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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on : 19/09/2016****Judgment delivered on : 10/11/2016****Criminal Appeal No.551 of 2013**

1. Haricharan S/o Jagatram Patel Aged about 27 years, R/o Village Diyagarh, Police Station Lailunga, Revenue and Civil Distt.Raigarh
2. Rohit Kumar S/o Sahitbaram Chouhan aged about 25 years, R/o Village Diyagarh, Police Station Lailunga, Revenue and Civil Distt.Raigarh
3. Haldhar S/o Ramni Yadav, aged about 23 years, R/o Village Diyagarh, Police Station Lailunga, Revenue and Civil Distt.Raigarh
4. Kirtan Sarthi S/o Chandan Singh, aged about 39 years, R/o Village Barkena, Police Station Lailunga, District Raigarh, Revenue and Civil Distt.Raigarh (CG)

---- Appellants**Versus**

State of Chhattisgarh Through : Station House Officer,
Police Station : Lailunga, District : Raigarh (CG)

---- Respondent**Criminal Appeal No.552 of 2013**

1. Bodhan Yadav S/o Raghunath Yadav, Aged about 23 years, R/o Village Diyagarh, Police Station Lailunga, Revenue and Civil Distt.Raigarh
2. Bhog Singh Sidar S/o Rathuram aged about 27 years, R/o Village Diyagarh, Police Station Lailunga, Revenue and Civil Distt.Raigarh
3. Nityanand S/o Gajanand, aged about 24 years, High School Para Lailunga, Police Station Lailunga, District Raigarh (CG) Revenue and Civil Distt.Raigarh

Versus

State of Chhattisgarh Through : Station House Officer,
Police Station : Lailunga, District : Raigarh (CG)

Criminal Appeal No.565 of 2013

1. Dau Singh S/o Ghursai Aged about 40 years, R/o Village Jhagarpur, Police Station Lailunga, District Raigarh (CG), Rev. & Civil Distt-Raigarh (CG)
2. Jai Singh S/o Late Bhaktu Ram Bhagat, aged about 40 years, R/o Village Jambahar, Police Station Lailunga, District Raigarh (CG), Rev. & Civil Distt- Raigarh (CG)

Versus

State of Chhattisgarh Through : Station House Officer,
Police Station : Lailunga, District : Raigarh (CG) Rev. &
Civil Distt-Raigarh (CG)

Criminal Appeal No.564 of 2013

Neharu Patel S/o Kanhaiya Lal Patel, Aged about 35 years, R/o Village Amapali, Police Station Lailunga, Civil & Revenue District Raigarh (CG)

Versus

State of Chhattisgarh Through : Station House Officer,
Police Station : Lailunga, District : Raigarh (CG) Rev. &
Civil Distt-Raigarh (CG)

Appearance:-

Mr.Arun Kochar, Advocate for appellants No.1 to 3 in Cr.A.No.551 of 2013 and for appellants No.1 and 2 in Cr.A.No.552 of 2013.

Mrs.Kiran Jain, Advocate for rest of the appellants in the aforesaid criminal appeals.

Mr.Vinod Deshmukh, Deputy Advocate General for the respondent/State in all criminal appeals.

Hon'ble Shri Deepak Gupta, Chief Justice

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

Sanjay K. Agrawal, J.

1. The accused persons (A1 to A9) i.e. Bodhan Yadav, Bhog Singh, Nityanand, Haricharan, Rohit Kumar, Hardhar, Kirtan Sarthi, Jaisingh & Dausingh and accused (A11) Umashankar @ Uma Banjare were tried by the Second Additional Sessions Judge, Raigarh, in S.T.No.63/2009, whereas accused Nehru Lal Patel (A10) was tried in S.T.No.3/2011 and all accused persons (A1 to A9) except the accused (A11) were convicted by the trial Court by its judgment of conviction dated 7.5.2013 and sentenced them as under:-

Conviction

Sentence

U/s 148 of the IPC

RI for two years and fine of ₹ 3000/-, in default of payment of fine to further undergo RI for three months

