

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

RESERVED ON: 12.12.2011
PRONOUNCED ON: 09.01.2012

+ **CRL. APPEAL No. 842/2011**

SHANKAR YADAV Appellant
Through: Mr. Avninder Singh, Advocate.

Versus

STATE NCT OF DELHI Respondent
Through: Mr. M.N.Dudeja, APP.

+ **CRL. APPEAL No. 963/2011**

INDERJEET @ INDER Appellant
Through: Mohd. Shamikh, Advocate.

Versus

STATE Respondent
Through: Mr. M.N.Dudeja, APP.

+ **CRL. APPEAL No. 1376/2011**

VINOD KUMAR Appellant
Through: Mr. Chetan Lokur, Advocate.

Versus

STATE NCT OF DELHI Respondent
Through: Mr. M.N.Dudeja, APP.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MS. JUSTICE PRATIBHA RANI

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MS. JUSTICE PRATIBHA RANI

1. The present criminal appeals by Shankar Yadav, Inderjeet @ Inder and Vinod Kumar (hereafter referred to by their names) are against the impugned judgment dated 12th May, 2011 and order on sentence dated 14th May, 2011 whereby all of them were convicted under Section 364/34 and were sentenced to undergo life imprisonment with fine of ₹1,000/- and in default, to undergo simple imprisonment for six months. They were also convicted under Section 302/34 IPC and sentenced to undergo life imprisonment with fine of ₹1,000/- and in default, to undergo simple imprisonment for six months; under Section 201/34 IPC and sentenced to undergo imprisonment of seven years with fine of ₹1,000/- and in default, to undergo simple imprisonment for six months; and under Section 404/34 IPC and sentenced to undergo imprisonment of three years with fine of ₹1,000/- and in default, to undergo simple imprisonment for six months and all the sentences have been ordered to be run concurrently with benefit of Section 428 Cr.P.C.

2. In brief, the prosecution's case is that on the night intervening 24/25.04.2003 at 00:35 hours Rameshwar Goswami, brother of the deceased (Ghanshyam) reported by DD No.2A Ex.PW27/A that Ghanshyam, aged about 35 years, 5' 7" height, fair complexion, who was wearing striped blue shirt and light blue trousers and khaki shoes, had left in his Tata Spacio Sumo (2000 model with engine no.4975826K27 772578 chassis no.421055K22 927295) with three passengers, booked by Amar Travels, Sector-1, Avantika. He had taken the three passengers to Hathras and Agra and was expected to return on 20.04.2003, but failed to return till that date.

SHO, P.S. Rohini was requested to get the case registered and trace the brother of the complainant and also the vehicle.

3. On 25.04.2003 Rameshwar Goswami made a complaint Ex.PW3/A narrating the above facts and he stated that he suspected that those three passengers were the cause for his brother's disappearance. He sought legal action against them. On the basis of this complaint, FIR No.205/03 was registered at P.S. Rohini under Section 365/34 IPC and investigation was assigned to S.I Ram Kumar Dahiya. For about a year, neither the vehicle nor its driver Ghanshyam could be traced. Further investigation was assigned to SI Raghbir Singh. After about one year on 13.05.2004, by DD No.35B (Ex.PW24/A) SI Pawan Kumar of AATS, telephonically informed P.S. Rohini about the arrest of one Inderjeet in case FIR No.160/04 P.S. Farsh Bazar under Section 25 Arms Act, where he made a disclosure statement regarding this case. Subsequently, two others, namely, Vinod and Shankar Yadav were arrested under Section 41 (1) Cr.P.C. by DD No.13A from P.S. New Ashok Nagar, they too disclosed about their involvement in the present case.

4. During investigation, they were interrogated and arrested in this case. They refused to take part in a TIP and their police remand was obtained. They led the investigating team to the place where the dead body of Ghanshyam (after his murder and the looting his van) had been thrown. All three appellants led to the recovery of the Tata Sumo vehicle from an open place in front of the house of one Lalit in Sikohabad. An HMT watch lying under sacks of garlic was recovered from the house of Vinod; one red coloured bag was recovered from the house of Shankar Yadav and one gold chain was recovered from the house of Inderjeet @ Inder. Judicial TIP of the

articles so recovered was also conducted. After investigation, chargesheet was filed against all the three appellants and Lalit Kumar, who was subsequently discharged.

5. The prosecution examined 34 witnesses to bring home the guilt of the appellants. Out of the 34 witnesses so examined (by the prosecution), PW-1 Smt. Suman – wife, PW-3 Sh. Rameshwar Goswami - brother of the deceased Ghanshyam and PW-2 Sh. Rameshwar Prashad Rathi, manager of the travel agency are witnesses to the “last seen” circumstance and the hiring of the TATA Sumo Spacio with registration No.HR-16-C-1104, by the appellants.

6. PW-6 ASI Vinod, PW-24 Ct. K. Badiya, Pw-27 SI Ram Kanwar Dahiya, PW-31 Ct. Sanjay and Pw-26 ASI Jagdish were posted at PS Rohini where initially this case FIR No.205/03 was registered; he was associated with this till it was transferred to DIU (North-West District).

7. PW-29 SI Pawan Kumar and PW-33 SI Rajnessh were posted in AATA and are witnesses to the nabbing of Inderjeet in case FIR No.160/04 PS Farsh Bazar on 07.05.2004 and the arrest of appellants Vinod and Shankar alongwith their other associates Jamuna, Jasbir and Lalit on 14.05.2004 by DD No.13-A PS New Ashok Nagar under Section 41 (1) CrPC. PW-29 SI Rajneesh also interrogated them and recorded their disclosure statements.

