THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 17-09-2012

CORAM

HON'BLE MR. JUSTICE PERMOD KOHLI, CHIEF JUSTICE

HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

Crl.A. No. 01 of 2012

State of Sikkim ... **Appellant**

Versus

Rajendra Nath Gharai,
S/o Late Rakhal Gharai,
Vill - Bagmari,
P.S. Ramnagar,
Dist. Purba Midnapore,
West Bangal. ... **Respondent**

For State : Mr J. B. Pradhan, Public Prosecutor with Mr. S. K. Chettri, Assistant Public Prosecutor and Ms. Prathana Ghataney, Advocate.

For Respondent : Mr. N. Rai, Senior Advocate as Legal Aid Counsel with Ms. Jyoti Kharka, Advocate as Legal Aid Counsel.

J U D G M E N T

Wangdi, J.

This Appeal is directed against the judgment dated 29-09-2011 passed by the Learned Sessions Judge, Special Division – I, Sikkim at Gangtok in S. T. Case No.3 of 2010 (hereinafter referred to as "the impugned judgment") by which the Respondent-Accused was acquitted of the charge.

2(i). The history of this case as per the charge-sheet is traced to a written FIR lodged by one Dilliram Sharma, P.W.1, on 06-01-2005 at 1500 hrs. in the Sadar Police Station at Gangtok stating that his wife, Indira Sharma, had been missing since 04-01-2005 and that while searching for her he came to learn from his family and friends that he was last seen with an army personnel (Respondent-Accused) who promised to provide sugar and kerosene oil at cheaper rates to her and that he knew the person very well as he had come to his house 2/3 times earlier. As his wife did not return home even till that day he suspected that she might have been kidnapped, raped and murdered by that army personnel or confined somewhere secretly. This led to the registration of Sadar Police Case No.04(01)05 dated 06-01-2005 under Sections 363/364/365 of the Indian Penal Code (in short "IPC").

(ii) During the investigation, it transpired that Dilliram Sharma, P.W.1 and his wife, Indira Sharma, the deceased, were running a ration shop in Swastik, Burtuk, Gangtok, in a rented premises of Shri Tenden Lachenpa, P.W.4, since November, 2004. Meena Sharma, P.W.2, the sister of Dilliram Sharma, P.W.1, who lived in

Namcheybong, Pakyong, East Sikkim, had come on 01-01-2005 to stay with them. On that day, when three of them, i.e., Dilliram Sharma, P.W.1, his wife Indira Sharma, the deceased and his sister, Meena Sharma, P.W.2, were in their shop, the Respondent-Accused had come and offered them kerosene oil and sugar at cheaper rates and that he would inform of such rates on the next day. True to his words, the Respondent-Accused appeared in their shop on 02-01-2005 with the rates in presence of the three of them. They then asked the Respondent-Accused to supply 10 litres of kerosene oil and 5 kgs. of sugar. On being asked by the Respondent-Accused they gave him a 5 litres capacity yellow coloured plastic jar for kerosene oil and a nylon bag for sugar. On 04-01-2005, when P.W.1, Dilliram Sharma, was away on duty, the Respondent-Accused came to the shop with some sugar and it gave to the deceased, Indira Sharma, and asked her to go with him to collect the kerosene oil. The deceased left with the Respondent-Accused for the purpose asking P.W.2 to look after the shop and her children. When P.W.1 returned for lunch at around 12 noon he did not find his wife at home and was told by his sister, P.W.2, that she had left with the Respondent-Accused to collect kerosene oil and to

shop for other things. P.W.1 then returned to his duty but, when he returned home in the evening he found that she had still not returned. When he was unable to find her whereabouts in spite of his searching, he lodged a missing report at the Sadar Police Station. Thereafter, when she could not be traced out despite efforts to find her even till 06-01-2005, P.W.1 lodged a FIR, Exhibit 1. It was further revealed during the investigating that the Respondent-Accused was an Orderly of Lt. Col. S. K. Tomar, 2 I/C, 617 EME Battalion, C/o 99 APO, Burtuk, P.W.6 and on leave since the morning of 05-01-2005. P.W.1 recognised the Respondent-Accused from a photograph shown to him as the person who visited his shop offering to provide kerosene oil and sugar.

(iii) On 07-01-2005, the State Police received an information from an army personnel that a dead body of a female had been found inside a septic tank situated below the quarter of Lt. Col. S. K. Tomar, P.W.6, which was later identified as that of the deceased, Indira Sharma. After conducting necessary inquest over the dead body the Investigation Officer (in short the "I.O.") forwarded it to the STNM Hospital, Gangtok, for post-mortem

examination. The Medico Legal Autopsy Report, Exhibit 48 of Dr. S. D. Sharma, P.W.18, who conducted the post-mortem opined that the cause of death was due to intracranial haemorrhage and shock due to multiple injuries caused by blunt weapon and that the injuries were ante-mortem, fresh before death and collectively sufficient to cause death in the ordinary course of nature. The suspect Respondent-Accused was arrested on 09-01-2005 by the Army Police from 211 Fd Wksp Coy EME at Barrackpore, West Bengal, and was handed over to the Police at Gangtok, Sikkim on 11-01-2005 where he was remanded to police custody.

(iv) Investigation further revealed that Lnk Rajendra Nath Gharai, the Respondent-Accused, was posted as an Orderly of Lt. Col. S. K. Tomar, 2 I/C 617 EME Battalion, P.W.6 and the latter was living alone in his quarter since 13-12-2004 after his family members had left for Delhi. That the Respondent-Accused, as a part of his duty used to reach the child of P.W.6 to the school bus stop below MES IB in the mornings and fetch him in the evenings when he used to meet the deceased, Indira Sharma and got acquainted with each other. On 01-01-2005 the

Respondent-Accused went to the shop of the deceased and told her that he could provide kerosene oil and sugar at cheaper rates. This finally led to P.W.1 and the deceased handing over a yellow coloured plastic jar of 5 litres capacity for kerosene oil and a nylon bag for sugar to him as already noted above. It further transpired that on 03-01-2005 the Respondent-Accused had gone to the Battalion Ration Store and collected 10 litres of kerosene oil in a black coloured plastic jar and 5 kgs. of sugar from Ration NCO Nk Surendra Singh, P.W.17, and took them to his barrack. The next day, i.e., 04-01-2005 at about 8.30 a.m. after Lt. Col. S. K. Tomar, P.W.6, had left for his office, the Respondent-Accused collected the kerosene and sugar from the barrack and brought them to the residence of P.W.6. Leaving the kerosene jar in the storeroom of the quarter of P.W.6, he took the sugar and gave it to the deceased, Indira Sharma, at her shop asking her to accompany him to collect the kerosene oil. As noted earlier, she then left with the Respondent-Accused asking her sister-in-law, P.W.2, to mind the shop and children. Once inside the quarter he bolted the door and tried to rape her that led to a scuffle taking place between them. The deceased ran towards the back door and managed to

reach the store room where the Respondent-Accused again caught up with her and hit her, poking her at the same time with an umbrella picked up from the store room. The deceased managed to free herself from the clutches of the Respondent-Accused and tried to flee from the storeroom but he caught hold of both her legs and pulled her making her fall heavily on her face on the concrete drain outside the storeroom. The Respondent-Accused then picked up a concrete block from the drain and smashed the face of the deceased with it resulting in her death. He then dragged her body into the storeroom carrying her lungi, shawl and other clothes and, after tying the body with an electric extension cord, dragged it further to a septic tank from behind the quarter and dumped the body in it. He then brought the kerosene oil from the storeroom, poured it over the body, and after setting it on fire put the lid back on the septic tank. Thereafter, he went back to the storeroom, washed the area and threw away all the weapon of offence including a gold chain of the victim. After that he spread some sand over the septic tank lid and some dry leaves over the sand, set it on fire and returned to the barrack where he washed the uniform he was wearing in the washing machine and hung

them on the verandah to dry. In the evening he handed over the yellow coloured 5 litres plastic jar containing kerosene oil to Lnk Md. M. Mondal, P.W.20, who in turn gave it to Hav. Vijay Singh, P.W.12 and left station on leave early in the morning of the day but, was later apprehended on 09-01-2005.

(v) The statement of Respondent-Accused under Section 27 of the Indian Evidence Act, 1872 was recorded in presence of witnesses based on which the concrete block, MO-XVIII in two pieces one of which contained blood stains and a gold chain, MO-III, were recovered vide Seizure Memo Exhibit 57 on 14-01-2005. The concrete block, MO-XVIII in two pieces, were recovered from a 'jhora' (meaning a brook) near Lt. Col. S. K. Tomar's quarter, the gold chain, MO-III, from septic tank and later a gold nose ornament, MO-IV, from the drain by the I.O. on re-inspection of the place of occurrence. The disclosure statement also led to the recovery and seizure of a cotton combat jacket, MO-XIX, and cotton combat trouser, MO-XX, vide Exhibit Memo 58 from the verandah of the side room of the barrack where the Respondent-Accused used to reside. Apart from this, recoveries were also made of

one ladies gold ear ring, MO-I, from right side pocket of the cotton combat trouser, MO-XX, and one pair of brown coloured P.T. shoes, MO XXI, from the locker of Respondent-Accused on that very day.

3. Having found *prima facie* case under Sections 376/511/364/301/201 IPC against him the Respondent-Accused was sent up for trial.

4. The CFSL reports, Exhibits 62 and 63, received later, indicated that the articles sent for examination tested positive for blood and that the genotype profile developed from the DNA recovered from the dry leaves, MO-XV and the umbrella, MO-XII, belonged to a female individual respectively.

5. Upon charge being framed by the Learned Sessions Judge, East and North Sikkim at Gangtok, under the aforesaid provisions of the IPC against Respondent-Accused, he pleaded not guilty and claimed to be tried.

6. On completion of the trial during which 41 witnesses were examined by the prosecution, the Learned Sessions Judge, Special Division – I, Sikkim at Gangtok, before whom the case was later transferred, acquitted the

Respondent-Accused on finding that the prosecution had failed to prove the case against him beyond reasonable doubt.

7. Leave having been granted under Sub-Section (3) of Section 378 of the Code of Criminal Procedure, 1908 (in short "Cr.P.C.") by the Order of this Court in Crl.L.P. No.01 of 2012 dated 20-02-2012, the present appeal was admitted for hearing.

8. Before this Court, Mr. J. B. Pradhan, Learned Public Prosecutor, submitted that the case was based purely on circumstantial evidence and the prosecution had been successful in proving each of the circumstances appearing against the Respondent-Accused and those proved circumstances formed an unbroken chain leading to the only conclusion of the Respondent-Accused having committed the offences. The Learned Public Prosecutor urged that the following circumstances stood fully established:-

(i) That the Respondent-Accused had come to the shop of Indira Sharma, the deceased, on 01-01-2005, 02-01-2005 and 04-01-2005.

This circumstance, as per the Learned Public Prosecutor, stands established by the evidence of P.W.2, Meena Sharma, upon which he heavily relied, who, as per him, is corroborated by P.W.3, Gyan Pd. Sharma, when in his evidence it has come that the Respondent-Accused had come to the shop of the deceased on the relevant day and a conversation had taken place between him and the deceased. The relevant portions of these witnesses referred to by the Learned Public Prosecutor are reproduced below:-

P.W.2, Meena Sharma

> "..... The accused present in the dock is the same Army personnel who had come to the shop and to whom my deceased sister-in-law had asked to provide candle sticks and red chilli. The accused left the shop saying he would provide the same if available. The accused returned after 10/15 minutes thereafter and told my deceased sister-in-law that the candle sticks and chilli were not available. However, the accused told her that he could arrange for other items like, Sugar and Kerosin oil which are lying with him and that she could come with him and collect the same. To that my deceased sister-in-law told the accused that as her husband was not at home then and the same would be collected in the evening after his return from his duty. However, the accused told her that if she wanted the item she collect the item then and there as in the evening her husband may not be there to collect the same. Then my deceased sister-in-law agreed to go with the accused to whom she asked to wait for some time as she would get dressed up. After dressing up my deceased sister-in-law went away along with the accused. towards the Army Camp. However, thereafter she never returned home. ....."

P.W.3, Gyan Pd. Sharma

"..... The deceased lady was running a provision shop in the building of one Lachungpa at Burtuk. I usually used to keep my milk containers infront (sic) of the said shop of deceased lady. I had seen the deceased lady one or two days before her sudden disappearance. On the relevant day I had visited the shop of the deceased lady to collect my milk container which was kept infront (sic) her shop. At that time I had seen the sister-in-law of the deceased lady in the shop. There was also an Army personnel in Army uniform at the shop of the deceased lady talking to her. ....."

(ii) The deceased was missing from the day she was last seen with the Respondent-Accused on 04-01-2005.

As per the Learned Public Prosecutor this stands proved from the very evidence of P.W.2, Meena Sharma, the missing report, Exhibit 2 and, FIR, Exhibit 1, lodged by P.W.1, Dilliram Sharma, the husband of the deceased, and sought to dwell on his deposition in great detail and laid emphasis on the following portions:-

P.W.1, Dilliram Sharma

"I am working as Constable under Sikkim Armed Police since the year 1992. During January 2005 I was residing with my wife and two children on rent in the building of one Mr. Lachenpa at Upper Burtuk. My wife the deceased, was running a small ration shop in the same premises in which our residence was situated. I used to attend my duty at Pangthang at SAP Camp. My duty hours on working days used to be between 7 am to 12 noon and again from 2 pm to 4.30 pm. I used to come home for lunch during the period of interval between 12 noon to 2 pm. On non working days

> my duty hours were between 7 am to 9 am and again from 2 pm to 4 pm. On non working days I used to be with my family during the off hours. On 4.01.2005 I went to attend my duty in the morning at 7 am as usual. And I came back to my residence at about 12 pm. As I did not find my deceased wife Indira Sharma at the residence nor in her shop I inquired about her whereabouts from my younger sister Mina Sharma who had come to stay with us since 1st January 2005. I was informed by my said younger sister that my deceased wife had accompanied one army personnel towards the army camp at Swastik as the army personnel had volunteered to arrange kerosene oil. Since my deceased wife did not return after I had waited for her for some time, I also proceeded towards the same direction in which my deceased wife was reported to have gone with the army personnel. However I did not find my deceased wife in the said direction. Thereafter I left for my duty and again returned back at about 4.30 pm. My deceased wife had not returned to our residence or to our shop even at that time. Thereafter I went and lodged a diary report at Sadar Police Station, Gangtok about the missing of my deceased wife. On 5.1.2005 I searched for my missing wife in and around the locality and outside the cantonment area to the extent permissible by the army authorities but could not find her.
>
> ....."

