

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

+ **CRIMINAL APPEAL NO. 434/2011**

Reserved on: 10th December, 2012

% **Date of Decision: 16th January, 2013**

GOPAL @ TITU & ANR. Appellants
Through Mr. Pradeep Rana, Mr. Sumit Choudhary
and Mr. Anil Kumar Rana, Advocates.

Versus

THE STATE Respondent
Through Mr. Sanjay Lao, APP for the State.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P.GARG

SANJIV KHANNA, J:

The appellants Gopal @ Titu and Rakesh Kumar @ Dhanna impugn their conviction under Section 302/201/379/12-B read with Section 34 of the Indian Penal Code (IPC, for short) vide judgment dated 6th January, 2011 in Session Case No. 135/09, arising out of FIR No. 348/06, P.S. Alipur. They have further impugned the order of sentence dated 19th January, 2011 by which they have been sentenced, under Section 302, for life imprisonment and fine of Rs 25,000 on each, in default of which they shall undergo SI for ten months, under Section 120B for life imprisonment and fine of Rs 25,000 on each, in default of which they shall undergo SI for ten months, under Section 379 for three years rigorous imprisonment and fine of Rs 25,000 on each, in default of which they shall undergo SI for one month and, under Section 201, for three years rigorous imprisonment and fine of

Rs 5,000 on each, in default of which they shall undergo SI for two months.

2. At the outset we delineate that in the present case crucial witnesses have either partly or wholly turned hostile. There are some contradictions or omissions which also need to be considered upon. Due to these considerations, “see through” examination, of the witnesses’ statements and evidence garnered, is required in the present case. We have referred to contemporaneous documentary records in form of DD entries/FIR, call data records etc. We have postulated the statement of witnesses with the contemporaneous record to reach an ineluctable conclusion. At this stage, we record that evidence of hostile witnesses, to the extent it is truthful and reliable, remains admissible and it is open to the Court, depending upon the facts of each case, to rely upon dependable and acceptable part of the statement made by a hostile witness, as is reiterated in ***Rameshbhai Mohanbhai Koli v. State of Gujarat***, (2011) 11 SCC 111:

“16. It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide *Bhagwan Singh v. State of Haryana* [(1976) 1 SCC 389 : 1976 SCC (Cri) 7 : AIR 1976 SC 202] , *Rabindra Kumar Dey v. State of Orissa* [(1976) 4 SCC 233 : 1976 SCC (Cri) 566 : AIR 1977 SC 170] , *Syad Akbar v. State of Karnataka* [(1980) 1 SCC 30 : 1980 SCC (Cri) 59 : AIR 1979 SC 1848] and *Khujji v. State of M.P.* [(1991) 3 SCC 627 : 1991 SCC (Cri) 916 : AIR 1991 SC 1853])

17. In *State of U.P. v. Ramesh Prasad Misra* [(1996) 10 SCC 360: 1996 SCC (Cri) 1278: AIR 1996 SC 2766] this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour

of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde v. State of Maharashtra* [(2002) 7 SCC 543 : 2003 SCC (Cri) 112] , *Gagan Kanojia v. State of Punjab* [(2006) 13 SCC 516 : (2008) 1 SCC (Cri) 109] , *Radha Mohan Singh v. State of U.P.* [(2006) 2 SCC 450 : (2006) 1 SCC (Cri) 661 : AIR 2006 SC 951] , *Sarvesh Narain Shukla v. Daroga Singh* [(2007) 13 SCC 360 : (2009) 1 SCC (Cri) 188 : AIR 2008 SC 320] and *Subbu Singh v. State* [(2009) 6 SCC 462 : (2009) 2 SCC (Cri) 1106] .

18. In *C. Muniappan v. State of T.N.* [(2010) 9 SCC 567: (2010) 3 SCC (Cri) 1402: JT (2010) 9 SC 95] this Court, after considering all the earlier decisions on this point, summarised the law applicable to the case of hostile witnesses as under: (SCC pp. 596-97, paras 83-85)

“83. ... the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

84. In the instant case, some of the material witnesses i.e. B. Kamal (PW 86) and R. Maruthu (PW 51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law. Some omissions, improvements in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature.