8. PW-5 Sh. Ram Babu, PW-8 Sh. Maharaj Singh, PW-10 Sh. Shailender Kumar, PW-11 Sh. Ram Pal, PW-12 Sh. Inder Pal, PW-21 Sh. Ashok Yadav are witnesses to the spotting of the dead body of an unknown male aged about 35 years in a field belonging to PW-5 Sh. Ram Babu.

9. PW-15 SI R.S. Singh, PW-16 Sh. Ram Baran Singh, PW-18 SI Surender Singh Yadav, PW-14 HC Mool Chand, PW-25 SI Tilak, PW-7 Sh. Rajesh Kumar, (photographer) are witnesses to the proceedings conducted with respect to an unknown dead body found in the field of PW-5 Ram Babu. The postmortem of the dead body was conducted by PW-23 Dr. P.K. Jain.

10. PW-13 Sh. Mukesh was running Pooja Travel Agency. The deceased was engaged with him. PW-19 Sh. Krishan Kumar and PW-22 Sh. Ashok Kumar are witnesses about the ownership of the TATA Sumo Spacio bearing registration No.HR-16-C-1104 driven by the deceased Ghanshyam, while PW-32 Sh. Raj Kapoor, the then MM conducted TIP in respect of the recovery of the belongings of the deceased Ghanshyam. Before PW-30 Dr. Archana Sinha, the then MM, the three appellants were produced for TIP, which they refused.

11. The statements of the appellants were recorded by Id. Trial Court under Section 313 Cr.P.C and the incriminating circumstances were put to all the appellants to record their explanation to the same. However, they simply denied the allegations and pleaded false implication by the police. Shankar Yadav stated that he was lifted from his house; Vinod also pleaded to the same effect, whereas Inderjeet @ Inder stated that he was not arrested in the manner alleged by the prosecution. He was kept in wrongful confinement prior to his arrest in case FIR No.160/2004, P.S. Farsh Bazar and his signatures were obtained on various blank papers. He denied recoveries of any articles at his instance and claimed that during police custody remand at P.S. Rohini and also at P.S. Farsh Bazar he was shown to public persons. None of the appellants examined any defence witness in support of their version.

12. The case of the prosecution being based on “last seen” and circumstantial evidence, it is necessary to refer to the testimony of material witnesses examined by the prosecution to appreciate the contentions raised before us.

13. PW-1 Smt. Suman’s (wife of the deceased) statement was about the arrival of her husband on 18th April at about 7.00/7.30 PM with three passengers in his TATA Sumo. He told her that he was going to Hathras with three passengers and would return by 20.04.2003 in the evening. He took with him some clothes and other necessary items in a red coloured bag. He failed to return on the due date. They continued to wait for 2-3 days and then on 25.04.2003 they got the FIR registered. She also stated that she identified the deceased through photograph Ex.PW1/A shown by the police. She also identified the three persons when they were produced in Tis Hazari Court. She also identified TATA Sumo Spacio bearing registration No.HR-16-C-1104 (Ex.P1) which was attached with Pooja Travels, Sultanpuri.

14. PW-3 Sh. Rameshwar Goswami – brother of the deceased also deposed about the visit of the deceased to his house on 18.04.2003 to collect his belongings as he was taking the three passengers to Hathras and going out for three days. He was expected to return on the evening of 20.04.2003. He saw all the three appellants sitting in the TATA Sumo when his brother was inside the house, packing necessary articles and clothes in a red coloured bag for the journey. He also stated that his brother was wearing a black dial HMT watch and gold plated silver chain with an ‘OM’ locket.

15. PW-3 further deposed that when his brother failed to return, he contacted Amar Travels on 21.04.2003 and asked about address of the passengers who had booked the TATA Sumo. The address given was B-826,

Mangol Puri. On verification, he came to know that nobody from that address had either gone to UP or booked the vehicle. He also informed Amar Travels and then reported the matter at PS Rohini by complaint Ex.PW3/A but the FIR was not registered till he contacted the ACP and the DCP and apprised them about the disappearance of his brother. Then on 24.04.2003, a missing person report Ex.PW27/A was lodged and thereafter on the basis of the complaint Ex.PW3/A, FIR was registered.

15. PW-2 Sh. Rameshwar Prashad Rathi, Manager of Amar Travel is an important witness, as he was the person approached by the three appellants when they wanted to hire a vehicle. His statement is that on 18.04.2003 when he was in the office, alongwith Gajender Shokeen, the three accused came in and asked for a TATA Sumo on rental basis, to go to Hathras and Agra. He expressed his inability to provide the same due to heavy rush. Vinod insisted that the vehicle had to be arranged by 6.00 pm and on this Sh. Gajender Shokeen offered to contact other agencies for this purpose.

16. The TATA Sumo Spacio bearing registration No.HR-16-C-1104 was available with Pooja Travels and that evening at about 6.30/7.00 PM, all three appellants reached the office of this travel agency. Sh. Ghanshyam (deceased) was the driver of that TATA Sumo. After recording Vinod's address (which was given by him) booking was done @ Rs.5/- per kilometer for Agra and Hathras with date of return as 20.04.2003, as the three appellants wanted to attend a marriage on 19.04.2003. All the three appellants left his office in the vehicle driven by deceased Ghanshyam.

