

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

RESERVED ON : 29th March, 2012
DECIDED ON : 1st June, 2012

+ **CRL.A.No.1091/2011**

SUNITA Appellant.

Through : Mr.Michael Peter with
Mr.Dharmendra Vashistha and
Mr.Sumit Kalra, Advocates.

Versus

STATE ...Respondent.

Through: Mr.Sanjay Lao, APP for the State.

CRL.A.No.1442/2011

STATE Appellant.

Through: Mr.Sanjay Lao, APP for the State.

Versus

SATBIR @ SATTE ...Respondent.

Through : Mr.A.J.Bhambhani with Ms.Bhavita
Modi, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant-Sunita impugns the judgment dated 18.04.2011 and order on sentence dated 25.04.2011 of the learned Additional Sessions Judge in Sessions Case No.247/2009 by which she was convicted for committing offences punishable under Section 302/201

IPC and sentenced to undergo imprisonment for life with fine of ₹2,000/- under Section 302 IPC and rigorous imprisonment for three years with fine of ₹ 1,000/- under Section 201 IPC. Both the sentences were to operate concurrently.

2. The State has also preferred leave to appeal against the acquittal of Satbir @ Satte by the impugned judgement dated 18.04.2011.

3. The prosecution alleged that on 17.07.2005 at 8:30 P.M. the appellant recorded Daily Diary (DD) entry No.21 (Ex.PW13/A) at Police Post Budh Vihar, Police Station Sultan Puri informing that her husband Rajbir @ Raje aged 40 years who was suffering from mental problem was missing for the last one and a half month and requested to search him. The investigation was marked to Head Constable Devender Singh who suspected foul play in the disappearance of her husband. The investigation was taken over by ASI Sajan Singh who interrogated Sunita to ascertain the circumstances in which her husband went missing. On finding her response unsatisfactory, he made an endorsement on DD No.21 (Ex.PW13/A) and sent the rukka for registering the case under Section 365 IPC. The further investigation was assigned to Inspector A.S. Dhaka (Investigating Officer). During investigation, he grilled the informant (Sunita) and recorded her statement on 20.07.2005. Goverdhan and Suresh Kumar, her husband's relatives suspected her conduct and character and it led to her arrest. In her statement made to the police, she confessed about the concealment of the dead body of her husband in a godown and also named Satbir's involvement in the incident. The disclosure led to the arrest of co-accused Satbir @ Satte who also confessed his complicity in the crime. Pursuant to their disclosure statements, they both led the police

to a godown owned by Ram Charan to effect the recovery of the dead body. The Investigating officer associated Sub Divisional Magistrate (SDM), Assistant Commissioner of Police (ACP), Officials of crime team and videographer at the place of recovery. After digging the spot pointed out by them for about 4½-5 feet, the police succeeded to recover the body which was identified to be that of Rajbir by his brothers Goverdhan and Suresh. The police also recovered empty pouches of Tata brand salt found in the pit. The investigating officer seized nail clippings, hair sample, blood stained earth, earth control, empty pouches of Tata Salt and prepared the seizure memos. The crime team inspected the spot and took the photographs. The body was sent to Sanjay Gandhi Memorial Hospital (SGMH). Dr.S.K.Sharma (PW-4) conducted post-mortem on the dead body. During investigation, the IO collected the post-mortem report, forensic reports and recorded the statements of the witnesses conversant with facts. Blood samples of the deceased's brother and father were sent for the purpose of conducting DNA test to forensic laboratory, Kolkata. After completion of the investigation, the police filed the charge-sheet accusing both of them for committing Rajbir's murder. They both were charged and brought to trial.

4. The appellant (Sunita) had three children and to have their custody, she moved an application before the Trial Court. The children were produced by relatives of the deceased but they declined to join the appellant. It transpired that the previous Investigating Officer had not examined deceased's daughter Asha (PW-8) though she was a witness to the incident. The police carried out further investigation under Section 173 (8) Cr.P.C. and submitted a supplementary charge-sheet.

