

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

**Reserved on 9th August, 2018
Pronounced on 8th October, 2018**

+ **CRL.A. 192/2017**

RAJIV @ MONU Appellant
Through: Mr.Anil Dabas, Advocate.

versus

STATE NCT OF DELHI Respondent
Through: Mr.Kewal Singh Ahuja, APP.

+ **CRL.A. 284/2017**

POONAM Appellant
Through: Ms.Anu Narula, Advocate.

versus

STATE NCT OF DELHI Respondent
Through: Mr.Kewal Singh Ahuja, APP.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE VINOD GOEL**

JUDGMENT

VINOD GOEL, J.:

1. These appeals are directed against the judgment dated 9th December, 2016 passed by the Court of learned Additional Sessions Judge, West,

Tis Hazari Courts, Delhi (ASJ) in Case No.56384/2016 arising out of FIR No.190/2013, Police Station (PS) Mundka whereby the appellants were convicted for murdering Sanjay, for the offence punishable under Section 120B of the Indian Penal Code (IPC), Section 302 IPC r/w Section 120B and Section 201 IPC r/w Section 120B IPC. The appellants have also challenged the order on sentence dated 15th December, 2016 whereby they were sentenced to undergo rigorous life imprisonment (RI) for the offence punishable u/s 302 IPC r/w Section 120B IPC. Appellant Rajiv @ Monu (A1) was directed to pay a fine of Rs.20,000/- and in case of default of payment of fine to undergo simple imprisonment (SI) for six months. Appellant Poonam (A2) was directed to pay a fine of Rs.5,000/- and in case of default of payment of fine to undergo SI for two months. It was further directed that out of payment of fine of Rs.25,000/-, Rs.15,000/- would be given to the father of the deceased. Both the appellants were further sentenced to undergo RI for four years for the offence punishable u/s 201 IPC r/w Section 120B. A1 was directed to pay a fine of Rs.5,000/- and in case of default of payment of fine to undergo SI for four months. A2 was directed to pay a fine of Rs.2,000/- and in case of default of payment of fine to undergo SI for two months. The Ld. ASJ recommended the DLSA to award compensation to the legal heirs of deceased u/s 357A Cr.P.C.

2. As per the case of the prosecution on 5th September, 2013, A2 lodged a missing report of her husband at PS Mundka by DD No.24A

(Ex.PW7/A) to the effect that her husband Sanjay has not returned home since having left at 11.30 pm on 4th September, 2013. On the same evening Jagan Lal (PW1) aged about 80 years visited the PS and recorded his statement (Ex.PW1/A) and stated that his son Sanjay had not returned home since the night of 4th September, 2013. He added that his daughter-in-law (A2) used to meet A1 and despite objections raised by Sanjay, she did not stop meeting A1, which led to multiple altercations between Sanjay and A1. Further he stated that 2-3 days back, Sanjay had an altercation with A1 and his companion JCL Vicky who were working as Security Guards in the under construction flats of Supreme Company near their residence. He flagged his suspicion towards A1, JCL Vicky for kidnapping his son, and towards A2 for being involved with them in their act.

3. On the statement of PW1 (Ex.PW1/A), SI Birpal Singh (PW25) recorded his endorsement (Ex.PW25/A) and FIR No.190/2013 under Section 365 IPC was registered on 5th September, 2013 and investigation was started. During investigation a secret informer conveyed to PW25 that Sanjay was murdered by A1 and JCL Vicky the previous night and both of them are hiding themselves near Vaishno Mata Mandir, near pond.

4. On identification by the complainant, PW25 and HC Ashok Kumar (PW27) apprehended both of them. They revealed that they murdered Sanjay in the Guard Room of Supreme Construction Company at Tikri Kalan and dumped the body in the borewell pit situated on Tikri

Nizampur Road. Thereafter, they led the police party to the borewell where PW25 with the help of a torch could see a body lying therein. After completion of the investigation charge-sheet u/s 365/302/201/120B/34 IPC was filed against both the appellants.

5. Charges were framed against both the appellants by the Ld. ASJ on 19th February, 2014 for the offences punishable u/s 120B IPC, Section 365 r/w Section 120B IPC, Section 302 r/w Section 120B IPC and Section 201 r/w Section 120B IPC, to which they pleaded 'not guilty' and claimed trial.

6. To bring home the guilt of the appellants, the prosecution has examined 28 witnesses.

7. Ld. ASJ after examining the prosecution evidence, called upon both the appellants and put to them separately all the incriminatory evidence against them under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.)

8. By the impugned judgment dated 9th December, 2016, the Ld. ASJ found that it was a case of circumstantial evidence and the chain of circumstances was so complete that it indicated the guilt of both the appellants without any hypothesis of their innocence.

