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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 28th January, 2020

Judgment pronounced on: 20th February, 2020

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CRL.A. 1222/2019

INDRAWATI

..... Appellant

Through: Mr. Saurabh Kansal and Ms. Pallavi
S. Kansal , Advs

versus

STATE & ORS.

..... Respondents

Through: Ms. Neelam Sharma, APP with Insp.
Rajesh Kumar and ASI Tulli Ram,
PS Badarpur
Mr. Farooque Alam, Adv for Mr. M.
Hasibuddin, Adv for R-2

CRL.A. 1223/2019

INDRAWATI

..... Appellant

Through: Mr. Dinesh Malik, Mr. Manish Malik
and Mr. Akash Saini, Advs

versus

STATE & ORS.

..... Respondents

Through: Ms. Neelam Sharma, APP with Insp.
Rajesh Kumar and ASI Tulli Ram,
PS Badarpur
Mr. H.K. Chaturvedi and Mr. Sagar
Chaturvedi, Mr. Sagar Chaturvedi,
Advs for R-2
Mr. Ashutosh Thakur and Mr. Heyshiv
Parashar, Advs for R-3.
Mr. H.K. Chaturvedi, Adv, Amicus
Curiae

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J

1. Present appeals arise out of a common FIR bearing No. 134/2004. With the consent of the parties both these appeals were heard together and are being disposed of by the present Judgment.
2. Criminal Appeal No. 1223/2019 was filed by the Appellant against the judgment dated 05.05.2008 passed by the learned Additional Sessions Judge, New Delhi whereby the accused persons namely Satinder, Vikas and Vinod/respondent Nos.2 to 4 were acquitted **(accused/respondent No.5 Diwakar @ Sudhakar was declared Proclaimed Offender)** in Sessions case No. 134/2004 arising out of FIR No.134/2004, under Sections 365/364A/302/120A/120B of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and the accused Satinder was also acquitted under Section 25 Arms Act registered at Police Station Badarpur, New Delhi.
3. Criminal Appeal No. 1222/2019 was filed the Appellant against the judgment dated 31.05.2016 passed by the learned Additional Sessions Judge, New Delhi whereby the Respondent No. 2 namely Diwakar @ Sudhakar was acquitted in Sessions case No. 60/2012 arising out of FIR No.134/2004, under Sections 365/364A/302/120B/34 of the IPC registered at Police Station Badarpur, New Delhi.

4. The brief facts of the case, as mentioned by the learned Trial Court are reproduced hereinbelow:

“The case of the prosecution, in brief, is that on 24.02.2004 the complaint was lodged by the maternal uncle of the deceased, with the police station Badarpur stating that the deceased Pradeep Kumar was not traceable. The ransom calls were made to the house of deceased Pradeep Kumar telephonically demanding Rs. 10 lakhs. During Investigation the telephonic information was received from police control room by the police that the dead body of a similar person was found in Banderwala Park within the jurisdiction of Police Station Sarai Rohilla. The voice regarding ransom call was taped and converted into a cassette with the help of the tape recorder. The efforts were made to recognize the voice. An unknown person telephonically informed the police station Badarpur that the voice in question is of the neighbour and friend of deceased Pradeep namely Vinod. The accused Vinod was joined into investigation during which he admitted his guilt and informed the police that he along with the other accused persons had kidnapped the deceased Pradeep for demanding ransom. He informed the police that he took the deceased Pradeep to show him Metro Rail along with two accused Sudhakar. They only wanted to take him to Shah Ganj to receive ransom from the family of deceased Pradeep but when no taxi man agreed to take them to Shah Ganj, Uttar Pradesh then they decided to get rid of Pradeep and took him to Banderwala Park and killed him there.

The SHO of Police Station Badarpur has challaned the four accused persons to face trial for the offences under sections 363/365/364A/302/120B/34 IPC and sections 25/27 Indian Arms Act, 1959. After supplying the copies in compliance the provisions of section 207 Cr.P.C. the learned Metropolitan Magistrate committed the case to the Court of Sessions

under section 209 Cr.P.C. It is pertinent to note that accused Diwakar @ Sudhakar could not be arrested by the police and was declared proclaimed offender.”

5. After hearing the argument on both sides the prima facie case for the offences under Sections 120B, 365 read with 120B, 364A read with 120A and under Section 302 read with Section 120B IPC was found made out against the accused persons and the charges were framed by the trial court. The four accused persons Satinder, Vinod, Vikas and Sudhakar pleaded not guilty and claimed trial. The charge under section 25 of Arms Act was also framed against the accused Satinder only to which he pleaded not guilty and claimed trial.
6. In Sessions case No. 134/2004 the prosecution examined 14 witnesses in all.
7. In Sessions case No. 60/2012 the prosecution examined 17 witnesses in all.
8. After the closure of the prosecution evidence, statement of the accused persons under Section 313 Cr.P.C, were recorded in which they have denied the prosecution case and have stated that they were innocent and have been falsely implicated in this case. The four accused persons did not lead any evidence in their defence.
9. Learned counsel for the appellant opened their submissions contending that the impugned judgments dated 05.05.2008 in Sessions Case 134/2004 and 31.05.2016 in Sessions Case 60/2012 are based on conjectures and surmises and the same are against the facts and the settled proposition of law as the learned Trial Court has ignored and omitted material evidence and have disregarded the

cogent evidence which could have convicted the Respondent Nos. 2 to Respondent No 5.

10. Learned counsel for the appellant further argued that the link of circumstantial evidence against the Respondent No. 2 to 5 (one was P.O.) is clear and forms an unbroken chain and the findings of acquittal of Respondent Nos .2 to 5 vide the impugned judgments is perverse.
11. Learned counsel for the appellant further argued that the learned ASJ vide Judgment dated 05.05.2008 has given undue weightage to the diagram of the weapon of offence and has erred in holding that recovery of knife is unreliable.
12. Learned counsel for the appellant further submitted that the articles in question (*Knife, Pant and wallet of the deceased*) that were recovered at the instance of and from Respondent Nos. 2 to 4 have been glossed over erroneously by the learned Trial Court.
13. Learned counsel for the appellant further contended that contradictions in relation to the color of the pant of the deceased are minor in nature and do not shake the foundation of the case.
14. Learned counsel for the appellant further contended that the learned trial court erred in ignoring the testimonies of prosecution witnesses namely Indrawati, Pramod and Vijay Singh which point that the deceased was last seen with the accused Vinod. Learned Counsel further contended that the conduct of the accused/Respondent Vinod and Satinder clearly depicts that they were involved in the commission of the crime and the onus under Section 106 of the Indian Evidence Act lies on them to prove their innocence.

15. Learned Counsel for the appellant further contended that the trial court erred in ignoring the ransom calls which were recorded by the Investigating officer and transferred into cassettes pointing towards the guilt of the Respondents and proves the commission of the alleged offence.
16. Learned Counsel for the Appellant further contended that the testimonies of prosecution witnesses adduced during trial establishes that all the accused-Respondents were involved in the commission of the crime and they hatched a criminal conspiracy to kidnap the deceased for ransom and thereafter eliminate him in order to avoid any criminal prosecution against them.
17. Lastly, the learned counsel argued that in view of the testimonies and other evidence on record all the four accused- respondents deserved to be punished and the impugned Judgment is liable to be set aside.
18. In Crl. A. 1223/2019, Mr. H.K. Chaturvedi and Mr. Sagar Chaturvedi appeared for Respondent No. 2 (Satinder), Mr. Ashutosh Thakur and Mr. Heyshiv Parashar appeared for Respondent No. 3 (Vikas), Mr. H K. Chaturvedi was appointed amicus for Respondent No. 4 (Vinod) and Mr. Farooque Alam and Mr. M. Hasibuddin appeared for Respondent No. 5. (Sudhakar @ Diwakar).
19. Learned Counsel for the Respondents, strongly refuted the submissions made by the counsels of the appellant and submitted that the impugned judgments are based on proper appreciation of the facts and evidence, no interference in the impugned judgments is called for by this Court; they stated that the Trial Court had perused the evidence and found that there existed contradictions in the

testimonies of Prosecution Witnesses which had created reasonable doubt with regarding the guilt of the Respondents.

20. Learned Counsel for the Respondents further argued that the last seen theory was unreliable as there were contradictions in the testimonies of prosecution witnesses namely Indrawati, Pramod and Vijay Singh who claimed to have last seen the deceased with the Respondent No.4 (Vinod). They further submitted that the name of Respondent No. 4 (Vinod) was not mentioned in the initial information given to the police and therefore making him a suspect was an after thought.
21. Learned Counsel for the Respondents further contended that the knife recovered from Respondent No. 2 (Satinder) was different from the one sent to the CFSL. He submitted that the knife recovered from Respondent No. 2 was a buttandar knife whereas the sketch prepared by the CFSL doctor was not of a buttandar knife. He further submitted that there was a variation in description of the knife in the seizure memo and the sketch prepared by the CFSL expert.
22. We have heard the learned counsel for the parties and have also perused the material placed on record including the record of the trial court.
23. At the outset, it is relevant to point out that in the present case, the trial court record was not traceable and pursuant to the order of the predecessor bench of this Court the Trial Court record was recreated.