5. The prosecution examined as many as 25 witnesses to prove its case. The statements of the accused were recorded under Section 313 Cr.P.C. to afford them an opportunity to explain the incriminating circumstances. They denied complicity in the crime and pleaded false implication.

6. After appreciating the evidence and after considering the rival contentions of the parties, the Trial Court convicted Sunita and acquitted Satbir by the impugned judgment. Aggrieved by the said conviction, the appellant (Sunita) has preferred the appeal. The State has also impugned the judgment against the acquittal of co-accused Satbir.

7. Learned counsel for the appellant challenged the findings of the Trial Court and urged that it did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of PW-1 (Sant Ram) and PW-2 (Goverdhan) who were related to the deceased and had ulterior motive to falsely implicate her with an intention to grab their property. Both PW-1 and PW-2 contradicted each other on vital facts and narrated inconsistent versions as to when they met the police and when the accused's confessional statements were recorded. The counsel emphasized that the prosecution failed to prove, beyond reasonable doubt that the dead body recovered/exhumed was that of Rajbir. The prosecution did not adduce link evidence i.e. entries in Register No.19, to prove when the blood samples of the deceased's father Hari Kishan were collected and sent for DNA to Central Forensic Science Laboratory (CFSL), Kolkota. The counsel contended that the blood samples on the basis of which deceased's identity was established belonged to Goverdhan and not to Hari Kishan. Counsel further argued

that being a poor and illiterate lady, Sunita could not lodge a missing report at the earliest. She had no inkling at that time that her husband was not alive. The police, alleged the counsel, fabricated the alleged disclosures and recoveries at her instance. The acquittal of co-accused Satbir on the same set of evidence reflects discrepancies in the prosecution case. PW-7 (Ram Charan), the owner of the godown, did not support the prosecution and turned hostile. The prosecution failed to explain how the Investigating Officer had instructed Ram Charan to remove the gunny bags in advance when the alleged disclosure statement was not in existence that day. The place from where the dead body was exhumed was already in the knowledge of the police and was never pointed out by the accused. The fact that the police had already marked that spot with white powder shows that the place they wanted to search was known to them. The investigation carried out by the police is defective and no independent witness or member of public was joined at any stage. The police did not associate any independent witness at the time of recording disclosure statements of the accused and the witnesses gave inconsistent versions when and where these were recorded. The investigating officer did not bother to examine the children to find out if the accused had any nexus with each other. Asha's (PW-8) statement was recorded after inordinate delay of 18 months and the Trial Court for valid reasons did not place any reliance on it. PW-8, the child witness remained with the deceased's relatives after the occurrence and there were every chance of coaching and tutoring. Her evidence requires to be evaluated carefully because children are liable to be influenced and their statements can be shaken and moulded easily. Counsel further argued that nothing

emerged on record that the Appellant had any objectionable relationship with co-accused Satbir. The impugned judgment based upon conjectures and surmises is unsustainable.

8. Learned APP supported the findings of the Trial Court and urged that the testimonies of PWs 1,2 and 8 proved the guilt of the accused and their evidence cannot be rejected merely because they were interested and partisan witnesses. Close relationship is not a factor to discard their otherwise cogent version. The dead body of the deceased was recovered pursuant to their disclosure statements and has evidentiary value under Section 27 of the Evidence Act. The police was not aware of the place from where the dead body was exhumed prior to the making of confessional statements by the accused. The conduct of the accused was highly strange and unnatural as she lodged a missing person report with the police on 17.07.2005 knowing that her husband was not alive. She intended to mislead the police and when her relatives suspected foul play in the disappearance of her husband, she reported the matter to the police alleging his disappearance for the last one and a half month. Again, the accused did not disclose the exact date when her husband went missing. The post-mortem report exposed her when Dr.S.K.Sharma (PW-4) gave his opinion that the death had occurred three to six months prior to the conducting of the procedure. Counsel further argued that the Skelton recovered pursuant to the disclosure statement was that of Rajbir and both PWs 1 and 2 identified the dead body to be that of Rajbir. DNA report proved by Dr.Ikramul Haque (PW-12) clearly established its identity.