U/s 452 of the IPC

RI for four years and fine of ₹ 4000/-, in default of payment of

fine to further undergo RI for four months

U/s 325 of the IPC

RI for four years and fine of ₹ 4000/-, in default of payment of fine to further undergo RI for four months

U/s 506(B) of the IPC

RI for four years and fine of ₹ 4000/-, in default of payment of fine to further undergo RI for four months

U/s 364 of the IPC

RI for ten years and fine of Rs.6000/-, in default of payment of fine to further undergo RI for one year

U/s 302 of the IPC

Imprisonment for life and fine of ₹ 8000/-, in default of payment of fine to further undergo RI for one year

Accused Nehru Patel (A10) was convicted under Sections 148, 452, 325, 506B, 364 and 302 of the IPC and sentenced to undergo RI for two years and fine of ₹

5000/-, in default of payment of payment of fine to further undergo RI for four months, RI for five years and fine of ₹ 6000/-, in default of payment of fine to further undergo RI for six months, RI for five years and fine of ₹ 6000/-, in default of payment of fine to further undergo RI for six months, RI for five years and fine of ₹ 6000/-, in default of payment of fine to further undergo RI for six months, imprisonment for life and fine of ₹ 15000/-, in default of payment of fine to further undergo RI for one and half years, imprisonment for life and fine of ₹ 20000/-, in default of payment of fine to further undergo RI for two years. However, accused (A11) Umashankar @ Uma Banjare, who was tried only for offence under Section 201/34 of the IPC, was acquitted by the trial Court finding no evidence against him.

2. Case of the prosecution as unfolded during the course of trial as under:-

- (i) That on 11.3.2009 the accused persons (A1 to A11) namely Bodhan, Bhogsingh Sidar, Nityanand Sahu, Haricharan Patel, Rohit Kumar Chouhan, Haldhar Yadav, Kirtan Sarthi, Jaisingh Bhagat, Dausingh Sarthi, Nehru Patel and Umashankar Banjare

constituted an unlawful assembly near the house of complainant Ku.Arti Lakda (PW-27) at Village Bhadrapara, Bhedimuda, Police Station Lailunga, District Raigarh with common intention of causing hurt to Ku.Arti Lakda, with intention to cause death of Nasim Khan, used criminal force armed with deadly weapons and thereafter trespass the house of Ku.Arti Lakda and caused grievous hurt to the complainant and also criminally intimidated her and kidnapped Nasim Khan (since deceased) and took him in their jeep and murdered Nasim Khan by assaulting him by hands & fists and thrown stone on his head and thereafter caused disappearance of evidence of offence and thereby committed the aforesaid offence.

- (ii) Accused Umashankar @ Uma Banjare (A11) was charged for offence under Section 201/34 of the IPC that on 11.3.2009 knowing well that at village Bhadrapara, Bhedimuda Nasim Khan has been murdered, in order to screen the offender of the aforesaid offence, motor-cycle of the deceased was thrown into dense forest of Tamnar with the help of accused Dau Singh.

- (iii) It is further case of the prosecution that deceased Nasim Khan and accused Nehru Patel were involved in the work of transporting of coal, bricks etc. and they developed some dispute in between and the deceased had left for Ambikapur. Few days before the date of occurrence in order to settle the dispute, the accused persons called deceased Nasim Khan to his house at Banekela through Surendra Patnaik to which he came and thereafter went back to Bhedimuda by motor-cycle owned by Jahoor Khan and on 11.3.2009 stayed in the house of complainant Ku.Aarti Lakda (PW-27). On 11.3.2009 at 3.30 p.m. all the accused persons (A1 to A10) reached with marshal and commander jeep and trespassed the house of Ku.Aarti Lakda (PW-27), at that time, her elder sister Asha Bada (PW-32) and younger sister Annakripa Lakda (PW-31) were present as their parents had gone to some other village for some work and after given threatening caused grievous hurt to Ku.Aarti Lakda (PW-27) by which she suffered fracture of ulna bone in the left hand and took away Nasim Khan in their jeep. They had taken Nasim Khan in Gahira jungle. The matter was not reported

because the accused persons threatened them that if they will report the matter, then the accused persons will kill them. After assaulting they have murdered Nasim Khan by throwing heavy stone in his head and kept dead body at Barsati Nala and covered the same with leaves etc. On 12.3.2009 they burnt dead body of Nasim Khan and thrown ash and bones in Gahira pond. On 14.3.2009 accused Nehru Patel and Jai Singh came into the house of Ku.Aarti Lakda (PW-27) and gave ₹ 2000/- to her mother for treatment of Ku.Aarti Lakda (PW-27).

