

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

1. CRA-D-1027-DB-2010

Dinesh and others

... Appellants

Versus

State of Haryana

... Respondent

2. CRA-D-1120-DB-2010

Ombir Singh @ Neetu

... Appellant

Versus

State of Haryana

... Respondent

3. CRA-D-211-DB-2011

Om Parkash @ Motta

... Appellant

Versus

State of Haryana

... Respondent

Reserved on : 30.01.2019
Date of decision : 08.02.2019

CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA
HON'BLE MR.JUSTICE KULDIP SINGH

Present: Mr.Sudhir Sharma, Advocate & Mr.Ram Krishan Rana, Advocate
for the appellants in CRA-D-1027-DB-2010.

Ms.Puja Chopra, Advocate
for the appellant in CRA-D-1120-DB-2010.

Mr. Tapan Kumar Yadav, Advocate
for the appellant in CRA-D-211-DB-2011.

Mr. Vishal Garg, Addl.A.G. Haryana.

RAJIV SHARMA, J.

Since common questions of law and facts are involved in the

aforesaid three appeals, therefore these are taken up together and disposed of by a common judgment.

2. These three appeals are instituted against the judgment and order dated 05.10.2010 and 08.10.2010 rendered by the learned Additional Sessions Judge, Rewari, in Sessions Case No.33 of 2008 whereby the appellants, who were charged with and tried for offences punishable under Sections 302, 201 read with Section 34 and 120-B of the Indian Penal Code (in short 'IPC'), have been convicted and sentenced as under:-

Under Section	Sentence
302/34 IPC	To undergo rigorous imprisonment for life and to pay a fine of Rs.5000/- each, in default of payment of fine, to further undergo rigorous imprisonment for one year each.
201/34 IPC	To undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.1000/- each, in default of payment of fine, to further undergo rigorous imprisonment for three months each.
120-B IPC	To undergo rigorous imprisonment for life and to pay a fine of Rs.5000/- each, in default of payment of fine, to further undergo rigorous imprisonment for one year each.

All the sentences were ordered to run concurrently.

3. The case of the prosecution in a nutshell is that Ram Kumar son of Pahlu Ram informed the police on 03.09.2008 that he was agriculturist by profession. On 03.09.2008 at about 11.00 A.M., he was informed that a dead body was lying in the forest of his village. Thereafter he along with some people of the village had gone to the forest and noticed that a dead body of unknown person was lying and a rope was found wrapped around his neck. The legs of the deceased were found burnt. Two plastic glasses, one bottle of English liquor marka ACP and one soft drink bottle were lying near the dead body. The person was murdered by unknown persons by strangulation and burning. An FIR under Sections 302, 201, 120-B, 34 IPC was registered in police station Jatusana against unknown persons. Initially

the investigation of the case was carried out by Inspector Ram Kumar. The autopsy of the dead body was got conducted from the Civil Hospital, Rewari. The dead body was identified by Mahender Kumar and Virender Singh. Two plastic glasses, one bottle (Dew) and one English liquor bottle marka ACP lying near the dead body of the deceased, were taken into possession. Kulwant Singh ASI Incharge, Police Post No.2, Ambala City, arrested accused Ombir Singh @ Neetu in case FIR No.232 dated 23.08.2008 under Sections 363, 366, 344, 506 IPC, Police Station City Ambala. He made a disclosure statement to the effect that his friend Om Parkash had illicit relation with wife of deceased Lambu resident of Kurahwata. Om Parkash had asked him to finish Lambu. He discussed the matter with his friends Govind, Dinesh and Mukesh. They all demanded *Supari* (contract killing amount) of Rs.1 lac from Om Parkash for killing Lambu. Om Parkash agreed. All four had gone to Mahendergarh in the black Esteem car of Sandeep. The car was being driven by accused Dinesh. Om Parkash gave them Rs.1 lac. At about 11.00 A.M. Om Parkash on the pretext of showing the land to them, sent Lambu in their car. They all four brought Lambu near forest of Kanina. Lambu was strangled with *chadar* (bed sheet). Thereafter production warrant of Ombir Singh @ Neetu was obtained. Mobile phone was recovered. Accused Dinesh, Mukesh and Govind were also arrested. They got the place of occurrence demarcated on 10.09.2008. Accused Govind also got recovered one pistol, 22 live cartridges, one empty cartridge, arm licence, as per his disclosure statement. Accused Dinesh and Mukesh as per their disclosure statements, got recovered Rs.20,000/- each. Govind also got recovered Rs.30,000/-. The investigation was completed. The challan was put up after completing all

the codal formalities.