(iii) The semi burnt dead body was recovered from inside the septic tank in the army cantonment area.

This as per the Learned Public Prosecutor stood established by the Inquest Report, Exhibit 31, and by the evidence of P.W. 5, Sepoy Ashok Kumar, P.W.6, Lt. Col. S. K. Tomar, P.W.7, Major Himesh Puri and P.W.9, Lt. Col. G. K. Sharma, and that they have been corroborated by P.W.32, Radesh Tamang and P.W. 36, P. M. Rai. The Learned Public Prosecutor

emphasised on the following portions of the evidence of P.W.5, Sepoy Ashok Kumar:-

P.W.5, Sepoy Ashok Kumar

"During January, 2005 I was working as A Sepoy under 617EME, Btn. at Burtuk. During January, 2005 I was assigned the work of a cleaner in the residence of Lt.Colonel S. K. Tomar I know the accused standing in the dock. His name is R.N. Gharai He was also working as Sepoy under 617EME, Btn. at Burtuk during 2005. He was an assistant in the quarter of Lt. Colonel S. K. Tomar. As usual on 4.1.2005 I went to the Official quarters of Shri S. K. Tomar on official usual duty at 8 A.M. The Police had recorded my statement in connection with this case. When I went to the official quarter of S.K. Tomar on the morning of 4.1.2005, Officer S. K. Tomar was not present at his residence but the accused person was inside the quarter attending to some works. After attending to my usual cleaning work at the quarter of S.K. Tomar, I went to the Officer's Mess in the Army Cantonment area to attend my duty there. On the following day i.e. 5.1.2005 when I went to the Bunglow of S.K. Tomar to attend my usual duty I did not find accused R.N. Gharai there. In his place I met Naik D.T. Reddi there. I was informed by Naik D. T. Reddi that R. N. Gharai had taken leave. As I was proceeding to my cleaning work in the quarter of S.K. Tomar I noticed patch of blood on the floor just outside the quarter. I enquired about the presence of such blood there from D. T. Reddi who also did not know anything about it. I left the quarter as usual after finishing my cleaning works. I came and attended to my cleaning work in the quarter of S.K. Tomar on 6.1.2005 also. On this date D. T. Reddi also told me to clean up the store room of the said quarter also. When I went to the Store room I noticed patches of blood on the walls of the store room I again made enquiry from D. T. Reddi about the said blood of which he also pleaded ignorance. I then told Reddi to report the matter to the Officer. In fact I had also noticed some smoke coming from outside the quarter of S.K. Tomar. D. T. Reddi had also seen the smoke there. Later that day I was called by Lt.Col . S.K. Tomar to his quarter where I was asked regarding what I had seen in his quarter. I told S. K. Tomar regarding my noticing patch of blood out side the

> quarter and patches of blood on the walls of the store room inside his quarter and regarding the smoke which I had noticed outside his quarter. Later an enquiry was being conducted in our Unit. Either on the 6th or 7th January, 2005 Civil Police came to our Cantonment. There were number of other persons including Civil Police, Army Personnel and also Civilian. At that time the civil Police recovered the dead body from the Septic tank behind the quarter of S. K. Tomar. As I noticed the dead body from a little distance I could not identify whether it was of a male or female but the dead body was charred. Thereafter the Civil Police took the dead body from the Cantonment.
> ....."

(iv) The disclosure statement of the Respondent-Accused based upon which the incriminating articles were seized.

The fact of the Respondent-Accused having made the disclosure statement and incriminating articles seized at the instance of the Respondent-Accused, as per the Learned Public Prosecutor, have been proved by P.W.23, Dawa Tshering Lepcha and P.W.24, Sonam Choejee Lachungpa.

(v) Smoke was noticed by P.W.5, Sepoy Ashok Kumar, near the septic tank where the dead body of the deceased was recovered in a semi-burnt condition.

(vi) The Respondent-Accused had proceeded on leave from 05-01-2005, i.e., from the day after the date of occurrence of the incident.

This as per Learned Public Prosecutor has been proved by P.W.7, Major Himesh Puri, who has been corroborated by P.W.6, Lt. Col. S. K. Tomar, P.W.34, Nk D. T. Reddy.

(vii) P.W.18, Dr. S. D. Sharma, Chief Medico-Legal Consultant, S.T.N.M. Hospital, who conducted the post-mortem examination on the dead body of the deceased, described the wearing apparels on the dead body that he had noticed at the time of the post-mortem and, that his descriptions fit in with the one given by Meena Sharma, P.W.2, as those worn by the deceased when she was last seen by her leaving with the Respondent-Accused. The medical autopsy report indicated the cause of death as being due to intracranial haemorrhage and shock due to multiple injuries produced by blunt weapon.

(viii) The finding of the CFSL Expert, P.W. 38, S. Sathyan, reveals that the blood found on the dry leaves, MO-XV, blood stains in umbrella cutting and blood stains and the blood sample on gauge piece as per the DNA report belonged to a female individual.

(ix) The Respondent-Accused was identified by P.W.2, Meena Sharma, during the Test Identification Parade (in short "T. I. Parade").

9(i). It was submitted that the circumstances set out above have been proved conclusively leaving no room at all for any doubt and that those proved circumstances form an unbroken chain that leads to the sole conclusion of the Respondent-Accused having committed the offence.

(ii) It was then submitted by the Leaned Public Prosecutor that rejection of the identification of the Respondent-Accused at paragraphs 51 to 56 of the impugned judgment by the Learned Trial Court was erroneous in the light of P.W.2, Meena Sharma, unhesitatingly identifying the Respondent-Accused at the T. I. Parade.

(iii) It was his further submission that it was erroneous for the Learned Trial Court to have held at paragraph 61 of the impugned judgment that the offence could not have been committed on 04-01-2005 as the patches of blood seen in the premises of the quarter of Lt. Col. S. K. Tomar, P.W.6, was fresh and that the body was

still bleeding even as on 07-01-2005 when the Respondent-Accused had already been sent on leave on 05-01-2005. That the Learned Trial Court had overlooked the opinion of the Medico-Legal Expert, Dr. S. D. Sharma, P.W.18, that the time of the death was about 2 to 5 days thereby bringing 04-01-2005 within its range. Moreover, the outright blunt denial of all the incriminating circumstances contained in questions no.1, 2, 11, 12, 13, 15, 44, 45, 71 and 72, added one more link to the chain of circumstances appearing against the Respondent-Accused.

(iv) Relying upon the decision of ***Rizan and Anr.*** vs. ***State of Chhattishgarh*** : ***(2003) 2 SCC 661***, it was submitted that even if major portion of the prosecution evidence is deficient, residue of such evidence if credible would be sufficient to prove the guilt of an accused.

(v) On the principle of appreciation of evidence, the Learned Public Prosecutor relied upon the following decisions of the Hon'ble Supreme Court:-

(a) ***Sanjiv Kumar*** vs. ***State of H.P.*** : ***(1999) 2 SCC 288***; and

(b) ***Prithu alias Prithi Chand and Anr.*** vs. ***State of Himachal Pradesh*** : ***(2009) 11 SCC 588***.

(vi) The consequence of an accused not explaining or totally denying the incriminating circumstances put to him in his examination under Section 313 Cr.P.C., as per the Learned Public Prosecutor, has been reiterated in the case of ***Joseph s/o Kooveli Poulo*** vs. ***State of Kerala*** : ***(2000) 5 SCC 197*** in paragraph 14 of which it has been held as under:-

> **"14.** The incriminating circumstances enumerated above unmistakably and inevitably lead to the guilt of the appellant and nothing has been highlighted or brought on record to make the facts proved or the circumstances established to be in any manner in consonance with the innocence at any rate of the appellant. During the time of questioning under Section 313 CrPC, the appellant instead of making at least an attempt to explain or clarify the incriminating circumstances inculpating him, and connecting him with the crime by his adamant attitude of total denial of everything when those circumstances were brought to his notice by the Court not only lost the opportunity but stood self-condemned. Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else, they being personally and exclusively within his knowledge. Of late, courts have, from the falsity of the defence plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed (see *State of Maharashtra* v. *Suresh*). That missing link to connect the accused-appellant, we find in this case provided by the blunt and outright denial of every one and all the incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause for the death of Gracy. ....."

(vii) Reliance was also placed upon the case of ***State of Rajasthan*** vs. ***Kashi Ram*** : ***(2006) 12 SCC 254***, more particularly, the following:-

> **"23.** It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Naina Mohd., Re*."

(viii) It was finally submitted that although there are certain contradictions appearing in the evidence of the prosecution yet, those do not displace the other evidence of clinching nature by which alone the guilt of the Respondent-Accused stand established.

10(i). Mr. N. Rai, Learned Senior Advocate, appearing as Legal Aid Counsel for the Respondent-Accused, appointed under the Orders of this Court, submitted that the evidence relied upon by the State-Appellant that are said to have established the circumstances against the Respondent-Accused are not to be read in isolation in view of the glaring contradictions in the other prosecution evidence on the facts asserted as proved circumstances.

(ii) The manner in which the Respondent-Accused was sent off hurriedly on leave on 05-01-2005 by P.W.7, Major Himesh Puri, on the ground of illness of his mother and, the evidence as regards the condition of the dead body of the deceased as indicated in the Medico Legal Autopsy Report considered along with the circumstances appearing at the place of occurrence, would lead one to reasonably conclude that the Respondent-Accused is a victim of conspiracy to get him implicated falsely in the case. As per Learned Counsel, this stands established by the evidence of P.W.5, Sepoy Ashok Kumar, who was assigned to clean the official quarter of P.W.6, Lt. Col. S. K. Tomar, by which it has been revealed that on 05-01-2005 when he had gone to the bungalow of P.W.6 to

attend to his usual duties, he did not find the Respondent-Accused there as he had gone on leave but, met only P.W.34, Nk D. T. Reddy. That while cleaning the quarter he noticed a patch of blood on the floor just outside the quarter and enquired about it from P.W.34 who expressed his ignorance about it. On 06-01-2005 P.W.34, Nk. D. T. Reddy, asked him to clean the storeroom also and when he went in there, he noticed patches of blood on the walls about which he asked P.W.34 but, he again expressed his ignorance. He also noticed some smoke coming from outside the quarter which was also seen by P.W.34, Nk D. T. Reddy. He was later called by P.W.6, Lt. Col. S. K. Tomar, to the quarter and asked regarding what he had seen. The information given by him led to an enquiry being conducted and, that it was either on 06-01-2005 or 07-01-2005 that the Civil Police arrived there and recovered the dead body from the septic tank located behind the quarter. This has been corroborated by P.W.34, Nk D. T. Reddy, who further went on to state that 2 I/C, Lt. Col. S. K. Tomar, P.W.6, went to his office and later came along with the Military Police and checked the storeroom and asked him to open the lid of the septic tank and, when he did so, he saw a dead body inside it. By

this, as per the Learned Counsel, it stands established that the offence was committed either on 05-01-2005 or 06-01-2005 after the Respondent-Accused had already left for his home on leave in the early morning of 05-01-2005.

(iii) Mr. Rai submitted that the evidence of P.W.18, Dr. S. D. Sharma, Senior Medico-Legal Consultant, assumes relevance here since as per his autopsy report the deceased was found "bleeding from both ears" and that the death of the deceased was likely to have taken place between 2 to 5 days. Considering the fact that the autopsy was conducted on the body of the deceased on 08-01-2005, a reasonable inference that the deceased had been killed either on 05-01-2005 or 06-01-2005 could be drawn. In support of his submission, the Learned Counsel placed before us an extract on the subject "Blood Stains and Other Body Fluids" from the publication "Forensic Science in India and the World" by Deepak Ratan and Mohd. H. Zaidi published by "Alia Law Agency, Allahabad, Lucknow" the relevant portion of which is reproduced below:-

> ***"(2) Blood Stains and Other Body Fluids.—***.....
> The blood comes out of the body due to the blood pressure. In the process of self-defence the

> blood pressure lowers down automatically and blood starts clotting too. Since there is no pressure of blood in a dead person hence the blood does not come out unless the wound is of large dimention and has been done in such a way that blood oozes out due to influence of gravitational force. The blood coming out of a dead body would be accompanied by serum and it would come out in large quantity and would come out freely.
>
> ....."

(iv) As per the Learned Counsel, the fact that there was "bleeding" which meant that the blood was fresh even as on 07-01-2005, it did not fit in with the circumstance in which blood would ooze out of a dead body as stated in the article extracted above. Therefore, it can be reasonably concluded that the murder had been committed just a day or two earlier, i.e., either on 05-01-2005 or 06-01-2005 which would then bring within the zone of suspicion persons other than the Respondent-Accused, namely, P.W.6, Lt. Col. S. K. Tomar and P.W.1, Dilliram Sharma.

(v) As per the Learned Counsel P.W.6, Lt. Col. S. K. Tomar, would be a suspect as he was living alone in his quarter when the offence was committed, his family being away at his native place in Delhi. That fact that the incident had taken place in his official quarter and the hurry in which he and P.W.7, Major Himesh Puri, had

granted leave to the Respondent-Accused in the night of 04-01-2005 under questionable circumstances causing him to leave early in the morning of 05-01-2005, are circumstances compounding the suspicion against him.