9. Learned APP assailed findings of the Trial Court and urged that the acquittal of co-accused Satbir was based upon mis-appreciation of

the prosecution's evidence. He urged that the Trial Court fell into grave error in rejecting the cogent, reliable and credible statement of deceased's daughter Asha who categorically proved that Satbir had illicit relations with her mother Sunita and had witnessed the accused committing her father's murder in the house. She had no ulterior motive to make false deposition against Satbir with whom she had no prior animosity. The Trial Court, urged the APP, did not consider the vital aspect that the body of the deceased was recovered at his instance also. Since the deceased did not like their illicit relationship, both accused had strong motive to eliminate him. The delay in recording the statement of Asha due to the negligence of the Investigating Officer is not a factor to discard her independent version.

10. We have considered the submissions of parties and have examined the Trial Court records. Before entering into the merits of the case, it is desirable to highlight that accused (Sunita), Rajbir's wife, lodged the missing report by DD No.21 (Ex.PW-13/A) on 17.07.2005. When the police suspected foul play in the disappearance of her husband an FIR under Section 365 IPC was registered. Satbir was also charged for hatching conspiracy with Sunita for committing Rajbir's murder. However, the Trial Court by the impugned judgment acquitted him. Initially, the prosecution case was based entirely on circumstantial evidence. Subsequently the prosecution filed a supplementary charge-sheet under Section 173(8) Cr.P.C. and cited Asha, deceased's daughter, as a witness to the incident. The case of the prosecution is discussed as under:

(A) Homicidal death

11. Homicidal death of the deceased is not under challenge. Only contention of counsel is that the prosecution failed to establish that the dead body/skelton exhumed was that of Rajbir. On scrutinizing the evidence on record, we find no substance in this plea. Rajbir's body was recovered pursuant to the disclosure statement of the accused. Sunita, Rajbir's wife, was the best person to identify the skelton/dead body. The police was not aware if the skelton of any human being was buried beneath 4/5 feet of the earth. They came to know about it only upon the disclosure made by the accused. It is hard to believe that the accused would recover the dead body of a stranger. Besides it, the body was exhumed in the presence of PW-1 (Sant Ram) and PW-2 (Goverdhan) who identified it to be that of Rajbir. PW-1 categorically deposed that the body exhumed was that of his brother Rajbir and it was handed over to them on 10.08.2005 after the post-mortem by receipt (Ex.PW1/A). PW-2 (Goverdhan) corroborated PW-1 in this regard and further testified that they took the body to their village Chhapra and performed the last rites there. No suggestion was put to both these witnesses in the cross-examination that it was not Rajbir's body. In fact, the accused never challenged the identity of the body during trial. Even in her statement recorded under Section 313 Cr.P.C, Sunita did not doubt the identification of the body. PWs 1 and 2 are not imagined to perform the last rites of the dead body not belonging to their near and dear one.

12. During investigation, the police produced Goverdhan, deceased's real brother, at Sanjay Gandhi Memorial Hospital, Mangolpuri on 22.08.2005 for collecting blood samples for DNA and sent it to CFSL,

Kolkata. The Trial Court record reveals that letter Ex.PW16/A bearing No.CFSL(K)/05/IV/CR/6516 dated 19.12.2005 was received from Director CFSL, Kolkata with reference to a letter No.23654/SO/DCP/NWD dated 16.12.2005 sent by Additional DCP, North-West Distt., Delhi in which request was made to the police to manage to forward the blood samples of the parents and/or the child of the deceased as identity of the victim using brother's sample was not possible. Pursuant to the requirements, the police produced Hari Kishan, deceased's father at SGMH hospital and his blood sample was collected. PW-22 (Prem Chand Kansal) filled the form (Ex.PW22/A). The record further reveals that these samples were sent to CFSL, Kolkata through a special messenger. Testimony of PW-12 (Dr.Ikramul Haque), who conducted the DNA test and proved the report (Ex.PW12/A) containing his signature confirming the receipt of ten sealed parcels is material. While appearing as PW-12, he testified before the Trial Court as under:

“All the parcels were number as exhibited as Ex.A,B,C,D,E,F. Exhibit F further contains Ex.F1,F2,F3 and F4. The Ex.G, Ex.H, Ex.I and Ex.J. Portion of Ex.A i.e.nail phalanges of the alleged deceased Ex.F, Ex.F4, teeth sample of deceased and Ex.H blood sample of Mr.Hari Kishan were subject for DNA isolation. Rest of the exhibits i.e.B,C,F1 to F3 and Ex.G alleged to be from the deceased were not found suitable for DNA examination. Ex.I and Ex.J were not considered for examination as both the exhibits owe their original to a single source i.e the source of Ex.E blood sample. Ex.A and Ex.H, Ex.F4 were used for DNA isolation using standard operational procedure for DNA isolation. Further, DNA was subjected for amplification using standard identifiller kit. The results have been tabled my report. From the above result, it is opined that the DNA profit developed from Ex.A and Ex.H are of human male origin, whereas DNA profile from Ex.F4 i.e.teeth could not be developed.

On comparing the partial DNA profile developed from Ex.A with that of Ex.H blood sample of Hari Kishan it is concluded that the “possibility of Ex.A.belongs to a biological male off spring of Mr.Hari Kishan blood sample Ex.H.could not be ruled out. All the remnanats of the exhibits have been sealed with the seal impression of CFSL Biology. My repot of page 4 is numbered 1 to 4 has been singed by me on dt.08.08.2006, each of the page of the report bears my seal and signature and the report is Ex.PW12/A, which bears my signatures at point A,B,C&D.

13. The accused did not cross-examine him on the relevant facts. He stated that there was no margin of error in his report or the procedure adopted by him. The authenticity of the report remained unchallenged in the cross-examination.

14. It is relevant to note that the prosecution produced Head Constable Mahinder on 30.07.2009 before the Trial Court to prove the relevant entries in Register No.19 recorded by the then Head Constable Kawal Singh (since expired). The order sheet for the said date reveals that the defence counsel did not dispute the relevant entries in Register No.19. Consequently the said entries were taken as admitted and proved. Since Hari Kishan’s blood samples were sent after the filing of the initial charge-sheet and the CFSL report from Kolkota was received during the pendency of the proceedings, the prosecution filed supplementary challan citing PW-12 (Dr.Ikramull Haque) as a witness. In the report (Ex.PW.12/A), there is a clear mention that ten sealed parcels described therein were received on 30.01.2006 by memo No.793/SO/DCP/NWD intact and tallied with the specimen seal forwarded through a messenger. The DNA report, thus, cannot be faulted merely because the police did not produce relevant entries in Register No.19 regarding sending the blood

samples of Hari Kishan to CFSL, Kolkata. Undoubtedly, it was a case of culpable homicide.

(B) Recovery of dead body.

15. Sunita was arrested on 20.07.2005; and pursuant to her disclosure statement (Ex.PW.16/A), she led the police team to a godown belonging to PW-7 (Ram Charan) and pointed out the spot where she with co-accused Satbir @ Satey had concealed/dumped the dead body of her husband after his murder. The IO prepared the pointing out memos (Ex.PW11/A and Ex.PW2/A). After removing the jute gunny bags from the godown, the place was earmarked with white powder and on digging for about 4½-5 feet, a skeleton was exhumed which was identified as that of the deceased (Rajbir). The police also seized five empty 'Tata' salt pouches from that pit by seizure memo (Ex.PW2/C).

16. PW-7 (Ram Charan), owner of the godown, deposed that in July, 2005 on the direction of the Police, he removed gunny bags stored in the godown. The spot pointed by the accused was encircled and dug out. In the cross-examination by APP (after seeking permission from the court), he stated that he had not seen Rajbir @ Satey who used to run a tea shop in the rented accommodation for the last ten days and when he inquired from his wife Sunita, she told him that he had gone somewhere after a quarrel with her. Since the accused did not opt to cross-examine the witness, his deposition remained unchallenged. Being the owner of the godown in question and nurturing no grudge against the accused, reliance can be placed on his testimony.