9. It is argued by Mr. Anil Dabas, learned counsel for A1 that the witnesses of the recovery of the dead body, weapon of offence i.e. the knife and blood stained clothes and the pointing out memo of the place

of occurrence do not inspire confidence since no public witness was associated. He argued that the site plan is not according to the topography of the place of occurrence and it does not reflect the side-wall of the guardroom from where the blood stains on the tiles were seized. He argued that the *naksha mauka nazri* (rough site plan) prepared by the IO of the place of the murder does not reflect the *khunti* (peg) on which the jeans pant of A1 was hanging. He argued that the contradictions between the statements of Constable Narender (PW17) and IO Insp. Sanwar Mal (PW28) create doubt about the recovery. He argued that the Ld. ASJ failed to consider as to why A1 would make a second disclosure statement against himself. He argued that the blood group of the deceased could not be detected either on the jeans pant of A1 recovered from the guardroom, or on the knife and iron pipe recovered from a pit. He argued that Rajbir (PW8), Dhirender Kataria (PW10) and Bhagirath Sharma (PW11) who were employed as security guards with Supreme Construction Company did not support the case of the prosecution. He referred to the deposition of Munna Lal (PW15), the security supervisor who stated that on the crucial night Dhirender Kataria, Rajbir Randhawa, Amit Kumar, Mukesh, Naveen and Sanjay were on duty. He argued that this evidence clearly suggests that the appellant had no access to the room where the alleged incident took place. He further argued that Pankaj (PW4), who is the owner of the motorcycle No. DL 4S CA 6615 and his brother Deepak (PW5), did not support the case of the prosecution and thus the prosecution has failed to prove that the said motorcycle

was used by A1 in the crime. He argued that the recovery of the dead body vide seizure memo Ex.PW25/B is doubtful as the seizure memo did not bear the signature of any independent witness despite the complainant Jaganlal (PW1), the father of the deceased being present there. He argued that it was not possible for A1 to drag the deceased away from his house to the guard room of the Supreme Construction Company without being heard by the father of the deceased who was admittedly residing with the deceased and A2. He argued that it is against the normal human conduct that a wife would have long conversations with another man during late hours when her husband is at home. He argued that even the family members of the deceased i.e. PW1 (father), PW2 (brother) and PW3 (brother) have not supported the case of the prosecution.

10. It is argued by Ms.Anu Narula, learned counsel for A2 that neither the family members of the deceased including PW1 who resides in the same house nor any neighbor testified about her illegitimate or intimate relations with A1. She argued that mobile No. 8510036520 was not registered in the name of A2 and the prosecution did not adduce any evidence to establish that the said mobile phone was in her exclusive use and possession. She argued that this phone in fact belonged to the deceased. She submitted that even for the sake of arguments if it is assumed that the mobile No.8510036520 was used by A2, it does not lead to the presumption that she was the only user of the said number in the family. She argued that the fact of A2 filing the

missing person report is inconsistent with the hypothesis of her guilt and the same has not been appreciated by the Ld. ASJ. She submitted that her endeavor was to get her husband traced rather than to confuse or mislead the police. She argued that the Trial Court has based its findings on conjectures and surmises.

11. Per contra, it is vehemently argued by the learned APP for the State that the Trial Court has based its findings on the evidence available on record. He submitted that there is no merit in both the appeals.

12. We have heard the learned counsel for the parties.

13. Insp. Sanwar Mal (PW28) testified that on 5th September, 2013 at about 10:00 pm SI Beerpal Singh (PW25) informed the then SHO, PS Mundka that during the investigation of the case they apprehended A1 and Juvenile in Conflict with Law (JCL), Vicky and the apprehended persons disclosed that they had killed the deceased i.e. Sanjay and threw his body in a borewell at Tikri-Nizampur Road. On receiving this information, he along with SHO/Insp. Raj Kumar, SI Manoj Bhatia, HC Rajesh, Ct. Narender (PW17), Ct. Rajpal reached the Nizampur Road. The place was at a distance of about 1 km from the railway line on the Nizampur Road. They met SI Beerpal Singh (PW25) and HC Ashok (PW27) who had apprehended A1 and JCL Vicky. Both A1 and JCL stated that the dead body of Sanjay was in the borewell. On the direction of the SHO, PW28 took over the

investigation. He interrogated the apprehended persons, A1 and JCL wherein they conveyed that the dead body was in the borewell. He saw the dead body lying in the borewell. The SHO directed to call the fire brigade officials as well as the crime team. With the help of the available police staff and the fire brigade officials, the dead body was pulled out from the borewell. The body was identified at the spot by Jaganlal (PW1) to be that of his son. The dead body was seized vide seizure memo Ex.PW25/B and through Ct. Santram (PW24), the body was taken in official hearse van for preservation in the mortuary to Sanjay Gandhi Memorial Hospital.

14. SI Beerpal Singh (PW25) (since retired) deposed that in the evening of 5th September, 2013 while he was posted at PS Mundka, the complainant i.e. Jaganlal (PW1) came to the police station and made his statement regarding the abduction of his son Sanjay for which A2 had informed the police during noon time vide DD No.24A (Ex.PW7/A). He stated that Jaganlal (PW1) expressed his suspicion over A1 and Vicky, who were working as Security Guards in the Supreme Construction Company at Tikri Extension. He stated that PW1 expressed his suspicion over A2 as well. He recorded the statement of Jaganlal (Ex.PW1/A) and read over the same to him and Jaganlal (PW1) put his thumb impression. He recorded his endorsement Ex.PW25/A and sent the *rukka* to the duty officer at about 7:15 pm. An FIR was registered under Section 365 of the IPC. He along with the complainant (PW1) and HC Ashok (PW27)