(vi) As per him, the reason to suspect P.W.1, Dilliram Sharma, arises out of the fact that it was in his own evidence that he had contracted a second marriage with a relative of the deceased soon after her death. It is further pointed out that in the missing report, Exhibit 2, lodged before the written FIR, Exhibit 1, in the Gangtok Sadar Police Station he did not mention the Respondent-Accused except to vaguely state "army personnel". That although it is in his evidence that it was his sister, P.W.2, Meena Sharma, who had informed him of his deceased wife, Indira Sharma, having left with the Respondent-Accused, he failed to mention this in the FIR and instead has stated that he came to know from his "family" that "she had been taken by the one army personnel". The vagueness of the FIR, Exhibit 1, gets compounded by the delay in lodging it as it was done only on 06-01-2005 when she had been admittedly found missing since 04-01-2005. That the only reason given in lodging the FIR as

being the deceased not returning home till 06-01-2005 which got him to suspect that she may have been kidnapped, raped and murdered or kept at some place secretly, was difficult to accept. All these, therefore, would also make P.W.1, the husband of the deceased, one of the suspects to the crime.

(vii) It was next contended that P.W.2, Meena Sharma, is a planted witness which is borne out by the serious contradictions in her evidence rendering her entire evidence suspect. The Learned Counsel drew our attention to the following appearing in her cross-examination:-

> "..... My eldest brother Dilley Ram Sharma is sitting in the Courtroom today. I came with him to the Court today. I have come today from Pakyong. I have been residing in Pakyong from my childhood. Infact (sic) I was born and brought up at Pakyong. I have not resided with my eldest brother PW 1 at Gangtok anytime except one or two days in the year 1992-93. My brother PW 1 used to come to the village during holidays. My deceased sister-in-law was missing from 4.1.2005 but I do not know when she expired. I live in Pakyong with my parents and my other family members. I cannot say as to what my deceased sister-in-law used to do as her occupation. I do not know if my eldest brother PW 1 and his deceased wife used to quarrel most of the times. I cannot say since the year 2004 till now in which place my eldest brother PW 1 resides. My eldest brother PW 1 told me that my deceased sister-in-law went missing on 4.1.2005. ....."

Relying upon the above, it was submitted by Mr. N. Rai that as the witness admittedly was not living with the deceased and P.W.1 at the time of the incident but only one or two days in the year 1992-93, an inference that her evidence to the contrary appearing in other portions were tutored and false could reasonably be drawn.

(viii) It was next contended that there was grave doubt as to the identification of the Respondent-Accused by P.W.2, Meena Sharma, in the T. I. Parade in view of the fact that she could identify him only in a second T. I. Parade that was conducted, as admitted by her in her cross-examination. This, as per Mr. Rai, would lead one to reasonably presume that the witness had been shown the Respondent-Accused after the first T. I. Parade, a position which, as per him, stands confirmed by her statement that "during the Test Identification the accused had been placed in the middle" and, also by the fact that the Police has shown the photograph of the Respondent-Accused to her brother, P.W.1, Dilliram Sharma, in the State Bank of India, Main Branch, Gangtok. The other reason is that although P.W.3, Gyan Pd. Sharma, was also listed as a witness for the T. I. Parade, he was tendered by the

prosecution on grounds that have gone unsubstantiated. That P.W.3 was unable to identify the Respondent-Accused even in the Court room which, as per the Learned Counsel, is borne out by his following deposition:-

> "..... I do not know the accused standing in the dock. The Army personnel taling (sic) to the deceased lady was someone like the accused standing in the dock.
>
> .....
>
> When I saw the said dressed Army personnel in the shop of the deceased, I did not find out whether he had come to buy some articles in the said shop. It is true that the Army personnels used to come to the shop of deceased to buy things from the shop. The said Army personnel had worn the Army camouflaged dress. The said Army personnel had long moustache. It is true that the said Army personnel was not like to resumbled (sic) the accused standing in the dock today. ....."

(ix) The other significant aspect of the case requiring consideration, as per Learned Counsel, is that P.W.1, Dilliram Sharma, has not been mentioned by any other witness except P.W.2.

(x) It was submitted that none had seen smoke emanating from the septic tank either on 04-01-2005 or 05-01-2005 except by P.W.5, Sepoy Ashok Kumar, and P.W.34, Nk D. T. Reddy on 06-01-2005. It was further submitted that on 07-01-2005 when P.W.7, Major Himesh Puri, and P.W.9, Lt. Col. G. K. Sharma had accompanied

P.W.6, Lt. Col. S. K. Tomar to his quarter, they found burnt leaves and fresh dry sand scattered over the lid of the septic tank. This, considered with the fact that smoke was seen only on 06-01-2005, could lead one to reasonably conclude that the fire was lit on 06-01-2005 as it was only on that day that the smoke was noticed by P.W.5, Sepoy Ashok Kumar and P.W.34, Nk D. T. Reddy.

(xi) The prosecution story of the yellow coloured jar said to have been handed over by the deceased to the Respondent-Accused on 04-01-2005 for kerosene oil stands belied by the evidence of P.W.12, Hav Vijay Singh, as per whom a yellow jerry can was seized from the store of the battalion and by the evidence of P.W.20, L/nk Md. M. Mondal, as per whom he had handed over a yellow coloured jerry can containing kerosene oil to P.W.12, Hav Vijay Singh, on 06-01-2005 as instructed by the Respondent-Accused. This as per the Learned Counsel displaces the theory of the Respondent-Accused having taken kerosene oil in a yellow coloured jar to the storeroom of P.W.6, Lt. Col. S. K. Tomar, and his having sprinkled the kerosene over the dead body in which case, it ought to have been seized from the storeroom and not

from the battalion store. The Learned Counsel went on to submit that the evidence of P.W.12 that such jars are deposited in the store empty after use by the officers further adds to the suspicion of P.W.6, Lt. Col. S. K. Tomar, being involved in the commission of the offence.

(xii) The Learned Counsel submitted that when two conclusions are possible, the one that is favourable to an accused ought to be accepted and, in the present case the possibility of the murder having been taken place after the departure of the Respondent-Accused is a reasonable possibility and the benefit of this should go in favour of the Respondent-Accused.

(xiii) The next lacunae in the evidence of the prosecution pointed out by the Learned Counsel is the nature of the disclosure statement under Section 27 of the Evidence Act, Exhibit 71, said to have been rendered by the Respondent-Accused. As per Mr. N. Rai, the disclosure statement does not fulfil the requirements of the law. By referring to the records, it was submitted that when they were first examined in Court, neither of the witnesses, namely, P.W.23, Dawa Tshering Lepcha, P.W.24, Sonam Choejee Lachungpa, have stated anything about it but, did

so only later, on being recalled. Even the recoveries of the articles cannot be said to have been made as a consequence of it as it has come in evidence that the 'jhora' from where the two broken pieces of concrete block, MO-XVIII (collectively), were recovered was accessible to all and the entire area had been trampled upon and searched by the Police personnel earlier. The recovery of the combat trousers, MO-XX, and combat jacket, MO-XIX found hanging to dry could not be believed as it could not have been left in such condition by a person going on long leave and, that the recovery of piece of gold from the combat trouser pocket also cannot be believed in view of the contradictory evidence of P.W.29 as per whom the pockets and its insides were not checked and verified when the combat jacket, MO-XIX, and combat trousers, MO-XX were seized and also did not know from where the P.T. shoes, MO-XXI, was brought. The most material of the Exhibits being MO-I, the pair of gold ear top, and MO-XVII, broken handle of an umbrella said to have been seized vide Seizure Memo Exhibits 55 and Exhibits 56, obviously appear to have been seized by the Police on their own and that the seizure memos had already been prepared on which they were only asked to sign.

Reference in this regard was made to the following portions of the evidence of P.W.22, Karma Loday Bhutia, P.W.23, Dawa Tshering Lepach, P.W.24, Sonam Choejee Lachungpa and P.W.29, Hav. C. K. Kothari:-

P.W.22, Karma Loday Bhutia

"..... I do not know whether Exbts. 54, 55 and 56 were already prepared by the Police when we were called to sign on that relevant day due to lapse of time. Mr. P.M. Rai, the then Inspector and a Dy.S.P. were there when we were called to sign on Exbts. 54, 55 and 56. ..... The Police were collecting the articles here and there by the side of the Army quarters from the portion which was occupied by the employees. ..... There was only one gold ear ring when the Police were making the seizure. ....."

P.W.23, Dawa Tshering Lepcha

"..... In respect of the instant murder case there was a big procession of both male and female of the Burtuk as well as Chanmari areas. The procession started from Burtuk up to Deorali. ON of the slogans of that procession was "murderer lai phasi deo" (hang the murderer). The participants of the procession dispersed after they were gathered and speech was delivered. I signed in Exbt. 54, Exbt. 55, Exbt. 56, Exbt. 57 and Exbt. 58 after the date of the said procession. In the said procession all the Panchayat members were present. I was also present. I went to the spot with the Police twice that was in the interval of one day. On my first visit the Police seized the gold "phuli" (nose ornament) M.O. IV and the gold ear tops M.O. I. The Police seized two numbers of ear top, M.O. I along with the said "phuli" on our first visit. The Police did not seize the gold ear ring. I cannot say whose combat jacket M.O. IX and combat trouser M.O. XX are. They were not seized from the person of somebody. They were found in the Army compound. I had visited the Army compound only twice with the Police persons in connection with this case. I had not visited the said Army compound before and after that. It is

not a fact that there was a piece of gold in the pocket of the combat trouser. I had seen the gold piece of about 1 cm of the circumference of a pin. ..... M.O. XVII a broken handle of umbrella was seized by the Police from a kitchen like room of the Army quarters. The umbrella M.O. XII was also there. M.O. XVII and M.O. XII i.e., the broken handle of the umbrella and the umbrella were together in the said kitchen like room. ..... The two broken concrete pieces M.O. XVIII (collectively) were on the ground. ....."

P.W.24, Sonam Choejee Lachungpa

"I cannot exactly say as to in which place I signed in Exbt. 57 and Exbt. 58 but I feel that I must have signed in the said Exbt. 57 and EXbt. 58 in the Court premises. I am a resident of Burtuk, East Sikkim. My house is immediately next to the house of the deceased. ..... There was a procession made in the area by the local people against the death of the said deceased. I was also a member of that procession. I went in that procession up to Ranipool. However no public speech was made after ending the said procession. ..... It is true that M.O. XVIII (collectively) were picked up from the jhora near the said Army quarters. It is not a fact that I was not present when the said M.O. XVIII were seized by the Police. There were Police from the Sadar Police Station but I cannot name them. I cannot exactly say as to from where the gold chain M.O. III was picked up. When I saw the said article that was in the hands of the Police. Besides the said two concrete blocks, gold chain M.O. III and the P.T. shoes M.O. XX, I did not see the Police seizing anything else. ....."

P.W.29, Hav. C. K. Kothari

"..... M.O.XIX is the same cotton combat jacket. M.O.XX is the same cotton combat trouser, M.O.XXI is the same pair of brown P.T. shoe size 6. I am however unable to identify the gold earring mentioned at Sl.No.3 of the seizure memo Exbt.58 from amongst the articles shown to me in the Court today. .....

XXX – by the accused through ld. Legal Aid counsel Shri N. Rai.

> ..... The combat jacket M.O.XIX, combat trouser M.O.XX were hung in a wire stretched outside the barrack. I cannot say where from the P.T. shoes M.O.XXI were brought. There were no other clothes hung on the said stretched wire. When M.O.XIX, XX and XXI were seized their pockets and insides were not checked or verified. Besides the said M.O.XIX, XX and XXI no other material articles were recovered or seized. I have seen Exbt.58 for the first time today. ....."

(xiv) The seizure of gold chain, MO-III, gold nose ornaments ("phuli") MO-IV under Seizure Memo Exhibit 57, which are other two vital material Exhibits, said to have been recovered from the septic tank, also suffer from the same inadequacy in the light of the evidence of P.W.23 and P.W.24. Even the seizure of 5 litres yellow coloured jerry can, MO-VI, in which the Respondent-Accused is said to have carried the kerosene from his room in the barracks to the storeroom of the quarter of P.W.6 after he received it from the battalion store and, the kerosene from which was said to have been used to set the body of the deceased on fire, do not appear to be above suspicion in view of the depositions of P.W.25, Dorjee Bhutia, P.W.26, Nedup Bhutia and P.W.30, Subedar Maj. M. C. Karmakar. The Learned Counsel referred to the following portions of their depositions:

P.W.25, Dorjee Bhutia

"..... Similarly vide the seizure memo already marked Exbt. 33 the Police had seized the yellow coloured jerry can in front of the barrack in the Army camp. .....

XXX – by the accused through
ld. Legal Aid counsel Shri N. Rai.

..... The plastic jerry can M.O. VI was lying on the ground in front of the Army barrack when the same was seized by the Police. ....."

P.W.26, Nedup Bhutia

"..... The place i.e., the army compound where we had gone that day is frequented by the local public even at other times. That day also I had gone on my own as I saw some people gathered there. M.O. VI jerry can is the jerrycan of the mustard oil. The kind of jerrycan like M.O. VI are available in the town. I cannot say as to wherefrom the Police brought the said M.O. VI. The said M.O. VI was with the Police when I saw that for the first time. I cannot even say wherefrom the sugar M.O. XXI was brought by the Police. When I saw them, both the said articles M.O. VI and M,O.XXI were in the hands of Police. The Police did not ask me anything and they did not take down my statement. ....." **[emphasis supplied]**

P.W.30, Subedar Maj. M. C. Karmakar

".....and at that time the said Civil Police Officer had seized a 5 litres capacity plastic jerrycan yellow in colour most probably a mustard old jerrycan in my presence from one official of EME Battalion whose name I do not know. The seizure was made by the Civil Police Officer under the seizure memo already marked Exbt. 33. As I was present at the time of the seizure I was also asked to sign on the said seizure memo. Exbt. 33 (d) is my signature. The said jerrycan was like M.O. VI shown to me in the Courtroom today.

XXX – by the accused through
ld. Legal Aid counsel Shri N. Rai.