85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. (Vide *Sohrab v. State of M.P.* [(1972) 3 SCC

751 : 1972 SCC (Cri) 819 : AIR 1972 SC 2020] , *State of U.P. v. M.K. Anthony* [(1985) 1 SCC 505 : 1985 SCC (Cri) 105 : AIR 1985 SC 48] , *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* [(1983) 3 SCC 217 : 1983 SCC (Cri) 728 : AIR 1983 SC 753] , *State of Rajasthan v. Om Prakash* [(2007) 12 SCC 381 : (2008) 1 SCC (Cri) 411 : AIR 2007 SC 2257] , *Prithu v. State of H.P.*[(2009) 11 SCC 588 : (2009) 3 SCC (Cri) 1502] , *State of U.P. v. Santosh Kumar*[(2009) 9 SCC 626 : (2010) 1 SCC (Cri) 88] and *State v. Saravanan* [(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580 : AIR 2009 SC 152] .)”

3. Accepting that there are hostile and opposing statements, we shall outline what should be admitted as veritable from the witnesses’ statement and then ascribe whether the conviction of the two appellants can be sustained. Before dwelling in to the crucial aspects, we record in paragraphs 4, 5, 6 and 7, the undisputed position proved from the recorded facts.

4. The deceased Sushil @ Sheela was a driver by profession and was working for Sardar Harmesh Singh (PW-3). He used to drive Toyota Qualis bearing registration No. PB 10 DH 5852 as a taxi. On 21st September, 2006 with permission of Sardar Harmesh Singh (PW-3), the deceased Sushil Kumar had driven the taxi outstation from Ludhiana, Punjab with the customers who had hired the taxi. As per the prosecution case, the persons who had hired the taxi were the two appellants but this position is repudiated by the appellants. Sushil Kumar was not seen alive thereafter, till his dead body was identified by Sardar Harmesh Singh (PW-3 and Jaspal Garg (PW-6), Sushil Kumar’s son, on 23rd September, 2006 at about 4.30/5 P.M, at mortuary in Delhi.

5. On 22nd September, 2006 at about 4.50 P.M., an unidentified dead body was chanced upon, in the fields of one Hawa Singh, by

Ramesh Dutt (PW-8) and three-four other villagers, residents of Tejpur Kalan, Alipur, Delhi. PW-8 made a call from his mobile to the police informing that a dead body was lying near the road. Similar statement was made by Ramesh (PW-17) another resident of village Tejpur Kalan, Delhi. He has deposed that on 22nd September, 2006 at about 5.00 P.M. he was driving his tractor when he reached Tej Kalan Road where he noticed a dead male person's body. He made a call from his mobile to the PCR. Before him four-five persons had already seen the dead person and intimated the police. He did not know the individual's name who had called the police, prior to him, but knew that he resided in the same village.

6. Matadin (PW-18) Incharge of the Mobile Crime Team had visited the spot after receiving a Control Room Report and prepared the Crime Team Report (Exhibit PW-18/A). The team found one dead person lying on the road and observed that the body had sustained injuries on the back of the head and blood had oozed out. There were clear ligature marks on the neck. Crime Team Report (Exhibit PW-18/A) indicates that the dead body's identity could not be ascertained. Nothing was found in the nearby surroundings by the crime team and public persons were unable to identify the dead person. SI Dalbir Singh (PW-9) has made a similar statement that an unidentified corpse was found lying in the fields, near village Tejpur Jatti Kalan road. The SHO and the Additional SHO reached the spot and the mobile team was called. Photographs were taken and memo (Exhibit PW-9/A) was prepared. The dead body was sent to mortuary of BJRM Hospital with request for 72 hours preservation through Constable Ravinder (PW-19). Constable Ravinder (PW-19) has testified that he had taken the dead male body to BJRM Hospital. The autopsy was conducted after

which the post-mortem pulandas and other requisite documents were prepared.

7. On the discovery of unidentified dead person who had discernibly died due to homicidal attack, FIR No. 348/2006 was registered in Police Station, Alipur at about 8.30 P.M. Head Constable Azad Singh (PW-1) has proved the FIR registered under Section 302/201 IPC (marked Exhibit PW-1/A) which does not record the name or identity of the unknown deceased. Head Constable Ramesh Chander (PW-2) had taken seven photographs, proved with negatives included, at the place of occurrence, at Tejpur Jatti Road (Exhibit PW-2/A-1 to A-7).