4. The prosecution examined a number of witnesses. Statements of accused were recorded under Section 313 Cr.P.C. They denied the case of prosecution. The appellants examined five witnesses in support of their defence. The appellants were convicted and sentenced, as noticed hereinabove. Hence these appeals.

5. Learned counsel appearing on behalf of the appellants have vehemently argued that the prosecution has failed to prove the case against the appellants.

6. Learned counsel appearing on behalf of the State has supported the prosecution case.

7. We have heard learned counsel for the parties and have gone through the judgment and record very carefully.

8. PW-2 Ram Kumar testified that on 03.09.2008 at 11.00 A.M. he received information that a dead body was lying in the Bani of village Motla Khurd. He went to the spot. It appeared that the person was strangled. One leg was burnt. Police had reached the spot. His statement was recorded. Two plastic glasses and one bottle of Dew were found at the spot.

9. PW-3 Birender Singh identified the dead body of Naresh.

10. PW-4 Bhup Singh deposed that on 03.09.2008 at about 11.00 A.M., they came to know that a dead body was lying in the Bani of their village. His wife Smt.Sharda Devi was the Sarpanch of village. An intimation was forwarded to P.S. Jatusana. The police reached the spot. Two plastic glasses, one bottle of Dew and one ACP wine bottle were recovered.

Memo was prepared.

11. PW-7 Badan Singh HC deposed that on 10.09.2008 he was posted as Head Constable at P.S. Jatusana. He was joined in the investigation. Accused Dinesh made a disclosure statement Ex.PE. He signed the same. Accused Mukesh also made a disclosure statement Ex.PF. Govind also made disclosure statement Ex.PG. They got demarcated the spot of the crime. These accused were arrested on 10.09.2008. The accused had also disclosed that they could get the money recovered from their houses. Govind had also disclosed that he had thrown the phone after breaking it. In cross-examination, he deposed that Sarpanch and other villagers were present throughout the interrogation. He did not remember whether these persons had signed memos Ex.PE to PH.

12. PW-10 Gyan Chand HC deposed that he was posted at Police Station Ambala City. Accused Ombir Singh was in custody of Police Station Ambala City. He was brought out and was interrogated in case FIR No.232 dated 23.08.2008 under Sections 363, 366, 344, 506 IPC, Police Station Ambala City. Ombir Singh stated that on 13.08.2008, Kamlesh daughter of Rampal was taken by him by way of intimidation in order to sell her. He took her to the residence of his friend Om Paraksh. Thereafter he and Om Parkash left the girl at the residence of sister of Om Parkash namely Ekta wife of Sohan. They could not sell the girl there. On 05.09.2008 the girl was brought back to Ambala Cantt. They were arrested from there. On 06.09.2008 accused Ombir Singh was interrogated. He told that his friend Om Parkash was having illicit relations with the wife of Naresh alias Lambu. In order to eliminate her, Om Parkash gave Rs.1 lac as ransom to Ombir Singh. On 02.09.2008, Ombir, Naresh, Govind and some other

persons, whose names he did not remember, made a plan. They went to the residence of Om Parkash in Esteem car black in colour. Lambu was made to sit inside the car by Om Parkash. Om Parkash gave a sum of Rs.1 lac to Ombir Singh. They took him in car in the jungle of Kanina. *Chadar* was put around the neck of Lambu. He was killed. Money was distributed amongst themselves. In his cross-examination, he deposed that no respectable or neighbour of Police Station City Ambala was called to join the interrogation proceedings.