17. PW-13 Sh. Mukesh is from Pooja Travel Agency. He deposed about a request made on 18.04.203 by Gajender Singh (of Amar Travels) to provide a TATA Sumo. The witness sent the TATA Sumo Spacio, bearing

registration No.HR-16-C-1104 to Amar Travels on 18.04.2003 in the evening at about 7.00 pm with Ghanshyam as the driver. The vehicle was requisitioned to take passengers to Hathras, U.P. and was to return on 20.04.2003; the hire charges were fixed Rs.5/- per kilometer. He also deposed that the vehicle alongwith the driver failed to return by the due date. After a lapse of about one year, he heard about the murder of Ghanshyam and the arrest of someone involved in the crime as well as the recovery of the vehicle.

18. The police team associated with the investigation of this case from PS Rohini are PW-6 ASI Vinod Kumar – (the Duty Officer who recorded FIR Ex.PW6/A); PW-24 Ct. K. Badiya (who recorded DD No.35-B Ex.PW24/A on the basis of information received from PS Farsh Bazar) and PW-27 SI Ram Kanwar Dahiya (who was assigned the missing person report Ex.PW27/A about deceased Ghanshyam). This information was flashed through wireless and thereafter on getting the complaint Ex.PW3/A from brother of the deceased, PW-27 made endorsement Ex.PW27/B and sent the rukka for registration of the case. He was also associated with the investigation. He accompanied the deceased's brother to Agra on 03.05.2003 where photographs of some of the dead bodies, found in the month of April were shown. The complainant suspected one to be of his brother but was not certain. PW-27, therefore, seized the remains of the dead body. Subsequently, the complainant confirmed that the photograph was not that of his brother. Thereafter the investigation was transferred to DIU. PW-26 ASI Jagdish was handed over the pullandas on 03.05.2003 which he deposited in the malkhana. PW-31 Ct. Sanjay is the witness to the seizure of photocopy of the documents regarding the booking of TATA Sumo Spacio

bearing registration No.HR-16-C-1104 with driver slip Ex.PW31/A and B vide memo Ex.PW27/C.

19. PW-19 Sh. Krishan Kumar deposed that as per record, a TATA Spacio vehicle No.HR-16-C-1104 was registered in the name of Sh. Ashok Kumar, S/o Sh. Bharat Singh R/o Village Jhati Luhari, Distt. Bhiwani, Haryana. PW-22 Sh. Ashok Kumar - the registered owner of this vehicle stated that he had sold the said vehicle to Ghanshyam for ₹ 3.5 lacs of which ₹ 1.5 lacs was paid and the balance was payable in 24 installments which were duly paid and that he had already applied for the transfer of the vehicle in the name of deceased Ghanshyam's brother.

20. PW-5 Sh. Ram Babu is owner of the field where he noticed the dead body of a 35 year old male lying in his field when he was harvesting wheat. He sent PW-8 Sh. Maharaj Singh, Chowkidar to inform the police. After the police arrived, panchnama was prepared and spot was photographed. He identified the photograph Ex.PW1/A as that of the body recovered from his field. PW-7 Sh. Rajesh Kumar, the photographer was called by the S.O., Village Fariya and as per directions, he took two photographs. One is Ex.PW1/A; it was taken and given by him to SI R.S. Singh.

21. PW-15 SI R.S. Singh deposed that on 20.04.2003 upon receiving information through Chowkidar Maharaj Singh (PW-8), he, SHO Prakash Yadav, and other police staff reached the spot and saw the dead body of a male and saw that the clothes were blood stained. He prepared the panchnama Ex.PW10/C and the sketch of the dead body Ex.PW15/A. He also prepared challan of the dead body Ex.PW15/B and informed the CMO by letter Ex.PW15/C and Reserve Inspector by letter Ex.PW15/D. He also got the dead body photographed. He seized the blood stained mud and earth

control by memo Ex.PW10/A and angochha, belt and shoes lying near the dead body by memo Ex.PW10/B. He sent the dead body for postmortem to Government Hospital, Firozabad in the custody of Ct. Munshi Lal and Ct. Ramesh. He identified the pair of shoes Ex.P3, belt Ex.P4 and angochha Ex.P2, earth control Ex.P9 and blood stained mud Ex.P10. The clothes of the deceased seized in this case were also identified as Ex.P5 (colly.) by this witness.

22. PW-23 Dr. P.K. Jain conducted postmortem on the dead body of the unknown male on 20.04.2003 at 4.30 pm. He noted eight external injuries and prepared the postmortem report Ex.PW23/A. According to his opinion, the cause of death was shock and hemorrhage due to ante-mortem injuries, both external and internal which were sufficient to cause death, and the time since death was about one day. He also sealed the deceased's clothes i.e. shirt, pant, baniyan, underwear, black thread and angochha in a pullanda with the seal of SNM Hospital and handed them over to the concerned Constable. He identified Angochha Ex.P2, Pant, and baniyan Ex.P5 (Colly.), underwear Ex.P11.

23. PW-34 ACP Jag Ram is the Investigating Officer of the case who, on receiving the information about the disclosure statement made by the three appellants, moved an application to interrogate them which was refused and he was directed to secure production warrants from the Court concerned. On his application seeking production warrants, appellants Vinod and Inderjeet were produced in the Court on 24.05.2004 and they were interrogated with the permission of the Court by interrogation report Ex.PW20/C and D. He moved a fresh application for issuing production warrants of Shankar and on 27.05.2004, all the three appellants were produced in the Court, interrogated

and arrested in this case. During their police remand, the disclosure statements Ex.PW21/G, H and I were recorded.

24. Pursuant to the disclosure statements, the three appellants pointed out the shop of Amar Travels from where TATA Sumo Spacio was hired. They also led the police to Awagarh, PS Fariya and pointed out the field of Sh. Ram Babu where dead body had been thrown. The recovery of dead body of a male aged 30-35 years from that place on 20.04.2003 was confirmed by Ct. Mool Chand of PS Fariya.