CRL.A. 1223/2019

INCEPTION OF THE CASE

24. Putting the facts in the present case, we find that, the police machinery was set into motion when on 24.02.2004 the maternal

uncle of deceased (Pradeep) lodged a complaint at about 1:45 AM stating that the deceased (Pradeep) had left the house on 23.02.2004 at 4:00 pm and was not traceable. DD No. 31 B (**Ex. PW11/A**) was recorded based on which a case under Sections 363 and 365 IPC was registered and FIR was lodged. The contents of the true English translation of DD No. 31B have been reproduced as under:-

“D.D. No. 31B dated 24-2-2004 P.S. Badarpur, New Delhi, Pramod Kumar C/o Manohar Lal S/o Kundan Lal R/o D-38/2, Gali No. 4, Mohan Baba Nagar, Badarpur, New Delhi Ph. 26995229, information of missing of boy aged 13-14 years time at 1:45 P.M., it is recorded that at this time the complainant came to the P.S. and gave statement that Pradeep Kumar S/o Manohar Lal R/o 38/2, Gali No. 4, Mohan Baba Nagar, Badarpur aged 14 years, fair complexion, 4 feet 6 inches tall wearing slippers and orange T-Shirt, Green Colour Pant, Sweater with blue and white flowers with an injury mark in the ankle who had on 23-2-2004 at about 4:00 P.M. gone out of the house and who has till now not returned back was searched at many places and whose whereabouts are not known till now despite search. Sd/- Pramod Kumar Sd/- (in Hindi), which information was recorded in the daily diary and information was given on No. 100. A copy of complaint given to the complainant and one copy was given to ASI Randhir. Sir, Duty Officer, P.S. Badarpur, New Delhi, it is requested that one Pramod Kumar S/o Manohar Lal R/o D-38/2, Gali No. 4, Mohan Baba Nagar, Badarpur New Delhi today came to the P.S. and gave information regarding the missing of his relative Kumar S/o Manohar vide DD No. 31B who has not been found till now. From the circumstances

and the DD Entry it appears that the said boy has been kidnapped by someone therefore, a case U/S 363, 365 IPC is registered and the investigation is handed over to I ASI. Date and Time of Occurrence is 23-2-2004 at 4:00 P.M., Place of Occurrence is D-38/2, Gali No. 4, Mohan Baba Nagar, Badarpur, New Delhi, Time of giving report is 24-2-2005 at 5:45 P.M. Randhir Singh ASI, P.S. Badarpur No. 2793 at 24-2-2004. Police action: - Upon the receipt of the report Case No. 134/04 U/S 363/365 IPC is registered. The documents shall be sent to the senior police officials by post.”

25. Subsequent thereto on 24.02.2004, PW-2 (SI Ajay Kumar), IC Mobile Crime Team, North District on receipt of information from the Police Control Room, that a dead body of a child was lying in Bandarwala Park, Sarai Rohilla, inspected the site and prepared a report (*Ex. PW 2/A*). A call was made from PCR to P.S. Badarpur and DD No. 10A (*Ex. PW 4/A*) was recorded by PW-4 (ASI Kushwant Kaur) .
26. The testimony of PW-4 (ASI Khuswant Kaur) who proves the said DD No. 10A is reproduced below:-

“On 24.02.2004, I was posted as ASI in PS Sarai Rohilla and working as DO from 9 AM to 12 Noon and at about 10.40 AM, I recorded DD No. 10A on the basis of the information of the PCR. After recording the DD, the true copy was handed over to SI Prabhat for further investigation and Ct.Sukhbir was also directed to accompany the SI to spot. I have brought the original DD register and the true copy of the same is Ex.PW-4/A.”

27. The body was sent to the mortuary, Subzi Mandi after which PW-13 (SI Ravi Shankar) went to the house of the Complainant. From there,

PW-13 (SI Ravi Shankar) along with the maternal uncles of the deceased PW-8 (Pramod) and PW-9 (Vijay Singh) went to the mortuary where they identified the body of the deceased child.

28. Subsequent thereto, the statement of the mother of the deceased, PW-7 (Indrawati) and the maternal uncles of the deceased, PW-8 (Pramod) and PW-9 (Vijay Singh) were recorded under section 161 Cr.PC by PW-13 (SI Ravi Shankar). Section 302 IPC was added in the FIR 134/2014 and investigation of the case was taken over by R.S. Dahiya, Investigating Officer.

RESPONDENT NO. 4 (VINOD) WAS LAST SEEN WITH THE DECEASED.

29. Since the present case is based on circumstantial evidence; it is essential for us to determine whether or not a complete chain of events stand established from the evidence produced by the prosecution. What, therefore, needs to be seen is whether the prosecution has established the incriminating circumstances upon which it places reliance and whether those circumstances constitute a chain so complete as not to leave any reasonable ground for the appellant to be found innocent.
30. During the course of argument, learned counsel for the Appellant argued that the deceased was last seen with Respondent No. 4 (Vinod) after which he got kidnapped and was later killed. He stated that the same had been corroborated with testimonies of PW-7 (Indrawati), PW-8 (Pramod) and PW-9 (Vijay Singh), however, the Learned Trial Court misconstrued the minor inconsistencies in their

testimonies as major contradictions and ruled them out while deciding the impugned judgment.

31. Learned Counsel for the Respondent, vociferously rebutted the contentions made by the Counsel for the Appellants and submitted that the learned Trial Judge had rightly held that there were major contradictions in the testimonies of PW-7 (Indrawati), PW-8 (Pramod) and PW-9 (Vijay Singh) and they should therefore be ruled out.
32. The last seen theory is required to be proved by established facts before the same can be actually weighed for the purpose of its relevance for ascertaining the guilt of the accused persons. 'Last seen together' can only be treated as an additional link in the chain of circumstances because the prosecution has to establish an unbroken chain of circumstances, which leads to only one conclusion, which is the guilt and culpability of the accused persons.
33. The Hon'ble Apex Court in *Nizam and Ors. v. State of Rajasthan* reported in (2016) 1 SCC 550, has held that the conviction on the basis of 'last seen theory' should be enforced keeping in mind the circumstances that precede the alleged incident. The germane portion of the judgment is extracted below:

“Undoubtedly, “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.”

34. Learned Trial Court in its judgment dated 05.05.2008 has discarded the last seen theory as unreliable and has held as under:-

*“The first information by DD No. 31B Ex.PW11/A to the police is given on 24.02.2004 at 1.45 a.m. by Shri Pramod the maternal uncle of deceased Pradeep stating that the latter was missing. But in this report PW8 has not stated that the deceased Pradeep was last seen with accused Vinod. In the cross-examination PW8 has stated that he had discussed with his family members including PW7 Indrawati and PW9 Vijay before lodging report with the police. He admitted that it was correct that no one was suspected when the report lodged by him with the police. **Therefore, it is clear that in the initial information given to the police the accused Vinod was not named as the person who was last seen with the deceased Pradeep and it is only afterwards that the name of accused Vinod was given by PW7, PW8 and PW9 the mother and maternal uncle’s of deceased Pradeep, respectively in there statements under section 161 Cr.P.C. before the police.***

*In her statement PW7 Indrawati, the mother of the deceased Pradeep has stated that Pradeep went to the house of Vinod to play carrom and she saw both Pradeep and Vinod going together from the house after playing carrom. **The statement made by the witness PW7 in her examination in chief was confronted with her statement under section 161 CrPC Ex PW7/DA where it was not so recorded. Thus the statement of PW7 that she saw accused***

Vinod and her son going together, made in the examination in chief has no value.

PW7 is the mother of the deceased Pradeep has stated that her son Pradeep went to the house of Vinod to play carrom but PW9 the maternal uncle of deceased Pradeep has stated that at about 4 p.m. accused Vinod came and took his nephew Pradeep with him. Similarly the PW8 another maternal uncle of the deceased has stated in his examination-in-chief that after taking meals Pradeep left outside. However, he did not return thereafter. PW8 also stated that Pradeep had left along with the accused Vinod Therefore, there is contradiction between the statement of the mother of the deceased PW7 and the maternal uncles of the deceased PW8 and PW9 the former stating that the deceased Pradeep were to the home of the accused Vinod to play carrom but the latter stating that the accused Vinod came and took the deceased Pradeep from his house with him.

In view of above the important aspect of evidence of last seen accused Vinod and deceased Pradeep is not established by any credit worthy evidence in this case.”

35. In this context, we deem it necessary to peruse the testimonies of material Prosecution Witnesses i.e. PW-7 (Indrawati), PW-8 (Pramod) and PW-9 (Vijay Singh). PW-7 (Indrawati) during her examination in chief deposed as under:-

“On 23.02.2004, my son Pradeep used to study in class 7th at Vijay Bharti Public School, Badarpur. On that day Pradeep had returned to the house from his school at about 1.40 PM. I asked Pradeep to go for tuition as it was 3 PM. Pradeep told me that he was not feeling well. There is a house of Vinod in my neighbourhood. My son Pradeep went to the house of Vinod to play Carrom. I insisted Pradeep to go for

tuition and not to play Carrom with Vinod. I stood at the door of the house of accused Vinod. Thereafter, I saw both Pradeep and Vinod going together from the house after playing Carrom. Thereafter came at my house. I started doing work at my house. After sometime I thought that Pradeep had not returned till that time. I searched for Pradeep but he could not be traced. I searched him till 10:30PM. I inquired from friends of Pradeep whether they had seen Pradeep. They refused to have seen him.”

In her cross-examination she deposed as under:-

“.....I had stated to the police in my statement that I had seen my son Pradeep and Vinod going together. Confronted with statement Ex.PW7/DA where it is not so recorded. It is incorrect to suggest that I have given false statement or that my son Pradeep was never seen by me in company of accused Vinod or that accused Vinod never took Pradeep with him or that I have falsely named him due to suspicion. It is incorrect to suggest that I have given false statement.”

36. PW-8 (Pramod) in his examination in chief deposed as under :-

I was doing private job at Delhi in the month of Jan and Feb 2004. I used to reside at that time at the house of my sister PW7 indrawati at her residence at D-38/2, Gali No.4, Mohan Baba Nagar, ND. Indrawati is my cousin. On 23/2/04 Pradeep came from school. After taking meals Pradeep left outside. However, he did not return thereafter. Pradeep had left along with accused Vinod. We searched for Pradeep till night but he could not be traced. Vinod returned to his house at 12 night. My sister Indrawati was sitting at the door of his house. My sister inquired from Vinod as to where he had left Pradeep. Vinod told her that Pradeep had not accompanied him.

37. PW-9 (Vijay Singh) in his examination in chief has deposed as under:-

“On 23/2/04 my nephew Pradeep came from the school at about 1.40 PM. He changed his school dress. After taking lunch, he started playing inside the house. His mother told him to go to tuition but he did not go to tuition and told his mother that he was having headache. At about 4 pm accused Vinod came and took my nephew Pradeep with him. My sister was also present in the house. In the evening my sister told me that Pradeep had not returned till that time. I and my sister started searching Pradeep. Pradeep did not turn till 10 pm. We searched him at the residence of relatives and friends in locality.