8. Sardar Harmesh Singh (PW-3), in his examination in chief on 3rd January, 2008, has testified that the deceased Sushil Kumar on 21th September, 2006 at about 9.00 P.M. had come with the appellants to his shop as they wanted to hire the Toyota Qualis taxi for being driven to Gohana. They were to return the next evening. PW-3 handed over Toyota Qualis to driver Sushil Kumar who left with the two appellants Gopal and Rakesh. However, the driver Sushil Kumar did not return the next day, i.e., 22nd September, 2006. At 8.45 P.M. on 22nd September, 2006, PW-3 claims that he received a call on his mobile from Bakhtawar village and the caller informed him that his driver identified as Gopal was trying to sell the Toyota Qualis. PW-3 informed the caller that his driver was not Gopal but Sushil Kumar and asked the caller to put Sushil Kumar on the phone. The caller answered that Sushil Kumar was not present. Thereupon, PW-3 asked the caller to call the police and not to allow Gopal to leave. In the intervening night on 21st/22nd September, 2006 at 2.00-2.30 A.M. PW-3 received a call from ASI Hawa Singh that the accused Gopal was

being taken to the Police Station, Alipur and PW-3 should reach immediately. PW-3, along with some others, left for Police Station, Alipur and reached there the next day, on 23rd February, 2006 at about 2.00-2.30 P.M. Inquiries were made from the appellant Gopal about the driver Sushil Kumar but satisfactory reply was not forthcoming. Appellant Gopal made a disclosure statement (Exhibit PW-3/B) signed by PW-3. Thereafter, PW-3 was taken to the mortuary of BJRM Hospital where he identified the corpse to be of his driver Sushil Kumar. Appellant Gopal and appellant Rakesh Kumar were arrested. PW-3 has stated that his Reliance mobile phone was given to Sushil Kumar before he (the driver) left with the appellants, in the Toyota Qualis. He has further claimed that the caller had informed that Gopal was trying to sell the Toyota Qualis for Rs.70,000/-.

9. PW-3 was cross-examined on 17th March, 2008, by the counsel for the two appellants. The cross-examination is brief with no direct or pointed questioning. Some questions were put by Mr. Bhupinder Mehta, Advocate for accused Gopal, and Mr. Sumit Chaudhary, Advocate for accused Rakesh, adopted the cross-examination done on behalf of the appellant Gopal. Thereafter, there was a change in appellants' counsel and an application under Section 311 Cr.P.C. was moved on behalf of the appellant Rakesh Kumar. The application was allowed and PW-3 was cross-examined, on 9th February, 2010. In the cross-examination, on the said date, PW-3 completely veered from his previous account and stated that, on 21st September, 2006 at 9.00 P.M., the deceased left the office for his house. Thereafter, PW-3 received a call from the deceased that one customer wanted Toyota Qualis for Delhi. PW-3 came to the deceased's house, at 10.30-11.00 P.M., where he met the two appellants and the deceased's son. There was a

third person, a Sikh, who appeared like a wrestler. The fare was negotiated at Rs.4,200/- to and fro travel to Delhi between PW-3 and the third person. The deceased Sushil Kumar asked the appellants to take care of his son, in his absence, and left with the said unknown customer in the Toyota Qualis. PW-3 accepted that he had received a telephone call from Delhi, on 22nd September, 2006, but claimed that the caller did not identify himself and the identity of the individual who had tried to sell the Toyota Qualis. PW-3 averred that, on reaching the place of said caller, he did not find the person who attempted to sell his Toyota Qualis. But on inquiry, the police informed him that the said person had escaped though they continued the search for him. He further averred that he had not seen the two appellants at the Police Station, Alipur on the said date before he returned from Delhi. He denied knowing about any person being interrogated by the police. He propels that nothing was recovered and no article was taken into possession by the police. He denied that any police proceedings were conducted in his presence and claimed that his signatures had been obtained on some papers without apprising him of the contents. He impels that he had only identified dead body of Sushil Kumar and no other inquiry had been made by the police officers. PW-3 stated that he was tutored at the time of his first deposition, on 3rd January, 2008.