proceeded with a copy of DD No.24A (Ex.PW7/A) for search of the suspected persons. They searched the cremation ground at Tikri Kalan when one informer passed on an information to him that A1 and JCL Vicky had murdered Sanjay on the night intervening 4/5th September, 2013 and they were hiding near Vaishno Mata Mandir Pond. They reached at the Vaishno Mata Mandir Pond. They apprehended A1 and JCL Vicky on identification of PW1. On interrogation, they disclosed that Sanjay was murdered by them in the guardroom of the Supreme Construction Company in Tikri Extension and his body was thrown by them in a borewell pit situated on the Tirki-Nizampur Road. Pursuant to this information, A1 and JCL led them to the borewell and with the help of a torch, PW25 could see a dead body lying in the borewell. He informed telephonically the facts to the SHO and conveyed the information to the duty officer at 10:10 pm and remained at the spot. He further testified that at about 10:35 pm, Insp. Sanwar Mal (PW28), Insp. Raj Kumar SHO, SI Manoj Bhatia, HC Devender, Ct. Narender (PW17) and Ct. Rajpal reached at the spot. He conveyed to them the facts and on the direction of the SHO, investigation was taken over by Insp. Sanwar Mal (PW28). He stated that the fire brigade and crime team officials were called and with the help of the fire brigade officials and beat staff, the dead body was taken out from the borewell, which was identified by the complainant Jaganlal (PW1) to be of his son Sanjay. He observed injury marks on the neck, chest, face and head. The photographs of the spot were taken by the crime team officials.

15. Ct. Parvinder (PW19), who was posted in the mobile crime team of the West District at the relevant time testified that the dead body was found in a well near the railway crossing and he took photographs of the dead body as well as of the two persons who were apprehended by the police.

16. Ct. Santram (PW24) also corroborated the statement of Insp. Sanwar Mal (PW28) and SI Beerpal Singh (PW25) that the dead body of a male person was taken out by the fire brigade officials from a borewell pit at Tikri-Nizampur Road across the railway track near the electricity pole. The dead body had injuries on its face, head and neck. He took the dead body to the Sanjay Gandhi Memorial Hospital by an ambulance and got preserved the body in the mortuary.

17. Dr.Munish Wadhawan (PW23), Specialized Forensic Medicines, Sanjay Gandhi Memorial Hospital, Nizampur conducted the post-mortem examination on the dead body of Sanjay on 7th September, 2013 at about 1:30 pm and testified that the dead body was brought with an alleged history of 'found dead' on 5th September, 2013. He found the following injuries on the body of the deceased:-

- “1. CUT THROAT WOUND, 17x5 cm, deep upto vertebral column bone, lying over front and lateral sides of neck with complete transaction of trachea and neck muscles at lower border of thyroid cartilage along with underlying blood vessels.
2. Bruise red coloured, 10x7 cm over back of left chest.

3. Lacerated wound, 5x1 cm x bone deep on right frontal region.
4. Lacerated wound, 9x1 cm, bone deep on right frontal parietal region.
5. Incised wound, 1.6 x 0.5 cm x muscle deep on left middle finger.
6. Incised wound, 1.4 x 0.3 cm x muscle deep on left index finger.”

18. In his opinion, the cause of death was due to haemorrhagic shock as a result of neck and head injuries that were ante-mortem in nature. He found that the injury No.1 was caused by a sharp edged weapon. After the post mortem examination he handed over the dead body to the IO along with the post mortem report (PMR) Ex.PW23/A. On 23rd September, 2013 after looking at the weapon of the offence i.e. the knife and the iron pipe and injuries mentioned in the PMR, he opined that injuries No.1, 5 and 6 were possibly caused with the knife examined or a similar one and injuries No.2 to 4 were possibly caused with the iron pipe examined or a similar one. It is thus clear that the death of the deceased was homicidal in nature.

19. A2 who is the wife of the deceased Sanjay approached the PS Mundka on 5th September, 2013 at about 12 noon and HC Ram Bhagat (PW7) recorded the missing report vide DD No.24A, which is Ex.PW7/A. According to the said missing report, A2 reported that the deceased left the house on 4th September, 2013 at 11:30 pm without informing anyone and was carrying his mobile No.9899075827. A2 also mentioned her mobile number as 8510036520 in the missing

report. Despite opportunity, both the appellants did not cross-examine the witness.

20. It is noticeable that Jaganlal (PW1) testified that his son Sanjay was killed 5/6 months ago and he is not aware of the identity of the person who killed him. He stated that A2, who was present in the Court during his deposition, must be aware of who killed Sanjay. He further testified that after the murder of his son, his corpse was thrown into a well situated at Nizampur Road, which was taken out by the police and he identified the body. He confirmed that he lodged a missing report, Ex.PW1/A which bears his thumb impression and thus corroborated the testimony of PW25 SI Beerpal Singh. He further testified that on 5th September, 2013 at 6:00 am, A2 informed him that the deceased had gone to answer the call of nature but never returned. He further stated that A2 lied to him in the morning. He stated that A2 had left the house at 3:00 am when he was sleeping in the other room.

21. The conduct of A1 to the extent of pointing out the spot of where they had thrown the dead body of the deceased to the police officials is relevant under Section 8 of the Indian Evidence Act, 1872 (IEA). In Para 8 of ***Prakash Chand vs. State (Delhi Administration)* 1979 (3) SCC 90**, the Hon'ble Supreme Court held that *"8.there is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement to a police officer in the course of an investigation which is*

*hit by Section 162 of the CrPC. What is excluded by Section 162 CrPC is the statement made to a police officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a police officer during course of investigation. For example, the evidence of circumstances, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were founded hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act (vide **Himachal Pradesh Administration vs. Om Prakash (1972) 1 SCC 249**).”*

22. The views expressed in the case of Prakash Chand (*supra*) were reiterated by the Hon’ble Supreme Court in **A.N.Venkatesh & Anr. vs. State of Karnataka (2005) 7 SCC 714:-**

“9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officers, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to

such conduct falls within the purview of Section 27 or not as held by this Court in ***Prakash Chand vs. State (Delhi Admn.) (1979) 3 SCC 90***. Even if we hold that the disclosure statement made by the accused appellants (Ex.P15 and P16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8.”