17. PW-3 (Anil Sahni) is a crucial witness who stated that at about 6:00 P.M., senior police officers on reaching the godown asked him

to remove some bags lying in the godown. The accused were brought in the godown and they pointed to a spot underneath which they had buried the dead body. After digging the earth about 4-5 feet deep with the assistance of his colleague Sikander, a lifeless body was recovered. He further stated that they were paid ₹ 150/- each for the job. No ulterior motive was imputed to this independent public witness for falsely deposing against the accused with whom he had no prior acquaintance. Nothing emerged in the cross examination to disbelieve the cogent version given by the witness.

18. The recovery of the dead body/skeleton was affected in the presence of PW-11 (Kedar Nath), Sub-divisional Magistrate, who was summoned at the spot at about 5:30 P.M. He also testified that the body recovered pursuant to the accused's disclosure statement after digging the earth was identified by Goverdhan and Suresh. The counsel could not elicit any discrepancy in the cross-examination to disbelieve his version. The Court has no reason to doubt the veracity of this official witness.

19. PW-2 (Goverdhan), the deceased's brother, categorically corroborated PW-11 in all material facts and proved that the body was exhumed in his presence. He also viewed the video prepared at the time of conducting the proceedings and identified various persons including PW-11 (Kedar Nath), Sub-divisional Magisterate, participating in it. PW-1 (Sant Ram) also testified that recovery of Rajbir's body was effected at the instance of the accused. The accused did not challenge his presence at the spot.

20. PW-17 (Pradeep) from M/s Shiv Photo Studio prepared the video cassette, (Ex.P-3) covering the entire processing of digging the

earth and recovery of body at the instance of the accused. There is no reason to doubt the testimony of this independent professional witness who was neither biased in favour of the prosecution nor prejudiced against the accused.

21. On careful analysing the evidence of all the witnesses what emerges is that they have corroborated each other on material facts without variations, omissions or contradictions. These witnesses associated during investigation had no motive to make false deposition. The police did all what it could do to show its bona-fide to make the proceedings transparent. We find no valid reasons to doubt the recovery of the dead body of the deceased at the instance of accused-Sunita. Trivial discrepancies pointed out by the counsel do not cause dent in the prosecution case. The observation of the Trial Court recording the testimony of PW-2, a illiterate witness from the village is relevant to note: *“The witness is seemingly illiterate and slow in understating. He has taken unduly long in comprehending the questions put by learned defence counsel.”* The witness also volunteered that he was illiterate and was of low intelligence quotient. Thus, no significance can be attached to the minor discrepancies in his testimony.

22. The recovery of body on the basis of disclosure statement (Ex.PW-16/A) is a material incriminating circumstance admissible under Section 27 of the evidence Act. It led to the discovery of distinct facts hitherto unknown to the police i.e. the place where the accused had concealed/dumped the body of her husband, its recovery from a hidden place not accessible to the public and the manner in which he was murdered i.e. strangulation. The police was not even aware about the

disappearance of the deceased and came to know when she lodged missing person report. These facts were in the special knowledge of the accused only. She had the opportunity to conceal the body at the place which was near to her residence and was uninhabitable being under construction at that time. She did not explain how and under what circumstances, she acquired the knowledge about the dead body of her husband lying buried at that place when she had nothing to do with the crime.

23. In the case of *State of Maharashtra v. Suresh* (2000) 1 SCC 471, the Supreme Court while discussing law on Sections 27, 106 and 114 of Evidence Act held as under:

“We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.”