Accused Vinod returned at his house at 12 night. We made inquiries from accused Vinod as to where Pradeep was. Accused Vinod told us that he had not taken Pradeep with him. We searched for Pradeep throughout the night.

38. A perusal of the testimonies of PW-7 (Inderawati), PW-8 (Pramod) and PW-9 (Vijay Singh) establish that the deceased was last seen with Respondent No.4 (Vinod). Though, in their testimonies there is minor variation in relation to whether Vinod came to the house of the deceased or the deceased went to the house of Vinod to play carrom. But the fact that the deceased left in the company of the accused cannot be ignored. Moreover, it has also emerged from testimony of PW-7 that when Vinod came back home at around 12:00pm, he was confronted by the mother of the deceased (PW-7) about the whereabouts of the deceased, but he failed to give any cogent reply. Further, in the statement recorded under Section 313 Cr.PC. a leading question was put to Respondent No. 4 (Vinod) that PW-7 saw both

the deceased and Vinod going together from the house after playing carom to which he also failed to give any justification. The comparative table showing the minute variance in testimonies is also reproduced below:-

PW-7 (Indrawati)	PW-8 (Pramod)	PW-9 (Vijay Singh)
<i>My son Pradeep went to the house of Vinod to play Carrom.</i> <i>I stood at the door of the house of accused Vinod. Thereafter, I saw both Pradeep and Vinod going together from the house after playing Carrom.</i>	<i>Pradeep had left along with accused Vinod.</i>	<i>At about 4 pm accused Vinod came and took my nephew Pradeep with him.</i>

39. A perusal of the testimonies of PW-7 (Indrawati), PW-8 (Pramod) and PW-9 (Vijay Singh) establish that the deceased was last seen with Respondent No. 4 (Vinod). Applying the Judicial precedent laid down by the Apex Court in *Nizam and Ors. v. State of Rajasthan (supra)* we can conclude that the last seen theory serves as an additional link to the chain of circumstances. It also shifts the burden of proof towards the accused to offer a reasonable explanation as to the factum of death of the deceased.
40. Another limb of the conclusion drawn by the Learned Trial Court with respect to the last seen theory is that Respondent No. 4 (Vinod) was not named in the initial information as last seen with the deceased (Pradeep) and therefore the last seen theory is not credit

worthy. We deem it necessary to point out that an FIR is not an encyclopedia of all the facts in a case.

41. In this context, we deem it necessary to refer to the dicta of Apex Court in State of *U.P. v. Krishna Master* and Ors. *Criminal Appeal No. 1180 Of 2004*

“16.As observed earlier FIR need not be an encyclopedia of minute details of the incident nor it is necessary to mention therein the evidence on which prosecution proposes to rely at the trial. The basic purpose of filing FIR is to set the criminal law into motion and not to state all the minute details therein. It is relevant to notice that six brutal and gruesome murders had taken place wherein fire arms were used. The hard reality of life is that the persons who has lost kith and kin in horrific incident is likely to suffer great shock and therefore law would not expect him to mention minutest details either in his FIR or statement under Section 161. The question before the Court is whether the assertion made by the witness that soon after the incident he had gone to the place where his injured brother was lying and on enquiry by him, his brother had told him that the appellants were his assailants, inspires confidence of the Court. Reading the evidence of the witness as a whole, this Court points that it has ring of truth in it. There is nothing improbable if a brother approaches his injured brother and tries to know from him as to how he had received the injuries nor it is improbable that an enquiry being made the injured brother would not give reply/information sought from him. The assertion by witness Jhabbulal that after the incident was over he had gone near his injured brother and tried to know as to who were his assailants, whereupon his injured brother had replied that the appellants had caused

injuries to him, could not be effectively challenged during cross-examination of the witness nor it could be brought on record that because of the nature of the injuries received by Baburam he would not have survived even for few minutes and must have died immediately on the receipt of the injuries.”

42. Applying the dicta of the Apex Court in *U.P. v. Krishna Master (supra)*, we can conclude that the Trial Court erred in taking an adverse inference with respect to omission in mentioning that the deceased was last seen with Respondent No. 4 (Vinod) in the FIR. The last seen circumstance is therefore established.

ARREST OF RESPONDENTS AND INCRIMINATING RECOVERIES PURSUANT TO THEIR DISCLOSURE.

43. Pursuant to the statement of PW-7 (Indrawati) that she had received a telephone call demanding ransom of Rs. 10 lakhs, PW-8 (ACP R.S. Dahiya) installed voice recording instrument with the landline phone installed at the house of Indravati. As per the testimony of PW-5 (Pramod Kumar in Crl. A 1222/2019) “On 01.03.2004, the police had taken the cassette from the house and got identified the recorded voice from Vinod (Respondent No. 4) and other persons from the neighborhood, the voice of ransom call was found to be made of accused Sudhakar”. Pursuant to identification of voice of Sudhakar, inquiries were made from Respondent No. 4 (Vinod), who was interrogated and then arrested. In relation to the arrest of Respondent No. 4 (Vinod), PW-14 (ACP RS Dahiya) deposed that:-

“On 01.03.04 DO received information that the voice which was played in locality was of Sudhakar, friend of Vinod who was neighbourer of deceased. On this information, accused Vinod was interrogated. He was arrested and his personal search was conducted vide memo Ex.PW9/A. He was interrogated and his disclosure statement Ex.PW8/F was recorded. As per his disclosure statement accused Vinod took the police team to area of Sarai Rohilla. He took the police to house of accused Satinder at Shashtri Park and at pointing out of accused Vinod, accused Satinder was arrested. His personal search was conducted vide memo Ex.PW9/B. Accused was interrogated and his disclosure statement Ex.PW8/H was recorded. As per his disclosure statement he got recovered a knife. I prepared sketch of the knife vide memo Ex.PW8/B. It was kept in pulanda, sealed with seal of RSD and seized vide memo Ex.PW8/C. Thereafter both the accused took the police team to house of accused Vikas. Accused Vikas was arrested and his personal search was conducted vide memo Ex.PW9C. His disclosure statement Ex.PW8/G was recorded. As per his disclosure statement he got recovered on pant of deceased and the same was identified by PW Vijay and Pramod. It was kept in pulanda, sealed with seal of RSD and seized vide memo Ex.PW8/D.

44. The testimony of PW-14 (ACP RS Dahiya) is corroborated with the testimony of PW-9 (Vijay Singh) who was a part of the team who conducted raids and arrested the accused persons.
45. Learned Counsel for the appellant has submitted that the learned trial court has erred in ignoring the recoveries effected at the instance of the appellants and holding them to be unreliable. He further submitted that the articles in question (*Knife, Pant and wallet of the deceased*) were recovered at the instance of and from Respondent

No.2 to 4 has been glossed over erroneously by the learned Trial Court.

46. Before delving into the veracity of recoveries which took place at the behest of the Respondent No. 2 (Satinder), Respondent No. 3 (Vikas) and Respondent No. 4 (Vinod) respectively, it is pertinent to discuss the law relating to recovery pursuant to a disclosure. In this context, it is relevant to peruse Section 27 of the Indian Evidence Act which 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.”

47. In the light of Section 27 of the Indian Evidence Act, 1872 whatever information is given by the accused in consequence of which a fact is discovered only that would be admissible in the evidence, regardless of the fact that such information amounts to confession or not. The basic idea embedded under Section 27 of the Evidence Act is the doctrine of confirmation by the 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 an accused; such a discovery is true and admissible. ***The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes reliable information.***

48. The Apex Court in a catena of Judgments has extensively discussed the law related to the admissibility of recovered articles at the instance of the accused and has held that recovery and pointing out memo which directly link the accused person to the commission of the alleged offence is relevant and admissible in the eyes of the law. The Apex Court in the case of ***Debapriya Pal vs. State of West Bengal*** reported at (2017) 11 SCC 31 has held as under: -

“7. ...Under Section 27 of the Evidence Act only so much of recovery, as a result of the disclosure statement, which directly pertains to the commission of crime is relevant. Otherwise, such an evidence is barred Under Section 25 of the Evidence Act. Recovery of laptop does not have any bearing. It is neither the weapon of crime nor it has any cause of connection with the commission of crime. The law on this aspect is succinctly said in the case "Jaffar Hussain Dastagir v. State of Maharashtra: (1969) 2 SCC 872 in the following manner:

5. Under Section 25 of the Evidence Act no confession made by an Accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an Accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the Accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the Section is that the information given by the Accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the

information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence.”

(emphasis supplied)

49. The Learned Trial Court while holding the recovery of knife as unreliable has held as under :-

“The said description of the knife and the sketch prepared by the said doctor are now exhibited as Ex C1 and Ex C2 respectively. In Ex C1 the opinion is given by the doctor that the injuries given in the postmortem report are possible by the weapon which was sent to CFSL by the investigating agency after obtaining the postmortem report. The knife sent to the CFSL the sketch of which Ex C2 was prepared by the doctor of CFSL is not a buttondar knife. Further the sketch of the knife allegedly recovered from the accused Satinder prepared by the investigating officer Ex.PW8/B besides showing that it was a buttondar knife also shows that there is variance in the description of the knife. The total length of the knife is shown in the sketch Ex.PW8/B as 23.9 cm, length of the blade as 11.2 cm and the length of the handle of the knife as 12.7 cm while the sketch of the knife Ex.C2 prepared by the doctor of CFSL shows the total length of the knife is 22.5 cm, the length of the blade as 11 cm leading to the inference that the length of the handle of the knife is 11.5 cm. These contradictions in the description and measurement of knife not only create serious doubt about the recovery of the knife/weapon of offence from accused Satinder vide memo Ex.PW8/C but also throw doubt on CFSL report Ex.PB which is proved by the prosecution to show that the knife contained human blood of ‘B’ Group. More so, when PW13 stated in the cross-examination that no fingerprints were lifted from the

spot or from the knife and PW14 has stated in the cross examination that it was correct that no finger prints of accused were found on said knife. The alleged recovery of the knife underneath the socks is otherwise doubtful as it is alleged that the socks were manufactured there. If the socks were manufactured at that place it is not likely that the knife/the weapon of offence would be kept under the socks which were manufactured for sale and would remain there since 24.02.2004 untouched.”