23. It has come in the deposition of PW25 and PW28 that A1 was arrested by memo Ex.PW25/C and his personal search was carried out vide memo Ex.PW25/D. On interrogation, A-1 made a disclosure statement (Ex.PW25/E). In the meanwhile, SI Anu also reached at the spot and conducted separate proceedings in respect of JCL Vicky.

24. Insp. Sanwar Mal (PW28) testified that A1 as well as JCL Vicky led them towards the fields situated along the Railway Line and got recovered blood stained shirt of JCL Vicky, which was seized by memo Ex.PW25/F. When they reached the premises of the Supreme Construction Company, A1 as well as JCL pointed out towards the Guard Room where they had committed the murder of Sanjay. The Pointing Out Memo Ex.PW25/G was prepared. He found that the Guard Room had since been washed but the blood stains were still visible on one of its walls. He had scratched out the portion of the blood stained wall from the Guard Room vide memo Ex.PW25/K. He had also scratched earth control from the wall of the Guard Room vide memo Ex.PW25/L. Insp. Sanwar Mal (PW28) deposed that A1 and JCL further led them to the cremation ground at Village Tikri and pointed out the spot where they had kept the deceased's body after

killing him. A pointing out memo Ex.PW25/H was prepared. He also noticed blood stains on the ground in the cremation ground at the spot pointed out by A1 and JCL and lifted blood stained earth control by memo Ex.PW25/N.

25. Insp. Sanwar Mal (PW28) further testified that A1 and JCL Vicky led them to the house of the deceased Sanjay where A1 pointed out that it was the house from where they had dragged the deceased Sanjay to the Guard Room of the Supreme Construction Company and prepared a memo Ex.PW25/J.

26. Upon further interrogation by Insp. Sanwar Mal (PW28), A1 made a disclosure statement (Ex.PW17/A) disclosing some new facts. PW28 stated that pursuant to the supplementary disclosure statement, A1 took them to the Security Guard Room of the Construction Company site where he dug out a kitchen knife from the ground on the south side outside the guard room. It was a blood stained knife, approximately 18.5 cm in length with a blade of about 8.5 cm. The knife was seized vide seizure memo Ex.PW17/B. A1 further got recovered a blood stained iron pipe from a pit on the eastern side at about 15-20 steps from the guard room, which was seized by seizure memo Ex.PW17/C. A1 further led Insp. Sanwar Mal (PW28) to his house in Village Tikri Kalan where he got recovered one mobile phone, which he would use to talk to A2 and it was seized by seizure memo Ex.PW17/E. He also got recovered a T-shirt and a *Payjama*,

which he was wearing at the time of commission of the offence from a 'Khunti' (peg) in his house and seized by seizure memo Ex.PW25/P.

27. A1 further led them to the house of his uncle, Virender, a resident of Village Tikri Kalan and got recovered a motorcycle DL 4S CA 6615, which was seized vide seizure memo Ex.PW-17/F (the Trial Court observed that witness could not tell the complete number of the motorcycle, however, the existence and identity of the motorcycle No. DL 4S CA 6615 was not disputed by the appellants). A1 also got recovered the clothes of JCL lying in the Guard Room of Supreme Construction Company, which were seized by seizure memo Ex.PW-17/D.

28. It is noticed from the deposition of Insp. Sanwar Mal (PW28), SI Beerpal (PW25), Ct.Narender (PW17) and HC Ashok Kumar (PW27) that they were present at the time the disclosure statement was made by A1 and at the time of the pointing out of the scene of crime where the murder of the deceased was committed, pointing out the location of the cremation ground where the body of the deceased was kept and the recovery of the knife and iron pipe and clothes. There is consistency and coherence in the statement of Insp. Sanwar Mal (PW28), SI Beerpal (PW25), Ct.Narender (PW17) and HC Ashok Kumar (PW27). Even in their respective cross-examination they remained firm to their stand and the defence could not cause any dent in their respective testimonies.

29. Blood stained cemented pieces seized from the Guard Room of the Supreme Construction Company and a shirt belonging to JCL seized from the field were examined by the Forensic Science Laboratory (FSL) by reports Ex.P1 and Ex.P2 and human blood of 'B' Group was found thereon.

30. Here it would not be out of place to refer to Section 27 of the IEA which reads as under: -

“27. How much of information received from accused may be proved. – Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

31. For application of Section 27 of the IEA, admissible portion of confessional statement has to be found as to a fact which was the immediate cause of discovery and only that would be a part of legal evidence and not the rest. In a statement if something new is discovered or recovered from the accused, which was not in the knowledge of the police before disclosure statement of the accused, is admissible in the evidence.

32. In **State (NCT of Delhi) Vs. Navjot Sandhu, 2005 (11) SCC 600**, the Hon'ble Supreme court has considered the question of discovery of a fact referred to in Section 27 of the IEA. The Apex Court has

considered a plethora of decisions and explained the decision in the often cited case of Privy Council in **Pulukuri Kottaya Vs. Emperor**, AIR 1947 PC 67, and held as under: -

“125. We are of the view that *Kottaya* case is an authority for the proposition that 'discovery of fact' cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place.

126. We now turn our attention to the precedents of this Court which followed the track of *Kottaya* case. The ratio of the decision in *Kottaya* case reflected in the underlined passage extracted supra was highlighted in several decisions of this Court.

127. The crux of the ratio in *Kottaya* case was explained by this Court in *State of Maharashtra Vs. Damu*. Thomas J. observed that:

"The decision of the Privy Council in *Pulukuri Kottaya Vs. Emperor* is 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".