25. PW-34 ACP Jagram collected the postmortem report, the deceased's photograph, pullandas and panchnama from PS Fariya and prepared memo Ex.PW25/A in respect of the pullandas. In respect of the photograph of the deceased and 16 papers from PS Fariya, a seizure memo Ex.PW16/A was prepared. The belongings of the deceased which were taken by the doctor were also obtained from PS Fariya and were seized by memo Ex.PW25/A. He identified the photograph Ex.PW1/A of the deceased and the papers seized by him as Ex.PW10/A to C, Ex.PW15/A to D, and the postmortem report Ex.PW23/A collected by him from PS Fariya.

26. PW-34 ACP Jag Ram also deposed about the recovery of one HMT wrist watch Ex.P7 at the instance of Vinod from his house at Village Jasrana from a pitcher lying underneath sacks of garlic which was sealed with the seal "JS" and seized by memo Ex.PW20/L. Shankar Yadav led to the recovery of one red coloured bag Ex.P6 from his house in Kannoj District which was also sealed (with the seal "JS") and seized by memo Ex.PW20/P. Inderjeet led to recovery of one golden colour chain with 'OM' locket from a box lying in his house which was sealed with the seal "JS" and seized by memo Ex.PW20/Q. All three appellants also led the police party to

Shikohabad and pointed out the house of one Lalit Kumar where one TATA Sumo Spacio bearing registration No.HR-16-C-1104 of white colour Ex.P1 was parked outside the house. It was seized by memo Ex.PW20/O and sent to Delhi through Ct. Ramesh Kumar.

27. We have heard Mr. Avninder Singh, counsel for Shankar Yadav; Mr. Mohd. Shamikh, counsel for the appellant Inderjeet @ Inder and Mr. Chetan Lokur, counsel for the appellant Vinod Kumar as well as learned APP for the State and given our thoughtful consideration to the submissions put forth by them.

28. On behalf of appellants, it was contended that there is a delay of about five days in lodging the FIR and even its contents do not implicate the appellants; they were neither named nor any other factor mentioned in the FIR led to their arrest.

29. Another contention of Id. Counsels for the appellants is that the description of the appellants was not mentioned in the FIR and there is absolutely no evidence to connect them with the booking of vehicle TATA Sumo Spacio bearing registration No.HR-16-C-1104 through Amar Travels.

30. The appellants challenge their conviction and sentence on the ground that they were arrested in this case after more than a year from the date of occurrence. The recovery of bag, chain and wrist watch have been planted on them. They are common items having no particular mark of identification and it is highly improbable that for a period of one year, they would have continued to be in possession of such useless items. On behalf of appellant Inderjeet, it was submitted that he was shown arrested in case FIR No.160/04 P.S. Farsh Bazar under Section 25 Arms Act and in that case, he was acquitted, which throws doubt on the entire case of the prosecution. On

behalf of Shankar Yadav and Vinod Kumar, it was urged that they were picked from their respective houses by the officials of PS Ashok Nagar and falsely arrested under Section 41 (1) Cr.P.C. and were forced to sign various blank papers and forms and later on, were falsely implicated in this case by the police officials of PS Rohini in connivance with the complainant.

31. Challenging the recovery of TATA Sumo Spacio bearing registration No.HR-16-C-1104 at their behest, it was urged that the recovery was made from an open place in Village Shirokhabad. In that circumstance, the recovery cannot be attributed to be from the possession of the appellant especially when the vehicle was found parked outside the house of one Lalit Kumar, resident of Village Shirokhabad. Lalit Kumar was also made an accused in this case but was discharged by the Court. In the circumstances, even recovery of the said TATA Sumo Spacio on the basis of disclosure or at the behest of the appellants, has to be disbelieved.

32. It has also been contended that the address mentioned in the booking is also not that of any of the appellants and was found to be fake by the police as well as the public witnesses when efforts were made to trace the persons who had booked the said vehicle. The signature of none of the appellants was obtained on any booking register which further makes the entire case of the prosecution doubtful.

33. Further it has been contended by Id. Counsels for the appellants that the two witnesses to the last seen i.e. PW-1 Smt. Suman – wife of the deceased and PW-3 Sh. Rameshwar Goswami – brother of the deceased are interested witnesses and the statement of PW-2 Sh. Rameshwar Prashad Rathi in this regard can also not be believed as there is no documentary

evidence to prove booking of the vehicle TATA Sumo Spacio bearing registration No.HR-16-C-1104 through PW-2 Sh. Rameshwar Prashad Rathi.

34. While referring to the statement of PW-27 SI Ram Kanwar that brother of the deceased (PW-3 Sh. Rameshwar Goswami) went with Inspector Ram Chander to Agra and after seeing a photograph of the dead body, suspected it to be of his brother Ghanshyam and since the body was already cremated, remains of the same were taken into possession. It was contended that PW-3 had already identified another body through a photograph as being that of his brother, and here again he claimed this body to be of his brother. Keeping in mind this grave inconsistency, they urged that a witness should not have been believed by the Court as the basis of the conviction of the appellants. It was also contended, that in the postmortem report, it was opined that injuries were not sufficient to cause death in the ordinary course of nature.