50. We deem it necessary to peruse the testimonies of PW-8 (Pramod), PW-9 (Vijay Singh), PW-13 (SI Ravi Shankar) and PW-14 (ACP RS Dahiya) to determine whether the recovery of knife is reliable. PW-8 (Pramod) in his examination in chief has deposed as under:-

“On 1.3.04 accused Vinod took the police party at the house of accused Satinder at Shastri Park. The accused Satinder was interrogated. Accused Satinder got recovered one knife from underneath the heap of socks of his factory cum residence. IO prepared the sketch of the knife which is Ex.PW8/B. The knife was put in a pulanda, sealed with seal of RSD and seized vide memo Ex.PW8/C.”

In his cross-examination he has deposed as under :-

“.....Accused Satinder used to reside on the 2nd floor. I do not remember if the stairs leading to 2nd floor was from inside the house or were separate near the gate of the house. No family member of the accused was present inside his house. The accused was alone in the house at that time. Landlord and his family members were present in their house. Police had asked them to be witness but they had not joined the investigation. The house of accused Satinder consisted of one room and open space in front of it. I cannot tell

the direction of his room. It is incorrect to suggest that I do not know direction as I never reached there. The landlord had opened the lock of the gate on ground floor. Police officials had entered inside the house of accused Satinder. First the police interrogated the accused and thereafter the accused got recovered the knife. The police had recovered knife from underneath the heap of socks when the accused had disclosed the same to be lying there. It was recovered by police in presence of accused Satinder. I had seen the knife. I do not remember if the knife was closed or open when it was recovered. I do not know if there was blood on the knife or not. I do not remember if the knife got recovered by accused was wrapped in any cloth or paper. I do not remember the length of the knife measured by the police at the spot. I do not remember from where the police had arranged the scale with which the knife was measured.

51. PW-9 (Vijay Singh) in his examination in chief has deposed as under:-

“Thereafter the accused Vinod took the police party to house of accused Satinder at Sarai Rohilla. At his pointing out accused Satinder was apprehended. He was interrogated after his arrest. Personal search memo of accused Satinder was prepared vide memo Ex. PW9/B. He was interrogated and his disclosure statement Ex.PW8/H was recorded. He got recovered one knife from underneath the heap of socks from his house. IO prepared the sketch of knife Ex.PW8/B. The knife was seized vide memo Ex.PW8/C.”

52. In his examination in chief PW-13 (SI Ravi Shankar) deposed as under:-

“I made inquiries from Vinod whose name had appeared in the DD entry. Vinod was interrogated. He was arrested and his disclosure statement

Ex.PW8/F was recorded. Thereafter accused Vinod took the police party to the area of PS Sarai Rohilla. There at the pointing out of Vinod, accused Satinder now present before the court was arrested. He was arrested and his disclosure statement was recorded. He got recovered one knife, the sketch of the knife was prepared which is Ex.PW8/B. It was seized vide memo Ex.PW8/C.”

53. Further, PW-14 (ACP RS Dahiya) in his examination in chief has deposed as under :-

“.....As per his disclosure statement accused Vinod took the police team to area of Sarai Rohilla. He took the police to house of accused Satinder at Shashtri Park and at pointing out of accused Vinod, accused Satinder was arrested. His personal search was conducted vide memo Ex.PW9/B. Accused was interrogated and his disclosure statement Ex.PW8/H was recorded. As per his disclosure statement he got recovered a knife. I prepared sketch of the knife vide memo Ex.PW8/B. It was kept in pulanda, sealed with seal of RSD and seized vide memo Ex.PW8/C....”

54. The variation in the measurements of the knife which was given by the CFSL expert and the one given by the investigating officer is reproduced below:

Total Measurements	Sketch prepared by Investigating Officer Ex. PW8/B	Sketch prepared by the CFSL Doctor.
Total length	23.9cm	22.5cm
Length of blade	11.2cm	11cm
Length of handle	12.7cm	11.5 cm

55. A perusal of the measurement of the knife prepared by the CFSL expert and the one prepared by the investigating officer (*Ex. PW8/B*) establish that there is a difference of 1.4 cm. In our considerate view, discrepancy in the measurement of the knife does not tantamount to a major contradiction and is covered under minor inconsistency which may arise due to different measuring points or measuring techniques adopted by the CFSL expert.
56. A conjoint reading of the testimonies of PW-8 (Pramod), PW-9 (Vijay Singh), PW-13 (SI Ravi Shankar) and PW-14 (ACP RS Dahiya) establish the following:
- a. Respondent No. 4 (Vinod) was interrogated and arrested on 01.03.2004.
 - b. Pursuant to the disclosure of Respondent No. 4 (Vinod) which was recorded as *Ex. PW8/F*, he took the police party to the place of residence of Respondent No. 2 (Satinder).
 - c. Subsequently, Respondent No.2 (Satinder) was arrested and his disclosure statement was recorded as *Ex. PW8/H*. A knife was recovered at the instance of Respondent No. 2 (Satinder) from his residence which was found underneath a heap of socks. The sketch of the knife was prepared vide memo *Ex. PW8/B*. The knife was sealed vide seizure memo *Ex. PW8/C*.

The fact, that the knife was recovered at the instance of Respondent No. 2 (Satinder) and had blood stains on it is sufficient to consider it as a reliable piece of evidence.

DEFECTIVE INVESTIGATION WITH RESPECT TO RECOVERY OF KNIFE

57. Learned Trial Court has taken adverse inference with respect to the omission in taking fingerprints from the knife which was recovered at the instance of Respondent No. 2 (Satinder)
58. In our considerate view, the omission by the investigation agency to lift the finger prints from the knife which was recovered at the instance of Respondent No.2 (Satinder) cannot be a ground for drawing an adverse inference against the entire case of the prosecution. At best, it opens the possibility of a defective investigation conducted by the Investigating Agency requiring a higher scrutiny of the said recovery.
59. At this stage, we also deem it necessary to refer to criminal law jurisprudence with respect to defective investigation. The Hon'ble Supreme Court in a catena of Judgements has discussed the law related to defective investigation where the Hon'ble Court has tried to strike a balance between the lacuna in investigation conducted by the investigation agency and the rights of the accused in a criminal trial.
60. The Apex Court in ***Hema v. State*** reported in ***(2013) 10 SCC 192***, held that fair investigation is a part of the Constitutional Rights guaranteed under Articles 20 and 21 of the Constitution of India and it is the immediate requirement of the rule of law that investigation must be fair, transparent and judicious and observed as follows:

“14. It is also settled law that for certain defects in investigation, the accused cannot be acquitted. This aspect has been considered in various decisions. In

C. Muniappan v. State of T.N. [(2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402] , the following discussion and conclusions are relevant which are as follows: (SCC p. 589, para 55)

“55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.”

xxxx xxxxx xxxx xxxxx

18. It is clear that merely because of some defect in the investigation, lapse on the part of the investigating officer, it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions, etc. it is the obligation on the part of the court to scrutinise the prosecution evidence dehors such

lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth. ”

(Emphasis supplied)

61. Further, it is settled law that defective investigation by itself cannot be a ground for acquittal as laid down by the Apex Court in the case of ***Ram Bali v. State of Uttar Pradesh*** reported in **(2004) 10 SCC 598**. Germane portion of the judgment is extracted below:-

“in case of defective investigation the Court has to be circumspect while evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective”

(emphasis supplied)

62. The legal principles that emerge from a careful consideration of the aforesaid decisions are summarized herein below:
- (i) Some defects in the investigation, lapse on the part of the investigating officer, would not result in acquittal of the accused.
 - (ii) If the evidence on record bears out that the case of the prosecution and the evidence is of sterling quality and is reliable then the lapses or irregularities in the investigation will not attribute benefit to the accused.
 - (iii) However, to set aside the conviction of the accused, there must be a sufficient nexus between the conviction and the irregularity in the investigation. If the prosecution evidence on which the accused has been convicted is held to be reliable and

of sterling quality, the conviction cannot be set aside solely on the basis of some irregularity or illegality.

63. In view of the aforesaid dictums laid down by the Apex Court, it is established that the benefit of defective investigation cannot be extended to the Respondents. We are of the opinion that in the case of defective investigation, the court has to be circumspect in evaluating the evidence, but it can be stated that error, illegality or defect in investigation cannot have any impact unless miscarriage of justice is brought about or serious prejudice is caused to the accused. If the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful. Hence, the finding of the Trial Court with respect to the recovery of knife as an unreliable piece of evidence on the grounds that the investigating officer failed to lift any finger prints is not correct.

RECOVERY OF PANT OF THE DECEASED AT THE INSTANCE OF RESPONDENT NO. 3 (VIKAS)

64. Subsequent to the recovery of knife at the instance of Respondent No. 2 (Satinder), Respondent No. 4 (Vinod) and Respondent No. 2 (Satinder) led the Investigating Agency to the residence of Respondent No. 3 (Vikas) at whose instance a pant (*Ex. PW 8/C*) was recovered.
65. Learned Counsel for the appellant have submitted that the pant of the deceased (Pradeep) recovered at the instance of Respondent No. 3 (Vikas) points towards the guilt of the Respondent No 3 (Vikas) towards the commission of the crime. They further contended that the

learned trial judge had picked minor inconsistencies with respect to the color of the pants which was identified by the Prosecution Witnesses and misconstrued it as major contradictions, thereby discarding the recovery of pants and making it unreliable.

66. With respect to the recovery of pants of the deceased Learned Trial Court in its Judgment has held as under :-

*“The prosecution has alleged that the pant of deceased was recovered from accused Vikas vide memo Ex.PW8/C but the witnesses of prosecution have given different colour of this trouser. **PW7 Indrawati has stated that the pant was of brown colour. PW-8 Pramod has stated in the examination –in-chief that it was striped brown and in the cross-examination he has stated that it had stripes of yellow colour. PW9 Vijay Singh has given the colour of the pant as chocolate colour. PW13 SI Ravi Shankar has stated that the pant was of chocolate colour with stripes. PW14 ACP R S Dahiya has stated that it was of maroon colour.** Further PW14 has stated that the landlord of the accused Satinder was not present while PW8 Pramod and PW9 Vijay Singh have stated that he was present. Further PW8 has stated that the residence of accused Satinder was at second – floor while PW 9 has stated that if ground floor is counted as first floor he was living at second floor meaning thereby that he was living at first floor and PW 13 has stated that he was living at first floor but PW 14 has stated that he did not remember about it. **Therefore, the recovery of the pant of deceased Pradeep from accused Vikas is also doubtful.**”*

67. In relation to the recovery of pant, we deem it necessary to peruse the testimonies of PW-7 (Indrawati), PW-8 (Pramod), PW-9 (Vijay Singh), PW-13 (SI Ravi Shankar) and PW-14 (ACP RS Dahiya) to

determine whether there are major contradictions in the testimonies of the Prosecution Witnesses or minor inconsistencies which can be overlooked.