13. PW-12 Sat Narain ASI deposed that he was posted as ASI at Police Station Jatusana, on 06.09.2008. On that day, he had gone to Ambala. Accused Ombir Singh was arrested. He was joined in the investigation by SHO Ram Kumar on 07.09.2008. He disclosed his involvement in this case. He also disclosed that Rs.20,000/- each were shared by each accused. The mobile of the deceased was thrown away after breaking it. He could get recovered Rs.16,000/- and his mobile phone which were concealed in his house. His disclosure statement is Ex.PJ. Mobile phone and Rs.16,000/- were recovered vide memo Ex.PJ/1. Accused Om Parkash was also arrested. He made disclosure statement Ex.PK. He got recovered a broken mobile phone, battery and pass book. Accused Dinesh also made disclosure statement before the SHO that he had concealed Rs.20,000/- in his house. He could get it recovered. His disclosure statement is Ex.PL. Accused Mukesh Kumar also made disclosure statement Ex.PM to the effect that he had concealed Rs.20,000/-. He could it get recovered. Accused Govind had also made disclosure statement Ex.PN on 11.09.2008. He also made disclosure statements Ex.PN/1 and Ex.PN/2 to the effect that he could get

the Esteem car recovered. A pistol was also recovered at his instance. It was taken into possession. Accused also suffered another disclosure statement Ex.PN/4. Pistol was recovered on the basis of statement made by accused Govind. In his cross-examination, he admitted that Ombir was arrested at about 1.00 P.M. He was interrogated in the Court premises of Ambala. No independent witness was associated during his interrogation. He was interrogated on second floor of Court Complex, Ambala. He was interrogated for about one hour. He also admitted that mobile and sum of Rs.16,000/- were not under lock and key but were lying in the corner of the house. The house of Ombir was surrounded by other residential houses. Though several villagers were present at the time of recovery, but they expressed their inability to join the investigation. Accused Govind was arrested from the bus stand of village Babepur on 10.09.2008 at about 11.00 A.M. No respectable of village Babepur was called at the time of interrogation of Govind at bus stand Babepur. Accused Mukesh was arrested on 09.09.2008. His disclosure statement Ex.PM was recorded. Several villagers were present but they were not joined during the course of interrogation. Accused Dinesh was arrested on 09.09.2008. His disclosure statement Ex.PL was recorded. Several villagers were present during the interrogation of Dinesh but none was joined.

14. PW-13 Kulwant Singh testified that during interrogation of Ombir Singh, he suffered a disclosure statement to the effect that his friend Om Parkash was having illicit relations with the wife of Naresh alias Lambu. In order to eliminate her, Om Parkash gave the amount of Rs.1 lac as ransom money to Ombir Singh. Thereafter a conspiracy was hatched.

They went to the residence of Om Parkash in Esteem car. Lambu was made to sit inside the car by Om Parkash. Om Parkash gave the amount of Rs.1 lac to Ombir Singh. They took Lambu in the car in the jungle of Kanina. Thereafter, *chadar* was put around the neck of Lambu. He was killed. The amount was distributed. In his cross-examination, he deposed that they interrogated the accused for one hour near the flyover of Ambala Cantt. Railway Station. Accused made disclosure statement.

15. PW-15 Rajesh Kumar deposed that he had purchased Esteem vehicle No.HR-36G-2989 from Ravi Kumar. The Esteem car remained with him only for 10 days. Thereafter he had sold the same to Govind. He had not got transferred the documents nor Govind had got transferred the documents of ownership in his name.

16. PW-18 Sube Singh ASI deposed that he was posted as Incharge Computer Branch at SP office Rewari, on 05.11.2008. Sat Narain ASI submitted application seeking call details of mobile number 9354188310, 9812080880 and 9991616656. The details were taken out from the concerned mobile company through internet. These were marked Ex.PW18/B, Ex.PW18/D, Ex.PW18/F. In his cross-examination, he admitted that he had no personal knowledge regarding Ex.PW18/A to Ex.PW18/F. He did not know who had made noting on these documents in ink. He did not know the name of person who had downloaded the documents Ex.PW18/A to Ex.PW18/F.

17. PW-19 Surender Singh deposed that he had sold a sim of Reliance company No.94541883102 to Naresh Kumar. In his cross-examination, he admitted that he could not tell the date, time and month of

purchasing the sim by him. He could not tell the date, time and month of sale of sim by him to Naresh. Volunteered it was about four months before the incident.