- (iv) It is further case of the prosecution that on 15.3.2009 missing report was lodged by family members of Nasim Khan on which Missing Report No.2/2009 was registered. In the meanwhile, on 21.3.2009 F.I.R. was lodged by Ku.Aarti Lakda (PW-27) in Crime No.50/2009 vide Ex.P/25. Complainant Ku.Aarti Lakda (PW-27) was examined by the doctor (PW-30) vide Ex.P/29. On 22.3.2009 investigating officer D.R.Verma (PW-30) prepared spot map vide Ex.P/26 and thereafter on the basis of memorandum statement of Nityanand Ex.P/14, from Gahira jungle at Barsati nala, ash, soil, piece of bone

and bloodstained stone and big stone of 10.5 kg. were seized by the police and with the assistance of plunger, burnt wood piece of coal, bones of Nasim Khan and burnt kada (tamba) were also recovered. Nazri map was prepared vide Ex.P/32. One Mahindra Jeep was seized vide Ex.P/11. Seized/burnt articles were sent for postmortem report. Dr.Yogeshwar Singh Sartiya (PW-20) examined the articles and opined that no definite opinion regarding any of the sent articles can be given and he expressed the need to send the seized articles for chemical examination regarding the presence of human blood.

- (v) After due investigation, charge-sheet was prepared against nine accused persons except the accused (A10 and A11). In Criminal Revision No.32/2011 the Sessions Judge, Raigarh vide order dated 23.5.2011 directed for further investigation and thereafter supplementary charge-sheet was filed against accused Nehru Patel and Umashankar @ Uma Banjare for the above-stated offences. Since both the sessions trial have arisen out of one and same incident, they were tried together.

- (vi) The prosecution in order to bring home the offence exhibited the documents Exs.P/1 to P/55 and examined 43 witnesses. The accused persons pleaded no guilty and entered into defence that they have not committed any offence and they have falsely been implicated in crime in question. They exhibited D/1 to D/6 documents, however, examined none in support of their plea.
 - (vii) The trial Court after appreciating oral and documentary evidence available on record, convicted A1 to A10 for the above-stated offences, however, acquitted A11 Umashankar @ Uma Banjare for the above-stated offence and only convicted him under Section 201/34 of the IPC holding that the prosecution has been able to bring home the offence against A1 to A10.
3. Feeling aggrieved against the judgment of conviction recorded and order of sentence awarded for the above-stated offences, the appellants have preferred these appeals.
4. For the sake of convenience and they have arisen out of the common judgment, they were clubbed and heard

together and being disposed of by this common judgment.

5. Mr.Arun Kochar, learned counsel appearing for appellants No.1 to 3 in Cr.A.No.551 of 2013 and for appellants No.1 and 2 in Cr.A.No.552 of 2013, would submit that the prosecution has failed to bring home the offence against the appellants as Ku.Aarti Lakda (PW-27), Asha Bada (PW-32) and Annakripa Lakda (PW-31) are not eyewitnesses. There is delay of ten days in lodging the F.I.R. and delay in lodging the F.I.R. has not been explained satisfactorily by the prosecution. There are serious contradictions in their statements recorded by the police and before the Court and no identification parade was conducted for identifying the accused persons. Dead body of Nasim Khan was not recovered and there are number of serious infirmities in the prosecution case and as such, judgment of conviction recorded and order of sentence awarded deserves to be set aside.
6. Mrs.Kiran Jain, learned counsel appearing for rest of the appellants in the aforesaid criminal appeals, would submit that the prosecution has failed to prove the offence beyond reasonable doubt, testimonies of the eyewitnesses are not reliable and there is inordinate delay in making the

F.I.R., which has not been explained satisfactorily and as such, there is no evidence that the appellants have abducted Nasim Khan and caused his death, thereafter burnt his dead body into bushes with attempt to hide the evidence and as such, judgment of conviction recorded and order of sentence awarded deserves to be set aside.