24. In the case of *Suresh Chandra Bhari v.State of Bihar* 1995 Supp(1) SCC 80 the Supreme Court while discussing the essentiality of Section 78 of Evidence Act held as under:-

“71. The two essential requirements for the application of Section 27 of the Evidence Act are that (1) the person giving information must be an accused of any offence and (2) he must also be in police custody. In the present case it cannot be disputed that although these essential requirements existed on the date when Gurbachan Singh led PW 59 and others to the hillock where according to him he had thrown the dead body of Urshia but instead of the dead body the articles by which her body was wrapped were found. The provisions of Section 27 of the Evidence Act are based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false. In the present case as discussed above the confessional statement of the disclosure made by the appellant Gurbachan Singh is confirmed by the recovery of the incriminating articles as said above and, therefore, there is reason to believe that the disclosure statement was true and the evidence led in that behalf is also worthy of credence.

72. In the light of the facts stated above we are afraid the two decisions mentioned above and relied on by the learned counsel for the appellants have no application to the facts of the present case and do not advance the case of the appellants challenging the discovery and seizure of the incriminating articles discussed above. In Nari Santa the accused of that case was charged for the theft and it is said that in the course of investigation the accused produced certain articles and thereafter made a confessional statement and it was in these facts and circumstances it was held that there was no disclosure statement within the meaning of Section 27 as the confessional statement was made only when the articles were already discovered having been produced by the accused. Similarly

the decision rendered in Abdul Sattar also does not help the appellants in the present case. In the case of Abdul Sattar recovery of wearing apparels of the deceased is said to have been made at the instance of the accused of that case more than three weeks after the occurrence from a public place accessible to the people of the locality and, therefore, no reliance was placed on the disclosure statement and recovery of the wearing apparels of the deceased. But in the present case it was soon after the arrest of appellant Gurbachan Singh that he took the Police Officer while in custody to the place where according to him he had thrown the dead body of Urshia wrapped by the incriminating articles. Those articles were not found lying on the surface of the ground but they were found after unearthing the Khad gaddha dumping ground under the hillock. Those articles were neither visible nor accessible to the people but were hidden under the ground. They were discovered only after the place was pointed out and it was unearthed by the labourers. No fault therefore could be found with regard to the discovery and seizure of the incriminating articles.”

25. The prosecution has established this circumstance beyond reasonable doubt against accused-Sunita. The counsel urged to consider this circumstance incriminating against co-accused-Satbir also as he had made disclosure statement and pursuant to that, the body of the deceased was recovered. We are unimpressed with this submission. The joint statement made by two accused persons leading to the discovery is not per se inadmissible in evidence. However, in the instance case the police had already recorded the confessional statement of accused Sunita and had discovered the fact regarding concealment of the dead body of the deceased under the ground in the godown of Ram Charan. Only thereafter, the police set out to apprehend the accused-Satbir and recorded his confessional statement on similar lines. There was, thus, long gap between two confessional statements made by accused-Sunita and co-

accused-Satbir and can not be taken as 'joint statements'. The confessional statement of accused-Sunita was sufficient to lead to the recovery of the body at her instance. The police for the reasons known to it waited for the arrest of the accused-Satbir and thereafter both were taken together to the place from where the body was recovered. So it cannot be said that the body was recovered pursuant to the disclosure statement of Satbir to make it admissible under Section 27 of the Evidence Act.

(C) Conduct:

26. Undoubtedly, Rajbir was missing from the house for long. The accused, his wife was fully aware of it but did not make serious efforts to search him. She did not contact her relatives or the police to seek their assistance. Only on 17.07.2005, she lodged the missing person report informing the police that her husband who had left for work about one and a half month earlier and had not returned. She did not explain the inordinate delay in lodging the report with the police. She did not divulge where her husband had gone to or whether remained in touch with him any time after he left. The police did not believe her version and suspected foul play, registered First Information Report (FIR) under Section 365 IPC on 19.07.2005 and arrested her on 20.07.2005. On interrogation, she spilled the beans and confessed to her crime. Pursuant to her disclosure, the dead body of her husband was recovered. All these facts reveal that at the time of lodging the report (Ex.PW-13/A), she was aware that her husband was not alive. To mislead the police and the relatives, she invented a false story alleging his disappearance. The post-mortem examination (Ex.PW-4/A) determined the time of death between three to