18. PW-20 Dhola Ram is most material witness. He deposed that on 02.09.2008 he had gone to Mahendergarh for some domestic work. Naresh Kumar his brother had also come there for work. Om Parkash, Ombir Singh, Dinesh, Mukesh and Govind, were with him. Ombir Singh was doing the business of dish (cable TV) in their village. They were having maruti car of black colour. The accused were talking with his brother Naresh. He asked Naresh as to where was he going. His brother replied that he was going with accused to Rewari regarding some plot. Accused Om Parkash remained there. Remaining persons went towards Rewari in the car. On 04.09.2008 they came to know about a dead body lying in the area of village Motla Khurd. Birender and Mahender had gone to Rewari to see and identify the dead body. Om Parkash accused present in Court was having illicit relations with the wife of his brother Naresh. For this reason, accused present in Court had murdered his brother. In his cross-examination, he deposed that he did not know whether the agreement dated 01.09.2008 bore the signatures of Naresh Kumar at point 1 on it. He was residing separately from Naresh for the last 10 years. He did not remember when Naresh was married. Naresh had two children. His house was situated at a distance of 35 yards from the house of Naresh. He had not seen the registration number of maruti car. Accused Dinesh, Mukesh and Govind had earlier met him as they used to visit their village for cable dish work. Om Parkash's house was situated at a distance of 3-4 acres of the house of deceased Naresh. Om

Parkash was unmarried. After reaching home, he did not enquire about the whereabouts of Naresh. On next two days also, he did not enquire about Naresh. Volunteered that his family members had made enquiries about him. He did not meet the police on 04.09.2008. The police first time came at the house of Naresh on 05.09.2008. He did not disclose the fact that he had seen the deceased Naresh in Mahendergarh to any of his family members. The police came in the village for enquiry again within 4-5 days after 05.09.2008. He did not disclose this fact to Panch, Sarpanch of the village or any person of the village that he had seen Naresh in Mahendergarh in the company of accused. According to him, Om Paraksh had illicit relations with the wife of Naresh. He had noticed Om Parkash frequently visiting the house of deceased Naresh and on this basis he had deposed that Om Parkash had illicit relations with the wife of deceased. He also categorically deposed that Om Parkash and Naresh were having friendly relations for the last 4-5 years.

19. PW-24 Ram Kumar Inspector deposed that he was posted as Inspector / SHO in Police Station Jatusana on 03.09.2008. On that day, a telephonic message was received that a dead body of unknown person was lying in the Bani of village Motla Khurd. He reached the spot. He recorded the statement of Ram Kumar son of Pahlu Ram. He inspected the spot of crime. He prepared inquest report Ex.PW24/P. The body was handed over to their relatives after conducting post-mortem vide receipt Ex.PW24/1. On 06.09.2008 a telephonic message was received from the Police Station Ambala City that accused Ombir Singh had suffered a disclosure statement in case FIR No.232 dated 23.08.2008 under Sections 363 IPC etc. He

disclosed the manner in which Naresh was killed. The recoveries were made on the basis of disclosure statement made by the accused.

20. PW-25 Jai Singh Inspector deposed that Govind made disclosure statement regarding his involvement in the case. Om Parkash made Naresh to sit in the Esteem car. They started to drink. He also disclosed that he had wrapped a *chadar* on the neck of Naresh. Dinesh and Mukesh had strangled Naresh. He also disclosed that they had burnt the clothes of the dead body and ran away. Similarly accused Mukesh Kumar had made disclosure statements Ex.PL, Ex.PM and Ex.PN. The amount of Rs.20,000/- was recovered from his house. Accused Govind also suffered disclosure statement vide Ex.PN/1. Recoveries were effected. Accused Govind suffered another disclosure statement Ex.PW25/E. Four disclosure statements of Govind were recorded by him. He could not tell the name of the scribe of these disclosure statements. No independent witness was joined by him at the time of recording these disclosure statements and effecting recoveries. Two disclosure statements of Dinesh and Mukesh have been recorded by him. He could not tell the scribe of these statements. No independent witness was joined at the time of recording of disclosure statement. The places where disclosure statements of accused were made were busy places. The places of recoveries were accessible to all. There was no specific denomination of the currency notes which were got recovered by him.