68. PW-7 (Indrawati) in her examination in chief has deposed as under :-

“After the return from school on 23.02.04, my son Pradeep had changed his school dress and had worn one white color jersey having blue color flowers on it, 1 shirt of pink color, pant of brown color. He was wearing chappals. I had not got checked Pradeep from any doctor when he had informed that he was not feeling well. Police had recorded my statement on 24/2/04. I do not remember if police had got signatures on my statement. It is incorrect to suggest that I have concocted a false story in connivance with police.”

69. PW-8 (Pramod) in his examination in chief has deposed as under :-

“Thereafter both accused Vinod and Satinder took the police to house of accused Vikas at Shastri Nagar, accused Vikas got recovered pant of stripped brown color belonging to the deceased from underneath the pillow from his house. The pant was put in a pulanda, sealed with seal of RSD and seized vide memo Ex.PW8/D.”

70. PW-9 (Vijay Singh) in his examination in chief has deposed as under:-

“Thereafter accused Vinod and Satinder took the police to house of accused Vikas at Sarai Rohilla, accused Vikas was apprehended at their pointing out. He was also interrogated. He was arrested vide memo Ex.PW9/C. His disclosure statement Ex.PW8/G was recorded. Accused Vikas got recovered pant of deceased from underneath the pillow which was seized vide memo Ex.PW8/D.

Thereafter all the accused persons were brought to the PS.”

In his cross-examination, he deposed as under :-

“The PS is at a distance of 1km. from our house. Deceased was wearing jersey of white color having blue flowers on it, T shirt of pink color and pant of chocolate color, wearing hawai chappals when he had left the house. Before lodging report with police we had searched in the locality.....”

71. PW-13 (SI Ravi Shankar) in his examination in chief deposed as under :-

“From there we reached at the residence of Vikas. He was arrested and interrogated. His disclosure statement Ex.PW8/G was recorded. At his pointing out one pant of the deceased child was recovered from inside the pillow lying on the bed of his room. The pant was put in a pulanda, sealed with the seal of RSD and was seized vide memo Ex.PW8/D. Thereafter all the accused took the police party to Monkey Park. The pointing out memo was prepared which is Ex.PW13/A.”

In his cross-examination he deposed as under :-

“Pillow was opened at room of accused Vikas. Colour of the pant was chocolate colour having strips. The length of the pant was not measured. The pant got recovered by accused Vikas was not compared with the pant of accused Vikas. It is incorrect to suggest that I have given false statement or that nothing was got recovered by accused Vikas.”

72. PW-14 (ACP RS Dahiya) in his examination in chief deposed as under:-

“Thereafter both the accused took the police team to house of accused Vikas. Accused Vikas was arrested and his personal search was conducted vide memo Ex.PW9C. His disclosure statement Ex.PW8/G was

recorded. As per his disclosure statement he got recovered on pant of deceased and the same was identified by PW Vijay and Pramod. It was kept in pulanda, sealed with seal of RSD and seized vide memo Ex.PW8/D.

In his cross-examination he has deposed as under :-

“Accused Vikas was residing on rented room. Accused Vinod has taken us directly at room of the accused Vikas. We had not contacted the landlord at that time. I do not remember the floor on which room of accused was situated. The color of the pant was Maroon. Accused Vikas had taken out the pant from inside the pillow. The pant was not measured”

73. A conjoint reading of the testimonies of PW-7 (Indrawati), PW-8 (Pramod), PW-9 (Vijay Singh), PW-13 (SI Ravi Shankar) and PW-14 (ACP RS Dahiya) reveal the following:-

- a. Respondent No. 2 (Satinder) and Respondent No. 4 (Vinod) took the investigation agency to the house of Respondent No.3 (Vikas) where Respondent No.3 was arrested and his disclosure statement was recorded (*Ex. PW 8/G*).
- b. A pointing out memo was prepared and the pants were recovered (*Ex. PW 8/C*) at the instance of Respondent No. 3 (Vikas) from inside the pillow lying on the bed of his room.

74. The Learned Trial Court in its Judgment dated 05.05.2008 has discarded the recovery of pant and has held it to be unreliable piece of evidence on the ground that the prosecution witnesses have stated different colors of the pant making their statements contradictory. In our considerate view, the color of the pant mentioned by the prosecution witnesses is a varied shade of a same color. The color

described by the prosecution witnesses is subject to different description by different individuals. Therefore, such description of color of the pant of the deceased recovered from the residence of Respondent No. 3 (Vikas) is a minor discrepancy and cannot be construed as a major contradiction. A table showing the varied versions of the color of the pants mentioned by the Prosecution Witnesses is reproduced below:

Prosecution Witnesses	Color of Pant mentioned
PW- 7 (Indrawati)	Brown
PW- 8 (Pramod)	Brown with stripes
PW- 9 (Vijay Singh)	Chocolate
PW- 13 (SI Ravi Shankar)	Chocolate color and stripes
PW- 14 (ACP RS Dahiya)	Maroon

75. **Hence it can be concluded that the recovery of the pant of the deceased at the instance of Respondent No. 3 (Vikas) is a reliable piece of evidence and points towards the guilt of the accused persons.**
76. At this stage, it is necessary to point out that minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. We deem it necessary to refer to the dicta of the Apex Court with respect to the law related to minor inconsistencies. In *Mritunjoy Biswas Vs. Pranab @ Kuti*

Biswas and Anr., reported at (2013) 12 SCC 796, the Apex Court has held as under:-

*“28. As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defense can take advantage of such inconsistencies. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See *Leela Ram vs. State of Haryana* and another, *Rammi alias Rameshwar v. State of M.P.* and *Shyamal Ghosh v. State of West Bengal*).*

(emphasis supplied)

77. Keeping in view the dicta of the Apex Court in *Mritunjoy Biswas (Supra)* we can conclude that the minor inconsistencies in testimonies of the Prosecution Witnesses cannot be grounds for discarding the Prosecution evidence. Therefore, it can be said that the recoveries which took place at the behest of Respondent No. 3 (Vikas) and Respondent No. 2 (Satinder) have minor inconsistencies and form a reliable piece of evidence. The aforesaid discussed inconsistencies do not go to the root of the matter and the evidence

therefore needs to be considered from a point of view of trustworthiness. We can therefore conclude that the recovery of knife and pant of the deceased are reliable and form a crucial part of the chain of circumstances which points towards the guilt of the Respondents.

RECOVERY OF THE PURSE OF THE DECEASED AT THE INSTANCE OF RESPONDENT NO. 4 (VINOD)

78. The next argument made by the Learned Counsel for the appellants is that the recovery of the purse of the deceased was at the instance of Respondent No. 4 (Vinod) which clearly points towards his guilt. They submitted that the Learned Trial Court had erred in holding the recovery of wallet as unreliable as the recovery of purse of the deceased was from an open area visible to the naked eye and is therefore outside the contours of Section 27 of the Evidence Act.
79. In this regard we deem it necessary to refer to the dicta of the Apex Court in ***State of H.P. v. Jeet Singh*** reported in (1999) 4 SCC 370

"26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would

remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others."

(Emphasis Supplied)

80. The Apex Court in ***Ibrahim Musa Chauhan @ Baba Chauhan v. State of Maharashtra*** reported in **2013 (3) SCALE 207** held as under :-

"133. Undoubtedly, the appellant's disclosure statement had been made before the police, as well as the panch witness. The fact that he did not disclose the place where the contraband had been hidden remains entirely insignificant, for the reason that he had led the police party to the said place, and that the said recovery had been made at his behest. The open space from where the recovery had been made though was accessible to anybody, it must be remembered that the contraband had been hidden, and that it was only after digging was done at the place shown by the appellant, that such recovery was made. Hence, it would have been impossible for a normal person having access to the said place, to know where the contraband goods were hidden."

(Emphasis Supplied)

81. We deem it necessary to peruse the testimonies of PW-8 (Pramod), PW-9 (Vijay Singh), PW-13 (SI Ravi Shankar) and PW-14 (ACP RS Dahiya). PW-8 (Pramod) deposed as under :-

"On return from the house of accused Vikas, accused Vinod got recovered one purse with words Woodland written over it from the bushes near the nali of Badarpur Mathura road. On checking the same it was

found containing one envelope of a letter and photograph of Indrawati. The purse was put in a pulanda sealed with seal of RSD and seized vide memo Ex.PW8/E.”

82. PW-9 (Vijay Singh) in his examination in chief deposed as under:-

“On return to the PS, accused Vinod got recovered one purse fro near the nala of PS Badarpur Mathura road. On checking the purse it found containing on envelope and one photo my sister Indrawati. The purse was put in pulanda, sealed with seal of RSD and seized vide memo Ex.PW8/E.”

83. PW-13 (SI Ravi Shankar) deposed as under :-

“Accused Vinod got recovered one purse from near a Ganda Nala near Badarpur police station. The purse contained the photograph of the mother of the deceased. It also contained one envelope sent by the father of deceased from Kuwait. The purse along with its contents was seized vide memo Ex.PW8/E after preparing its sealed pulanda.”

84. PW-14 (ACP RS Dahiya) has deposed as under :-

“Thereafter we returned to Badarpur. Accused Vinod took the police team near the ganda nala near wine shop, Badarpur and got recovered one purse from there and told me that purse belonged to deceased. On opening the purse, one photograph of mother of deceased and one envelop sent by father of deceased from Ouwait was found. The purse along with its contents was kept in pulanda, sealed with seal of RSD and seized vide memo Ex.PW8/E. Thereafter, we returned to PS. I deposited the case property in Malkhana along with form FSL. Accused were kept in lock up.”