35. Referring to the various discrepancies and improvements in the testimony of the material prosecution witnesses, the appellants argued for their acquittal especially in the light of the testimony of PW-1 Smt. Suman when she stated that she saw the appellants in unmuffled faces at a time when they were produced in Court and identified by her, which shows justified reason for refusal of TIP by the appellants. Learned Counsel for the appellant Vinod Kumar relied upon *Venkatesan v. State of Tamil Nadu 2008 (9) SCALE*; *Ram Chander @ Ganju & Anr. V. State of Delhi 2011 V AD (Delhi) 383*; *SK. Yusuf v. State of West Bengal 2011 (6) SCALE*; *Dandu v. State of A.P. 2011 (9) SCALE* & *Tipparam Prabhakar v. State of Andhra Pradesh (2009) 13 SCC 534* in support of his contentions.

36. On behalf of State, Sh. M.N. Dudeja, Learned APP submitted that the case of the prosecution, no doubt, is based on last seen and circumstantial evidence but the nature of evidence produced by the prosecution completes the chain of circumstances to lead only to one conclusion, i.e., that the appellants had committed this crime. From the testimony of PW-1 Smt. Suman, PW-2 Sh. Rameshwar Prashad Rathi and PW-3 Sh. Rameshwar Goswami who had last seen the deceased going with the appellants in TATA Sumo Spacio bearing registration No.HR-16-C-1104 which was arranged from Pooja Travels by Amar Travels, it can be seen that failure of the appellants to return by due date i.e. 20.04.2003 led to the search of the vehicle and the driver and during inquiry by family of the deceased, even the address given by the individual who booked the vehicle, was found to be fake. Only after waiting for his return in the normal course, the matter was reported to the police. Thus, the delay was well explained in the circumstances. Referring to the recovery of bag, wrist watch and chain as well as vehicle at the instance of the appellants, it was submitted that clinching evidence was gathered to connect them to crime, and consequently the impugned order should be confirmed.

37. We have considered the rival contentions and have also gone through the trial court record. No doubt, the case of the prosecution is based on last seen and circumstantial evidence. Where a case rests on circumstantial evidence it is the prosecution's duty to establish that from the circumstances proved on record the only conclusion that can be drawn is the guilt of the accused and the circumstances established must be inconsistent with the innocence of the accused. The observation of the Supreme Court in a recent

judgment in ***G. Parshwanath vs. State of Karnataka, (2010) 8 SCC 593*** are quite apposite. We would like to extract Para 23 and 24 hereunder:-

“23. In cases where 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. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applied. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful

it might be. There must be chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.”

38. The contention of learned Counsel for the appellants regarding delay of five days in lodging the FIR, though attractive on the face of it, is without substance. The deceased Ghanshyam left in his TATA Sumo Spacio on 18.04.2003 and was to return in three days, i.e., on 20.04.2003. PW-3 Sh. Rameshwar Goswami – brother of the deceased testified before the Court about his making rounds to Amar Travels that hired the vehicle of the deceased, even to the extent of obtaining the address of the person who hired the vehicle and then visiting the given address. He not only informed Amar Travels and Pooja Travels that the address recorded for booking was fake as no such person from that place had hired the vehicle or gone to UP. He had not only been visiting the local police but even met the senior police officers. The police also adopted a “wait and watch” policy and the travel agents also asked him to wait for the return of his brother expecting break down of the vehicle could be one of the causes. In what circumstance the delay has occurred, has been explained by PW-3 Sh. Rameshwar Goswami whose testimony has been duly corroborated on this aspect by PW-2 Sh. Rameshwar Prashad Rathi, Manager, Amar Travels.

39. The fact that DD entry No.2A Ex.PW27/A was recorded on the night intervening 24/25.04.2003 at 12.35 AM is sufficient to prove that the deceased’s family were spending sleepless nights looking for him. The FIR

has been recorded on 25.04.2003 in the evening on the basis of complaint Ex.PW3/A. This in itself explains that so far as the complainant was concerned, he was making constant efforts to report the matter to the police and at the same time also to follow the advice to wait for his return. In the case *Balram Singh & Anr. v. State of Punjab, 2003 (11) SCC 286*, it was observed by the Supreme Court that if the ocular evidence adduced by the prosecution is worthy of acceptance the element of delay in registering the FIR/complaint or sending the same to the jurisdictional Magistrate by itself would not in any manner weaken the prosecution case.

40. The next contention on behalf of the appellants is about the absence of their description in the FIR and documentary evidence to connect them with the booking of TATA Sumo Spacio bearing registration No.HR-16-C-1104. DD entry Ex.PW27/A recorded at midnight on 24/25.04.2003 contains the description of the vehicle i.e. make, model, registration number, engine number, chassis number and that it was booked through Amar Travels, Shop No.5, Sector-1, Avantika, DDA Market on 18.04.2003. In this DD entry itself, he has given the description of his brother which shows that passengers were not suspects and he was just giving the description of his brother so that he could be traced out with the help of particulars of the vehicle driven by him. In this DD Ex.PW27/A, the fact that his brother Ghanshyam did not return by the expected date i.e. 20.04.2003 is mentioned together with the fact that the deceased had taken three passengers to Hathras and Agra on being hired through Amar Travels till that time. The family of deceased Ghanshyam did not apprehend that he could be murdered by those who hired the vehicle. There was consequently no reason for them to give

their description in the first report Ex.PW27/A. The complaint Ex.PW3/A is a very brief complaint containing only the relevant fact.

41. The appellants in this case were arrested after a period of one year and it is only on the basis of disclosure statement made by them that the case FIR No.205/03 was solved. All three appellants were produced in the Court alongwith the applications for TIP, after their faces were muffled as is proved from the applications moved to this effect before the Court. There is no observation by the Court that the appellants were in unmuffled faces at the time of their production for TIP when the date for TIP was fixed. They also did not complain at that time about being shown to witnesses in PS Rohini.