21. PW-23 Dr. Ashok Ranga conducted the post-mortem examination with his team. He has led his evidence by filing his affidavit.

According to the affidavit, ligature mark well defined transversely was

placed circular, continuous. Width was 3 cm. Base of ligature mark was pale and margins were reddish and leathery feel, posteriorly encircling the neck, i.e. lower part of neck. Burn marks were also present. In their opinion, the cause of death was asphyxia due to strangulation which was ante-mortem in nature and sufficient to cause death in its natural course of life. The probable time between injury and death was instantaneous and between death and post mortem examination was within 36-48 hours. The viscera was also sent for examination. The report is Ex.PW23/C. According to report Ex.PW23/C, in the content of exhibit No.1 and 2, i.e. stomach, small and large intestine, lungs, liver, spleen, kidney and brain, traces of organophosphorus compound group of insecticide were found. Confronted with the opinion of doctor Ex.PW23/C, the police again sought their opinion. They gave opinion that the cause of death was asphyxia due to strangulation which was ante mortem in nature and presence of organophosphorus compound poisoning was also found in the body and sufficient to cause death in its natural course of life.

22. The case of the prosecution is that Om Parkash appellant had illicit relations with the wife of Naresh @ Lambu. Om Parkash gave supari money. Rest of the appellants had hatched conspiracy to eliminate Naresh. Naresh was taken in Esteem car to Jungle where he was killed and his clothes were burnt to conceal the identity. The most material witness in the present case is PW-20 Dhola Ram. According to him, he had seen his brother Naresh on 02.09.2008 in the company of appellants. According to him, they were travelling in black maruti car. Appellant Om Parkash remained there and rest of the appellants went to Rewari. He came to know

recovery of dead body on 04.09.2008. His statement was recorded on 05.09.2008 under Section 161 Cr.P.C. In case he had seen his brother in the company of the appellants, he should have told the family members of the deceased. He categorically admitted in his cross-examination that he did not disclose this fact to his family members on 04.09.2008. Police had visited his village after 05.09.2008. He did not disclose this fact to police, Sarpanch and Panch of the village that he had seen Naresh at Mahendergarh. The case is based on circumstantial evidence. The motive attributed to the appellants that Om Parkash had illicit relations with the wife of Naresh. Om Parkash wanted to remove the hurdle by killing Naresh @ Lambu. According to PW-20 Dhola Ram, Om Parkash was seen frequently visiting the house of deceased Naresh. He on this basis had deposed that Om Parkash had illicit relations with the wife of Naresh. However, in the same breath he stated that Om Parkash and Naresh were having friendly relations for the last 4-5 years. Since the relations between Om Paraksh and Naresh were friendly, Om Paraksh was bound to visit the house of deceased Naresh. Merely that Om Parkash was visiting the house of Naresh frequently, it cannot be said that Om Parkash had illicit relations with the wife of Naresh. Police had not interrogated the wife of Naresh. Her statement was not recorded under Section 161 Cr.P.C. It is not believable that Dhola Ram who had seen his brother Naresh in the company of appellants would not have made any complaint to the police, Sarpanch and Panch of the village. This is unusual behaviour.

23. The case of prosecution is based on disclosure statement made by appellants from time to time that Naresh was strangulated with *chadar*.

However, it has come in the chemical examiner report Ex.PW23/C that traces of poison were also found in vital organs of the body, i.e. stomach, small and large intestine, lungs, liver, spleen, kidney and brain. The police had also taken into possession one bottle of Aristocrat and cold drink (Dew). There are multiple disclosure statements of the appellants from time to time. Police had not joined any independent witness during the course of interrogation. These disclosure statements Ex.PE, PF, PG, PJ, PK, PL, PM, PN, PN/1, PN/4, PN/5, PR, PW20/C, 25/E cannot be termed voluntary in nature. These were made after sustained interrogation. The police has also relied upon call details. However the same were not proved under Section 65-B of the Evidence Act. PW-18 Sube Singh ASI deposed that he had taken information from the internet. No certificate was issued by the Nodal Officer of the mobile company. The police had also taken into possession Aristocrat bottle and cold drink bottle (Dew). The opinion of the finger print expert after comparison is as under:-

“(a) The photographed chance print marked B1 on photograph mention in para III(a) above is comparable and different from the 10 digit finger print search slips of Ombir Singh @ Nitu s/o Rajender Yadav. Dinesh s/o Hari Ram, Mukesh s/o Suresh and Gobind s/o Suraj Singh on their respective search slips as the ridge characteristic details as well as type of pattern of the chance print does not tally with said finger prints on their search slips.