85. A conjoint reading of (Vijay Singh), PW-13 (SI Ravi Shankar), PW-14 (ACP RS Dahiya) establishes that Respondent No. 4 (Vinod) took the police team near a ganda nala and the purse of the deceased was recovered from the bushes near the ganda nala. An envelope was also recovered which was sent by the father of the deceased and a photograph of the Indrawati, mother of the deceased, was found in the purse. It can therefore be said, that the disclosure statement of Respondent No. 4 (Vinod) led to the bushes from where the purse of the deceased was recovered. It is pertinent to point out here that the recovery of purse of the deceased was not from an area ordinarily visible to others. Applying the abovementioned dictas of the Hon'ble Apex Court with respect to recovery from an open space, we can conclude that the recovery of the purse of the deceased was not from an open space ordinarily visible to others and therefore falls under recovery made under Section 27 of the Indian Evidence Act, 1872. We therefore find the recovery of purse as a reliable piece of evidence.

MEDICAL EVIDENCE

86. At this stage, it is relevant to examine whether the medical evidence placed on record serves as an additional link to the chain of circumstances so created. PW-3 (Dr. Jayan M.G), who was posted as Senior Resident AIIMS, New Delhi had conducted the post-mortem of the deceased. He proved the post-mortem report (*Ex. PW3/A*) and has deposed as under :-

“On 26.3.2004 I have conducted postmortem on the body of deceased Pradeep Kumar s/o Manohar Lal Aged 14

years Male. After examination, I observed the following observation: -

Rigor mortis was present on all parts of the body. Postmortem staining was present on back and dependent parts except over the pressure points. Eyes and mouth were closed and there was no sign of decomposition.

ANTE MORTEM INJURIES: -

1. Incised wound of size 9 x 5 cms on upper most part of neck with clean cut edges, gaping and beveling (Lower margin and tissues more visible) placed obliquely on left side laterally and extending upto the middle on the back (with anterolateral end lower than the upper end on back), measuring 8 cm from left mid clavicular line, 4 cms from left mastoid and 7 cms from left scapula. On exploration, subcutaneous tissues, muscle, blood vessel (Jugular V) were found cut associated with reddened tissues and collection of small blood clots. Spinal cord was found fully severed between C2 and C3 Vertebra with (intervertebral) ligaments.
2. Incised wound of size 3 x 1.5 cms with clean edges placed transversely on left upper most anterior aspect of neck, almost in line and continuation with injury No. (1) except for a skin tag of .7 cms in between, measures 1 cms from midline, 9 cms from sternal notch and 6 cms from the chin. On examination, subcutaneous tissues and muscles were found cut with red colour tissues.
3. Incised wound of size 7 X 1 cms placed transversely on right anterior aspect of neck with clean edges over thyroid, measuring 7 cms from sternal notch and 6 cms from right ear (extends from mid line). Underlying subcutaneous tissues, muscle, right thyroid lamina are found severely associated with reddened tissues.
4. Incised wound of 5 X 1 cms placed transversely on right anterior aspect of neck with clean edges, 2 cms above injury No. 3 measuring 9 cm from sternal notch, 2 cms from midline, 5 cms from right mastoid

underlying subcutaneous tissues and muscle were found cut.

5. *Two superficial incised wounds of size 6 and 5 X .200s respectively 2 cms apart on anterior aspect of neck and upper one measuring 8 cms from sternal notch and 7 cms from the chin.*
6. *Incised wound near left angle of mouth of size 1x.5 cms with clean edges measuring 10 cms from left ear horizontally and 4 cms from chin underlying muscle was cut with bleeding surface.*
7. *Incised wound over left nostril extending into adjoining were of left side of face of size 1 X.7 cms with clean edges measuring 4 cms from injury No. 6 vertically.*

INTERNAL EXAMINATION:

Brain- Pale in appearance Stomach shows blood and blood clots mixed with partially digested food.

Anal sphincter - Patulous. Recent red coloured tears present in 6 and 12 O'clock position.

Blood in gauze, anal swab, clothes, blood stained handkerchief and blood-stained stone were collected and sealed and handed over to the IO alongwith the sample seal.

The time since death in this case was about two and a half days.

As per my opinion, the cause of death in this case was due to shock due to injury No.1 and 3 caused by sharp edged weapon which are sufficient to cause death in ordinary course of nature. All injuries are ante mortem in nature. I prepared my detailed report which is Ex. PW 3/A and the same is in hand writing and bears my signatures at Point A. 11 inquest papers along with the post mortem report were also handed over to the IO.

87. A perusal of the testimony of doctor who conducted the post-mortem reveals that the cause of death of the deceased was due to shock

caused by injury number 1 (Incised wound of size 9 x 5 cms on upper most part of neck) and injury number 3 (Incised wound of size 7 X 1 cms places transversely on right anterior aspect of neck) due to a sharp-edged weapon which is sufficient to cause death in the ordinary course of nature. Therefore, it is established that the cause of death of the deceased (Pradeep) was due to a sharp edged weapon, similar to the blood stained knife which was recovered at the instance of Respondent No. 2 (Satinder). The medical evidence therefore fortifies the case of the Appellant and points towards the guilt of Respondent No. 2 to 4.

CRIMINAL CONSPIRACY UNDER SECTION 120B IPC AND ARMS ACT

88. The Apex Court in the case of *Baldev Singh v. State of Punjab* reported in **2009 6 SCC 564** has held as under: -

"17. Conspiracy is defined in Section 120A of the IPC to mean:

"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 a criminal 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.

Explanation. --It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

An offence of conspiracy which is a separate and distinct offence, thus, would require involvement of more than one person. Criminal conspiracy is an independent offence. It is punishable separately; its ingredients being: -

- (i) an agreement between two or more persons.*
- (ii) the agreement must relate to doing or causing to be done either*
 - (a) an illegal act;*
 - (b) an act which is not illegal in itself but is done by illegal means.*

It is now, however, well settled that a conspiracy ordinarily is hatched in secrecy. The court for the purpose of arriving at a finding as to whether the said offence has been committed or not may take into consideration the circumstantial evidence. While however doing so, it must be borne in mind that meeting of the mind is essential; mere knowledge or discussion would not be sufficient.

18. Adverting to the said question once again, we may, however, notice that recently in Yogesh @ SachinJagdish Joshi v. State of Maharashtra [MANU/SC/7528/2008 : (2008) 6 SCALE 469], a Division Bench of this Court held:

"25. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its

objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement."

19. Yet again in *Nirmal Singh Kahlon vs. State of Punjab & Ors.* (2008) 14 SCALE 639], this Court following *Ram Lal Narang vs. State (Delhi Administration)* held that a conspiracy may be a general one and a separate one meaning thereby a larger conspiracy and a smaller which may develop in successive stages. For the aforementioned purpose, the conduct of the parties also assumes some relevance.

20. In *K.R. Purushothaman vs. State of Kerala*, this Court held:

"11. Section 120A of I.P.C. defines 'criminal conspiracy.' According to this Section when two or more persons agree to do, or cause to be done (i) an illegal act, or (ii) an act which is not illegal by illegal means, such an agreement is designed a criminal conspiracy. In Major E.G. Barsay v. State of Bombay, MANU/SC/0123/1961 : (1962) 2 SCR 195, Subba Rao J., speaking for the Court has said:

"31 The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a

single illegal act, It may comprise the commission of a number of acts."

13. To constitute a conspiracy, meeting of mind of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of conspiracy. Neither it is necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implications. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair, The existence of conspiracy and its objects are usually deducted from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the Court to keep in mind the well-known rule governing circumstantial evidence viz., each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. The criminal conspiracy is an independent offence in Indian Penal Code.

(emphasis supplied)

89. Further, in the case of ***Bilal Hajar@Abdul Hameed v. State Rep by Inspector of Police*** reported in ***AIR 2018 SC 4780*** the Hon'ble Apex Court has held as under:-

"27. The expression "criminal conspiracy" is defined in Section 120-A, Indian Penal Code. It says that when

two or more persons agree or cause to be done an illegal act or an act, which is not illegal by illegal means, such an agreement is designated a "criminal conspiracy". It then provides an exception to the effect 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. The explanation appended to the Section clarifies that it is immaterial whether the illegal act is the ultimate object of such agreement or is merely incidental to that object.

28. Section 120-B, Indian Penal Code provides a punishment for committing an offence of criminal conspiracy. It says that whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life, or rigorous imprisonment for a term of two years or upwards shall be punished in the same manner as if he had abetted such offence provided there is no express provision made in the Code for punishment of such conspiracy.

29. Sub-section (2) of Section 120-B, Indian Penal Code, however, provides that a person who is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with an imprisonment of either for a term not exceeding six months or with fine or both.

30. Reading of Section 120-A and Section 120-B, Indian Penal Code makes it clear that an offence of "criminal conspiracy" is a separate and distinct offence. Therefore, in order to constitute a criminal conspiracy and to attract its rigor, two factors must be present in the case on facts: first, involvement of more than one person and second, an agreement between/among such persons to do or causing to be

done an illegal act or an act which is not illegal but is done or causing to be done by illegal means.

31. The expression "criminal conspiracy" was aptly explained by this Court in a case reported in Major E.G. Barsay v. State of Bombay (1962) 2 SCR 195. Learned Judge Subba Rao (as His Lordship then was and later became CJI) speaking for the Bench in his distinctive style of writing said:

31. ...The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts.

32. Therefore, in order to constitute a conspiracy, meeting of mind of two or more persons to do an illegal act or an act by illegal means is a must. In other words, it is sine qua non for invoking the plea of conspiracy against the accused. However, it is not necessary that all the conspirators must know each and every detail of the conspiracy, which is being hatched and nor it is necessary to prove their active part/role in such meeting.

33. In other words, their presence and participation in such meeting alone is sufficient. It is well known that a criminal conspiracy is always hatched in secrecy and is never an open affair to anyone much less to public at large.

