also not been able to connect the weapons which they claimed to have recovered at the instance of the accused to the commission of the offence. In this background, there are several gaps in the chain of circumstances which the prosecution was required to establish in order to bring home the finding of guilt of the appellant. It would thus be inappropriate to fall back on the statement without oath which was recorded of the appellant

under Section 313 of the Code of Criminal Procedure, especially in the circumstances noticed above.

194. Ms. Ritu Gauba, learned APP for the State has contended that even if this court was to hold and conclude that there had been procedural unfairness to the appellant, the course to be adopted by this court was to remand the matter for retrial from the stage at which there was procedural unfairness to the appellant.

195. Mr. Siddharth Aggarwal, learned counsel for the appellant has urged at great length that the retrial cannot be ordered only to enable the prosecution to adduce additional evidence for filling up the lacunae. In this regard, reliance has been placed on the pronouncement of the Supreme Court reported at **AIR 1963 Supreme Court 1531, Ukha Kolhe v. The State of Maharashtra** wherein the court has ruled as follows:-

*“11. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again.*

*An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in Ramanlal Rathi v. The State AIR1951Cal305 , observed :*

*"If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case."*

196. Before the prosecution has placed the intimation with regard to the demise of PW 20 on record, submissions were made by learned counsel for both the sides with regard to the procedure which this court ought to adopt. Our attention was drawn to the provisions of Section 368 and Section 391 of the Cr.P.C. Learned counsel for the appellant has placed reliance on the pronouncement of the Supreme Court reported **at 1990 CRI.L.J. 1800, Lakshmanan Sundaram v. State of Kerala** wherein the principles with regard to the exercise of this

question under this statutory provisions have been laid down. Learned counsel has also relied on the pronouncement of the Supreme Court reported at **1976 (2) SCC 819 (Para 24 and 25) S. Harnam Singh v. The State (Delhi Administration)**. In view of the position noticed by us hereinabove, it is not necessary to deal with this submission.

197. Upon a scrutiny of a testimony of PW 20 – Inspector Lakhwinder Singh, we find that he is a material witness who has proved Ex.PW20/A which is the postmortem report and is only evidence on record which has been proved by the prosecution to establish that it was the blood of the deceased which was found in the different parts of the school premises as well as on the Pocha (mop) in the school. If the testimony of PW 20 is not to be considered, CFSL report dated 25<sup>th</sup> October, 2002 would not have been proved on record. There would then be no evidence of an important circumstance in the chain of evidence.

198. As discussed hereinbefore; so far as the cross-examination of PW 20 - Inspector Lakhwinder Singh is concerned, he had unfortunately expired on 10<sup>th</sup> November, 2011 as reported by the State. Even if the same could be held to be legally permissible almost 10 years after the incident and more than three years after recording of his examination-in-

chief, he is not available for being subjected to cross-examination at this stage. That being so, in view of our finding that the appellant has been wrongly denied a fair opportunity of cross-examination of this witness, his testimony cannot be looked at for any purpose.

199. As per the nominal roll received from the jail, the appellant had been in custody for a period of 9 years, 11 months and 7 days. The reality that memory fades with passage of time would not change merely because an accused person was to be examined. On the issue of remanding trial in a criminal case after passage of time, in para 37 of the judgment in ***Md. Hussain alias Julfikar Ali v. State (Govt. of NCT), Delhi (supra)***, it was observed as follows :-

“37. Having found that the Appellant has been held guilty and sentenced to death in a trial which was not reasonable, fair and just, the next question is as to whether it is a fit case in which direction be given for the de novo trial of the Appellant after giving him the assistance of a Counsel. I have given my most anxious consideration to this aspect of the matter and have no courage to direct for his de novo trial at such a distance of time. For an occurrence of 1997, the Appellant was arrested in 1998 and since then he is in judicial custody. The charge against him was framed on 18.02.1999 and it took more than five years for the prosecution to produce its witnesses. True it is that in the incident four persons have lost their lives and several innocent persons have sustained severe injuries. Further, the crime was allegedly committed by a Pakistani but these factors do not cloud my reason. After all, we are proud to be a democratic country and governed by rule of law. The Appellant must be seeing the hangman's noose in his

dreams and dying every moment while awake from the day he was awarded sentence of death, more than seven years ago. The right of speedy trial is a fundamental right and though a rigid time limit is not countenanced but in the facts of the present case I am of the opinion that after such a distance of time it shall be travesty of justice to direct for the Appellant's de novo trial. By passage of time, it is expected that many of the witnesses may not be found due to change of address and various other reasons and few of them may not be in this world. Hence, any time limit to conclude the trial would not be pragmatic."

200. Given the failure of the prosecution to prove all relevant and necessary circumstances in the chain of circumstances necessary to hold that the appellant was guilty of the offence of which he was charged, we are unable to persuade ourselves to remand the matter only for the purpose of re-examination of the appellant under Section 313 of the Code of Criminal Procedure.

201. For the aforesaid reasons, the appeal is allowed. The impugned judgment dated 16<sup>th</sup> April, 2009 for the offence under Sections 302 and 201 IPC passed by the Additional Sessions Judge and the order of sentence dated 20<sup>th</sup> April, 2009 are hereby set aside and quashed. It is directed the appellant shall forthwith be released.

**GITA MITTAL, J**

**J.R. MIDHA, J**

**March 28, 2012**

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