(b) The photographed chance prints marked A, A1 and B on photographs mentioned in para III(a) above are faint, partly, super imposed and do not bear sufficient ridge characteristic details. Hence unfit for comparison. Life size photographs of all are enclosed.”

24. Their Lordships of the Hon'ble Supreme Court in *Criminal Appeal No.1980 of 2008* titled as *Ashish Jain vs. Makrand Singh and others, decided on 14.01.2019* have held as under:-

*“21. As regards the recovery of incriminating material at the instance of the accused, the Investigating Officer K.D. Sonakiya, PW35, has categorically deposed that all the confessions by the accused persons were made after interrogation, but the mode of this interrogation does not appear to be of normal character, inasmuch as he himself has deposed that the accused persons were further grilled and interrogated multiple times before extracting the confessions which lead to the recovery of the ornaments, cash, weapons and key. We find from the totality of facts and circumstances that the confessions that led to the recovery of the incriminating material were not voluntary, but caused by inducement, pressure or coercion. Once a confessional statement of the accused on facts is found to be involuntary, it is hit by Article 20(3) of the Constitution, rendering such a confession inadmissible. There is an embargo on accepting self-incriminatory evidence, but if it leads to the recovery of material objects in relation to a crime, it is most often taken to hold evidentiary value as per the circumstances of each case. However, if such a statement is made under undue pressure and compulsion from the investigating officer, as in the present matter, the evidentiary value of such a statement leading to the recovery is nullified. It is noteworthy to reproduce the observations of this Court regarding the relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution in *Selvi v. State of Karnataka*, (2010) 7 SCC 263:*

"102. As mentioned earlier "the right against self-incrimination" is now viewed as an essential

safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives- firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is quite possible that a person suspected or accused of a crime may have been compelled to testify through methods involving coercion, threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the "rule against involuntary confessions" is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.

103. The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements- often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined. In this sense, "the right against self-incrimination" is

a vital safeguard against torture and other "third degree methods" that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. The exclusion of compelled testimony is important otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such "short cuts" will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the "right against self-incrimination" is a vital protection to ensure that the prosecution discharges the said onus. ...

133. We have already referred to the language of Section 161 CrPC which protects the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 CrPC which lay down procedural safeguards in respect of statements made by persons during the course of investigation. However, Section 27 of the Evidence Act incorporates the "theory of confirmation by subsequent facts" i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which "furnish a link in the chain of evidence" needed for

a successful prosecution. This provision reads as follows:

"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."

*134. This provision permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of Miranda [16 L Ed 2d 694 : 384 US 436 (1965)] warnings. **However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).***

135. The relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution was clarified in Kathi Kalu Oghad [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10]. It was observed in the majority opinion by Jagannadhadas, J., at SCR pp. 3334: (AIR pp. 181516, para 13)

"13. ... The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that section. If it is not incriminatory of the person giving the information, the question

does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the selfincriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion [has] been used in obtaining the information."

(emphasis supplied)"

25. The case of the prosecution is that appellants had strangled Naresh with the help of *chadar*. The *chadar* was not recovered. However as per inquest report Ex.PW23/E, a rope was wrapped around the neck of the dead body. This rope was never taken into possession by the police. Though the rope is stated to have been used as ligature. Udey Singh in his statement Ex.PW23/E also stated that rope was found wrapped around the neck of the deceased. Similar statement was made by Bhup Singh vide Ex.PW23/E. Similarly Ram Kumar in his statement Ex.PB had deposed that the *fanda* was found on the neck of the body. He had also referred that appellants had used rope on the neck. PW-2 Ram Kumar has proved his report Ex.PB.