7. On the other hand, Mr.Vinod Deshmukh, learned Deputy Government Advocate appearing for the State while opposing the appeals, would submit that the prosecution has proved the offence beyond reasonable doubt, sufficient material has been brought on record to hold them guilty and they have rightly been convicted by the trial Court for the aforesaid offences. No interference is warranted in the judgment of conviction recorded and order of sentence awarded and therefore, all the appeals deserve to be dismissed.
8. We have heard learned counsel for the parties, considered the rival submissions made herein and gone through the records of the trial Court with utmost circumspection.
9. Ku.Aarti Lakda (PW-27), Asha Bada (PW-32) and Annakripa Lakda (PW-31) are real sisters. They are eyewitnesses to the incident. We shall first consider their testimonies.

Ku.Arati Lakda (PW-27) has clearly stated before the Court that on the date of incident i.e.11.3.2009 (on the day of Holi festival at 3.30 p.m.), two vehicles Marshal and Balero jeep came into front of her house and the appellants came out from the vehicles and asked her and her sisters to open the door and when they did not open the door, they forcefully entered into the house and caught-hold Nasim Khan, who was present in their house, they caused grievous injury to her with the help of lathi by which she suffered fracture in her left hand and sister Asha Bada (PW-32) was also maltreated by the accused persons/appellants. She further states that the accused persons threatened Asha Bada (PW-32) and Annakripa Lakda (PW-31) not to tell anyone about the incident, otherwise they have to suffer consequence. She further stated that she has lodged the report Ex.P/25 to the police and the police has prepared spot map Ex.P/26. She has explained that she has not named the appellants in the F.I.R. on account of threatening given by the appellants/accused persons. She has been subjected to lengthy cross-examination, but she has maintained her version what she has stated before the police in her statement under Section 161 CrPC.

10. PW-31 is Annakrupa Lakda, sister of Arti Lakda (PW-27). She has stated that she has identified accused Nehru Patel, Nityanand and Jai Singh Bhagat by name and face, whereas she identified other accused persons by face. She has clearly stated that on the date of Holi festival in 2009 when she along with her two sisters Arti Lakda (PW-27) and Asha Bada (PW-32) were in house and their parents had gone to Jashpur, Nasim Khan came into their house to stay, at 3.30 p.m. the accused persons came to their house in Balero and Commando jeep and when she and her sisters did not open the door, they forcefully entered into their house and assaulted her and her sister Arti and took away Nasim Khan in their jeep and on the next day accused Nehru and Jaisingh Bhagat came into their house and asked them to destroy jacket and shoe of deceased Nasim Khan and when they declined them, they took away jacket and shoe of deceased Nasim Khan. She has also been subjected to lengthy cross-examination.
11. Similar is the statement of Asha Bada (PW-32), who is elder sister of Arti Lakda (PW-27) and Annakrupa Lakda (PW-31). She has given the evidence in line of her sisters Arti Lakda (PW-27) and Annakrupa Lakda (PW-31). She has stated that accused Naresh Partel had also taken motor-

cycle of Nasim Khan and had given ₹ 2000/- for treatment of Arti (PW-27).