> ..... The place from where the seizure was made was above the road. The official quarters of Lt. Col. Tomar was below the said road. ..... When I went to the place the said jerrycan was in the hand of the Police. I cannot say as to from where the Police had brought the said jerrycan. I cannot say whether the jerrycan seized by the Police on that day is M.O. VI or not. Only I can say is there was a yellow jerrycan. ....." **[emphasis supplied]**

(xv) It was submitted by the Learned Counsel that glaring contradictions in the evidence of these witnesses is apparent when they have stated that it was recovered from the ground in front of the army barrack and, that the Seizure Memo Exhibit 33 by which it was seized, had already been prepared on which they were only asked to sign, contrary to the case of the prosecution that the plastic jerry can was left by the Respondent-Accused in the storeroom. That the prosecution case further gets eroded when, in complete contradiction P.W.30 on his part states that the jerry can was seized from one official of EME Battalion whose name he did not know, under Seizure Memo Exhibit 33 and the jerry can, as per him, was in the hand of the Police when he went to the place.

(xvi) It was the submission of the Learned Counsel that for all these reasons in the first instance the recovery of the articles and their seizure are not above suspicion

and, secondly, that such recoveries were made on the basis of the statement of the Respondent-Accused under Section 27 of the Evidence Act have not been successfully proved by the prosecution. In fact, as per him, the very genuineness of disclosure statement under Section 27 of the Evidence Act is rendered unreliable.

(xvii) Mr. Rai placed heavily relied upon the decision of ***Pulukuri Kottaya and Others*** vs. ***Emperor*** : ***AIR 1947 PC 67*** where the principle underlying Section 27 of the Evidence Act, 1872, has been set out in detail, more particularly, in paragraph 10, relevant portion of which is reproduced below:-

> "[10] ..... The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. ....."

(xviii) On the above, reference also was made to the following decisions:-

(a) ***Anter Singh*** vs. ***State of Rajasthan*** : ***AIR 2004 SC 2865***;

(b) ***Mani*** vs. ***State of Tamil Nadu*** : ***2008 CRI.L.J. 1046*** (SC) (paragraphs 20 and 21); and

(c) ***Damber Bahadur Chhetri*** vs. ***State of Sikkim*** : ***2010 CRI.L.J. 3076*** (Sikkim) (paragraphs 9 to 13).

(xix) Referring to the case of ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra*** : ***AIR 1984 SC 1622*** (paragraphs 144, 148, 150 to 154, 162, 165, 175) the Learned Counsel emphasised on following three principles laid down therein:-

(a) A Circumstance which is not put to an accused under Section 313 Cr.P.C. would naturally stand discarded;

(b) Care and caution ought to be exercised in accepting the evidence of related witnesses;

Mr. Rai pointed out that P.W.1 and P.W.2 were related as husband and sister-in-law to the deceased and re-emphasised their unreliability for the reasons already discussed.

(c) Where on the evidence two possibilities are available or open, one which goes in favour of prosecution and the other which benefits an

accused, the accused is entitled to the benefit of doubt.

(xx) It was next contended that the prosecution has failed to comply with the provision of Sub-Section (1) of Section 157 Cr.P.C. there being a gross delay in sending the FIR to the competent Court as required thereunder. As per him, it was received by the Magistrate only on 01-02-2005 which is borne out by the signature of the Magistrate Exhibit 62(c) when the case had been registered by the Gangtok Sadar Police Station as early as on 06-01-2005. Therefore, the delay of about 25 days which has gone unexplained by the prosecution is fatal to the prosecution case. On this, the Learned Counsel placed on the following:-

(a) ***Ramesh Baburao Devaskar & Ors.*** vs. ***State of Maharashtra*** : ***2008 CRI.L.J. 372*** (paragraphs 6 and 17);

(b) ***Motilal & Anr.*** vs. ***State of Rajasthan*** : ***AIR 2009 SC 2790*** (paragraphs 2, 4, 6); and

(c) ***N. H. Muhammed Afras*** vs. ***State of Kerala*** : ***AIR 2009 SC 731*** (paragraph 5).

(xxi) That there was also a gross delay of 15 hours in lodging the FIR, Exhibit 1, that rendered the prosecution doubtful following the principle of law laid down in the

case of ***Birappa & Anr.*** vs. ***State of Karnataka*** : ***AIR 2010 SC 3398*** (paragraph 6).

(xxii) The Learned Counsel went on to submit that in view of the nature of the T. I. Parade and the evidence of the P.Ws.1 and 2, as also that of P.W.3, no reliance could be placed thereupon as it was conducted belatedly and become the Respondent-Accused had been seen by them during the time of his remand in police custody. The last seen theory set up by the prosecution would also lose its significance in view of the doubtful identification of the Respondent-Accused. In support of his contention reliance was placed on the following decisions:-

(a) ***Mohibur Rahman and Anr.*** vs. ***State of Assam*** : ***2002 SCC (Cri.) 1496*** (paragraph 10); and

(b) ***Anant Bhujangrao Kulkarni*** vs. ***State of Maharashtra*** : ***1993 SCC (Crl.) 520*** (paragraph 12)

(xxiii) On the principle of interested witnesses, Mr. Rai referred to the following decisions:-

(a) ***State of Karnataka*** vs. ***Bheemappa and Others*** : ***1993 CRI.L.J. 2609*** (SC) (paragraph 17); and

(b) ***State of Punjab and Gurmej Singh*** vs. ***Jit Singh and Others*** : ***AIR 1994 SC 549*** (paragraph 3).

(xxiv) Replying to the contention of the Learned Public Prosecutor that the cross-examination of P.W.2 need not be looked into in view of his categorical statements appearing in the statement-in-chief, Mr. Rai submitted that the object of cross-examination is to test the veracity of the statements made in examination-in-chief and was, therefore, an essential part of the evidence that called for giving it equal weightage. Mr. Rai also referred to the following decisions:-

(a) ***Damber Bahadur Chettri*** vs. ***State of Sikkim*** : ***2005 CRI.L.J. 808*** (Sikkim) (paragraph 12); and

(b) ***Govind*** vs. ***State of M.P.*** : ***2005 CRI.L.J. 1244*** (MP) (paragraph 27); and

(xxv) Dwelling upon the scope of appeal against the acquittal it was submitted that an Appellate Court would interfere with the order of acquittal only where there are compelling circumstances bearing in mind the presumption of innocence of the accused and further that the acquittal by the Learned Trial Court bolsters such presumption. To this effect Learned Counsel relied upon the following decisions:-

(a) ***Brahm Swaroop & Anr.*** vs. ***State of U.P.*** : ***2011 CRI.L.J. 306*** (SC) (paragraph 15); and

(b) ***Aruvelu & Anr.*** vs. ***State & Anr.*** : ***2010 CRI.L.J. 433*** (SC) (paragraphs 24, 25, 45).

(xxvi) Mr. Rai urged that the Learned Public Prosecutor while pressing the Appeal did not indicate or set out the circumstances that were said to be appearing against the Respondent-Accused and also did not point out as to which part of the impugned judgment was perverse. It was thus his submission that there was no reason as to why the impugned judgment of the Learned Trial Court should be interfered with.

11. In his brief reply, Mr. J. B. Pradhan, Learned Public Prosecutor, contended that there were no doubt some lacunae in the evidence of the prosecution but those are not such as to shake the foundation of the prosecution case. That there were bound to be some mistakes or embellishments in the evidence but, the mistakes or embellishments appearing in the present case are not such as to wash away the entire evidence of the prosecution. It was further submitted that the fact of Respondent-Accused having been contacted by his wife informing him of the serious illness of his mother had been fully established by the evidence of P.W.6 and P.W.7 who have corroborated each other and that P.W.7 had not been

cross-examined on this. That these circumstances had been put to the Respondent-Accused while being examined under Section 313 Cr.P.C. but his answer to those were in the nature of complete denial which as per him add constituted one more link in the chain of circumstances appearing against him. Therefore, as per the Learned Public Prosecutor the doubt being raised as to the involvement of P.W.6 or anyone else in the commission of the offence was misplaced.

12(i). We have given thoughtful consideration to the rival submissions on behalf of the parties and have carefully examined the evidence on record with the anxiety that it deserves. Greater caution has been exercised by us as the Appeal is against acquittal of the Respondent-Accused and that there is a presumption that the impugned judgment of the Learned Trial Court is correct apart from the fact that the liberty of an individual is involved. For this reason, we have dealt with the submissions placed by the Learned Counsels in detail.

(ii) It is an admitted position that the case against the Respondent-Accused is purely based upon circumstantial evidence. The law on circumstantial

evidence is well-settled and it would be unnecessary to cite any decisions on this score but, suffice it to note that each of the circumstances appearing against an accused requires to be proved beyond reasonable doubt and that those circumstances ought to form an unbroken chain that would lead to the sole hypothesis that the offence has been committed by the Respondent-Accused and none other.

(iii) On a careful reading of the impugned judgment, we find that the Learned Trial Court has dealt with the evidence minutely and has arrived at its finding upon due consideration of all aspects relevant for the purpose and we are of the view that it deserves to be upheld for the reasons that follow hereafter.

(iv) While proceeding to give our findings it has been felt convenient to deal with the circumstances set out by the Learned Public Prosecutor in seriatim.

(A) That the Respondent-Accused had come to the shop of Indira Sharma, the deceased, on 01-01-2005, 02-01-2005 and 04-01-2005.

(i) As per the Learned Public Prosecutor, the fact that the Respondent-Accused had visited the shop of the deceased on 01-01-2005 and 02-01-2005 have

been proved by the husband of the deceased, P.W.1, Dilliram Sharma as per whom, the Respondent-Accused who was wearing an army combat uniform had come to their shop on 01-01-2005 when he was present and had introduced himself as a MES personnel volunteering to make available items like kerosene oil at concessional rates. That when he asked him about the rates, the Respondent-Accused told him that he would confirm about it and let them know. That at about 5.30 p.m. of the following day, i.e., 02-01-2005, the Respondent-Accused again came to the shop and showed him a paper containing rates of various items like kerosene oil, sugar, etc., and when was asked as to when the items would be delivered, the Respondent-Accused told him that he would inform him after a few days and asked him for containers for kerosene, sugar, etc. P.W.1 then gave him a yellow plastic jar along with a nylon bag and a polythene sack which the Respondent-Accused carried and left. By referring to the deposition of P.W.1, the Learned Public Prosecutor submitted that on 04-01-2005 when he returned home from duty at about 12 noon and did not find his deceased wife

either in the residence or in the shop, he asked his younger sister, Meena Sharma, P.W.2, who as per him had come to stay with them since 01-01-2005, about her whereabouts and, was informed that the deceased had gone towards the Army Camp at Swastik accompanied by one army personnel who had volunteered to arrange for some kerosene oil. When she did not return for some time he went in search of her in the direction where she was reported to have gone with the army personnel but when he could not find her, he left for his duty. That when he returned from his duty at about 4.30 p.m. and found that his wife had still not returned, he lodged a missing report, Exhibit 2, at the Sadar Police Station, Gangtok. On 05-01-2005 also he searched for his missing wife but was unsuccessful and, on 06-01-2005 he lodged a written FIR, Exhibit 1, expressing his suspicion of her being abducted, raped, murdered and disposed of.

(ii) The Learned Public Prosecutor went on to submit that P.W.2, Meena Sharma, the younger sister of P.W.1, corroborates P.W.1. In her evidence, we

find that she has stated that she had gone to the rented residence of her brother, P.W.1 on 01-01-2005 to assist the deceased sister-in-law in her shop. On 04-01-2005, P.W.1 as usual left for his duty at 7 a.m. At about 9.30 a.m. when she and the deceased were in the shop, a person in army uniform had come to the shop to whom the deceased asked if he could provide her some candle sticks and red chilli for her shop. She then identified the Respondent-Accused as the same army personnel and further stated that he left the shop saying he would provide those if available and returned after 10-15 minutes. He stated that candle sticks and chilli were not available but could arrange for other items like sugar and kerosene oil which she could go with him and collect. When the deceased told the Respondent-Accused that she would collect them in the evening after the return of her husband from his duty, the Respondent-Accused told her that she should collect the items immediately as her husband may not be there in the evening. The deceased then agreed to go with the Respondent-Accused and did so after getting dressed and headed towards the army camp. Thereafter, she

did not return. When P.W.1 later had come for lunch and enquired about his wife, she told him that she had gone with the Respondent-Accused to the army camp to collect sugar and kerosene. She described the dress worn by the deceased when she had left and identified the burnt pieces of those clothes recovered from the place of occurrence. The Learned Public Prosecutor also relied upon the evidence of P.W.3, Gyan Pd. Sharma, who as per him, also had seen P.W.2, Meena Sharma, in the shop and an army personnel in uniform talking to the deceased.

(iii) On examination of the evidence as regards the circumstances, on the face of it there appear to be corroborations among the witnesses. However, on closer examination, we find that there are irreconcilable contradictions which renders the proof of the circumstance as doubtful which are evident from the following:-

(iv) While it is in the evidence of P.W.1 that the offer of sugar and kerosene was made by the Respondent-Accused on 01-01-2005 and 02-01-2005, the evidence of P.W.2 indicates that such offer was made

by the Respondent-Accused only on 04-01-2005. The evidence of P.W.3, Gyan Pd. Sharma, is found to be vague and of no assistance as his evidence is only to the effect that he had seen the sister-in-law of the deceased, a fact that we find doubtful for the reasons that shall be stated later and, that there was an army personnel in uniform talking to deceased. He was unable to identify the Respondent-Accused in Court and in his cross-examination he has categorically stated that "the said Army personnel was not like or resumbled (sic) the accused standing in the dock".

(v) The other aspect of the evidence that adds to the incredulity of the prosecution story is that although P.W.3 had been named in the list of witnesses for identification of the Respondent-Accused in the T. I. Parade, we find from the evidence that he did not participate in it. As per the prosecution, he was not examined on the ground of his illness as is borne out by the requisition, Exhibit 40, submitted by P.W.41, the I.O. but, curiously we find in the evidence of P.W.3 that he was not asked to identify the accused by a T. I. Parade and that he

did not know if any T. I. Parade was conducted in that case. This has not been controverted by the Prosecution.