In *Mohd. Inayatullah vs. State of Maharashtra*, Sarkaria J. while clarifying that the expression "fact discovered" in Section 27 is not restricted to a physical or material fact which can be perceived by the senses, and that it does include a mental fact,

explained the meaning by giving the gist of what was laid down in *Pulukuri Kottaya* case. The learned Judge, speaking for the Bench observed thus:

"Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see *Pulukuri Kottaya v. Emporer; Udai Bhan vs. State of U.P.*)"

33. In another judgment ***State of Maharashtra vs. Damu S/o Gopinath Shinde & others*, 2000 (6) SCC 269**, the Apex Court observed that the statement leading to the discovery of a fact that the accused had carried a dead body from the scene of crime by a motorcycle up to a particular spot is admissible in evidence. Para 35 to 38 of the judgment are relevant and read as under: -

"35. The basic idea embedded in Section 27 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-inculpatory 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 the Privy Council in *Pulukuri Kottaya v. Emperor* [AIR 1947 PC 67 : 74 IA 65] is 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.

36. 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 A-3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motorcycle.

37. How did the particular information lead to the discovery of the fact? No doubt, recovery of dead body of Dipak from the same canal was antecedent to the information which PW 44 obtained. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motorcycle of A-2 Guruji, it can safely be held that the investigating officer discovered the fact that A-2 Guruji had carried the dead body on that particular motorcycle up to the spot.

38. In view of the said discovery of the fact, we are inclined to hold that the information supplied

by A-2 Guruji that the dead body of Dipak was carried on the motorcycle up to the particular spot is admissible in evidence. That information, therefore, proves the prosecution case to the abovementioned extent.”

34. In view of the above settled legal position, the Ld. ASJ has rightly concluded that pointing out the house from where the deceased was taken to the guard room and killed, the cremation ground where the dead body of the deceased Sanjay was kept and the borewell where the dead body was thrown are facts relevant under Section 8 of the IEA.

35. In **State of Maharashtra Vs. Suresh, (2000) 1 SCC, 471**, it was noted that after the rape and murder of 4 years old female child, the body was dumped in the field. The accused was convicted and condemned to death penalty by the Sessions Court but was exonerated by the DB of the High Court of Bombay. State of Maharashtra, not having reconciled with the clean chit granted to the accused, filed an SLP before the Hon'ble Supreme Court. **The Apex Court noted that one of the formidable incriminating circumstance against the respondent/accused was that the dead body was recovered on his pointing out. The statement of the respondent/accused which led to the recovery of the dead body was held to be admissible.** The Hon'ble Supreme Court observed that there could be three possibilities where the accused points out towards the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it;

secondly he would have seen somebody else concealing it; and thirdly he would have been told by another person that it was concealed there by other person. After the accused declined to tell the criminal court about his knowledge regarding the concealment 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 an explanation as to how he came to know of such concealment and if he refrains from telling the court as to how 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 and such an interpretation is not inconsistent with the principle embodied in Section 27 of the IEA. The Supreme Court found that the prosecution has presented such reliable and formidable circumstances forming into a complete chain and pointing unerringly to the irresistible conclusion that the little girl was raped and killed by respondent/accused, ended in unmerited acquittal from the Division Bench of the High Court.

36. Recently in the case of **Charandas Swami vs. State of Gujarat, (2017) 7 SCC 177**, the Hon'ble Supreme Court after analyzing its earlier decisions on the same subject reaffirmed the view that the disclosure statement made by one of the accused pursuant to which the dead body of the deceased is recovered is admissible in evidence under Section 27 of the IEA.

37. In the present case A1 has failed to give an explanation for his knowledge about the concealment of the dead body on account of the last two possibilities as enumerated in the case of **State of Maharashtra vs. Suresh (supra)**. He has not explained as to how he came to know about the dead body being in the borewell. A1 took the police to the borewell and pointed out to the spot where the dead body of the deceased was thrown. This conduct is not only relevant under Section 8 of the IEA as held by the Supreme Court in the case of **Prakash Chand (supra)** but is also a fact discovered which is admissible in evidence under Section 27 of IEA as held by Apex Court in **Suresh (supra)**. The factum of the recovery of the knife, iron pipe, jeans pant of the JCL Vicky from the Guard Room, his mobile phone, clothes and said motorcycle in pursuance to the disclosure statement, made by A1 are admissible under Section 27 of the IEA.

Role of A2 in the crime:

38. It is noticeable that A2 did not inform her father-in-law i.e. Jaganlal (PW1) about the deceased being missing until 6:00 am of the next morning even though he was sleeping in the same house in a separate room. At 6:00 am she told him that the deceased had gone to answer the call of nature whereas in the DD No.24A (Ex.PW7/A) lodged on 5th September, 2013 at 12 noon she stated that her husband left the house at 11:30 pm on the previous night i.e. 4th September, 2013. Insp. Sanwar Mal (PW28) has admitted the suggestion given by A2 *“it is correct that accused Poonam gave a missing report in the PS*

Mundka regarding missing of the deceased on 05.09.2013.”

Deposition of PW7, who recorded DD No. 24A (Ex.PW7/A) at the instance of A2, wherein A2 submitted her own mobile number as 8510036520 and that of her husbands’ as 9899075827 and the time of her husband leaving the house on 4th September, 2013 to be 11.30 pm, went un rebutted and unchallenged during his cross-examination. A2 also admitted having lodged the missing report in the grounds of appeal.