12. All the three witnesses have identified all ten accused persons and have also explained the delay in lodging the F.I.R. as they were threatened to kill if they will disclose the incident to any person. Not only they threatened on the date of incident, thereafter also on the next day accused Nehru Patel and Jaisingh Bhagat came to their house and asked them to destroy jacket and shoe of deceased Nasim Khan and when they declined, accused Nehru Patel and Jaisingh Bhagat had not only taken those articles but also threatened them to kill and as such, delay in lodging the F.I.R. has been explained by them satisfactorily.
13. It is well settled that delay in lodging the F.I.R. by itself would not be sufficient to reject the prosecution version unless it is unexplained and there is likelihood of fabrication of evidence.
14. In the matter of **Chunni Lal vs. State of Uttar Pradesh**¹, the Supreme Court has held that delay in making FIR would not be result in the rejection of the

¹ (2010) 7 SCC 496

prosecution case and observed as under:-

“26. In this regard we would like to refer to a decision of this Court in *Silak Ram vs. State of Haryana*², relevant portion of which is as follows:-

“12.....Delay in lodging FIR by itself would not be sufficient to discard the prosecution version unless it is explained and such delay coupled with the likelihood of concoction of evidence. There is no hard-and-fast rule that delay in filing FIR in each and every case is fatal and on account of such delay the prosecution version should be discarded. The factum of delay requires the court to scrutinise the evidence adduced with greater degree of care and caution. In this case the eyewitnesses have given a vivid description of the events. The evidence of PW 11 as noted above, is cogent and consistent and the version given by this witness fits with medical evidence.”

15. At this stage, it is pertinent to mention here that Annakrupa Lakda (PW-31) is child witness aged about 12 years. She has not only identified the accused persons in the Court but has also clearly affirmed that on the next day, Nehru, Jai Singh and Doctor Pradhan came to their house and directed to destroy jacket and shoe of deceased Nasim Khan to her sister Asha and when it was refused

² (2007) 10 SCC 464

they have taken shoe and jacket with them and threatened and out of threatening, her sisters Asha and Arti had left the village and gone to village Godhi.

16. Ku.Arti Lakda (PW-27) is injured witness. She has clearly supported the case of the prosecution and on medical examination, she has found fracture in ulna bone (left hand) by Dr.Rajkumar Gupta (PW-9), who has proved his report Ex.P/9 and x-ray report Ex.P/10.
17. Thus, the accused persons have duly been identified by these three witnesses and they have also been proved that the appellants have trespassed the house after causing grievous hurt and after forming an unlawful assembly threatened them to kill and kidnapped Nasim Khan in order to commit murder. Thus, learned Additional Sessions Judge has rightly convicted them for above-stated offences.
18. Now the question would be whether Nasim Khan was murdered by the appellants as found by learned Additional Sessions Judge.
19. The argument of Mr. Arun Kochar and Smt. Kiran Jain, learned counsels appearing for the accused persons, are

that since the dead body of the deceased Nasim Khan was not recovered by the Investigating Officer and as such, homicidal death of Shri Khan is not established on record, therefore the appellants/accused persons are entitled to be acquitted.

20. It is well settled law that one of the essential ingredient of the offence of culpable homicide required to be proved is that the accused "caused the death" of the person alleged to have been killed and as such it must be established that the homicidal death has been caused and ordinarily recovery of the dead body of the victim bearing mark of injury is held sufficient to prove homicidal death of the victim.
21. Way back, in the year 1981 in the matter of **Ramanand and others v. State of Himanchal Pradesh**³ Their Lordships of the Supreme Court have held in no uncertain terms that discovery of dead body of the victim bearing physical evidence of violence has never been considered as only mode of proving the *corpus delictii* in murder. Their Lordships further held that the body doctrine is merely a rule of caution and not of law. It has further been held where dead body of the victim in a murder is not

³ (1981) 1 SCC 511

found, other cogent and satisfactory proof of homicidal death must be adduced by the prosecution, but where the fact of *corpus delicti* or homicidal death is sought to be established by circumstantial evidence, or by both. But where the fact of *corpus delicti*, i.e. 'homicidal death' is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Their lordships held as under:-