six months before the conduct of post-mortem which falsified her claim as to when her husband went missing. She offered contradictory excuses to various persons under what circumstances her husband disappeared. In the DD Entry No.21 (Ex.PW.13/A), she informed the police that her husband had gone for work. However, in response to PW-7's enquiry, she told him that he had gone to some unknown place after quarrelling with her without disclosing the cause of quarrel. In the statement under Section 313 Cr.P.C. she did not explain when and under what circumstances, her husband went missing or if she made any efforts to find his whereabouts.

27. In the case of *Prakash v.State* AIR 1979 SC 400, the Supreme Court observed as under:

“By virtue of Section 8 of the Evidence Act the conduct of the accused is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer the place where the dead body of the kidnapped boy was found and then pointed out, the body was exhumed, would be admissible as a conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not. Even if the Court held that the disclosure statement made by the accused-appellant is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8 of the Act.

28. The conduct of the accused is not only unnatural and perplexing but in a way symptomatic enough to hold her guilty. It is well-settled that the conduct of the accused subsequent to the commission of the offence may be relevant, if there is sufficient evidence to show that the accused fabricated some evidence to screen, absolve himself/herself from

the offence, such circumstance may point towards his/her guilt. In the instance case the accused attempted to fabricate the report lodged with the police on 17.07.2005.

(D) Statement of PW-8

29. PW-8 (Asha) daughter of the deceased was aged about 10/11 years on the date of incident and resided with her parents. However, the investigating officer for the reasons known to him did not examine her. She was a crucial witness and could have thrown light under what circumstances her father disappeared; what was the attitude of the accused towards him or if the co-accused Satbir used to visit the house and what used to be the reaction of her father etc. PW-2 (Goverdhan), deceased's brother, produced the children namely baby Asha aged about 11 years and Master Basant aged about four years in the Court on 09.11.2005. Under Section 173 (F) Cr.P.C the statement of PW-8 (Asha) was recorded on 06.02.2007 and the investigating officer submitted the supplementary charge-sheet.

30. In her deposition, PW-8 (Asha), claimed to have witnessed the incident and stated that she saw accused Satbir and Sunita strangulating her father with a wire. She also deposed that there were illicit relations between the accused and Satbir. The Trial Court did not consider her deposition as it was recorded after a considerable delay of about 18 months and no explanation was offered by the previous investigating officer for the serious lapse. Apparently, it resulted in the acquittal of co-accused Satbir as there was no other strong incriminating circumstance against him.

31. APP vehemently argued that the Trial Court was not justified in rejecting the testimony of the child witness PW-8 (Asha) who was a witness to the occurrence and whose presence at the spot was quite natural. She attributed specific role to each of the accused. Undoubtedly, the Investigating Officer did not examine her for eighteen months despite her availability. Unusual delay in her examination without any plausible explanation makes her version suspect. Such unexplained delay is indicative and suggestive of some unfair practice by the investigating agency. After the incident, she continuously resided with the close relatives of her deceased father. There was every possibility of her being tutored during this period. The Trial Court for valid grounds did not place reliance on her testimony to hold the accused Satbir responsible for the crime.

32. APP urged the court to expunge the uncalled for adverse comments made by the Trial Court in the impugned judgment on the conduct of the investigating officer. The investigation conducted by him, contended the counsel, resulted in Sunita's conviction. On his request to Assistant Commissioner of Police (ACP) the IO recorded Asha's statement.