26. The case is based on circumstantial evidence. The prosecution is required to complete the chain. All the circumstances must point out conclusively to the guilt of the accused. The prosecution though attributed the motive to the appellants but has not conclusively proved the same.

Initially the case of the prosecution was of strangulation but traces of poison were also found in the vital organs of the deceased. The presence of poison

has not been explained by the prosecution. The case of the prosecution throughout was that appellants had used *chadar* to strangle Naresh. However it has come, as discussed hereinabove, that as per the inquest report Ex.PW23/E, rope was found around the neck of the deceased but was never taken into possession. Recoveries of bottles of wine and of cold drink were made but finger prints did not match. The prosecution has relied upon multiple disclosure statements made by the appellants. No independent witness was associated during the time of recording of disclosure statements. Recoveries have been made from open areas without joining independent witness. The disclosure statements are not voluntary in nature since these were made during sustained interrogation. Naresh Kumar's wife was never interrogated. The conduct of PW-20 Dhola Ram was unusual and unnatural. The case of the prosecution is that PW-20 Dhola Ram had seen his brother Naresh in the company of appellants on 02.09.2008. His statement was recorded on 05.11.2008. It is not believable that why he had not disclosed this fact to his close family members including the wife of the deceased. The police had visited the village even after 05.09.2008. Thus the theory of last seen together by the prosecution is not believable.

27. Their Lordships of Hon'ble the Supreme Court in ***Kanhaiya Lal v. State of Rajasthan, (2014) 4 Supreme Court Cases 715***, have held that circumstance of last seen together does not by itself necessarily lead to inference that it was the accused who committed crime. There must be something more for establishing connection between accused and crime, that points to guilt of accused and none else. Mere non-explanation of being last seen together with deceased person on part of accused, by itself cannot lead to proof of guilt against him. Their Lordships have held as under :-

“12. The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.”

28. In ***Mahavir Singh v. State of Haryana, (2014) 6 Supreme Court Cases 716***, their Lordships of the Hon'ble Supreme Court have held that last seen together theory normally comes into play only in a case where time-gap between point of time when accused and deceased were seen alive and when deceased was found dead, is small. Their Lordships have held as under :-

“12. Undoubtedly, it is a settled legal proposition that the last seen theory comes into play only in a case where the time-gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead (sic) is small. Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime. In the instant case, if we examine the medical report minutely, it becomes evident that the deceased Suraj Mal had been murdered one week prior to the post-mortem. Thus, it becomes evident that he had been killed in a very proximity of time when the deceased was seen alive with the appellant and Jagbir Singh, co-accused.”

29. In ***Nizam and another v. State of Rajasthan, (2016) 1 Supreme Court Cases 550***, their Lordships of Hon'ble the Supreme Court have held that “last seen theory” is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The “last seen theory” holds the courts to shift the burden of proof

to the accused and the accused has to offer a reasonable explanation as to the cause of death of the deceased. But it is not prudent to base the conviction solely on “last seen theory”. “Last seen theory” should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so late seen. Where time gap is long, it would be unsafe to base conviction on “last seen theory”. Their Lordships have held as under :-

“14. The courts below convicted the appellants on the evidence of PWs 1 and 2 that the deceased was last seen alive with the appellants on 23.1.2001. Undoubtedly, the “last seen theory” is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The “last seen theory” holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well settled by this Court that it is not prudent to base the conviction solely on “last seen theory”. “Last seen theory” should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

15. Elaborating the principle of “last seen alive” in State of Rajasthan vs. Kashi Ram, (2006) 12 SCC 254, this Court held as under:-

“23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to

how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohamed., Re. (AIR 1960 Mad 218)”

The above judgment was relied upon and reiterated in Kiriti Pal vs. State of W.B., (2015) 11 SCC 178.