"28. This means that before seeking to prove that the accused is the perpetrator of the murder, it must be established that homicidal death has been caused. Ordinarily, the "recovery of the dead body of the victim or a vital part of it, bearing marks of violence, is sufficient proof of homicidal death of the victim. There was a time when under the old English law, the finding of the body of the deceased was held to be essential before a person was convicted of committing his culpable homicide. "I would never convict," said Sir Mathew Hale, "a person of murder or manslaughter unless the fact were proved to be done, or at least the body was found dead." This was merely a rule of caution, and not of law. But in those times when execution was the only punishment for murder, the need for adhering to this cautionary rule was greater. Discovery of the dead body of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the *corpus delicti* in murder. Indeed, very many cases are of such a nature where the discovery of the dead body is impossible. A blind adherence to this old "body" doctrine would open the door wide open for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to de-

stroy the body of their victim. In the context of our law, Sir Hale's enunciation has to be interpreted no more than emphasising that where the dead body of the victim in a murder case is not found, other cogent and satisfactory proof of the homicidal death of the victim must be adduced by the prosecution. Such proof may be by the direct ocular account of an eyewitness, or by circumstantial evidence, or by both. But where the fact of *corpus delicti* i.e. "homicidal death" is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world, and absolute certainty is a myth. That is why under Section 3 of the Evidence Act, a fact is said to be "proved", if the court considering the matters before it, considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculcating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned."

22. The principle of law laid down in **Ramanand** case (supra) has been reiterated and followed by the Supreme Court in the matter of **Ramjee Rai and others Vs. State of Bihar**⁴ and it has been held by Their Lordships of the Supreme Court that discovery of the dead body is a rule of caution and not of law and where strong circumstantial evidence exist, conviction can be recorded even in absence of the dead body.

4 (2006) 13 SCC 229

23. Very recently again the Supreme Court in the matter of **Rishi Pal Vs. State of Uttarakhand**⁵ following **Ramanand** case (supra) held that absence of corpus delicti is insignificant if cogent and satisfactory proof of homicidal death of victim is adduced.

24. In convicting the appellants under Section 302 of IPC for murder of Nasim Khan, learned Additional Sessions Judge has concurrently relied upon those circumstances which, according to them had been established by the prosecution:-

(i) That the appellants had strong motive to murder of Nasim Khan.

(ii) That the Nasim Khan was kidnapped and last seen alive with the appellants on 11.03.2009 in the house of Ku. Arti Lakda (PW-17) at Village Bhadarapara-Bhedimuda, Police Station Lailunga, District – Raigarh.

(iii) That the accused persons kidnapped Shri Nasim Khan on said date from the house of Ku. Arti Lakda (PW-17).

(iv) That on 12.03.2009 the accused persons

⁵ 2013 Cri.L.J. 1534

burnt the dead body of Nasim Khan and bone and remains of body of deceased were seized by the prosecution and forensic science expert has found the bones to be human bones.

(v) That the prosecution has established that the deceased Nasim Khan was seen alive with the accused persons but they have not explained as to how the deceased died.

- 25.** It is well settled that where the inference of guilt of an accused persons are to be drawn from circumstantial evidence only, those circumstances must, in the first place, be cogently established. Further, those circumstances should be of a definite tendency pointing towards the guilt of the accused, and in their totality, must unerringly lead to the conclusion that within all human probability, the offence was committed by the accused and none else.
- 26.** The first circumstances which has been found to established is that the accused persons had very strong motive to commit murder of Nasim Khan. The testimonies of the prosecution witnesses would show that the deceased was resident of District Ambikapur

and involved in the work of transporting of coal and bricks along with appellant Nehru at Raigarh and dispute arose between them in relation to the said work. Before the date of occurrence, the deceased had went back to Ambikapur, he was called by accused Nehru back to Raigarh with the help of Surendra Patnaik and the deceased and Shri Surendra Patnaik met accused Nehru at his village Banaikela (Raigarh) and thereafter the deceased came to the house of PW-17 Ku. Arti Lakda in the motor cycle of Jahur Khan and on the date of incident he was staying in the house of PW-17 Ku. Arti Lakda and as such, the motive on the part of the appellants to kill Nasim Khan is clearly established.

27. Since deceased Nasim Khan was kidnapped by A1 to A10 and they were seen last time together with the deceased, they were required to explain as to how Nasim Khan died which they have miserably failed.