39. Pursuant to the disclosure statement, A1 and JCL led the police party to the house of the deceased Sanjay and pointed it out to be the house from where the deceased was dragged to the Guard Room of the Supreme Construction Company. Insp. Sanwar Mal (PW28) testified that A2 was available in the house and lady Ct.Meena (PW18) interrogated her. She was arrested by arrest memo Ex.PW18/A. Her personal search was carried out by PW18 vide memo Ex.PW18/B. A mobile phone was recovered from the personal search of A2, which was seized by memo Ex.P18/C.

40. The testimony of Insp. Sanwar Mal (PW28) was corroborated by W/Ct.Meena (PW18) and SI Beerpall Singh (PW25) to the effect that A2 was arrested from her house i.e. House No. 46-D, Tikri Kalan Extension, near *Shamshan Ghat* on 6th September, 2013. PW18 conducted the personal search of A2 on the direction of Insp. Sanwar Mal (PW28) and the mobile phone recovered from her personal search

was seized and sealed vide memo Ex.PW-18/C. Noticeably, the seizure of the mobile phone and the personal search of the A2 was not disputed in the cross-examination of Insp. Sanwar Mal (PW28), Ct.Meena (PW18) and SI Beerpal Singh (PW25).

41. Israr Babu (PW14), Alternate Nodal Officer, Vodafone Mobile Services Limited, C-45, Okhla Phase-II, New Delhi-110020 has proved the Prepaid Customer Information Form (CIF) (Ex.PW14/1), and it is clear that on the request of A1, the mobile number 9811264013 was allotted to him on 18th April, 2013. Ex.PW14/2 is the copy of the voter ID card of A1. The CDR of the said mobile phone number 9811264013 is Ex.PW-14/3 for the period, from 2nd June, 2013 to 6th September, 2013 with a certificate Ex.PW14/4 u/s 65-B of the IEA.

42. PW13 Pawan Singh has brought the Customer Application Form (CAF) for the prepaid connection Ex.PW-13/1, submitted by the deceased Sanjay Kumar s/o Jagan Lal on 3rd April, 2013. A mobile number 8510036520 was allotted. The CDR of this mobile for the period from 1st June, 2013 to 5th September, 2013 is Ex.PW-13/3 with a certificate Ex.PW13/4 u/s 65B of the IEA.

43. The CDR of Mobile No.8510036520 under the use of A2 and mobile no. 9811264013 issued to A1 reflect that they have been in touch since 9th July, 2013 till 4th September, 2013. Records of CDR of both the mobile phones reflect that they spoke to each other over the

phone 8 times on 1st September, 2013, 3 times on 2nd September, 2013, once on 3rd September, 2013 and 6 times on 4th September, 2013 i.e. the date of incident. Not only the frequency but the duration of their conversations was found to have increased over the period of time. This clearly established that both the appellants were in regular touch with each other. On 5th September, 2013, while lodging the missing report of her husband, A2 stated that her husband left the house at 11.30 pm on 4th September, 2013 whereas she informed her father-in-law i.e. Jagan Lal (PW1) that the deceased had gone to answer the call of the nature at 6 am, which clearly reflects her *mens rea* in her attempt to afford explanation of lodging the missing report of her husband. The cross-examination of Jagan Lal (PW1) by the defence does not dispute that she informed him about the deceased leaving the house at 6 am to answer the call of nature. The use of the mobile phone no.8510036520 by A2 is further proved from the fact that the calls were also made on 5th September, 2013 several times with the last call being made at 17.00.16 hours.

44. It is well settled that a criminal conspiracy is hatched in secrecy and prosecution cannot be burdened to establish the same with direct piece of evidence. The prosecution can discharge its onus by relying upon the circumstances to establish the existence of criminal conspiracy, however, the circumstances relied upon by the prosecution have to be of a definite character which unerringly point towards guilt of the accused. In the case of criminal conspiracy, the court has to

infer certain facts and circumstances. In considering the question of criminal conspiracy, it is not always possible to give affirmative evidence about the date of formation of conspiracy, about the persons who took part in the formation of conspiracy, about the object which the conspirators set before themselves as the object of conspiracy and the manner in which the object of conspiracy was to be carried out. All this is necessarily a matter of inference. It is not necessary that there should be an express proof of the agreement, as from the acts and conduct of the parties, the agreement can be inferred.

45. At this stage it would be relevant to advert to Section 120A which reads as under:-

"120A. Definition of Criminal Conspiracy: When two or more persons agree to do, or cause to be done, -

- (1) an illegal act, or
 - (2) an act which is not illegal by illegal means
- such an agreement is designated as conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

46. On a bare perusal of Section 120A of the IPC, it is manifestly clear that for imputing a person as a conspirator there has to be existence of an agreement between two or more persons either to do an

illegal act or to do a legal act through illegal means. It is a well settled proposition of law that agreement of conspiracy can be proved either by direct evidence or by circumstantial evidence or by both and despite that an offence of conspiracy cannot be deemed to have been established on mere suspicion, surmises or inferences which are not supported by cogent or acceptable evidence. Reference is made to the judgment of the Hon'ble Supreme Court in **State of Kerala v. P. Sugathan & Another (2000) 8 SCC 203**, wherein it has been observed:-