(vi) We also find doubtful as to the veracity of the evidence of P.W.2, Meena Sharma, in view of the grossly incongruous statement in her evidence which we have reproduced while dealing with the submissions of the Learned Counsel for the Respondent-Accused which, in substance, is that she had stayed with her elder brother, P.W.1, Dilliram Sharma, at Gangtok only for one or two days in the year 1992-93 and had no knowledge of what her deceased sister-in-law used to do as her occupation and also did not know where her brother P.W.1 resided since the year 2004. These are categorical and unambiguous statements that are grossly irreconcilable with and incompatible to the other parts of her evidence rendering it most unreliable. Strangely, the prosecution also chose not to declare her hostile and cross-examine her on this. The other aspect of her evidence that also is a cause for our serious doubts as to its veracity, is when in her

examination-in-chief we find her categorical statement as a direct witness that the deceased did not return after she had left with the Respondent-Accused, in her cross-examination she has contradicted this by stating that it was her brother, P.W.1, who told her that the deceased had gone missing on 04-01-2005. Her very presence in the house of the deceased and P.W.1 during the relevant period, as claimed by her, is questionable, when we also take into consideration the evidence of P.W.4, Tenden Lachenpa, in whose building P.W.1 and her deceased wife were tenants, when he has stated that "I did not see any other person in the house of my tenant besides the said S.A.P., his wife and their two children".

(vii) There is another aspect of the matter that gives rise to our doubts of the Respondent-Accused having visited the shop of the deceased first on 01-01-2005, as it has come in the evidence of P.W.5, Sepoy Ashok Kumar, as the 'Safaiwala' he used to attend his duty about 9/10 a.m. every day and that when, in the morning of 04-01-2005, he went to attend to his duty

as usual in the quarter of P.W.6, Lt. Col. S. K. Tomar, the accused was inside the quarter attending to some work. It is, therefore, difficult to believe the evidence of P.W.2 that the Respondent-Accused had come to the shop of the deceased at 9.30 a.m. of 04-01-2005 as it was not possible for him to have been in two places at the same time. Moreover, we do not find any evidence that the Respondent-Accused had sought for permission either from P.W.6 or from P.W.7, the Commanding Officer to go out of the campus which is necessary to be obtained as would appear from the evidence of P.W.6 to the effect that "when a sahayak wants to go out from the campus he has to inform me and take permission and in my absence the permission from the Commanding Officer".

(viii) In view of such conflicting evidence we find the circumstance set up by the prosecution of the Respondent-Accused having visited the shop of the deceased on 01-01-2005, 02-01-2005 and 04-01-2005 rather doubtful.

(B) The deceased was missing from the day she was last seen with the Respondent-Accused on 04-01-2005.

(i) The Learned Public Prosecutor relied upon the very evidence referred to against the first circumstance dealt with above and submitted that the circumstance of the deceased being last seen with the Respondent-Accused on 04-01-2005 before she went missing stands fully established. In our view, the inadequacy of the evidence in respect of the first circumstance indicated by us would also be fully applicable to this circumstance also. We find substance in the submission of the Learned Counsel for the Respondent-Accused that there is serious flaw in the evidence of P.W.1 in as much as in his missing report dated 04-01-2005, Exhibit 2, he has neither mentioned the name of the Respondent-Accused nor has it been stated that the deceased had gone with an army personnel but has simply stated that when he asked "his children" they told him that she had left for the black cat area for shopping when it is P.W.2 who is said to have informed him of this. In the written FIR dated 06-01-2005, marked at Exhibit 1, also he has only mentioned that he came to know

from "his family", not from his sister, P.W.2, that she had been taken by one army personnel and further strangely been mentioned therein that he fully suspected that his wife might have been kidnapped, raped and murdered by that army personnel or kept somewhere secretly. This, in our view, renders his evidence and that of his sister, P.W.2, greatly suspect. If indeed the Respondent-Accused had come to the shop on 01-01-2005, 02-01-2005 and 04-01-2005, there was nothing that came in the way of P.W.1 in mentioning his name in the missing report, Exhibit 2, and the written FIR, Exhibit 1, as both P.W.1 and P.W.2 claimed to know it, both having identified the Respondent-Accused in the T. I. Parade and named him in reply to question no.3 put to them by the Chief Judicial Magistrate, P.W.16 by answering "Yes, his name is R. N. Garai". The meticulous and identical answers to the questions put to the two witnesses in the T. I. Parade as would appear from Exhibits 30 and 41 in respect of P.W.2 and P.W.1 respectively and, the apparent conflict in the missing report, Exhibit 2, the FIR, Exhibit 1 and the oral evidence of P.W.1 leads us to draw a

reasonable inference that they are tutored witnesses. In fact, from our foregoing discussions and observations on circumstances (A) and (B), we get the distinct impression that P.W.2, Meena Sharma, is a planted witness.

(ii) Even as the aforesaid two circumstances are found not to have been established fully, the rest of the circumstances set up against the Respondent-Accused also appear to crumble as would be revealed when we take up those hereafter. Even otherwise, we find no nexus having been established between the offence and the Respondent-Accused.

(C) The semi burnt dead body was recovered from inside the septic tank in the army cantonment area.

(i) This circumstance no doubt stands established as submitted by the Learned Public Prosecutor in view of the evidence of P.W.5, Sepoy Ashok Kumar, P.W.6, Lt. Col. S. K. Tomar, P.W.7, Major Himesh Puri, P.W.34 Nk D. T. Reddy, P.W.32, Radesh Tamang, 2nd O/C, Sadar P.S. and P.W.36, O/C, P. M. Rai, Gangtok Sadar P.S. Although, Mr. N. Rai, Learned Counsel for the Respondent-Accused, laid

great stress on the statement "Blood was oozing out from the nose and mouth" appearing in the evidence of P.W.32 and the observation "bleeding from both ears" of P.W.18 based on his Medico Legal Autopsy Report, Exhibit 48, in our view, nothing much would centre around this, as we find from the various authoritative writings that such phenomenon would arise once the stage of putrefaction begins on the dead body after *rigor mortis* passes off. As per the opinion the cause of death has been indicated in Exhibit 48 as due to "intracranial haemorrhage and shock due to multiple injuries produced by blunt weapon". We also notice the entry at the end of the column for general observation "discolouration of (R) iliac fossae". At this stage, it may be useful to refer to some of the authorities as regards the above phenomenon.

(ii) In "Modi's Medical Jurisprudence and Toxicology" by N. J. Modi, twentieth edition, under the heading of "Development or Foul-Smelling Gases" under the head of 'Putrefaction or Decomposition and Autolysis' it has been opined:-

> "..... Wounds, whether caused before or after death, begin to bleed once more owing to the pressure of gas within the heart and blood vessels. ....."

(iii) It, therefore, would follow from the above that 'bleeding' does not necessarily mean 'bleeding' with fresh blood but also could be after death due to unclotting of the blood once the second phase after the *rigor mortis* sets in when the phenomenon of colour also changes. We may refer to the portion dealing with this aspect in "Modi's Medical Jurisprudence and Toxicology" which is reproduced below:-

> **"Colour Changes.—**The first external evidence of putrefaction in a body exposed to the air is the formation of greenish discoloration of the abdominal skin over the iliac fossae and internally seen on the under surface of the liver, the contents of the bowel in this position are fluid and contain numerous organisms. The discoloration is due to the conversion of haemoglobin of the blood pigment into sulph-haemoglobin by the action of sulphuretted hydrogen diffusing from the intestine into the tissues, and occurs from one to three days after death in winter, and six to twelve hours in summer. This patch of green discoluration is more evident on a fair skin than on a dark one. About the same time the eyeball becomes soft and yielding, the cornea becomes white and milky and is either flattened or compressed Later, the eye collapses and the cornea becomes concave.
>
> From twelve to eighteen hours after death in summer the green coloration spreads over the entire abdomen and the external genitals. Green patches also make their appearance successively on the chest, neck, face, arms and legs. These patches gradually deepen in colour, and later become purple and dark blue. They are at first separate and distinct, but later on coalesce

together, and the whole skin of the body appears discoloured.

Soon after the discoloration of the skin has commenced the superficial veins look very prominent like purplish red, brown or green streaks giving a marble like appearance owing to the decomposed blood setting free the colouring matter of the red blood corpuscles, which stains the walls of the blood vessels and infiltrates into the tissues, which also appear coloured. The clotted blood becomes fluid; hence the position of post-mortem staining is altered, and the fluid blood collects in the serious cavities, especially in the pleurae and pericardium."

(iv) We also find under the topic "Circumstances modifying the Onset and Duration of Rigor Mortis" in Sub-Paragraph (d) as under:-

"(d) *Atmospheric Conditions*.—Rigor mortis commences slowly, but lasts for a long-time in dry, cold air. On other hand, its commencement is rapid, and duration short, in warm, moist air. It comes on rapidly and disappears late in bodies immersed in cold water."

(v) Under the head 'Rigor Mortis' and 'Decomposition Changes' in "Parikh's Textbook of Medical Jurisprudence and Toxicology" by Dr. C. K. Parikh, fourth edition, we find the following:-

"**Rigor mortis:** The presence and extent or absence of rigor mortis should be noted. In India, it usually commences in 2-3 hours after death, takes about 12 hours to develop from head to foot, persists for another 12 hours, and takes 12 hours to pass off. These timings are however subject to variation.

Decomposition changes: The presence, character, and extent of putrefaction is very valuable indeed. In India, greenish discolouration of abdomen over the caecum and flanks appears in about 12-24 hours after death. It spreads over

whole of abdomen and the rest of body within the next 24 hours.

(vi) In "Medical Jurisprudence and Toxicology" by H W V Cox, sixth edition, it has been opined that in temperate climates, rigors lasts for two to three days, but sometimes may persist much longer, even up to five days or more because the low temperature inhibits chemical changes which lead to *rigor* and that the disappearance of *rigor mortis* due to chemical changes associated with the onset of putrefaction. It has also been noted under the head 'Post-Mortem Decomposition' that the whole of such process may be modified very markedly by a number of factors. They are –

"(a) *Temperature* is all-important and where the, temperature is below five or ten degrees Centigrade, many of these changes will be inhibited or very much slowed. This naturally is the rationale of mortuary refrigeration, where bodies will remain virtually intact for long periods though even at this temperature, some shrivelling and possibly surface mould formation will occur after long periods.

If the conditions are actually freezing, which may happen in the northern mountainous areas of India, then there will be no change whatsoever, as all enzyme and bacterial action is arrested. However, when, such a body is brought into a warm place or the season changes, then post-mortem changes are likely to be very rapid. The efficiency of such deep-freezing was illustrated in Siberia, where pre-historic animals such as the mammoth were found in such good condition after

> many thousands of years that the meat was fed to dogs without ill effect.
>
> At the other end of the sale, increase in temperature naturally accelerates the putrefaction. The activity of enzymes, the speed at which ordinary chemical reactions proceed and the acceleration of bacterial growth is hastened by temperatures up to about 45°C and appears to be optimum or just above body temperature. Thus where ambient temperatures are equal to, or slightly more than body temperature, putrefaction will proceed very rapidly and within one or two days, the body may be virtually unrecognisable, especially if the other factors mentioned below are active."

(vii) Having due regard to the above, we find it difficult to accept the simplistic conclusion sought to be drawn on behalf of the Respondent-Accused on the observation "bleeding from both ears" in isolation of the other observations in the same column of the Medico Legal Autopsy Report, Exhibit 48. The term "bleeding" as opined by Dr. S. D. Sharma, P.W.18, therefore, can be reasonably concluded as 'bleeding' due to putrefaction. We have concluded thus based on the two factors noted in the Medico Legal Autopsy Report, Exhibit 48 against item no.4, i.e., Post Mortem changes, under column (A) – General, where it has been entered as "Rigor mortis passed off from the whole body" and "Greenish discolouration of (R) iliac fossae". It also needs to be noted that the

cause of death of the deceased has been indicated as "intracranial haemorrhage and shock due to multiple injuries produced by blunt weapon" which naturally would imply existence of severe injuries in the cranium, i.e., head, which began to putrefy leading to bleeding from the ears as noticed by Dr. S. D. Sharma, P.W.18, and also from nose and mouth as noticed by P.W.32, second OC, Gangtok Sadar Police Station when the body was recovered from the septic tank. From the Medico Legal Autopsy Report, Exhibit 48, we find the following external injuries:-

> "(1) Contused laceration of the scalp 15 x 10 cms with anulsion of the skin over (L) fronto-temporal region, (2) Irregular contused laceration 2 x 1 cms on the centre of forehead. (3) Irregular contused laceration 3 x 1 cms over the frontal region of scalp in the centre. (4) Extravasation of blood in the eyelids of both eyes. (5) Contused abrasion 1 x 1 cm over nasal bridge. (6) Multiple small contused lacerations less than 1 cm in length, five in number over the (L) cheek. (7) Contused laceration 2 x 1 cms adjacent to (L) angle of mouth. (8) Contused laceration 1 x .5 cms on the lower lip. (9) Contused laceration 2 x 1 cms with anulsion of the skin on the centre of upper lip with multiple small abrasions surrounding the injury. (10) Fracture and dislocation of the upper four incisor and (L) upper canine teeth. ....."

We also find the following under the Column B – Head and Neck:-

"(B) –**HEAD AND NECK**

1. Skull, Brain, Meninges and Cerebral Vessels (note presence of any abnormal smell)	Extravasation of blood in the frontal, temporal and parietal regions of the scalp with commutted depressed fracture of (L) frontal bone. Subarachnoid haemorrhage over the (L) hemisphere of brain.
2. Orbital, Nasal and Aural cavities (examine if special indications present)	NAD
3. Mouth, tongue and pharynx.	- As mentioned
4. Neck, larynx, thyroid and other neck structures."	NAD

In the Inquest Report, Exhibit 31 also, we find that P.W.32, the second O/C has noted the following external injuries:-

".....