28. In the matter of **Harijan Bhala Teja vs. State of Gujarat**⁶, the Supreme Court has held that since the accused only was staying with his wife at time of her death, it is for the accused to show as to in what manner she died and relying upon Section 106 of the Indian

6 AIR 2016 SC 2065

Evidence Act it was held as under:-

“19. Section 106 of the Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Since it is proved on the record that it was only the appellant who was staying with his wife at the time of her death, it is for him to show as to in what manner she died, particularly, when the prosecution has successfully proved that she died homicidal death.”

29. Likewise, in the matter of **Gajanan Dashrath Kharate vs. State of Maharashtra**⁷, where the accused (Gajanan Dashrath Kharate) alleged to have killed his father and accused has not offered any explanation for homicidal death of his father, conviction was affirmed by the Supreme Court by holding as under:-

“14. Upon appreciation of oral evidence and the circumstance of the recovery of blood stained clothes of the accused and the conduct of the accused in not offering any explanation for the homicidal death of his father, by concurrent findings, the trial court and the High Court rightly convicted the appellant-accused under Section 302 IPC and we do not find any reason to interfere with the impugned judgment.”

7 AIR 2016 SC 2065

- 30.** Ku.Arti Lakda (PW-27), Annakrupa Lakda (PW-31) and Asha Bada (PW-32) have clearly stated that the accused persons have kidnapped Nasim Khan from their house on 11.3.2009 at 3.30 p.m. and on the basis of memorandum statements of Nityanand, Bodhan and Bhog Singh Exs.P/14, P/15 and P/16, from the place of incident the police have recovered burnt pieces of sticks, ash, bloodstained soil, stone etc. and also recovered 10.5 kg. of stone vide Ex.P/18. The police have also recovered broken pieces of bones and kada, which were sent to the postmortem vide Ex.P/20 to Dr.Yogeshwar Singh Sartiya (PW-20) on 25.3.2009 and in the Forensic Science Laboratory Report it has also been found the bones to be human bones and structures resembled to male bone characters.
- 31.** Since in the present case, death of Nasim Khan has been proved and deceased was kidnapped by A1 to A10 and thereafter he was murdered, his dead body was burnt and on the basis of memorandum statements of Nityanand, Bodhan and Bhog Singh Exs.P/14, P/15 and P/16, remains of dead body have been recovered, it was for the accused persons to explain how Nasim Khan died, but they have miserably failed. This is a case where Section 106 of the

Evidence Act is clearly attracted, which requires the accused persons to explain the facts in their exclusive knowledge. True it is that burden of proof is on the prosecution and Section 106 of the Evidence Act does not relieve it of that duty but the said provision is attracted, when it is impossible or it is difficult for the prosecution to establish the facts which are fully within the knowledge of accused persons. Recovery of remains of dead body of the deceased and other articles from the place disclosed by accused Nityanand, Bodhan and Bhog Singh in their memorandum is fully established and the accused persons had failed to explain as to how they alone had the information leading to recovery. Thus, the failure of the accused persons to give an explanation is an additional circumstance against the accused (See **State of Rajasthan Vs. Jagguram**⁸, followed in **Suresh and Another Vs. State of Haryana**⁹). Thus, we are of the considered opinion that the prosecution has proved its case beyond reasonable doubt that the appellants murdered Nasim Khan.

32. The deceased was kidnapped and murdered and the accused have failed to explain as to how the deceased

8 (2008) 12 SCC 51

9 (2015) 2 SCC 227

died and as such, we do not find any illegality or material on record to differ with the view taken by learned trial Court. Learned trial Court after properly analyzing oral and documentary evidence has rightly come to the conclusion that the prosecution has proved the offence beyond reasonable doubt.

- 33.** Consequently, the criminal appeals preferred by the appellants deserve to be and are hereby dismissed. The appellants are in jail, therefore, no further direction is necessary.

Sd/-

(Deepak Gupta)
Chief Justice

Sd/-

(Sanjay K.Agrawal)
Judge

B/-