34. It is for this reason, its existence coupled with the object for which it was hatched has to be gathered on the basis of circumstantial evidence, such as conduct of the conspirators, the chain of circumstances leading to holding of such meeting till the commission of offence by applying the principle applicable for

appreciating the circumstantial evidence for holding the Accused guilty for commission of an offence. (See also Baldev Singh v. State of Punjab.

35. Keeping in view the aforesaid principle of law which is consistently followed and reiterated by this Court in several cases, the issue involved in this case is required to be examined with a view to find out as to whether Appellant (A-6) was a member of a criminal conspiracy which was hatched on 01.09.1991 to kill Siva on 05.09.1991 or in other words whether there is any evidence to sustain Appellant's conviction Under Section 120-B, Indian Penal Code and, if so, whether the evidence adduced by the prosecution is in conformity with the parameters laid down by this Court to prove the guilt of the Appellant beyond reasonable doubt."

(emphasis supplied)

90. From the perusal of the record we find that testimony of PW-7 (Indrawati), PW-8 (Pramod) and PW-9 (Vijay Singh) establishes that Respondent No.4 (Vinod) was last seen with the deceased. In addition, the testimony of PW8 (Pramod), PW-9 (Vijay Singh), PW-13 (SI Ravi Shankar) and PW-14 (ACP RS Dahiya) establish that pursuant to the disclosure statement and at the instance of the Respondent No. 2 (Satinder) the weapon of offence i.e knife was recovered from the house of Respondent No. 2 (Satinder). Moreover, the purse and pants of the deceased were recovered at the instance of accused persons. From a conjoint reading of the testimonies of prosecution witnesses along with the law settled by the Apex Court it is proved on record that Section 120-B of the IPC is clearly attracted against the Respondents in the present case. Hence, the argument

raised by the appellants that the prosecution failed to prove any criminal conspiracy under Section 120-B IPC among the appellants holds no ground.

91. It is further evident from the testimony of PW-3 (Dr. Jayan M.G.) that the death occurred due to shock caused by injury no. 1 (Incised wound of size 9 x 5 cms on upper most part neck) and injury no. 3 (Incised wound of size 7 x 1 cms on right anterior aspect of neck) due to sharp edged weapon which is ante mortem in nature and is caused by a sharp edged weapon. The recovery of weapon of offence i.e. knife in the present case depicts that death in the present case has occurred due to a knife blow which was recovered by the investigating officer pursuant to the disclosure of Respondent No. 2 (Satinder). The testimony of prosecution witnesses, namely the investigating officer, PW-14 (ACP RS Dahiya) and PW-13 (SI Ravi Shankar) establishes that Section 25 of Arms Act is made out against the Respondent No. 2 (Satinder). Hence the argument made by the counsel for the Respondent No. 2 (Satinder) that Section 25 Arms Act has not been proved against the Respondent holds no ground.

A CASE OF CIRCUMSTANTIAL EVIDENCE

92. The present case is one of circumstantial evidence and for the same reason we deem it necessary to peruse the jurisprudence on Circumstantial evidence discussed by the Hon'ble Supreme Court. The Apex Court in the case of *Mohd. Azad vs. State of West Bengal* reported in *AIR 2009 SC 1307* has held as under :-

“9. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrapa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC350); Ashok Kumar Chatterjee v. State of M.P (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

10. We may also make a reference to a decision of this Court in C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193, wherein it has been observed thus:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....".

11. In *Padala Veera Reddy v. State of A.P. and Ors* (AIR 1990 SC 79), it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

12. In *State of U.P. v. Ashok Kumar Srivastava*, (1992 CrLJ 1104), it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

13. Sir Alfred Wills in his admirable book "*Wills' Circumstantial Evidence*" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the

basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

14. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

15. In Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh, (AIR 1952 SC 343), wherein it was observed thus:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within

all human probability the act must have been done by the accused."

16. A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra, (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

17. These aspects were highlighted in State of Rajasthan v. Rajaram (2003 (8) SCC 180), State of Haryana v. Jagbir Singh and Anr. (2003 (11) SCC 261) and Kusuma Ankama Rao v State of A.P.

(Criminal Appeal No.185/2005 disposed of on 7.7.2008)

93. After having discussed the material on record in detail and analyzing the same on the scale of well established rules of criminal jurisprudence, we can safely conclude that the prosecution has established the following circumstances leading to the guilt of Respondent No. 2 (Satinder), Respondent No. 3 (Vikas) and Respondent No.4 (Vinod).
- a. The Respondent No. 4 (Vinod) was last seen with the deceased (Pradeep) after which the deceased went missing.
 - b. Testimony of PW-7, PW-8, PW-9 have established that the deceased was kidnapped for ransom.
 - c. The investigation agency arrested Respondent No. 4 (Vinod) and his disclosure statement was recorded and he took the investigating agency to the house of Respondent No. 2 (Satinder).
 - d. The blood stained knife (murder weapon) was recovered at the instance of Respondent No. 2 (Satinder) from his residence. Respondent No. 2 (Satinder) and Respondent No.4 (Vinod) then directed the investigating agency to Respondent No. 3 (Vikas).
 - e. The pant of the deceased was recovered from Respondent No. 3 (Vikas) at his instance from his residence.
 - f. Respondent No. 4 (Vinod) got recovered the purse of the deceased from the bushes near a ganda nala.

- g. The post-mortem report proved by PW-3 (Dr. Jayan M.G.) establishes that death was caused due to a sharp-edged weapon which was sufficient to cause death.

CRL. A NO. 1222/2019

RANSOM CALL AND INVOLVEMENT OF RESPONDENT NO. 2 (SUDHAKAR)

94. Learned Counsel for the Appellant has argued that the Ransom call was made by Respondent No. 2 (Sudhakar) who had since been declared a proclaimed offender (PO), and was involved in the criminal conspiracy of kidnapping and killing the deceased. He submitted that the learned trial court vide Judgment dated 31.05.2016 erred in holding that the Respondent No. 2 (Sudhakar) is not connected with the ransom call.

MATERIAL CONTRADICTION IN THE TESTIMONIES OF PROSECUTION WITNESSES

95. We deem it necessary to peruse the testimony of Indrawati, Vijay Singh and ACP R.S. Dahiya in the Judgment dated 31.05.2016 to determine whether the voice of Respondent No. 2 (Sudhakar) was recognized by any of the Prosecution Witnesses.
96. Prosecution witness Vijay Singh in Judgment dated 31.05.2016, in his testimony, has deposed as under :-

*“.....I was residing in the house (at Mohan Baba Nagar) of Smt. Indirawati, my sister, who was the mother of Pradeep Kumar (deceased). After ransom call, police had installed a call recorder on 24.02.2004, on our telephone landline number installed at my sister's house. **On 01.03.2004, police***

made inquiries regarding voice from the neighbours. Neighbours were made to hear the recorded voice by the police. In my presence, Vinod informed the police that the recorded voice was the voice of his friend Sudhakar @ Diwakar @ Chhotu. Vinod disclosed and pointed out the place of Sudhakar @ Diwakar @ Chhotu in Khan at Mohan Baba Nagar. I had accompanied the police and Vinod at the said place where Sudhakar @ Diwakar @ Chhotu was residing at Khan at Mohan Baba Nagar but he was not found there. It was revealed that he was absconded from the said place where he was resided. I had not seen Sudhakar @ Diwakar @ Chhotu prior to the incident but after his arrest, police had told us that he has been arrested and in the Court, he was shown to me, my sister and my wife and had pointed out that he was Sudhakar @ Diwakar @ Chhotu”

In his cross examination he has as under:-

“I never personally heard the voice of Sudhakar @ Diwakar @ Chhotu. I cannot say where the voice recorded by the police with the help of instrument in the telephone line was the voice of Sudhakar @ Diwakar @ Chhotu. It is wrong to suggest that Vinod had not disclosed before the police that the voice recorded by the police with the help of instrument in the telephone line was the voice of Sudhakar @ Diwakar @ Chhotu. It is wrong to suggest that I am deposing falsely.”

97. Prosecution witness Indrawati in Judgment dated 31.05.2016, in her testimony, has deposed as under :-

“Pramod son of my uncle had told me that he had attended a telephonic call made at my landline phone number wherein caller had demand ransom of Rs.10 lakhs in order to release Pradeep. We informed the

police about this fact. The police had installed an instrument to record the telephonic conversation with the landline telephone installed at my house on 24.02.2004. On the same day, i.e., 24.02.2004 I received a ransom call at my landline telephone in my house. Caller had asked me to make arrangement of Rs. 10 lakhs in case I wanted to save the life of my son Pradeep and that he was in their custody. He had further told me not to inform the police. I had informed the police that the voice of the caller was the voice of Sudhakar who used to visit the house of Vinod who was our neighbour.

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At this stage, MHC(M) produced one sealed pullanda sealed with the seal of Court. On opening the same, it is found to contain cassette (Ex.MO-1). The cassette is played and witness is asked to hear the same. After hearing the cassette, witness states that she identifies the voice of accused, voice of her husband Manohar Lal, Satpal (brother-in-law of my brother), Smt. Vidyawati mother-in-law of her brother Vijay.

She also identifies the voice of some other persons i.e. Vishambher and others, who belong to her native place as well as her matrimonial house. Witness states that accused Sudhakar was demanding Rs. 10 Lacs as ransom money and was giving warning to not to do any cheating and asked to do as he directed and to proceed at 06:00 pm, when he called them and come to the place, which he would suggest, when he called again.

(Witness identifies the voice of accused Sudhakar @ Diwakar in the recorded cassette, who is demanding Rs. 10 Lacs as ransom money to release her son and is giving warning to not to do any cheating and asked to do as he directed and to proceed at 06:00 pm, when he called them and come to the place, which he would suggest, when he called again.”