16. *In the light of the above, it is to be seen whether in the facts and circumstances of this case, the courts below were right in invoking the “last seen theory.” From the evidence discussed above, deceased-Manoj allegedly left in the truck DL 1GA 5943 on 23.1.2001. The body of deceased Manoj was recovered on 26.1.2001. The prosecution has contended that the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent*

explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

17. During their questioning under Section 313 Cr.P.C., the appellant-accused denied Manoj having travelled in their Truck No. DL 1 GA 5943. As noticed earlier, body of Manoj was recovered only on 26.1.2001 after three days. The gap between the time when Manoj is alleged to have left in Truck No. DL 1GA 5943 and the recovery of the body is not so small, to draw an inference against the appellants. At this juncture, yet another aspect emerging from the evidence needs to be noted. From the statement made by Shahzad Khan (PW 4) the internal organ (penis) of the deceased was tied with rope and blood was oozing out from his nostrils. Maniya village, the place where the body of Manoj was recovered is alleged to be a notable place for prostitution where people from different areas come for enjoyment.

18. In view of the time gap between Manoj being left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that appellants and deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the “last seen theory”; it is safer to look for corroboration from other

circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory.”

30. Their Lordships of Hon'ble the Supreme Court in ***Anjan Kumar Sarma and others v. State of Assam, (2017) 14 Supreme Court Cases 359***, have held that in a case where other links have been satisfactorily made out and circumstances point to guilt of accused, circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. Their Lordships further held that suspicion alone cannot take place of legal proof.

Their Lordships have held as under :-

“16. It is no more res integra that suspicion cannot take place of legal proof for sometimes, unconsciously it may happen to be a short-step between moral certainty and the legal proof. At times it can be a case of “may be true”. But there is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions. (See Jaharlal Das v. State of Orissa, (1991) 3 SCC 27).

17. It is settled law that inferences drawn by the court have to be on the basis of established facts and not on conjectures. (See Sujit Biswas v. State of Assam, (2013) 12 SCC 406). The inference that was drawn by the High Court that the death was caused on 28.12.1992 within the time of 48 hours as mentioned in the post-mortem report is not correct. The post-mortem examination was conducted on 30.12.1992 at 12.00 noon and it was opined by PW 11 that the death occurred 24 to 48 hours

prior to the time of post-mortem examination. Even if the time is stretched to the maximum of 48 hours, the death was after 12.00 noon on 28.12.1992. The deceased was in the company of the accused till 9.00 p.m. on 27.12.1992. The inference drawn by the High Court that the accused had killed the deceased on 28.12.1992 in the night-time and thrown the body on the railway track is not on the basis of any proved facts. The trial court is right in holding that there is no evidence on record to show that the deceased was with the accused after 12.00 noon on 28.12.1992.

18. *x x x*

19. *The circumstance of last seen together cannot by itself from the basis of holding the accused guilty of the offence. In Kanhaiya Lal v. State of Rajasthan (2014) 4 SCC 715, this Court held that :*

“12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

** * **

15. *The theory of last seen – the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and*

the deceased for a long time. The fact situation bears great similarity to that in Madho Singh vs. State of Rajasthan (2010) 15 SCC 588.”

20. *In Arjun Marik v. State of Bihar 1994 Supp (2) SCC 372, this Court held that :*

“31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19.7.1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.”

21. x x x

22. x x x

23. *It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in State of Goa v. Sanjay Thakran (2007) 3 SCC 755 in support of this submission that the circumstance of last seen together would be a relevant circumstance in a case*

where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under :

“34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although

there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.”

24. *As we have held that the other circumstances relied upon by the prosecution are not proved and that the circumstances of last seen together along with the absence of satisfactory explanation are not sufficient for convicting the accused. Therefore the findings recorded in the above judgment are not applicable to the facts of this case.*

25. *Due to the lack of chain of circumstances which lead to the only hypothesis of guilt against the accused, we set aside the judgment of the High Court (State of Assam v. Jit Kakati, 2013 SCC OnLine Gau 655) and acquit the appellants of the charges of Sections 302, 201 read with Section 34 IPC. The appellants are directed to be set at liberty forthwith, if not required in any other case.”*

31. Accordingly the appeals are allowed. The appellants are

acquitted. The appellants are on bail. Their bail bonds and surety bonds are discharged.

(RAJIV SHARMA)
JUDGE

(KULDIP SINGH)
JUDGE

February 08, 2019.
Davinder Kumar

Whether speaking / reasoned	Yes/No
Whether reportable	Yes/No