10. PW-3 was again re-examined on 26th August, 2010, by the Public Prosecutor. On the said date PW-3 accepted his initial deposition, recorded on 3rd January, 2008 and 17th March, 2008, as the true and correct deposition and deposition made in his cross-examination on 9th February, 2010 as one falsely made on the request of deceased's son Jaspal. Jaspal had informed him that he had received

money from the appellants' relatives. Jaspal had lost both his parents, as his mother had expired earlier and his father died due to this incident, therefore there was no one to look after his future. Because of these considerations PW-3 had deposed in appellants' favour on 9th February, 2010 in the Court.

11. After due rumination on PW-3's testimony, we feel that his deposition on 9th February, 2010, when he was cross-examined on behalf of the appellant Rakesh Kumar, should be disbelieved and discarded. We have held this on the basis of PW-3's statement on 26th August, 2010, other material and evidence gleaned and produced including contemporaneous police station records in form of DD entries, FIR etc. as well as Yasin PW-5's deposition with whom PW-3 had the telephonic conversation on 22nd September, 2006 and the call records produced.

12. At this stage, we notice the deposition of Jaspal (PW-6), son of the deceased Sushil Kumar, aged 15 years who, it is indubitable, had been won over by the appellants and, therefore, has not supported the prosecution case. His statement has to be completely disregarded and not take into consideration. Perhaps poverty and sheer helplessness, since he had become an orphan at such a young age, had tempted him to depose falsely in the court. We are galvanized by his craven stand and are refraining from action against him, since he was only 15 years of age when deposed in the court but this conduct is highly deplored.

13. The call records of telephone Nos. 9316157219 and 9888441386 have been proved by Raj Kumar (PW-12) and Jyotish Moharana (PW-13), Nodal Officer, Reliance Communications and Vodafone Essar Mobile Service Limited, respectively. The said mobile phone records

have been marked Exhibit PW-11/H and PW-13/B. Mobile Phone No. 9316157219 was in the name of Harmesh Singh (PW-3) and this phone was given to the deceased Sushil Kumar when he had left for Delhi. Mobile phone No.9888441386 is in the name of Ashish Bhandari of Ludhiana. This phone instrument, as is revealed from the testimony of the other witnesses, was seized from the possession of the appellant Gopal. Call details of telephone No.9316157219 reveals that, on 21st September, 2006, the said telephone number was used to make calls to telephone No. 9888441386. At that time, telephone No. 9316157219 was being used in Ludhiana. It was further revealed that on 22nd September, 2006 a call was made to Ludhiana to telephone No. 9810040664 from the said number. Similarly, from telephone No. 9888441386 conversation was held with phone No. 9810040664 on 22nd September, 2006 at 1946 hours. The Prosecution has not placed on record the person who was using telephone No. 9810040664 but this does not materially affect the prosecution version. Prosecution has not also placed on record telephone number and call details of conversation between Harmesh Singh (PW3) and Yasin (PW5) but this we feel cannot be a justification and ground to acquit the appellants as there are incriminating established/proved facts which justify confirmation of their conviction. The call details mentioned above indicate the connection and use of phones.

14. Yasin (PW-5) has deposed that he runs a denting and painting shop near Sarvodya Kanya Vidyalaya, Kiranki Road, Bhaktawar. At 8.00-8.30 P.M. on 22nd September, 2006, one person came to his shop to sell Toyota Qualis bearing registration No. PB 10 BH 5842 and wanted to sell the Toyota Qualis for Rs.75,000/- for which he had the documents. PW-5 suspected that the vehicle was stolen and demanded