42. Statement of PW-3 Sh. Rameshwar Goswami also proved that he was summoned to Tihar Jail and asked to wait till he called in for identification but subsequently he was informed that TIP was refused by the suspects. In these circumstances, he had no occasion to see them in the Court before their refusal to take part in TIP. It is pertinent to note that when the deceased visited his house to collect his necessary items before proceeding to Hathras and Agra, the three passengers in the Sumo were seen by PW-1 Smt. Suman and PW-3 Sh. Rameshwar Goswami in normal course. So far as PW-2 Sh. Rameshwar Prashad Rathi is concerned, these appellants visited his office twice and had sufficient time to interact with him in the forenoon as well as later in the evening. PW-1 Smt. Suman, PW-2 Sh. Rameshwar Prashad Rathi and PW-3 Sh. Rameshwar Goswami correctly identified all the three appellants to be the man who hired the deceased's vehicle on the fateful date to go to Hathras and Agra. None of these witnesses during their cross examination stated that before being called for TIP, they were shown the

appellants in PS Rohini or any other place. Even if it is assumed for the sake of arguments that PW-1 Smt. Suman and PW-3 Sh. Rameshwar Goswami did not have enough opportunity to see the three passengers sitting in the TATA Sumo Spacio that would not apply to PW-2 Sh. Rameshwar Prashad Rathi who is an independent public witness instrumental in getting the vehicle booked for the three appellants on that day. His testimony in this regard remains unchallenged.

43. The prosecution has proved on record the copy of the extract of the booking register maintained at Amar Travels alongwith the booking slip Ex.PW13/A and B seized by the IO by memo Ex.PW27/C. Since booking can be done even on telephone if one has the number of the travel agent, there was no requirement to obtain the signature of the passengers on the booking register or booking slip.

44. It is well settled that identification by a witness in the Court is substantive evidence. Identification in the TIP during investigation has only corroborative value. The purpose of conducting TIP during investigation is to test the memory of the witness who has seen the accused committing the crime and to be assured that the investigation is in the right direction. In this case, PW-2 had enough time to interact with the three appellants initially to express the inability to provide any TATA Sumo on that date and then on being persisted to arrange the same by evening, he contacted Pooja Travel Agency. The appellant later went in the evening to confirm the availability of the vehicle. All of this gave him enough opportunity to have a good look at the appellants; and their faces were ingrained in his memory on failure of the deceased to return alongwith the vehicle by the due date, and even thereafter.

He was also contacted time and again by the brother of the deceased to find the whereabouts of those who booked the vehicle.

45. We are supported in our view by ***Munshi Singh Gautam & Ors. vs. State of M.P.***, (2005) 9 SCC 631 and ***Ramanbhai Naranbhai Patel vs. State of Gujarat***, (2000) 1 SCC 358.

46. In ***Munshi Singh Gautam***, the Hon^{ble} Supreme Court held:-

“17. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is, accordingly, considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.” (emphasis supplied).

47. Delay of one year in arrest of the appellants (after the date of commission of offence) is the defence’s main contention, questioning the conviction of the appellants. The question that arises is that if the crime remains undetected for a long period but subsequently later offenders are

nabbed and on the basis of information given by them, some pending cases are solved, whether that in itself is sufficient to render the case of the prosecution doubtful. Such an argument is unmerited. If someone is accused in a crime and after arrest, reveals his involvement in an unsolved previous case, the delay (in the latter case) in arrest cannot go against the prosecution. To hold so would put a premium on those evading the course of justice. It was an unending search for the family of the deceased as well as for the police till the arrest of Shankar Yadav, Inderjeet and Vinod Kumar who led the police to Awagarh, U.P. and pointed out the place where Ghanshyam's body was thrown. The police officials of PS Fariya confirmed this fact by showing the photograph Ex.PW1/A, taken of the deceased when the body lay in the field of PW-5 Sh.Ram Babu. It confirmed the identity of that body to be that of Ghanshyam; till that date the records of MHC(R) of PS Fariya showed it as that of an unknown male person aged about 35 years. This fact was not within the knowledge of Delhi Police or of PS Fariya till it was disclosed to them by the appellants. In the given circumstances, merely because the Delhi Police could catch the appellants in other cases and during interrogation, could secure information which led to the recoveries pertaining to this case FIR No.205/03, the gap of one year in their arrest is insignificant.

48. The appellants have challenged the recovery of bag, chain and wrist watch of the deceased contending that they are common items and had no specific mark of identification and could have been planted by the police to solve the case. The TIP proceedings Ex.PW32/B conducted in respect of one red coloured bag, a yellow chain and a wrist watch reveal that identical property was brought by the IO for mixing with the case property and during the TIP proceedings, the witness Sh. Rameshwar Goswami correctly

identified the case property despite their being so mixed by the Magistrate. (as shown in portion-A in the proceedings Ex.PW32/B). In compliance of the directions given by the Magistrate, the case property and the property taken there for being mixed was also photographed. The two photographs placed on page No.1053 of the Trial Court Record show that similar property was brought there, to be mixed up. PW-3 Sh. Rameshwar Goswami correctly identified the case property which belonged to his brother deceased Ghanshyam. Thus, there was hardly any doubt regarding recovery of wrist watch Ex.P7, red colour bag Ex.P6 and chain, Ex. P8 from possession of the appellants, from their houses even after one year. The appellants failed to explain how they came into possession of the personal belongings of the deceased. If the recovery was made after one year from their houses, and they have been correctly identified by the material prosecution witnesses i.e. PW-1 Smt. Suman, PW-2 Sh. Rameshwar Prashad Rathi and PW-3 Sh. Rameshwar Goswami as those who hired the vehicle, that circumstance is sufficient to connect the appellants with the deceased's murder.