33. Apparently PW-25 (Insp.A.S. Dhaka), omitted to record the statement of a crucial witness about actual occurrence without any plausible justification despite her availability in the house at the time of his visits. When PW-8 appeared in the Court on 09.11.2005, pursuant to the prayer of the appellant to hand over her custody to her, SI Umesh Kumar apprised the Court that she was a witness to the incident. The application moved on 06.02.2007 by the previous Investigating Officer after two years of this development was an afterthought and a late attempt

to rectify the omission. He did not offer any explanation for inordinate delay in requesting the subsequent Investigating Officer to record her statement under Section 173(8) Cr.P.C. The damage to the prosecution case had already been done and his omission resulted in the acquittal of co-accused Satbir. Strangely, the police recorded her (PW-8) statement on 06.02.2007 itself under Section 161 Cr.P.C though she was not residing at Delhi that date. The Trial Court without recommending any immediate action, merely requested the higher authorities to investigate the lapses in the investigation of a heinous offence. It will be open to the Investigating Officer to prove his bona fides in the departmental proceedings.

(E) Statement of PW-2

34. The Trial Court excluded the testimony of PW-2 (Goverdhan) from consideration under the mistaken belief that it remained incomplete for want of cross examination. A perusal of the order-sheet dated 03.10.2008 reveals that his entire statement was completely recorded in two spells that day; some portion was recorded before lunch and remaining statement was completed after lunch. Hence there was no bar for appreciation of his statement.

(F) Miscellaneous

35. When questioned under Section 313 Cr.P.C. the appellant did not even attempt to explain or clarify the incriminating circumstances inculpatory and connecting her with the crime. Such incriminating facts could if at all have been only explained by the Appellant and by no body else, as they were personally and exclusively within her knowledge. She merely alleged that the deceased's brother Goverdhan falsely implicated

her in order to grab her husband's property. She however, did not elaborate when he attempted to grab the land. It has emerged that deceased owned one 'kila' of land in village Sapra, District Sonipat and it was in possession of one Jai Narain on 'batai' @ ₹4,500/- p.a. The deceased used to collect the said amount from Jai Narain. In the year 2005, the accused went to collect the amount and that caused suspicion in the minds of the deceased's brothers about what prevented him from collecting the amount as usual. The appellant never lodged any complaint against her brother-in-law any time. After the arrest of the accused, her children stayed with him and had no complaint against his conduct and behavior. She did not examine any witness in defence to substantiate her allegations.

36. Satbir's acquittal due to want of evidence is not sufficient to give clean chit to the accused. Lapses in the investigation and remissness of the IO apparently resulted in his acquittal. The Supreme Court in the case of *Ram Udgar Singh v. State of Bihar* (2004) 10 SCC 443 held as under:

"That even if a major portion of evidence of a witness is found to be deficient, in case the residual is sufficient to prove the guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, conviction can be maintained. It is a duty of the Court to separate grain from chaff and appreciate in each case, as to what extent, the evidence is worthy of acceptance."

37. The prosecution could not collect any cogent evidence to establish the involvement of the co-accused Satbir. The ocular testimony of PW-8 was disbelieved for the detailed reasons narrated in the impugned

judgment. There was no other circumstance i.e last seen, motive, recovery of any incriminating articles etc. at his instance to connect him with the crime. The Trial Court was within its discretion to give him benefit of doubt.

38. It is well established in law that the Appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the Appellate Court may be the more probable one. In the case of '*State of Uttar Pradesh vs. Nandu Vishwakarma*', (2009) 14 SCC 501, Supreme Court observed as under :

"23. It is a settled principle of law that when on the basis of the evidence on record two views could be taken- one in favour of the accused and the other against the accused- the one favouring the accused should always be accepted. This Court in 'Chandrappa vs. State of Karnataka', SCC 432 observed as follows :

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

- (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.*
- (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*
- (3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court*

to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

- (4) *An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*
- (5) *It two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court”.*

(G) Conclusion

39. In the light of the above discussion we find no illegality or irregularity in the impugned judgment by which the appellant was convicted for committing offences punishable under Section 302/201 IPC. Crl.A.No.1091/2011 lacks merits and is dismissed.

40. We also find no merit in the criminal appeal filed by the State against the acquittal of accused Satbir. Crl.A.No.1442/2011 is also dismissed accordingly.

**(S.P.GARG)
JUDGE**

**(S. RAVINDRA BHAT)
JUDGE**

JUNE 01, 2012/sa