5. There are born injuries on both the legs heaps and on the back. There are blunt injuries on face & head regions and blood still found oozing from the nose and the mouth. The steins on the back, buttock, Arms and on legs are found peeled off of brown.

Manner in which and means by which injuries appear to have been inflected

by blunt force injuries and burn injuries

....."

(viii) Therefore, considering the nature of the injuries and the condition of the body at the time of its

recovery, it can reasonably inferred that the death of the deceased could have taken place any time before 06-01-2005. This circumstance, however, requires to be considered along with the other evidence and established by the standard of proof necessary under the law which is found wanting in this case. The recovery of the dead body and the condition by itself is not sufficient to establish any nexus between the offence and the Respondent-Accused or, for that matter, anyone else.

(D) The disclosure statement of the Respondent-Accused based upon which the incriminating articles were seized.

(i) The fact of the Respondent-Accused having made the disclosure statement, Exhibit 71, also do not appear to be free of infirmity. P.W.23, Dawa Tshering Lepcha, and P.W.24, Sonam Choejee Lachungpa said to be witnesses to the disclosure statement, Exhibit 71 of the Respondent-Accused and recovery of incriminating articles as a consequence thereto and, therefore, vital to the prosecution, ought to have deposed on those in their first examination, i.e., P.W.23 on 19-08-2009 and P.W.24 on 24-08-

2009, but they were completely silent about it. Curiously, it was brought on record only on their recall when P.W.24 was examined on 23-11-2010 and P.W.23 on 09-02-2011, i.e., much beyond the period of one year after their first examination. The recall of the witnesses per se may not displace the fact of the Respondent-Accused having made the disclosure statement, Exhibit 71, but it certainly gives rise to a lurking suspicion in our minds and, may have remained so but, for the suspicion being justified on account of serious discrepancies and gross contradictions arising in their evidence when compared with their statements recorded earlier on 19-08-2009 and 25-08-2009.

(ii) Dealing first with the evidence of P.W.23 recorded on 09-02-2011 in respect of the disclosure statement, Exhibit 71, it is in his evidence that when the statement of the Respondent-Accused marked Exhibit 71 was being recorded in his presence he recalled that "another person by the name of Sonam was also present" and that "After recording this statement, I, accused person and the police

personnel went to the barrack of the accused for investigation of the case." The relevant portion of the depositions are as under:-

> "..... another person by the name of Sonam was also present at the time when the accused made the statement. After recording this statement I, accused person and the police personnel went to the barrack of the accused for investigation of the case. On the basis of the statement made by the accused an umbrella, gold ornaments (ear ring, nose ring, chain), two stones, a yellow plastic jar were recovered from the barracks and the combat jacket and trouser was recovered from the room of the accused. A small piece of gold was also recovered from the trouser pocket. All the articles were already identified by me marked MO XII, MO I, MO III, MO IV, MO VI, MO XVIII(collectively), MO XIX and XX." **[emphasis supplied]**

(iii) However, in his cross-examination he has stated that-

> "..... that in my previous statement made before the Court the piece of gold which was recovered from the pocket of the cotton combat trouser MO XX was not shown to me. ..... It is true that I cannot say who else signed Exbt.71. It is true that I do not know what is written in Exbt.71. When I signed in Exbt.71 I was only person and here was no other individuals. ....." **[emphasis supplied]**

(iv) On the other hand, P.W.24, in his evidence recorded on 23-11-2010, stated as under:-

> "I along with one Dawa Lepcha on the request of the police signed a document in the office of the S.P, East. At the time I recall the accused standing in the dock was also present in the next room in the office of the S.P, East. This is the said document marked Exbt.71 bearing my signature Exbt.71(a). I cannot recall exactly the events of the day when I signed Exbt.71 however,

I do remember after signing the same we accompanied the police along with the accused to a spot in the Army Camp where the accused pointed out the spot and the stone which he took out from the 'Nali'/drain. A gold chain was also recovered from the septic tank after the accused pointed out the spot. I do not recall the name of the O.C who we accompanied at the time however, if I see him I can recognize him. I cannot identify the other signature on Exbt.71.

XXX-by the accused through ld.Sr.counsel Shri N.Rai.

It is not a fact that the accused did not accompany us to the spot. It is not a fact that the accused did not point out the spot from where the gold chain was recovered. It is not a fact that a stone was not recovered from the spot at the behest of the accused. It is not a fact that accused was not present when I signed Exbt.71 and that Exbt.71(a) is not my signature. It is true that I cannot read the contents of Exbt.71."

[emphasis supplied]

(v) As can be seen from the above as per the evidence of P.W.24, he along with one Dawa Lepcha signed a document in the office of the S.P., East and that too on the request of the Police and, at that time the accused was present in the next room in the office of the S.P, East. That after signing Exhibit 71 they accompanied the Police along with accused towards the spot in the army camp whereas the accused pointed out the spot and a stone which he took from a "nali" (drain) and a gold chain was recovered from the septic tank after the Respondent-Accused pointed out the spot. Apart from other

serious contradictions, we find that as per P.W.23 not less than nine articles were seized on 14-01-2005 said to be at the behest of the Respondent-Accused but, as per P.W.24 it was only a stone and a gold chain, i.e., stone from the 'nali' and gold chain from the septic tank, that were seized. These are apparent contradiction appearing in their depositions when they are supposed to have witnessed the recovery together.

(vi) When we further analyse the evidence of these two witnesses, it is apparent that P.W.23 in contradiction to his examination-in-chief, did not appear to know the other signatories to Exhibit 71 and that he was the only one present when he signed it and also did not know the contents of it. When we compare this evidence with the one that was recorded on 19-08-2009 the genuinity of the disclosure statement becomes clearly doubtful. For convenience and better appreciation, we may reproduce the relevant portions of his earlier deposition recorded on 19-08-2009 which are as follows:-

"I am a resident of Burtuk, East Sikkim. I was the member of Burtuk Panchayat during the relevant period. I do not now recollect the date or month but one day in the year 2005 I was asked by P.M. Rai, S.P. to visit the Army Cantonment Area at Burtuk in connection with the investigation of a murder case. Accordingly I went to the Army Cantonment Area at Burtuk. The enquiry which the Police was then conducting was within the premises of the Army quarters. When I reached the spot some personnel of Sikkim Police and some personnel of the Army were present. During the course of investigation the Police recovered one gold ornament. The Police has seized a number of items in the course of the enquiry after preparing five different seizure memos. Exbt. 54 already marked, Exbt. 55 already marked, Exbt. 56 already marked are three of the said seizure memos which was prepared by the Police in my presence. Exbt. 54 (b), Exbt. 55 (b) and Exbt. 56 (b) are my signatures. Exbt. 57 and Exbt. 58 are two more seizure memos which the Police had then prepared in my presence. Exbt. 57 (a) and Exbt. 58 (a) are my signatures. M.O. I is the same gold ear ring, M.O. XVI is the same tooth which the Police had seized under the seizure memo Exbt. 55, M.O. XV is the same leaf which the Police had recovered and seized in my presence under the seizure memo Exbt. 54, M.O. XVII is the same broken handle of umbrella and M.O. XII is the same multi coloured umbrella which the Police had seized under the seizure memo Exbt. 56. M.O. III is the same gold chain and M.O. IV is the same gold nose ornament "phuli" which the Police had seized under the seizure memo Exbt. 57. M.O. XVIII (collectively) are the two broken pieces of concrete blocks which were also seized by the Police under the seizure memo Exbt. 57. M.O. XIX is the same cotton combat jacket, M.O. XX is the same cotton combat trouser, M.O. XXI is the same pair of brown coloured P.T. shoes which were also seized under the seizure memo Exbt. 58. The Police had also recovered a piece of gold in the pocket of the cotton combat trouser M.O. XX at the time of its seizure. I however do not find the said piece of gold produced in the Court today along with the other case exhibits. I had signed as a witness in the seizure memos Exbt. 54 to Exbt. 58 on the spot where the recovery and the seizures were made.

XXX – by the accused through ld. Legal Aid counsel Shri N. Rai.

During the relevant period I was the Vice President of the Burtuk Chanmari Gram Panchayat. In respect of the instant murder case there was a big procession of both male and female of the Burtuk as well as Chanmari areas. ..... The participants of the procession dispersed after they were gathered and speech was delivered. I signed in Exbt. 54, Exbt. 55, Exbt. 56, Exbt. 57 and Exbt. 58 after the date of the said procession. In the said procession all the Panchayat members were present. I was also present. I went to the spot with the Police twice that was in the interval of one day. On my first visit the Police seized the gold "phuli" (nose ornament) M.O. IV and the gold ear tops M.O. I. The Police seized two numbers of ear top, M.O. I along with the said "phuli" on our first visit. The Police did not seize the gold ear ring. I cannot say whose combat jacket M.O. IX and combat trouser M.O. XX are. They were not seized from the person of somebody. They were found in the Army compound. I had visited the Army compound before and after that. It is not a fact that there was a piece of gold in the pocket of the combat trouser. I had seen the gold piece of about 1 cm of the circumference of a pin. ..... The two broken concrete pieces M.O. XVIII (collectively) were on the ground. ..... It is not a fact that M.O. XVIII in two numbers were not lifted from the ground of the Army compound. ....."

[emphasis supplied]

(vii) Apparent from the opening portion of his deposition, P.W.23 has most unambiguously stated that he had been asked by P.W.36, P. M. Rai, O/C Sadar P.S., one day in the year 2005 to visit army cantonment area in connection with the investigation of a murder case and, not for recovery in terms of the disclosure statement, Exhibit 71, as narrated by

him in his subsequent deposition discussed above. He further stated that when he reached the spot the Police and Army were already present and in course of the investigation the Police recovered one gold ornament and number of other items after preparing five different seizure memos. Thereafter, he has proceeded to narrate on the various articles seized under those seizure memos but has not stated from where. He has further stated that he went to the spot with the Police twice in an interval of one day and in the first day as per him the police seized two number of articles, i.e., one ear top, MO-I along with the gold "phuli', MO-IV vide Exhibit 57 and nothing more. Again in the examination-in-chief, it has been deposed by him that "The Police had also recovered a piece of gold in the pocket of the cotton combat trouser M.O.XX at the time of its seizure", but in his cross-examination he has denied this by stating that "It is not a fact that there was a piece of gold in the pocket of the combat trouser" which is also corroborated by P.W.29, Hav C. K. Kothari as per whom when MO-XIX, combat cotton jacket, MO-XX, combat cotton trouser and MO-XXI, P.T. Shoes were

seized, the pockets of those were not checked or verified.

(viii) P.W.23 has further deposed that the broken umbrella handle, MO-XVII, and umbrella, MO-XII, were seized from a kitchen like room of the army quarter and, the two broken concrete block pieces, MO-XVIII (collectively) were on the ground which is in clear contradiction to the evidence of P.W.24 and P.W.35 as per whom those were recovered from the 'jhora'. He is completely silent on this in his subsequent examination held on 09-02-2011 in connection with the disclosure statement. The seizures of the articles mentioned by him and the disclosure statement, Exhibit 71, said to have been rendered in his presence also clearly fall within the realm of doubt as we find that seizure memos Exhibits 54, 55, 57 and 58 were signed by him after the public procession and not after the seizures in the light of the fact that he was also present during the procession as appear in his evidence.

(ix) There is another contradiction appearing in the evidence of P.W.41, I.O., who has stated that he had

seized a pair of gold ear top marked MO-I on 14-01-2005 on the basis of the disclosure statement whereas it is in the evidence of P.W.36, P. M. Rai that he also seized the very gold top on 07-01-2005. The other is the recovery of the gold nose ornament ("phuli"), MO-IV, which as per the I.O. was seized on 14-01-2005 after recording of the statement of the Respondent-Accused under Section 27 of the Evidence Act. But, we find that P.Ws. 23 and 24 are absolutely silent on this in their subsequent evidence on recall and, rather find from the evidence in their first examination that it was recovered on 07-01-2005 at the time of initial investigation.

(x) The statement of P.W.23 that "I went to the spot with the Police twice that was in the interval of one day" recorded on 19-08-2009 also adds to the suspicion as to the veracity of the disclosure statement as it is also in his evidence and that of P.W.36, P. M. Rai, O/C Sadar Police Station, that it was during the first investigation conducted by the latter that material objects like, the gold ear ring, MO-I, seized vide Exhibit 55, the burnt pieces of

clothes, MO-VI, MO-V and MO-XXV, the bangle MO-II, dry leaves with blood stains and blood stains lifted in cotton gauge, MO-XV, umbrella, MO-XII, broken handle of umbrella, MO-XVII, were seized on 07-01-2005. It is, therefore, difficult to believe that most of those very articles were seized by P.W.41, the I.O., as a consequence of the disclosure statement more than a month later on 14-02-2012. P.W.24, Sonam Choejee Lachenpa on his part is found to be completely silent on this. If these two witnesses had indeed witnessed the discovery of those articles and that they were present during that time, both ought to have stated so but, as we find, they have not. In view of such serious contradictions the value of the evidence of P.W.23 gets severely diminished and rendered unreliable.