49. Even if the Court were to assume, *arguendo*, that identification of the said articles is not free from doubt and the articles being commonly available could have been planted by the police to solve the dead case, yet the appellants have not been able to explain how after a year the TATA Sumo Spacio could be recovered at their instance. Such a vehicle with the same engine number, chassis number, registration number could not have been planted on them by the Delhi Police; it was recovered from Shikohabad at their behest. No doubt, the vehicle was lying parked in the open near Lalit's house. However, knowledge of its disposal and where it could be found were with the appellants, while in the initial statement made by Inderjeet, without

naming Lalit, he disclosed that it was sold in Shikohabad. After the arrest of Vinod and Shankar Yadav, during their interrogation, the fact of its sale to Lalit in Shikohabad was known. Co-accused Lalit was discharged by order dated 12.12.2005 as prima facie the material on record was found insufficient to charge him. It is the prosecution's case that the vehicle was not recovered from possession or due to its pointing out by Lalit. It was in fact parked in the open outside his house. In the given circumstances, the appellants at whose behest the vehicle was recovered could not derive any benefit from Lalit being discharged from the case.

50. The recovery Memo Ex.PW20/O reveals the recovery of vehicle TATA Sumo Spacio bearing registration No.HR-16-C-1104 bearing engine number and chassis number contained in Ex.PW27/A at the behest of all the three appellants from outside the house of Lalit. No doubt, seizure memo has not been witnessed by any independent public witness but that in itself has no adverse effect to the prosecution's case. In *State, Govt. of NCT of Delhi vs. Sunil & Anr.*, (2001) 1 SCC 652, it was held that there is no requirement in law either under Section 27 of the Indian Evidence Act or under Section 161 Cr.P.C. to obtain signatures of independent respectable persons of the locality on the statement made by the accused. We would like to extract Para 19 of the report hereunder:-

“19. In this context we may point out that there is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII

of the Code.”

51. The appellants had contended that PW-3 Sh. Rameshwar Goswami identified previously the photograph of one body and IO had even seized the remains of that body, which rendered his testimony untrustworthy, carries no force. The statement of PW-3 Sh. Rameshwar Goswami – brother of the deceased as well as the statement of IO is that one body in Agra was suspected to be that of the deceased but later disclaimed. The photograph of the deceased, obtained from PS Fariya (page No.1053 of LCR) shows his face and on the basis of that photograph preserved at PS Fariya in respect of the dead body recovered from PW5's field the police came to know about commission of murder of Ghanshyam by the appellants.

52. We have to consider the state of mind of the family of the deceased who were not aware about his death till the identification of the place where the body was thrown by the appellants. The inquiry from the concerned PS also revealed recovery of the body from that place; it was photographed before a postmortem was conducted. As the face of the deceased is identifiable in the photograph and was duly identified by his wife and brother, merely because earlier they were looking at photographs of unclaimed bodies does not discredit their testimony.

53. As far as discrepancies and improvements in the testimony of material witnesses are concerned, one has to keep in mind that the deceased's family underwent constant trauma for one year till the arrest of the appellants, and their subsequent revelations during investigation. Continuous search for such a long duration by close family members is bound to affect their capacity to recollect the entire events and their chronological sequence; the

state of mind and lapse of time being major contributing factors. Discrepancies are bound to occur in the testimony of natural witnesses when they appear in the Court to depose after lapse of long interval are are subjected to lengthy cross examination. In ***Krishna Mochi & Ors. vs. State of Bihar, 2002 (6) SCC 81***, the Supreme Court deprecated the practice to pass orders of acquittal on the basis of minor discrepancies and contradictions.

54. The testimonies of PW-1 Smt. Suman and PW-3 Sh. Rameshwar Goswami i.e. wife and brother of the deceased on the aspect of last seen is duly corroborated by PW-2 Sh. Rameshwar Prashad Rathi, Manager of Amar Travels who had long deliberations with the appellants, when they went to hire a TATA Sumo on 18.04.2003. PW-1 Smt. Suman and PW-3 Sh. Rameshwar Goswami cannot be termed as interested witnesses, they are natural witnesses who saw the deceased leaving with three passengers for three days in the said vehicle. The conduct of the deceased in visiting his house to collect a change of clothes and other daily use items required for the journey was natural as he was not only required to inform his family about the duration and destination, but also to take necessary things required for journey. After going through the testimony of prosecution witnesses, we find that the prosecution has been able to prove the circumstances discussed hereafter against all the three appellants beyond reasonable doubt.

55. The deceased Ghanshyam was seen alive by PW-2 Sh. Rameshwar Prashad Rathi in the company of appellants when they hired his TATA Sumo Spacio, bearing registration No.HR-16-C-1104, through Amar Travels and thereafter again by PW-1 Smt. Suman, his wife and PW-3 Sh. Rameshwar Goswami, his brother, when he (the deceased) went home to collect his

belongings and informed the family about his departure for Hathras and Agra with three passengers, in his TATA Sumo on 18.04.2003 at about 7.30 PM.