to speak to the vehicle's owner. The said person informed that the vehicle was of his maternal uncle who could not be contacted at that time. This person carried three mobile phones. PW-5 switched on one of the mobile phones and talked to the owner of the Toyota Qualis. The owner wanted to talk to the driver and spoke to the person concerned. PW-5 again made a call, on the telephone number of the owner, who asked him not to allow the said person to leave the premises. PW-5 made a call at number 100 but claims that the person had left the spot by then. PCR and local police came and took into possession the three mobile phones and Toyota Qualis. Subsequently, PW-5 denied that the appellant Gopal, present in the court, was the individual who had come to his shop to sell the Toyota Qualis. He denied the name of the person who had come to sell the car was Gopal. Therefore, he was declared hostile and cross-examined by the Public Prosecutor. We are inclined to accept the statement of PW-5, to the extent that a person had come to his shop on 22nd September, 2006 at 8.00-8.30 P.M. to sell Toyota Qualis, and that he had spoken to the owner of the vehicle, i.e., PW-3 on the telephone and, thereafter, PW-5 made a call to the police as he suspected that the vehicle was stolen. We do not accept his version that the appellant Gopal was not the person who had come to sell the car and had subsequently run away from the spot. There is ample evidence to show that the appellant Gopal was detained by the police from the shop of PW-5. Head Constable Kaushal Pratap (PW-20) has stated that, on receiving DD No. 17B, Police Station, Alipur at about 9.20 P.M. regarding apprehension of a person who was suspected to have stolen the vehicle, he along with SI Hawa Singh reached Bakhtawar Pur Burari Road. One Yasin produced Gopal along with Toyota Qualis bearing

registration No. PB 10 BH 5842 and informed him that he was trying to sell this car for Rs.70,000/-. He and ASI Hawa Singh brought Gopal and the vehicle to Police Station Alipur. Appellant Gopal did not reveal the name of the vehicle's owner. Registration book of the vehicle revealed the owner's name to be Harmesh Singh (PW-3). ASI Hawa Singh made a call and spoke to Harmesh Singh who was asked to come to Delhi. There Harmesh Singh disclosed that the vehicle belonged to him and in the vehicle deceased Sushil Kumar, appellant Gopal and appellant Rakesh had left Ludhiana. Harmesh Singh was taken to mortuary of BJRM Hospital for identification of the unknown dead body, on next day when it was suspected that the corpse could be of the driver. Harmesh Singh identified the body to be his driver Sushil Kumar's. Inspector Veer Singh (PW-11) interrogated Gopal at about 4.00 P.M. and inquired the relevant facts from ASI Hawa Singh and Harmesh Singh. Inspector Veer Singh (PW-11), thereafter, recorded appellant Gopal's statement, arrested him and took mobile phones into custody. In the cross-examination he stated that Toyota Qualis was taken to the police station on 22nd September, 2006 at 10.15 P.M. Harmesh Singh had arrived at police station at 2.00 P.M. on 23rd September, 2006. The appellant Gopal was arrested on 23rd September, 2006 at about 4.00-4.30 P.M. We note that ASI Hawa Singh expired and, therefore, could not be examined. The arrest memo of Gopal (Exhibit PW-3/C) dated 23rd September, 2006 shows the time of arrest as 4.00 P.M. SI Dalbir Singh (PW-9) has stated that on 23rd September, 2006 at about 3.30 P.M. ASI Hawa Singh Police Station, Alipur apprised Inspector Veer Singh that Toyota Qualis PB 10 BH 5842 could be associated and be used for the murder of the unidentified dead body. At that time, PW-9 was busy investigating a

case at village Bakhtawar but when he came back and met Harmesh Singh (PW-3), in the police station, he was informed that the deceased Sushil Kumar was PW-3's driver and the appellant Gopal, present there, was a friend of the deceased. The mobile phones were taken into possession. The aforesaid facts explain the complete chain of events, as they occurred during the police investigation.

15. The appellants' counsel has contended that the recovery of T-shirt, chappal and the plastic rope, from the place where the dead body was found on 23rd/24th September, 2006, should be disbelieved, in view of the fact that the place was thoroughly searched when the dead body of the unidentified person was found on 22nd September, 2006. Even if we discount the alleged recovery, made on 24th September, 2006, and give way to the possibility that these may have been planted still there is enough material to indubitably point towards the involvement of the two appellants.