(xi) Now, coming to the evidence of P.W.24, Sonam Choejee Lachungpa, recorded on 23-11-2010, it is quite clear that he was not a witness to the disclosure statement, Exhibit 71, of the Respondent-Accused, which is borne out by his very opening statement "I along with one Dawa Lepcha on the request of police

signed a document in the office of the S.P, East" and that at the time of signing the Respondent-Accused was in the next room. Although he has stated that he accompanied the Police after signing Exhibit 71 to the spot in the army camp and witnessed the Respondent-Accused pointing out the spot and the stone which he took out from the "nali" (drain) and that the gold chain was also recovered from the septic tank after Respondent-Accused pointed out the spot, nothing further has been stated by him rendering the evidence absolutely vague. When we compare this with his statement rendered on 24-08-2009 he is found to have stated quite differently. We may reproduce his evidence rendered on 24-08-2009 the relevant portions of which are under:-

> "I am a resident of Burtuk, East Sikkim. I cannot now exactly recollect the date, month and exact year but one day about two-three years back the Police had requested me to be a witness in two seizure memos prepared by them in connection with this case which I accordingly did. I remember the Police having shown me a gold chain that was reportedly recovered by them and seized under the seizure memo already marked Exbt. 57. Since I was present at the time of enquiry by the Police regarding this matter at the Burtuk Army Camp I remember the Police having recovered two concrete blocks from near the place of occurrence. I vaguely remember the Police having recovered one gold chain. I also remember faintly the Police having seized one pair of brown coloured P.T. shoe from the place of occurrence. I cannot now say if the other items mentioned in

the seizure memos Exbt. 57 and Exbt. 58 besides the one referred to by me above were seized by the Police under the said two seizure memos Exbt. 57 and Exbt. 58. M.O. XVIII (collectively) are the same two pieces of the concrete block, M.O. III is the same gold chain which was recovered and seized by the Police under the seizure memo Exbt. 57 and M.O. XX is the same pair of brown coloured P.T. shoe which was also seized by the Police under the seizure memo Exbt. 58. I cannot now recollect if the other items mentioned in the seizure memos Exbt. 57 and Exbt. 58 and produced in the Courtroom today were also seized by the Police under the said two seizure memos. In the seizure memo Exbt. 57, Exbt. 57 (b) is my signature and in seizure memo Exbt. 58, Exbt. 58 (b) is my signature.

XXX – by the accused through ld. Legal Aid counsel Shri N. Rai.

I cannot exactly say as to in which place I signed in the said Exbt. 57 and Exbt. 58 but I feel that I must have signed in the said Exbt. 57 and Exbt. 58 in the Court premises. I am a resident of Burtuk, East Sikkim. My house is immediately next to the house of the deceased. ..... There was a procession made in the area by the local people against the death of the said deceased. I was also a member of that procession. ..... It is true that M.O. XVIII (collectively) were picked up from the jhora near the said Army quarters. It is not a fact that I was not present when the said M.O. XVIII were seized by the Police. There were Police from the Sadar Police Station but I cannot name them. I cannot exactly say as to from where the gold chain M.O. III was picked up. When I saw the said article that was in the hands of the Police. Besides the said two concrete blocks, gold chain M.O. III and the P.T. shoes M.O. XX, I did not see the Police seizing anything else. ....."

[emphasis supplied]

(xii) The very second sentence that the police had requested him to be a witness to the seizure memos prepared by them in connection with the case and that he accordingly did, indicates that he was only a

signatory to the seizure memos and not the recovery in terms of the disclosure statement, Exhibit 71. This certainly appears to be the case when he further went on to state that the police had shown him the gold chain and reportedly recovered by them and seized under the seizure memo, Exhibit 57. As per him, the two concrete blocks, Exhibit 17, were seized from near the place of occurrence but from where he did not remember and further he "vaguely" remembered the place from where the police had recovered the gold chain. Of course, in his cross-examination he has no doubt stated that it was recovered from the 'jhora' but, this contradicts the evidence of P.W.23, Dawa Tshering Lepcha, as per whom those were found on the ground. He did not know the other items mentioned in the seizure memos Exhibits 57 and 58 except the ones referred to by him. The part of his evidence that completely betrays its falsity is when he says that he did not know exactly where he had signed the Exhibits and felt that he must have signed them in the Court premises. He has further stated that he could not say exactly as to from where the gold chain MO-III

was picked up from and that when he saw it, it was in the hands of the police. He did not see the police seizing anything else other than the two concrete blocks, gold chain and P.T. Shoes. In the light of such serious contradictions and the lacunae appearing in his evidence, we are of the view, that it would be too risky to place reliance on it, completely diminishing the value of the disclosure statement. Our doubt gets further fortified when it is in the evidence in his subsequent deposition on recall that during the seizures both he and P.W.23 had accompanied the Police along with the Respondent-Accused for the purpose of the recovery but, we find that these witnesses rather than corroborating are in total in conflict having contradicted themselves on all material parts that are found to be irreconcilable.

(xiii) There is one more aspect of the evidence that renders the disclosure statement and the recoveries of the incriminating articles from the quarter of P.W.6, Lt. Col. S. K. Tomar greatly suspect. We have noted from the evidence of P.W.5, Sepoy Ashok Kumar and P.W.34, Nk D. T. Reddy, the substitute

Sahayak attached to P.W.6, that they had been working everyday in the quarter which can be said to be from the evening of 04-01-2005. Their schedule of work commenced from the early mornings. It is in the evidence of both these witnesses that blood was noticed by P.W.5 on the stairs outside the quarter in the morning of 05-01-2005 and in the storeroom on the 06-01-2005. Most surprisingly these witnesses did not appear to have seen any of the articles viz., the gold ear ring, MO-I, nose ring, MO-IV, the handleless umbrella, MO-XII, broken umbrella handle, MO-XVII and the two broken pieces of a concrete blocks, MO-XVIII in and around the quarter. It is not their case that the places from where those were seized were not visible to the eyes. It is in the evidence of P.W.26, Nedup Bhutia, that those places were frequented by public and were easily accessible. We also find from the evidence that P.W.6, P.W.7, P.W.8, P.W.9, P.W.5 and P.W.34 had already visited the places in the morning of 07-01-2005 before the Police had arrived and, after their arrival all of them had gone around the place and its vicinity. Moreover, the quarter being that of P.W.6, he was all

the time living there. Therefore, we find it difficult to accept that none of them detected any of the articles.

(xiv) Such being the nature of the evidence pertaining to the disclosure statement and the recoveries riddled with contradiction and confusion as they are, we are of the considered view that they are completely unreliable and fraught with risk to give any credence thereto.

(xv) One more aspect as regards the disclosure statement that throws the prosecution story to serious doubts is that as per P.W.41, the I.O., it was recorded by P.W.36, P. M. Rai, the O/C Gangtok Sadar Police Station but admittedly he did not put his signature anywhere in Exhibit 71. This is evident from the following portion of his deposition:-

> "..... The statement Exbt.71 was written by P.I P.M.Rai. The said P.M.Rai has not put his signature anywhere in Exbt.71. ....."

(xvi) However, on perusal of the evidence of P.W.36, P. M. Rai, we find that there is not even a whisper of him having recorded the disclosure statement. His evidence is only confined to the receipt of the written

FIR, Exhibit 1, from P.W.1, Dilliram Sharma, the investigation that followed after receipt of information from 617 EME Battalion on 07-01-2007 and the seizure of the various articles as already alluded to above. Therefore, the suggestion put to P.W.41, the I.O. on behalf of the Respondent-Accused in his cross-examination that "It is not a fact that the statement Exbt.71 has been put by me in the case record knowing fully well that the same is not admissible in evidence" appears quite probable, in view of the quality of evidence in proof of the disclosure statement and the recovery of the articles said to have been made as a consequence thereto. Under such circumstances, we find the prosecution story of the disclosure statement, Exhibit 71, having been made by the Respondent-Accused difficult to accept and wholly unreliable.

(xvii)In ***Bodhraj alias Bodha and Others*** vs. ***State of Jammu and Kashmir*** : ***(2002) 8 SCC 45*** it has been held as follows:-

> ***"18.*** ..... The statement which is admissible under Section 27 is the one which is the information leading to discovery. ..... The basic idea embedded in Section 27 of the Evidence Act is the doctrine of

> confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. ..... It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in *Pulukuri Kotayya* v. *Emperor* is the most-quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (see *State of Maharashtra* v. *Damu Gopinath Shinde*.) No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given."
>
> **[emphasis supplied]**

(xviii)The portion of the disclosure statement, Exhibit 71, that may be considered as admissible under Section 27 of the Evidence Act for the sake of clarity, is reproduced below:-

> "..... And I threw that lady's broken gold chain into another chamber of that septic tank which was also dry and threw that wire over the dead body. ..... After that I came back towards the store room and threw all those articles including an umbrella, a broken handle and a block of cement which I had used while killing that lady, which had broken into the pieces at drain near the quarter. ..... Then I went towards barrack and changed my uniform and dried the clothes in a washing machine after washing it. I can show my uniform which I had worn while killing that

lady, Gold chain, cement block and an umbrella and its handle in front of the witness."
[emphasis supplied]

(xix) On a bare perusal of the above, we find that the places from where the incriminating articles were said to have been disposed of by the Respondent-Accused are quite different from those stated by P.W.23 and P.W.24. As noticed earlier we also find conflict in the evidence of the witnesses as to the place of recovery of the concrete blocks, umbrella and its handle. As per the disclosure statement, those articles were said to have been thrown into a drain near the quarter but, as per the seizure witnesses they were either found in the 'jhora' (a brook) or in front of the quarter of P.W.6, which of course is not discounting the other inherent contradictions. For this reason also the disclosure statement and the recoveries said to have been made in pursuance thereof are wholly unreliable.

(E) Smoke was noticed by P.W.5, Sepoy Ashok Kumar, near the septic tank where the dead body of the deceased was recovered in a semi-burnt condition.

This evidence of P.W.5 is not supported by any other prosecution witnesses. He is the sole witness

to have stated that he noticed some smoke coming out from outside the quarter of S.K. Tomar and that "The smoke which I saw that morning was coming out of the burning dry leaves upon the said septic tank and around it". Although, it is in his evidence that P.W.34, Nk D. T. Reddy, had also seen the smoke, the latter has not supported him as the fact is conspicuously missing in his evidence. The other prosecution witnesses have only stated that there were either burnt leaves or semi-burnt leaves on the septic tank. Even if we take the evidence of P.W.5 as acceptable, we find that it would be of no assistance to the prosecution, as dry leaves could not have been continuing to burn for over three days if spread on a concrete floor, in this case, this septic tank, with fresh sand spread over it. It rather indicates that the leaves were put on fire or had caught on fire only a short time earlier. This circumstance would rather favour the Respondent-Accused in view of his having left station in the early morning of 05-01-2005.

(F) The Respondent-Accused had proceeded on leave from 05-01-2005, i.e., from the day after the date of occurrence of the incident.

(i) It is no doubt found that P.W.6, Lt. Col. S. K. Tomar and P.W.7, Major Himesh Puri, O/C of its Unit having corroborated each other to the fact of the Respondent-Accused having sought for leave on the ground of his mother's sudden serious illness in the night of 04-01-2005, and the leave having been granted to him immediately. We may refer to the following portions of the evidence of P.W.6 and P.W.7 respectively:-

P.W.6, Lt. Col. S. K. Tomar

"..... The accused standing in the dock is the same lansnaik R.N. Garai who was working as my sahayak during the relevant period. On the same evening at about 7.30pm when I was sitting in my office my sahayak lansnaik R.N. Garai came and told me that his mother was seriously ill and that he wanted to proceed on leave to attend to her. The accused had told me that the information regarding his mother's ill health was received by him from his Officer Commanding Major Himresh Puri who in turn had received a call from the wife of the accused regarding the illness of the mother of the accused. Thereafter I checked out the information given to me by my sahayak from Major Himresh Puri over intercom and when Major Himresh Puri confirmed the information about the illness of the mother of the accused, I agreed to the leave being granted to the accused and made a request fornaother sahayak during the absence of the accused on leave. The accused accordingly proceeded on leave on the very next date. One Nayak D.T. Reddy was detailed as my Nayak in place of Mr. Garai thereafter. ....."

P.W.7, Major Himesh Puri

"..... On 4th January, 2005 I received a telephone call at around 7.00 p.m. from

> a lady who identified herself as the wife of the accused. She told me over the phone that the mother of the accused is seriously ill and she would like to speak with him. I informed her that I will call the accused and make him speak to her. I call L/Nk Ghorai (accused) and after 15 minutes he came to my Office and I informed him about his wife's call and asked him to speak to his wife on phone. After about 15 minutes accused came to me and informed that he had talked to his wife and his mother is seriously ill. And he would like to go on leave immediately. Since he was employed as helper to Lt. Col. Tomar I asked him to report to him and take his permission for going on leave. After some time I received telephonic call over the intercom from Lt. Col. Tomar and he asked me to send the accused on leave and he also knew that the accused mother was operated last year. Thereafter I sent him on leave for 31 days and asked him to take the leave from 5th of January, 2005 and he went on leave. ....." **[emphasis supplied]**

(ii) We also find from the findings of P.W.21, Nk D. S. Sawant who has narrated the following in his evidence:

> "..... During the relevant period I was also working in the Office of the Battalion as a Champion and my work as such entailed keeping records of leave, jointing reports, preparing sanction for leave etc. On 04.01.2005 the accused came to my Office and told me that he had received information regarding his mother being seriously ill at home and expressed his desire to go on leave. The accused had already an advance leave sanctioned for the period 22.01.2005 for 15 days. Upon getting this information from the accused I took instructions from the O/C Major Puri who directed me to advance the leave of the accused w.e.f. 05.01.2005. I accordingly prepared the leave papers for the accused as part Annual Leave. Thereafter the O/C Saab Major Puri sanctioned the said leave of the accused. Later I handed over to the accused his leave document. ....."

(iii) In his cross-examination he has stated the following:-

> "I am a retired man from 31st July, 2008. It is true that on 04.01.2005 the accused told me that he received an information from the O/C Major Himresh Puri that the said O/C had received a phone call from this home to the effect that the mother of the accused was seriously ill and that the accused was required to go home on leave. Thereafter I enquired to the said O/C Major Himresh Puri who said that he received the telephone as has been said and that he gave me an instruction to prepare a document of leave for he accused beginning from 05.01.2005. The accused, otherwise, was to go on leave from 22.01.2005 to 05.02.2005. It is true that it was Major Himresh Puri who sent the accused on leave. ....."