56. The body of the deceased Ghanshyam was recovered by police officials of PS Fariya on 20.04.2003 on receiving information by DD No.15 recorded at 10.15 AM regarding discovery of the body of unknown 35 years old male in the field of Ram Babu. The postmortem was conducted at 4.50 PM on 20.04.2003 and time since death was given as one day. Thus, the death seems to have been caused in the evening of 19.04.2003. The manner in which death was caused, was disclosed in the statements Ex.PW21/G to I. Till that date, Delhi Police was not aware of the recovery of dead body on 20.04.2003 by police officials of PS Fariya and postmortem report Ex.PW23/A. The statement of PW-23 Dr. P.K. Jain, CMO, District Hospital, Badaiyun, UP and postmortem report Ex.PW23/A prove that the facts disclosed as to how Ghanshyam was murdered, were confirmed during postmortem. These are clearly “facts discovered” pointing to knowledge about the place where the deceased’s body was recovered by the local police in U.P, but not known to the Delhi Police, and therefore, admissible under Section 24 of the Evidence Act.

57. The deceased Ghanshyam was last seen alive by PW-1 Smt. Suman, PW-2 Sh. Rameshwar Prashad Rathi and PW-3 Sh. Rameshwar Goswami before leaving Delhi. His dead body was recovered after two days from the place which was pointed out by the three appellants after a gap of one year.

58. The time gap when the deceased was last seen alive in the company of appellants and when his dead body was recovered is such that either the appellants had to explain when and how they parted from his company or to explain in what circumstances Ghanshyam died an unnatural death.

59. As to whether the recovery of a dead body stands on the same footing as the recovery of any other object, cannot be open to debate. The position was spelt out clearly in ***State of Maharashtra v. Suresh : (2000) 1 SCC 471*** where the Supreme Court observed that:

"Three possibilities are there when an accused points out the place where dead body or an incriminating material was concealed without stating that it was concealed by him. 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 him. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act."

Similarly, in ***Deepak Chandrakant Patil Vs. State of Maharashtra: (2006) 10 SCC 151***, the Supreme Court observed as follows:

"Apart from being last seen with the deceased, there is evidence to the effect that he pointed out the place where the body of the deceased was lying which was in the garden behind the house of A-1. The motorcycle of the deceased was also recovered from the same spot. The evidence is thus conclusive that the appellant and the deceased travelled from the house of the deceased to the point where he was assaulted and killed. The objective findings also prove that the appellant had brought the deceased towards the house of A-1 and that in fact he had told the deceased that he was required by A-1. Learned

counsel submitted that the statement made by the appellant that he had a fight with the deceased and that he could show the place where his body was lying, is not admissible as it was made in the presence of a police constable. Assuming that the inculpatory part of the statement may not be admissible in evidence, the statement, so far as it relates to other parts disclosed leading to recovery, is admissible.”

60. In this case, the prosecution has discharged its initial burden of proving that the Appellants and deceased Ghanshyam were together at the place and time of close proximity of the death of Ghanshyam. The Appellants were under obligation to explain when and how they parted with the company or in what circumstances Ghanshyam died an unnatural death. Rather, their complete denial becomes an additional link in the prosecution case, as held in ***State of Rajasthan vs. Kashi Ram, (2006) 12 SCC 254.***

61. In another case ***Mohibur Rahman vs. State of Assam, 2002 (6) SCC 715***, the Supreme Court observed that there may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability of the homicide. The case law relied upon on behalf of appellant Vinod Kumar is clearly distinguishable having regard to facts of the present case.

62. The recovery of the deceased's vehicle at the behest of the three appellants from Shikohabad after a gap of one year is a strong circumstance; it not only proves motive for commission of murder but also provides clinching evidence against the appellants which they failed to rebut. It has

already been observed that the deceased's vehicle was recovered at the behest of the three appellants from Shikohabad and it could not have been planted by the police officials.

63. In view of the foregoing discussion we are of the opinion that the prosecution successfully proved, beyond reasonable doubt that the three appellants, viz. Inderjeet, Shankar Yadav and Vinod Kumar hired the vehicle of the deceased through Amar Travels. The statement of PW-2 Sh. Rameshwar Prashad Rathi shows that the TATA Sumo was booked at Rs.5/- per kilometer for Agra and Hathras; the appellants stated that the date of return was 20.04.2003 as they wanted to attend a marriage on 19.04.2003. It is obvious that the motive to hire the TATA Sumo was not to attend the marriage but to deceitfully induce Ghanshyam to accompany the appellants; the motive was to take away his TATA Sumo for which they could even commit his murder, which in fact they did.

64. We are of the considered view that the prosecution has been able to prove each circumstance conclusively and also prove the entire chain of circumstances not only by last seen circumstance but also by other circumstances pointing only to the hypothesis that the crime was committed by the appellants, excluding any other hypothesis indicating their innocence.

65. The appellants have been convicted under Section 364/302/201/404 IPC. So far as findings of Id. Trial Court convicting the three appellants under Sec.201 and 404 IPC is concerned, since the dead body was thrown in an open field and could be noticed by the passers-by, and further that the photograph of the body reveals that it was not disfigured to make the identification difficult, the conviction under Sec.201 is liable to be set side. Section 404 IPC deals with dishonest misappropriation of property possessed

by the deceased person at the time of his death. Taking into consideration the facts of this case where the deceased was abducted by deceitful means and murdered to facilitate the taking away of his TATA Sumo Spacio and belongings, Section 404 IPC has no application to the facts of the case. Hence, conviction under Sec.201 and 404 IPC is set aside.

66. The finding of learned Trial Court convicting the appellants for the offence punishable under Sections 364 & 302 IPC and sentence awarded thereunder calls for no interference and is affirmed. All the three appeals are disposed of in above terms. A copy of this order be sent to the concerned Jail Superintendent.

PRATIBHA RANI
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

January 09, 2012
dc/st