"12. We are aware of the fact that direct independent evidence of criminal conspiracy is generally not available and its existence is a matter of inference. The inferences are normally deduced from acts of parties in pursuance of purpose in common between the conspirators. This Court in *V.C. Shukla v. State (Delhi Admn.)* (1980) 2 SCC 665 held that to prove criminal conspiracy there must be evidence direct or circumstantial to show that there was an agreement between two or more persons to commit an offence. **There must be a meeting of minds resulting in ultimate decision taken by the conspirators regarding the commission of an offence and where the factum of conspiracy is sought to be inferred from circumstances, the prosecution has to show that the circumstances giving rise to a conclusive or irresistible inference of an agreement between the two or more persons to commit an offence.** As in all other criminal offences, the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt. **The circumstances in a case, when taken together on their face value, should indicate the meeting of the minds between the**

conspirators for the intended object of committing an illegal act or an act which is not illegal, by illegal means. A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. **It has to be shown that all means adopted and illegal acts done were in furtherance of the object of conspiracy hatched. The circumstances relied for the purposes of drawing an inference should be prior in time than the actual commission of the offence in furtherance of the alleged conspiracy."**

47. In **Central Bureau of Investigation, Hyderabad v. K. Narayana Rao, (2012) 9 SCC 512**, while dealing with the same subject matter Apex Court observed:-

"24. The ingredients of the offence of criminal conspiracy are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing of an illegal act or for doing, by illegal means, an act which by itself may not be illegal. In other words, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both and in a matter of common experience that direct evidence to prove conspiracy is rarely available. **Accordingly, the circumstances proved before and after the occurrence have to be considered to decide about the complicity of the accused.** Even if some acts are proved to have been committed, it must be clear that they were so committed in pursuance of an agreement made between the accused persons who were parties to the

alleged conspiracy. Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation. In other words, an offence of conspiracy cannot be deemed to have been established on mere suspicion and surmises or inference which are not supported by cogent and acceptable evidence."

48. A DB of this Court in the case of **Rakesh Kumar & Ors. v. State, 2009 (163) DLT 658** after referring to a plethora of Supreme Court Judgments on Criminal Conspiracy eloquently summarized the law that exists with regards Criminal Conspiracy. The relevant para is reproduced as under:

"**133.** After survey of the case law on the point, following legal principles pertaining to the law of conspiracy can be conveniently culled out:

A. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy [See the decision of Supreme Court *State v. Nalini*, (1999) 5 SCC 253).

B. The very agreement, concert or league is the ingredient of the offence. It is not necessary that all

the conspirators must know each and every detail of the conspiracy as long as they are co-participants in the main object of the conspiracy. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse role to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role [see the decisions

of Supreme Court *Yash Pal Mittal v. State of Punjab*, (1977) 4 SCC 540 : AIR 1977 SC 2433 and *State v. Nalini*, (supra)].

C. It is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the gist of the crime of conspiracy.

D. **The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy. Since a conspiracy is generally hatched in secrecy, it would quite often happen that there is no evidence of any express agreement between the conspirators to do or cause to be done the illegal act. For an offence under Section 120B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act; the agreement may be proved by necessary implication.** The offence can be only proved largely from the inference drawn from acts or illegal omission committed by the conspirators in pursuance of a common design. The prosecution will also more often rely upon circumstantial evidence. It is not necessary to prove actual meeting of conspirators. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the

unlawful design is sufficient. **Surrounding circumstances and antecedent and subsequent conduct of accused persons constitute relevant material to prove charge of conspiracy** [see the decisions of Supreme Court *Shivnarayan Laxminarayan Joshi v. State of Maharashtra*, (1980) 2 SCC 465 : AIR 1980 SC 439; *Mohammad Usman Mohammad Hussain Maniyar v. State of Maharashtra*, (1981) 2 SCC 443 : AIR 1981 SC 1062; and *Kehar Singh v. State*, (1988) 3 SCC 609 : AIR 1988 SC 1883].

49. It is clear that even though there is no direct evidence to prove the criminal conspiracy between A1 and A2, the Court can look into the surrounding circumstances and their antecedent and subsequent conduct to prove the charge of criminal conspiracy. The prosecution has placed on record, in form of CDRs, a tabulation of the multiple conversations between A1 and A2 dating back to 9th July, 2013 till 4th September, 2013. On 4th September, 2013, A1 & A2 had a conversation even at 23:21:17 hours and 23:18:46 hours for 44 and 57 seconds respectively. During the day, on 4th September, 2013, they talked to each other at 6:18:19 hours (17 seconds), 8:22:43 (428 seconds) 9:58:41 (112 seconds) and 12:28:12 (516 seconds). A2 has given the mobile number 9899075827 having been carried by deceased with him in her missing report (Ex.PW7/A) but the CDR of her mobile No.8510036520 (Ex.P13/3) for 4th September, 2013 does not indicate any attempt by her to call the deceased even once after 12:25:52 hours on that day. Further, the dubious conduct of A2 after the deceased went missing is also on record in the form of testimony

of PW1 (the father of the deceased) wherein he stated that on 5th September, 2013 at about 06:00 AM, A2 informed him that the deceased had gone to answer the call of nature and never returned whereas in DD No. 24A that she lodged at 12:00 noon on the same day (Ex.PW7/A) she stated that her husband had been missing since 11:30 pm on 4th September, 2013. Additionally, PW1 has also deposed that A2 left the house at about 03:00 am in the night.