(iv) When we consider the above evidence, on the face of it we do not find anything unusual in the sequence of events leading to the grant of leave to the Respondent-Accused w.e.f. 05-01-2005. Nothing appears to have brought in to contradict the above evidence that could demolish those with the evidence quite firm and unshaken. It appears that the Respondent-Accused had to leave suddenly on 04-01-2005 only in view of the information of the serious illness of his mother received from his wife. However, on its closer examination, the circumstance appears to be too meticulously set up. Our suspicion arises from the fact that apart from his oral evidence,

there is no other evidence at all of the telephone call having been received by P.W.7, Major Himesh Puri, from the wife of the Respondent-Accused and no record has been produced in proof of that which is quite unusual in a Military establishment. The only evidence that is available is the Respondent-Accused having applied for leave suddenly which is borne out by the evidence of P.W.21, Nk D. S. Sawant, the 'Champion' of a Unit who deals with the matter. We also find in the evidence of P.W.7 that he has categorically stated "I do not remember now that the accused had applied only for casual leave but we forcefully sent him on P.A.L." (Privilege Annual Leave) which stand corroborated by the evidence of P.W.21, Nk. D. S. Sawant, the 'Champion' which is borne out by sentence that "It is true that it was Major Himresh Puri who sent the accused on leave", and that on 04-01-2005 the Respondent-Accused had also told him of the information received by him from O/C Major Himresh Puri of the phone call received from his wife informing of his mother's serious illness and his requirement to go home on leave. The unusual feature of this story noticed by us is that the

Respondent-Accused had not submitted a leave letter but only a requisition in a register. Surprisingly the register was not produced which was necessary for the prosecution to have done as it would have revealed the reason for the Respondent-Accused to have taken the leave.

(v) Further, when the factum of the telephone call is a vital evidence for the prosecution it was also essential for them to have produced the wife of the Respondent-Accused to prove that she had indeed made the call informing P.W.7 and thereafter the Respondent-Accused of the serious illness of his mother. These having not been done we are constrained to hold that an adverse presumption ought to be drawn against the prosecution for withholding a vital witness. In view of these, the circumstance of the Respondent-Accused having proceeded on leave from 05-01-2005 certainly cannot be held against him.

(G) The next circumstance of P.W.18, Dr. S. D. Sharma, the Chief Medico-Legal Consultant having described the wearing apparels of the dead body

during the post-mortem examination, would be of no assistance as those had also been seen by all those who are present at the time of recovery of the dead body on 07-01-2005.

(H) The CFSL report, in our view, would also be of no consequence as there is no dispute as regards the death of the deceased having taken place. No nexus is found to have been established between the death of the deceased and the Respondent-Accused and, the proof of the preceding circumstances set up against him by the prosecution, as already observed, miserably fail to meet the standard required under the law.

(I) The Respondent-Accused was identified by P.W.2, Meena Sharma, during the Test Identification Parade (in short "T. I. Parade").

(i) Identification of the Respondent-Accused by P.W.2, Meena Sharma, during the T. I. Parade also do not inspire our confidence as being beyond reproach. We have already observed that the very presence of P.W.2 in the shop of the deceased on 04-01-2005 is doubtful in view of her grossly

contradictory evidence and the improbability of the Respondent-Accused being present both in the quarter of P.W.6, Lt. Col. S. K. Tomar and the shop of the deceased at the same time. We also have noticed an inordinate delay in holding the T. I. Parade as it was held only on 10-02-2005 when the Respondent-Accused had been in custody of the police since 11-01-2005. There is also no explanation on the part of the prosecution for the delay. The delay per se may not have been sufficient to vitiate the T. I. Parade but, we find that the possibility of the Respondent-Accused having been shown to the witness cannot be ruled out and, is in fact most probable. Our anxiety is found vindicated when we read the questions put to the Respondent-Accused on this and the answers given by him in his statements recorded under Section 313 Cr.P.C. which we may reproduce for convenience:-

> "11. It is in the evidence of PW.2 Miss Meena Sharma that on 1.1.2005 her sister-in-law (deceased) had called her to help her in the shop and on 4.1.2005 as usual PW.1 Dilliram Sharma had left for his duty while her sister-in-law and she was in the shop. At about 9.30 am a person in an army uniform came to the shop and the deceased asked him if he could provide her some candle sticks and red chilli for her shop. She then identified you as

the same said person who had come to the shop. What have you to say?
Ans:

I saw this lady for the first time in the haazat. I have never seen her before that.

14. The witness further states sometime in the month of February,2005 she and PW.1 Dilliram Sharma had gone to the State Jail at Rongyek for your Identification where she identified you twice out of a line up of eleven persons in the presence of a Lady Magistrate. She says she was also asked some questions and proved Exbt.30 as the questionnaire prepared by the Lady Magistrate and Exbt.30(a) as her signature . What have you to say?
Ans:

Prior to the T.I in the jail, P. M. Rai had brought the husband of the deceased and a lady to the police station where I was held and told them I was R. N. Gharai. Thereafter I was identified in the jail." **[emphasis supplied]**

As can be seen from the above, the explanations to the circumstances put to the Respondent-Accused reveals that while P.W.2 had seen him twice, i.e., once at the 'haazat' and the other at the 'jail' before the T. I. Parade, and P.W.1 had seen him at least once in the 'jail' prior to the T. I. Parade. The explanations to the circumstances given by the Respondent-Accused during the proceedings under Section 313 Cr.P.C., when considered with the conflicting and contradictory evidence of the prosecution witnesses alluded to earlier, appear to be the probable truth and, therefore, reliable.

(ii) Even the identification by P.W.1 do not appear to be such as to inspire our confidence in view of the fact that on 07-01-2005 he had been shown the photograph of the accused in the State Bank of India, M. G. Marg, Gangtok Branch, when he was called there by the Police. In any case, the identification of the Respondent-Accused by P.W.1, Dilliram Sharma, would be rendered redundant when it is his case that the Respondent-Accused had come to the shop of the deceased on 01-01-2005 and 02-01-2005 offering supply of kerosene and sugar. This, of course, is subject to our doubt of such encounter as discussed earlier. We have also noted the unusually meticulous and uncannily in verbatim replies to the questions put to P.W.1 and P.W.2 during the T. I. Parade which, considered with the discrepancies observed in the other evidence, leads us to draw a reasonable inference that they are tutored witnesses. The veracity of the identification of these two witnesses also appear to be gravely suspect in view of the conflicting evidence as regards the non-participation of P.W.3, Gyan Pd. Sharma, in the T. I. Parade. It,

therefore, cannot be said that this circumstance stands proved against the Respondent-Accused.

(iii) In ***Lal Singh and Others*** vs. ***State of Uttar Pradesh*** : ***AIR 2004 SC 299*** the Apex Court after considering a large number of its previous decisions held as follows:-

> **"43.** It will thus be seen that the evidence of identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest possible opportunity, no hard and fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probablising the possibility of the accused having been shown to the witnesses, the Court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in Court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the Court has to consider the evidence in its entirety."
>
> **[emphasis supplied]**

(iv) In the present case we have already noted that the probability of the Respondent-Accused having been shown to the witnesses most certainly exists and, therefore, we are of the view that we ought not to act on the basis of such evidence. Although the conviction here is not solely based on the identification in Court but on the basis of other corroborative evidence such as recovery of the various incriminating articles but, considering the

evidence in its entirety, the circumstances set up against the Respondent-Accused do not appear to be proved for the reasons already noted earlier. We may remind ourselves that the case is solely based on circumstantial evidence and the T. I. Parade is only one of such circumstance.

13(i). There is also a mystery attached to the yellow coloured 5 litres jar, Exhibit MO-VI and the sugar, Exhibit MO-XXI, in view of its discordant note to the prosecution case. The charge is that the Respondent-Accused had taken the yellow coloured jar, a nylon bag and a nylon sack from P.W.1 from the deceased on 02-01-2005 as per P.W.1 and on 04-01-2005 as per P.W.2. It is also the prosecution story that while some sugar was supplied to them, kerosene was not. The prosecution case further is that it was the kerosene from the yellow jar that was used to set the body of the deceased on fire by the Respondent-Accused after he had done her to death. The evidence in respect of the seizure of these articles, however, are not in consonance with the prosecution case. While P.W.12, Hav. Vijay Singh, in his evidence has stated that a yellow coloured jar was seized empty from the Battalion store,

P.W.20, L/nk Mohd. M. Mondal, has deposed that the yellow coloured jar filled with kerosene was received at the Battalion store on 06-01-2005 as per instruction of the Respondent-Accused. Of course, we find that P.W.30, Subedar Major M. C. Karmakar, has corroborated P.W.12 to the extent that the 5 litres capacity yellow jar was seized from one official of EME Battalion but, in his cross-examination, we find a serious contradiction in this regard when he states that "When the Police had come for the seizure there was no civil witness present with them". This, therefore, belies the prosecution case that P.W.25 and P.W.26 were the witnesses to such seizure. Thereafter, his further statement that "When I went to the place the said jerrycan was in the hand of the Police. I cannot say as to from where the Police had brought the said jerrycan", makes it all the more worse. Clearly, therefore, P.W.12 and P.W.30 do not corroborate each other. Contrary to the evidence of these witnesses, again the evidence of P.W.25, Dorjee Bhutia, suggests that the very yellow coloured jar was recovered from in front of the barrack in the Army Camp. On the other hand, P.W.26, Nedup Bhutia, is not aware of these articles when he states that -

> "..... I cannot say as to wherefrom the Police brought the said M.O. VI. The said M.O. VI was with the Police when I saw that for the first time. I cannot even say wherefrom the sugar M.O. XXI was brought by the Police. When I saw them, both the said articles M.O. VI and M.O. XXI were in the hands of Police. ....."

As regards the sugar, Mo-XXI, P.W.26, states that –

> "..... I cannot say whether I had stated to the Police that the said sugar M.O. XXI was seized from the shop of the deceased ....."

(ii) It is worth noting that except for P.W.26 there is no other witness who has stated anything about the seizure of the sugar. From an analysis of the evidence, therefore, it can reasonably be inferred that the 5 litres yellow coloured jar to which P.W.12, P.W.20 and P.W.30 are the seizure witnesses is different from the one to which P.W.25 and P.W.26 are the witnesses. The seizure of the sugar, MO-XXI, cannot be said to be proved at all.

(iii) There is yet another black coloured burnt piece of jerry can marked MO-XXIII that was recovered and seized by P.W.32 from the septic tank from where recovery of the body of the deceased was made. The case of the prosecution that it was the kerosene contained in the yellow jar that was used for setting the body of the deceased on fire, therefore, stands completely displaced.

We, therefore, find that the evidence produced by the prosecution is riddled with contradictions thereby rendering the case of the prosecution extremely doubtful.

14(i). For all the reasons aforesaid, it cannot be said that each of the circumstance against the Respondent-Accused stands proved beyond reasonable doubt which is the standard of proof required under the law. When the circumstances considered individually have remained in the realm of doubts, the question of those circumstances forming an unbroken chain so complete as to lead to the sole hypothesis and none other than the guilt of the Respondent-Accused would not and does not arise. Although the principle of law on circumstantial evidence is well-established but for the sake of reminding ourselves we may refer to the very case of ***Bodhraj (supra)*** where it has been held as under:-

> **"10.** It has been consistently laid down by the 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*, *Eradu* v. *State of Hyderabad*, *Earabhadrappa* v. *State of Karnataka*, *State of U.P.* v. *Sukhbasi*, *Balwinder Singh* v. *State of Punjab* and *Ashok Kumar Chatterjee* v. *State of M.P.* 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* 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 home the offences beyond any reasonable doubt.

11. We may also make a reference to a decision of this Court in *C. Chenga Reddy* v. *State of A.P.* wherein it has been observed thus: (SCC pp. 206-07, para 21)

> "*21.* 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."

12. In *Padala Veera Reddy* v. *State of A.P.* it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (SCC pp. 710-11, para 10)

> "*10.*(*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."

13. In *State of U.P.* v. *Ashok Kumar Srivastava* 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.

14. 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; and (*5*) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

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

16. In *Hanumant Govind Nargundkar* v. *State of M.P.* it was observed thus: (SCC pp. 345-46, para 10)

"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

(ii) The prosecution, as we have observed, has failed to prove beyond reasonable doubt the most vital circumstances appearing against the Respondent-Accused, namely, (a) the Respondent-Accused having visited the shop of the deceased on 01-01-2005, 02-01-2005 and 04-01-2005 offering sale of sugar and kerosene, (b) the deceased having been seen last with the Respondent-Accused, (c) the Respondent-Accused having rendered the disclosure statement, Exhibit 71, leading to the recovery of the incriminating articles, and (d) the Respondent-Accused having proceeded on leave the very next date, i.e., 05-01-2005, after he was last seen with the deceased before which the deceased went missing.

15. Under such circumstances, the benefit of doubt would certainly lie in favour of the Respondent-Accused. The decisions cited by the Learned Public Prosecutor no doubt sets the well-settled principle of law but, those clearly do not appear to be of any assistance to him in the facts and circumstances of the present case. When the very foundation of the prosecution case stands vitiated for the reasons already stated, the other questions raised on

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."

17. A reference may be made to a later decision in *Sharad Birdhichand Sarda* v. *State of Maharashtra*. 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 the this Court, before conviction could be based on circumstantial evidence, must be fully established. They are: (SCC p. 185, para 153)

> (*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 compete 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."

behalf of the Respondent-Accused need not be gone into as we do not find them so grave but rather peripheral.

16. We find that the Learned Trial Court has taken great pains to appreciate the facts and the evidence in meticulous detail in arriving at the well-considered findings contained in the impugned judgment. We neither find perversity in the impugned judgment nor do we find compelling circumstances made out by the prosecution for this Court to interfere.

17. In the result, the Appeal is dismissed.

18. No order as to costs.

19. Let a copy of this judgment along with the original records of the case be transmitted to the Learned Sessions Judge, Special Division – I, Sikkim at Gangtok forthwith.

(Permod Kohli)
Chief Justice
17-09-2012

(S. P. Wangdi)
Judge
17-09-2012

Approved for reporting : Yes/~~No~~
Internet : Yes/~~No~~

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