In his cross examination he deposed as under :-

“.....It is wrong to suggest that I had not personal received any telephonic call made by the person making ransom call. I had told to the police about the fact that the voice of the caller was the ‘voice of Sudhakar, who used to visit the house of Vinod, who was our neighbour’ (confronted with the statement of witness u/s 161 Cr.P.C. (Ex.PW6/P), where it is not so recorded). It is wrong to suggest that I had wrongly identified the voice in the tape recorded as that of accused Sudhakar @ Diwakar at the instance of my family members. It is wrong to suggest that I did not previously knew Sudhakar @ Diwakar. It is wrong to suggest that Sudhakar @ Diwakar had never made any ransom call

98. Prosecution witness ACP R.S. Dahiya in Judgment dated 31.05.2016, in his testimony, has deposed as under :-

“On 01st March .2004, I had recorded the statement u/s 161 Cr.PC of witnesses namely Pramod and Indrawati, who had identified the voice of the accused Sudhakar @ Diwakar, which was recorded at that time, when he (Sudhakar @ Diwakar) made a call at the house of the deceased for demand of ransom money on 24th February, 2004”

In his testimony dated 25.05.2007 which was used in Judgment dated 05.05.2008 he has deposed as under :-

“On 01.03.04 DO received information that the voice which was played in locality was of Sudhakar, friend of Vinod who was neighbourer of deceased. On this information, accused Vinod was interrogated. He was arrested and his personal search was conducted vide memo Ex.PW9/A. He was interrogated and his disclosure statement Ex.PW8/F was recorded.

99. A perusal of the testimonies of Indrawati, Vijay Singh and ACP RS Dahiya bring out the following contradictions:-

Indrawati in Judgment dated 31.05.2016 deposed	She stated that she had identified voice of the ransom caller as that of Respondent No. 2 (Sudhakar), and had told the same to the police, however, there is no mention of the same in her statement under Section 161 Cr.PC.
Vijay Singh in judgment dated 31.05.2016 deposed	He stated that he had not personally heard the voice of Respondent No. 2 (Sudhakar) and he cannot say whether the voice recorded was that of Respondent No. 2 (Sudhakar)
ACP R.S. Dahiya in Judgment dated 31.05.2016 deposed	In his testimony he has deposed that he recorded the statement of witnesses namely Pramod and Indrawati where they mentioned that the voice of the ransom caller was that of Respondent No. 2 (Sudhakar). However, the same is contradicted by his previous testimony dated 25.05.2007 where he deposed that the Duty officer received information from an unknown caller stating that the voice of ransom caller was that of Respondent No. 2 (Sudhakar).

100. We can, therefore, conclude that there were material contradictions in the testimonies of Prosecution Witnesses with regard to the person who recognized and informed the Investigating Agency that the ransom Caller was Respondent No. 2 (Sudhakar).

LACK OF SCIENTIFIC EVIDENCE WITH RESPECT TO THE RANSOM CALL

101. It is also pertinent to note here that the voice recording of the said ransom call is not supported by any scientific evidence. The cassette containing the recorded version of the ransom call was neither sealed in a proper manner nor was it sent to CFSL for obtaining the result of voice test. Moreover, the voice sample of Respondent No. 2 (Sudhakar) was never collected to check whether the voice of the Respondent matched with that of the ransom caller.
102. In our considerate opinion, the tape recorded conversation of the ransom caller is bereft of Scientific evidence and therefore serves as a weak piece of evidence to connect Respondent No. 2 (Sudhakar) to the said crime. In this regard, we may refer to the dicta of the Apex Court in *Nilesh Dinkar Paradkar vs State Of Maharashtra* reported in **2011(3)JCC 1972(SC)** where the Hon'ble Court has discussed the evidentiary value of a voice recording and subsequent voice identification. The Apex Court has held as under:-

“30. In our opinion, the evidence of voice identification is at best suspect, if not, wholly unreliable. Accurate voice identification is much more difficult than visual identification. It is prone to such extensive and sophisticated tampering, doctoring and editing that the reality can be completely replaced by fiction. Therefore, the Courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification. This Court, in a number of judgments emphasised the importance of the precautions, which are necessary to be taken in placing any reliance on the evidence of voice identification. In the case of Ziyauddin Burhanuddin Bukhari v. Brijmohan

Ramdass Mehra and Ors. (1976) 2 SCC 17, this Court made following observations:

We think that the High Court was quite right in holding that the tape-records of speeches were "documents", as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions:

(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act.

(emphasis supplied)

In the case of Ram Singh and Ors. v. Col. Ram Singh 1985 (Supp) SCC 611, again this Court stated some of the conditions necessary for admissibility of tape recorded statements, as follows:

(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence -- direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

In Ram Singh's case (supra), this Court also notices with approval the observations made by the Court of: 1985 (Supp) SCC 611 Appeal in England in the case of R. v. Maqsud Ali (1965) 2 AER 464. In the aforesaid case, Marshall, J. observed thus:

We can see no difference in principle between a tape-recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this Court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape- recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged.

To the same effect is the judgment in the case of R. v. Robson (1972) 2 AER 699, which has also been approved by this Court in Ram Singh's case (supra). In

this judgment, Shaw, J. delivering the judgment of the Central Criminal Court observed as follows:

The determination of the question is rendered more difficult because tape-recordings may be altered by the transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination by technical experts.

31. Chapter 14 of Archbold Criminal Pleading, Evidence and Practice discuss the law in England with regard to Evidence of Identification. Section I of this Chapter deals with Visual Identification and Section II relates to Voice Identification. Here again, it is emphasised that voice identification is more difficult than visual identification. Therefore, the precautions to be observed should be even more stringent than the precautions which ought to be taken in relation to visual identification. Speaking of lay listeners (including police officers), it enumerates the factors which would be relevant to judge the ability of such lay listener to correctly identify the voices. These factors include:

- (a) the quality of the recording of the disputed voice,*
- (b) the gap in time between the listener hearing the known voice and his attempt to recognize the disputed voice,*
- (c) the ability of the individual to identify voices in general (research showing that this varies from person to person), 8 2010 edition at pg: 1590-91*
- (d) the nature and duration of the speech which is sought to be identified and*
- (e) the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a way listener may nevertheless be wrong.*

The Court of Appeal in England in R. v. Chenia (2003) 2 Cr.App.R. 6 CA and R. v. Flynn and St. John (2008) 2 Cr.App.R. 20 CA, has reiterated the minimum

safeguards which are required to be observed before a Court can place any reliance on the voice identification evidence, as follows:

(a) the voice recognition exercise should be carried out by someone other than the officer investigating the offence;

(b) proper records should be kept of the amount of time spent in contact with the suspect by any officer giving voice recognition evidence, of the date and time spent by any such officer in compiling any transcript of a covert recording, and of any annotations on a transcript made by a listening officer as to his views as to the identify of a speaker; and

(c) any officer attempting a voice recognition exercise should not be provided with a transcript bearing the annotations of any other officer.

In America, similar safeguards have been evolved through a series of judgments of different Courts. The 9 [2003] 2 Cr.App.R. 6 CA 10 [2008] 2 Cr.App.R.20, CA principles evolved have been summed up in American Jurisprudence 2d (Vol. 29) in regard to the admissibility of tape recorded statements, which are stated as under:

The cases are in general agreement as to what constitutes a proper foundation for the admission of a sound recording, and indicate a reasonably strict adherence to the rules prescribed for testing the admissibility of recordings, which have been outlined as follows:

(1) a showing that the recording device was capable of taking testimony;

(2) a showing that the operator of the device was competent;

(3) establishment of the authenticity and correctness of the recording;

(4) a showing that changes, additions, or deletions have not been made;

- (5) a showing of the manner of the preservation of the recording;
- (6) identification of the speakers; and
- (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

... However, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said.

32. This apart, in the case of *Mahabir Prasad Verma v. Dr. Surinder* (1982) 2 SCC 258, this Court has laid down that tape recorded evidence can only be used as corroboration evidence in paragraph 22, it is observed as follows:

Tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape-recorded conversation is indeed no proper evidence and cannot be relied upon. In the instant case, there was no evidence of any such conversation between the tenant and the husband of the landlady; and in the absence of any such conversation, the tape-recorded conversation could be no proper evidence.

103. From the abovementioned judgment we can draw out the following principles which are relevant to the present case to determine evidentiary value of voice recording and subsequent voice identification:-

- a. Accurate voice identification is much more difficult than visual identification. It is prone to such extensive and sophisticated tampering, doctoring and editing that the reality can be completely replaced by fiction. Therefore, the Courts

have to be extremely cautious in basing a conviction purely on the evidence of voice identification.

- b. The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence -- direct or circumstantial.
 - c. Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.
 - d. The recorded cassette must be carefully sealed and kept in safe or official custody.
104. In the present case, the voice recordings of the ransom call were not sent to CFSL. Therefore, the accuracy of the tape-recorded conversation cannot be determined. In addition, the cassette of the tape-recorded conversation was not sealed properly. This makes room for tampering of the tape-recorded conversation thereby making it an unreliable piece of evidence.
105. Apart from the voice recording, there exists no other evidence which points towards the guilt of Respondent No. 2 (Sudhakar). In view of the dicta laid down by the Apex Court in ***Nilesh Dinkar Paradkar*** (*Supra*) the evidentiary value of a tape-recorded conversation and subsequent voice identification becomes a weak piece of evidence as the same is not corroborated by other circumstances.
106. In view of the aforesaid facts, we do not find any infirmity in the impugned judgment passed by learned trial court in sessions case No.

60/2012 and the acquittal of Respondent No. 2 (Sudhakar @ Diwakar @ Chottu) is upheld. CRL.A No.1222/2019 is dismissed.

CRL. A. No. 1223/2019

107. With respect to CRL.A No.1223/2019, we find that there is sufficient evidence on record which proves the guilt of Respondent Nos. 2 to 4. Accordingly, the impugned judgment passed by learned trial court in Sessions Case No. 134/2004 acquitting respondent No. 2 (Satinder), respondent No. 3 (Vikas) and respondent No. 4 (Vinod) is set aside.
108. The Respondent Nos. 2, 3 and 4 are held guilty for offences punishable under Section 365 /364A read with 120B and under Section 302 read with Section 120B IPC. Respondent No.2 (Satinder) is also held guilty for the offence punishable under Section 25 of the Arms Act.
109. List the matter on 24th February, 2020 for arguments on Order on Sentence.
110. Proxy counsel for respondent Nos. 2, 3 and 4 is present in court today. Learned counsels for respondent Nos. 2 to 4 are directed to produce the respondents on the next date of hearing i.e, 24th February, 2020.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

FEBRUARY 20, 2020

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