50. Both the appellants failed to provide a reasonable explanation of their prolonged and multiple conversations over the mobile phone since 9th July, 2013 till the time the deceased went missing. The lack of an explanation coupled with the dubious behavior of A2 by not informing her father-in-law residing in the same house about the deceased having gone missing since 11.30 pm on 4th September, 2013 is relevant as subsequent conduct and inferences from such circumstances may be drawn. The CDRs of the said mobile numbers of the appellants have been proved. The deposition of PW1 to the effect that at 6:00 am A2 told him about his son not returning after having gone to answer the call of nature, and that A2 had left the house at about 3:00 am in the night went un-rebutted and is relevant. There exists no reasonable explanation as to why A2 would lie about her missing husband to her husband's own father and why she would leave the house at 03:00 am. Further, there is no reasonable explanation provided by the appellants or one that this court can think of as to why both the appellants would talk to each other on the phone

immediately prior to the deceased going missing at 23.21.17 hours and 23.18.46 hours on 4th September, 2013. The incriminatory evidence was put to both the appellants separately u/s 313 of Cr.P.C., by the Ld. ASJ. While answering Q.No.92, 93 & 94, A1 stated it's a matter of record regarding his CAF with ID proof Ex.P14/1 & Ex.PW14/2 and CDR (Ex.PW14/3) and added that the record was fabricated and false at the instance of the Investigation Officer. Deposition of PW14 (Vodafone Service Provider) reflects that no such suggestion was given in his cross-examination by A1. While answering Q.No.138 about his conversation from his mobile No.9811264013 on mobile of A2 i.e. 8510036520 on 4th September, 2013, he stated it to be incorrect and added that he has no relations with A2. A2 admitted having gone to lodge the missing person report of her husband Sanjay (deceased). While answering Q. No.59, she stated that there was no call or conversation between her and A1. While answering Q. No.72 she stated that she did not use the phone. While replying to Q.NO.138 that as per the CDR of her mobile No.8510036520 and of A1 (9811264013) they had made calls to each other, she replied it to be incorrect and added that she had no relation with A1. These explanations given by A1 and A2 are obviously false in view of the CDR record of both the mobile numbers. Thus, reliable inferences from such circumstances may be drawn as A1 and A2 have failed to deliver any other reasonable explanation u/s 106 of the IEA and in this case the prior circumstances and subsequent conduct point towards the criminal conspiracy between them. The false explanation given by A1

and A2 are in itself additional links in the chain of circumstances as has been decided by the Apex Court in many cases.

51. In **Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116** it was held that a false explanation or false plea taken by the accused can be used as an additional link in the chain of circumstantial evidence subject to the satisfaction of three essential conditions, namely, (i) various links in the chain of evidence led by the prosecution have been satisfactorily proved, (ii) the said circumstance points to the guilt of the accused with reasonable definiteness, and (iii) the circumstance is in proximity to the time and situation.

52. In the case of **Deonandan Mishra v. State of Bihar (1955) 2 SCR 570**, the Supreme Court observed that:

“9....It is true that in a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain.”

53. We found that the conduct of A1 in pointing out the borewell where he along with JCL had thrown the body of the deceased is relevant u/s 8 of the IEA. Subsequent conduct of A1 by pointing out the house from where the deceased was taken to the Guard Room of the Supreme Construction Company and killed, and the pointing out of the *Shamshan Ghat* where the body of the deceased was kept after the murder is also relevant u/s 8 of the IEA. Based on his disclosure statement, A1 got recovered the knife and the iron pipe used in the commission of crime and also the blood stained clothes of JCL. These facts are admissible in evidence u/s 27 of the IEA. Further, only A1 had knowledge of the whereabouts of the body of the deceased and since he failed to explain the same to the Trial Court, the Court in view of Suresh's case (*supra*), can make a presumption that body of the deceased was concealed by him and the same is a well justified course to be adopted by the criminal court and is also admissible in evidence u/s 27 of the IEA. All these circumstances and the conduct of A1 unerringly and satisfactorily prove the guilt of A1 beyond reasonable doubt. The phone number 9811264013 was issued to A1 and phone no. 8510036520 although registered in the name of the husband of A2 i.e. the deceased, was being used by A2. The prosecution has also unerringly proved that A1 and A2 have been in touch with each other over the phone since 9th July, 2018. On the date of the incident i.e. 4th September, 2013, they have talked to each other at 6:18:19 hours, 8:22:43, 9:58:41, 12:28:12, 23:21:17 hours and 23:18:46 hours. It is clear that they spoke to each other immediately

before the deceased went missing. Since, they have given false explanation in respect of their conversation by stating that the records are fabricated and false and they have no relation with each other, their false explanations and false pleas are in itself additional links in the chain of circumstances. A2 lodged a missing person report on 5th September, 2013 wherein she stated that the deceased had not returned home since 11:30 pm on 4th September, 2013. When her husband carrying the mobile number 9899075827 did not return after 11.30 pm on 4th September, 2013, A2 (using the mobile number 8510036520) did not even make an attempt to call and find out about the whereabouts of her husband. A2 in her missing report Ex.PW7/A lodged on 5th September, 2013 mentioned that the deceased left the house on 4th September, 2013 at 11:30 pm but at 6:00 am on 5th September, 2013 she lied to her father in law that the deceased had gone to answer the call of nature.

54. There is consistency in the facts established by the prosecution, which only leads to the hypothesis of the guilt of A1 and A2 and the chain of evidence is so complete as to not leave any reasonable ground for a conclusion consistent with the innocence of A1 and A2.

55. In view of the above discussion, we found that the prosecution has proved its case against the appellants upto the hilt. There is no merit in both the appeals which are accordingly dismissed.

56. Trial Court Record be sent back forthwith with the certified copy of this judgment.

(VINOD GOEL)
JUDGE

(S. MURALIDHAR)
JUDGE

OCTOBER 8th, 2018
dkb/shailendra