16. It may be appropriate now to refer to Section 27 of the Evidence Act and its applicability. Section 27 of the Evidence Act is attracted when there is disclosure of a relevant fact, in consequent to information received from a person in custody who is accused of an offence. It is only so much of information as is distinctly related to the fact is admissible. Discovery of a fact is not to be equated with the recovery of material or physical object i.e. weapon of assault, dead body etc. The fact discovered embraces the place from which the object is produced and the knowledge of accused as to this. (see *Palukuri Kotayya vs. Emperor* AIR 1947 PC 67). Section 27 is based on the principle that when the fact is actually discovered in consequence of the information given, there is some guarantee afforded thereby, that the information is true and, accordingly, can be

safely allowed to be given as evidence. The said provision is based on doctrine of confirmation by subsequent events. In *State of Maharashtra vs. Damu* 2000(6)SCC269, the Supreme Court explained the expression 'facts discovered'. In the said case, dead body of Dipak had already been recovered before the disclosure statement. Thus, the statement of accused that he had thrown it in the canal was not admissible. However, the Investigating Officer had picked up a broken piece of glass from the spot. It transpired that the same was a broken piece from the tail lamp of the motor cycle which was subsequently seized and collated with the said evidence. The Supreme Court observed as under:-

“37. The basic idea embedded in Section 21 of the Evidence Act is the doctrine of 'confirmation by subsequent events'. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculcator in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well-settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of Privy Council in *Pullukurn Kottayya v. Emperor* AIR 1947 PC 67 as the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the Section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.

38. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. In, this case, the fact discovered by PW

44 is that A3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motor cycle.”

17. In *State of Maharashtra vs. Suresh* 2001(1) SCC 471, Supreme Court elucidated and explained the said principle observing that there were only three possibilities in such cases inter-alia observing:-

“26. 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 conceded 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 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.”

18. In the present case, before the disclosure by the appellant Gopal, the police had not been able to identify the dead body. They did not know that the dead body was of Sushil Kumar. On the basis of disclosure and then subsequent identification by PW-3, a new fact was known and ascertained that the dead body was of Sushil Kumar, the driver.

19. In view of the aforesaid, we feel that the principle of last seen, disclosure resulting in recovery under Section 27 of the Evidence Act and the conduct of the appellant Gopal leading to his arrest and recovery of the vehicle completes the chain and proves the case beyond reasonable doubt. For convenience and clarity, the said incriminating

material, which complete the chain against the appellants, are recapitulated below.

- (i) That the appellant Gopal and Rakesh Kumar had left Ludhiana with the deceased driver Sushil Kumar, in Toyota Qualis bearing registration No. PB 10 BH 5842. Thereafter, Sushil Kumar was not seen alive and his dead body was found in the fields at Tejpur Jatti Road on 22nd September, 2006 at 4.30/5.00 P.M. The dead body, taken to the mortuary of BJRM Hospital, remained unidentified and, could not be ascertained to be that of Sushil Kumar at that time.
- (ii) Appellant Gopal tried to sell Toyota Qualis to Yasin (PW-5) at about 8.30/9 P.M. on 22nd September, 2006. At that time, PW-5 had a conversation on telephone with PW-3, owner of the Toyota Qualis and employer of Sushil Kumar. PW-3 became apprehensive that Gopal or somebody was trying to sell his Toyota Qualis. PW-5 Yasin made a call to the police and on his information Gopal was detained by police and Toyota Qualis was taken in possession. Gopal was in possession and had tried to sell the vehicle.
- (iii) PW-3 thereafter reached Delhi and contacted the police officers in Police Station, Alipur. He met Gopal and identified the Toyota Qualis PB 10 BH 5842. Gopal then made a disclosure that the two appellants had murdered Sushil Kumar and his dead body was left in the fields at Tejpur Jatti Road.
- (iv) Police officers collated that the unidentified body could be of the driver Sushil Kumar and PW-3 was taken to BJRM Hospital where the unidentified dead body was shown to him. It

was identified to be that of Sushil Kumar by him and before this identification, the identity of the corpse was not determined. The identity was ascertained after Gopal had made a disclosure statement Exhibit PW-3/B.

(v) The appellant Rakesh was arrested on the same day near Jama Masjid area, vide arrest memo Exhibit PW-9/F in which the date and time of arrest has been mentioned as 23rd September, 2006 at 8 P.M.

(vi) The appellants were confronted with the aforesaid facts, in their statement under Section 313 Cr.P.C. The appellants have not suggested anything which controverts or dents the facts. They have simply averred that they are innocent and had been falsely implicated.

20. In view of the aforesaid position, the appeal is dismissed. The conviction and the sentence are upheld and maintained.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(S.P. GARG)
JUDGE

JANUARY 16, 2013
VKR/kkb